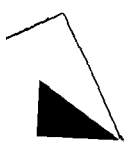


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STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN COUNCIL OF COUNTY AND  
MUNICIPAL EMPLOYEES and MARGARET RABUCK

Complainants,

vs.

OZAUKEE COUNTY (SHERIFF'S DEPARTMENT)

Respondent

Case V  
No. 23116 MP-805  
Decision No. 16416-B

ORDER DENYING COMPLAINANTS' MOTION TO AMEND  
THE COMPLAINT TO CONFORM WITH THE PROOF

The above-named Complainants 1/ having filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on June 7, 1978, and the Commission having appointed Stephen Schoenfeld, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats.; and hearing on said complaint having been held on August 8, 1978 2/ and March 16, 1979, at which time the hearing was closed, and on July 18, 1979, Complainants filed a motion that the complaint be amended to conform with the proof presented during the hearing; and the Respondent having responded to said motion; and the Examiner having considered the matter;

NOW, THEREFORE, it is

ORDERED

That Complainants' motion to amend the complaint to conform with the proof presented is denied.

Dated at Madison, Wisconsin this 18th day of December, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld  
Stephen Schoenfeld, Examiner

- 1/ During the course of the second day of hearing, the Complaint was amended and the Ozaukee County Law Enforcement Association was deleted as a Complainant and Ms. Margaret Rabuck was added as a Complainant.
- 2/ On August 8, 1978, the hearing was adjourned pursuant to Complainants' motion to hold the proceeding in abeyance until Complainants' counsel could file a motion to compel testimony. On September 1, 1978, Complainants filed a motion for Judgement and on October 11, 1978, Respondent submitted a motion in which it requested that the Examiner dismiss count three or in the alternative, to separate count three from the rest of the complaint. Both parties were afforded an opportunity to brief the issues involved in said motions and after the Examiner disposed of same, the second day of hearing was scheduled for March 16, 1979.

MEMORANDUM ACCOMPANYING ORDER DENYING  
COMPLAINANTS' MOTION TO AMEND THE COMPLAINT  
TO CONFORM TO THE PROOF PRESENTED

The complaint filed on June 7, 1978, alleges at paragraph 18, as part of Count No. 3, that:

Even though it was originally agreed by all parties including the Association that the Association would not appear on the ballot, such was not the case. ("Attachment No. 4" made a part hereof and incorporated herein by reference.) The County, through its officers and agents, insisted that the Association appear on the ballot. When the election was conducted, the Association did in fact appear on the ballot.

The complaint at paragraph 20 also alleges that "The action of the County, through its officers and agents, in insisting on the inclusion of the Association on the ballot and in removing the law-enforcement credentials of certain of its employees was in violation of Section 111.70(3)(a)1, 2 and 3, Wis. Stats." The Complainants, on July 18, 1979, after the close of the hearing, moved to amend the complaint and requested that the following paragraphs be added to said complaint:

18(a). During the course of the election campaign, the County prepared and distributed pro-Association and anti-Union literature.

18(b). During the election campaign, the County Representative appeared at an Association meeting while reading the pro-Association and anti-Union literature.

18(c). During the course of the election campaign, the Chairman of the Personnel Committee, Allen Goldmann, made public statements opposing the Union and in favor of the Association.

Additionally, the Complainants' moved that paragraph no. 20 be amended as follows:

20. The action of the County, through its officers and agents, in insisting on the inclusion of the Association on the ballot and removing law enforcement credentials of certain of its employees; in preparing and distributing pro-Association and Anti-Union literature; in appearing at the Association meeting while reading pro-Association and anti-Union literature; and in making public statements opposing the Union and in favor of the Association, individually and collectively were in violation of Sections 111.70(3)(a)1, 2 and 3, Wis. Stats.

Employment Relations Commission Administrative Rule, Chapter ERB 12 3/ sets forth the procedures of the Commission in prohibited practice proceedings, and even though the Commission has liberally granted motions to amend pleadings when made prior to or during a hearing, it is the Examiner's judgment that Complainants' motion, made after the close of the hearing, ought to be denied in the case at bar. There was no reference in the pleadings filed on June 7, 1978, to any claim that during the course of the election campaign, the County prepared and distributed pro-Association and anti-Union literature; that during the course of the election campaign, the County Representative appeared at an Association meeting while reading the pro-Association and anti-Union literature; or that during the course of the election campaign, the Chairman of the Personnel Committee, Allen Goldmann, made public statements opposing the Union in favor of the Association. Although evidence relating to these allegations was proffered during the course of the hearing, the record convinces the Examiner that the Respondent could well have been justified in believing that such evidence was proof in support of Complainants' contentions set forth at Count No. 3 of the original complaint and was not offered to establish an independent statutory violation. 4/

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3/ See Specifically ERB 12.02 Complaint

(5) AMENDMENT.

(a) Who may amend. Any complainant may amend the complaint upon motion, prior to the hearing by the commission; during the hearing by the commission if it is conducting the hearing, or by the commission member or examiner authorized by the board to conduct the hearing; and at any time prior to the issuance of an order based thereon by the commission, or commission member or examiner authorized to issue and make findings and orders.

(b) Conformance to evidence. At the conclusion of the hearing, the complaint, on motion, may be amended as necessary to conform to the evidence as to minor and immaterial variances which might appear in the record.

4/ See, for example, Vol. I, p. 139-140 of the transcript where an attempt is made to offer evidence relating to the allegations set forth in paragraphs 18(a), (b) and (c) of Complainant's motion and Respondent's Counsel objects to a line of questions propounded to one of its witnesses by Complainants' Counsel and Complainants' Counsel argues against the objection by saying:

We have alleged among other violations, that the use of the Association on the ballot was precipitated in part by the County Board of Supervisors of this County, as we tend to offer proof in support of that.

Furthermore, Complainants' Attorney, in a letter brief responding to Respondent's motion to dismiss Count 3, indicated:

The Complainants have further and additional evidence to offer in support of the contentions contained in Count No. 3 of the complaint.

Consequently, it would be improper to make a finding that the conduct alleged in paragraphs 18(a), (b) and (c) constitutes an independent statutory violation inasmuch as that matter wasn't in issue during the hearing.

The principle of fair play is an important factor in a consideration of due process of law. Parties to a legal proceeding have a right to be apprised of the issues involved, and to be heard on such issues. A finding or order made in a proceeding in which there has not been a "full hearing" is a denial of due process and is void. General Electric Co. v. Wisconsin Employment Relations Board (1958) 3 Wis. 2d, 227, 241.

The Examiner can appreciate that if the matters set forth in paragraphs 18(a), (b) and (c) had been treated by Complainants as separate allegations setting forth independent charges of prohibited practices, Respondent would have handled same differently at the hearing. Since the hearing is formally closed and Respondent is precluded from presenting his defense to said allegations, Respondent would be prejudiced by granting Complainants' motion to amend. The fact that some evidence found in the record might be relevant to the charges set forth in paragraphs 18(a), (b) and (c), as well as being probative on Count No. 3 of the June 7, 1978, complaint, doesn't satisfy the Examiner that the matters set forth in paragraphs 18(a), (b) and (c) were fully litigated or the record evidence is all of the evidence which would have been offered if the complaint had initially alleged or was amended before or during the hearing to allege the matters set forth in paragraph 18(a), (b) and (c). Furthermore, this is not a minor or immaterial variance as to justify the granting of the motion pursuant to ERB 12.02(5)(b) to conform the pleadings to the evidence.

Additionally, Section 111.07(14) Stats., which is incorporated into MERA by Section 111.70(4)(a), Stats. provides that:

The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

The acts complained of in paragraphs 18(a), (b) and (c) of said motion occurred in August, 1977. The motion to amend the complaint was filed in July, 1979, which is certainly beyond one year from the date of the prohibited practices alleged. The conduct complained of in paragraphs 18(a), (b) and (c) states a new cause of action and does not merely restate in different form the cause of action stated in the June, 1978 pleadings. Inasmuch as the allegations set forth in paragraphs 18(a), (b) and (c) did not arise out of the conduct complained of in Count 3 of the complaint filed in June, 1978, and since the conduct complained of in the July 18, 1979, motion occurred well in excess of one year from said date, the events complained of in the motion are barred by the one year statute of limitations. For this reason and the reasons expressed heretofore, the Examiner has denied Complainants' motion to amend the complaint. The record evidence relative to the alleged events set forth in paragraphs 18(a), (b) and (c) can only be considered as background for the purpose of shedding light on the events complained of in the June 7, 1978 complaint.

Dated at Madison, Wisconsin this 18th day of December, 1979

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld  
Stephen Schoenfeld, Examiner