

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON METROPOLITAN SCHOOL DISTRICT
CITY OF MADISON, VILLAGES OF MAPLE
BLUFF AND SHOREWOOD HILLS, TOWNS OF
MADISON, BLOOMING GROVE, FITCHBURG
BURKE AND WESTPORT, and its AGENT,
BOARD OF EDUCATION OF THE MADISON
METROPOLITAN SCHOOL DISTRICT,

Complainants,

vs.

MADISON TEACHERS INCORPORATED and
JOHN A. MATTHEWS, EXECUTIVE DIRECTOR
OF MADISON TEACHERS INCORPORATED

Respondents.

Case CII
No. 25435 MP-1060
Decision No. 17514-A

ORDER DENYING MOTIONS TO QUASH SUBPOENAS DUCES TECUM

Complaint of prohibited practices having been filed by the Madison Metropolitan School District, et. al., wherein said District alleged that Madison Teachers Incorporated (hereinafter MTI) and John A. Matthews committed prohibited practices within the meaning of Sections 111.70(3)(b)3 and 111.70(3)(b)4 of the Municipal Employment Relations Act; and hearing on said complaint having been set for February 29, 1980; and prior to said hearing the Respondents having filed Motions to Quash certain subpoenas issued by Attorney Gerald C. Kopps, Attorney for Complainants, seeking to take depositions of John A. Matthews, Executive Director of MTI and Robert C. Kelly Attorney for MTI, and the production of documents by both said individuals; and the undersigned examiner being satisfied that the Commission lacks jurisdiction to quash subpoenas which are issued by attorneys pursuant to Sections 804.05 and 805.07 Wis. Stats.;

NOW THEREFORE it is

ORDERED

That said Motions to Quash Subpoenas Duces Tecum be, and the same hereby are, denied.

Dated at Madison, Wisconsin this 23rd of April, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Michael F. Rothstein
Michael F. Rothstein, Examiner

No. 17514-A

MEMORANDUM ACCOMPANYING ORDER DENYING
MOTIONS TO QUASH SUBPOENAS DUCES TECUM

On December 7, 1979, Madison Metropolitan School District filed a prohibited practice complaint against Madison Teachers Incorporated (MTI) and John A. Matthews. Hearing on said complaint was scheduled for February 29, 1980. On February 6, 1980, Attorney Kopps, Counsel for the Complainant, issued two subpoenas duces tecum pursuant to Sections 804.05 and 805.07 of the Wisconsin Statutes, seeking to take oral depositions of John A. Matthews and Robert C. Kelly (Attorney for MTI) and further ordering Matthews and Kelly to produce certain documents. In addition, Kopps stated in the subpoenas duces tecum addressed to Robert C. Kelly that the purpose of the subpoena was for a deposition upon oral examination pursuant to Sections 111.07(2)(b) and 101.02(14)(c) of the Wisconsin Statutes. On February 11, 1980, Counsel for Respondents filed motions to quash subpoenas duces tecum on behalf of both Kelly and Matthews. Hearing on said Motions to Quash was held on February 18, 1980, at which time the undersigned examiner orally denied Respondents' Motion to Quash Subpoenas Duces Tecum. This memorandum is for purposes of more thoroughly explaining the rationale for denying said motions.

Complainant urges the Commission to accept the theory that depositions of witnesses or parties in proceedings before the Commission are controlled by Sections 804.05 and 805.07 Wis. Stats., and not by Wisconsin Administrative Code Rules of the Employment Relations Commission (ERB 10.14 and 10.15); and further that the obtaining of depositions pursuant to subpoenas issued under the foregoing statutes (Sections 804.05 and 805.07) derive as a matter of legal right.

Respondents contend that utilization of 804.05 and 805.07 is inapplicable to proceedings before the Wisconsin Employment Relations Commission; and that, under the administrative rules of the Commission, depositions may be taken only on accordance with the applicable rules of the Commission which require that good cause be shown to the Commission before said depositions may be authorized.

RELEVANT STATUTORY PROVISIONS AND REGULATIONS

111.07 PREVENTION OF UNFAIR LABOR PRACTICES

. . .

2(b) The Commission shall have the power to issue subpoenas and administer oaths. Depositions may be taken in the manner prescribed by s. 101.02(14)(c).

. . .

111.70 MUNICIPAL EMPLOYMENT

. . .

(4) Powers of the Commission. The commission shall be governed by the following provisions relating to bargaining in municipal employment in addition to other powers and duties provided in this subchapter:

(a) Prevention of prohibited practices.

Section 111.07 shall govern procedures in all cases involving prohibited practices under this subchapter . . .

. . .

101.02 Powers, Duties and Jurisdiction of Department

It shall be the duty of the department, and it shall have power, jurisdiction and authority: (14)(c) the department or any party may in any investigation cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in circuit court.

. . .

804.05 Depositions upon oral examination

(1) WHEN DEPOSITIONS MAY BE TAKEN. After commencement of the action, any party may take the deposition of any person including a party by deposition upon oral examination. The attendance of witnesses may be compelled by subpoenas as provided in section 805.07.

. . .

805.07 Subpoena

(1) ISSUANCE AND SERVICE. Subpoenas shall be issued and served in accordance with chapter 885. A subpoena may also be issued by any attorney of record in a civil action or special proceeding to compel attendance of witnesses for deposition, hearing or trial in the action or special proceeding. (Emphasis added)

(2) SUBPOENA DUCES TECUM. A subpoena may command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein.

ERB 10.14 Hearing Subpoenas. Any member of the commission or any individual authorized to take testimony, shall on behalf of the commission, on written application of any party, issue subpoenas, requiring attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence or documents in their possession or under their control. Application for subpoenas may be made ex parte. The subpoena shall show on its face the name and address of the party, at whose request it was issued, and the proceeding involved.

ERB 10.15 Depositions. Upon application and good cause shown, the commission or any individual authorized to take testimony, may order that the testimony of any person, including a party, be taken by deposition in the manner prescribed by and subject to the provisions of chapter 326, Wis. Stats.

A review of the various statutes and administrative rules dealing with the matter of the issuance of subpoenas to compel

depositions of parties or witnesses in proceedings before the Wisconsin Employment Relations Commission, suggests two divergent schools of thought when analyzing the appropriate interpretation of these statutes and thus the necessary outcome in this matter. At the very heart of Complainant's theory as to why depositions are a matter of right under Wisconsin law is the basic assumption that pre-trial discovery before the Wisconsin Employment Relations Commission is controlled by the general discovery statutes applicable to civil proceedings before courts of record. Respondents argue that depositions can only be obtained by resort to the Commission pursuant to the Commission's administrative rules, specifically ERB 10.15. It is conceivable that given these two separate lines of reasoning with nothing other than an examination of existing rules and statutes, that the arguments pressed by Complainant (suggesting that a legal right exists by statute for the obtaining of depositions through the mechanisms established by Wisconsin Statutes Section 804 and Section 805) might prevail. However, the argument of Complainant overlooks (1) prior case law; and (2) prior Commission decisions.

As to prior case law, State ex rel Thompson vs. Nash 27 Wis. 2nd 183, clearly establishes the principle that subpoenas to compel depositions issued by an attorney can only be utilized in proceedings before a court of record:

"Sub(1) of Sec. 326.12 . . . provides: 'In any civil action or proceeding, any party may examine any person, including a party, by deposition upon oral examination . . .'

The key words for the purpose of this appeal are: "in any civil action or proceeding". Clearly, "civil action" is confined to actions in court. "Proceeding" is a more ambiguous term, and, standing alone, could refer to a proceeding before an administrative agency as well as one in court.

. . .

Since "action" means a specific type of court proceeding the word "proceeding" in Section 326.12(1), Stats., is restricted to a proceeding in court."

Section 805.07 provides for the issuance of subpoenas by an attorney in order to compel depositions:

"A subpoena may also be issued by any attorney of record in a civil action or a special proceeding to compel attendance of witnesses for deposition hearing or trial in the action or special proceeding." (Emphasis added)

Obviously, then, the court, having reviewed the use of the same words in the predecessor statutes to sections 804 and 805, concluded that the utilization of the discovery mechanism by means of compelling attendance for the purposes of oral examination were not applicable to matters other than those in a court of record. In further explaining its decision the court states that:

"this action on our part is inconsistent with appellant's theory that the statute is applicable to administrative agency proceedings, since such agencies are creatures of the legislature, apart from the judicial branch of state government. Our rule making power does not extend

to prescribing procedures to be followed by administrative agencies".

The court goes on to quote from Graywell Drilling Co. vs. State Board of Health 236 Wis. 417 at 419:

"the functions of administrative agencies and courts are so different that the rules governing judicial proceedings are not ordinarily applicable to administrative agencies, unless made so by statute. It is not the province of courts to prescribe rules of procedure for administrative bodies as that function belongs to the legislature. The legislature may either prescribe rules for pleadings and procedure before such bodies, or it may authorize the administrative board or agency to prescribe its own rules."

Proceedings in matters held before the Wisconsin Employment Relations Commission are controlled by Wisconsin Administrative Rules Chapters ERB 1 through ERB 31. It is within these rules that the legislature has established the mechanism by which depositions of parties and witnesses may be ordered. Since Complainant has not applied to the Wisconsin Employment Relations Commission pursuant to ERB 10.15 in order to obtain subpoenas for the purpose of ordering depositions, the subpoenas issued by the attorney for Complainant are null and void as to matters and proceedings brought before the Commission. Had the Complainant complied with ERB 10.15 and made application to the examiner by way of affidavit and shown good cause as to why depositions in this matter are necessary, it is possible that the examiner would have issued subpoenas compelling attendance for the purpose of taking depositions. At no time in the proceedings, however, did the Complainant in any way demonstrate why depositions of the parties and witnesses were necessary in the above-captioned proceeding.

There is also Commission law dealing with the same legal issue. The reasoning of the Commission in Wisconsin State Attorneys Association, Inc. vs. Department of Administration, et. al., (Case LXXXVI No. 20135 PP(S)-36, Decision No. 14355-D) stands for the proposition that subpoenas to compel depositions obtained from a Court Commissioner for proceedings before the Wisconsin Employment Relations Commission are null and void. The Commission reasoned that Section 111.07(2)(b) in conjunction with Section 101.02(14)(c) permits the issuance of subpoenas for the purpose of deposing witnesses in a manner which is like the practice of deposing witnesses in civil actions in circuit courts. "They do not in the Commission's judgement authorize the courts or Court Commissioners to issue subpoenas for the purpose of deposing witnesses in an unfair labor practice proceeding before the Commission". The commission also noted that this interpretation is consistent with the Wisconsin Supreme Court decision of State ex rel Thompson vs. Nash, supra. It would seem that, given the reasoning of the Commission in the Wisconsin State Attorneys Association case, the subpoenas of an attorney pursuant to Section 804 and Section 805, Wis. Stats. are likewise without authority, and thus they, too, are null and void.

Finally, it is worth reiterating the basic concerns and philosophical foundations for the Commission's decision in Wisconsin State Attorneys Association, supra,:

Because of its concern that proceedings under Section 111.07 Wisconsin Statutes and Section 111.84(4) of the State Employment Labor

Relations Act, which are intended to be expeditious and readily available to non-lawyers, not be unduly delayed or complicated, the Commission has by rule (ERB 20.15) adopted a requirement that a party show good cause why it should be allowed to depose a witness in a proceeding before it pursuant to the provisions of Sections 111.07 and 111.84(4)."

While the instant proceedings have been commenced pursuant to Section 111.70 as apposed to proceedings under Section 111.84, the wording of the applicable administrative rules is identical. It is the conclusion of the undersigned examiner that the subpoenas in question are not authorized by any law or rule administered by the Wisconsin Employment Relations Commission; and therefore they are deemed null and void. Since the subpoenas issued by the attorney for the Complainant in this matter do not fall within the laws or rules which the Commission is empowered to administer, it follows that the Commission likewise lacks jurisdiction to quash such subpoenas.

Dated at Madison, Wisconsin this 23rd day of April, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Michael F. Rothstein
Michael F. Rothstein, Examiner