

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

 :
 In the Matter of the Petition of :
 :
 GREEN BAY MUNICIPAL EMPLOYEES :
 (PUBLIC HEALTH R.N.'s) LOCAL :
 1672-A, WCCME, AFSCME, AFL-CIO :
 :
 To Initiate Mediation-Arbitration :
 Between Said Petitioner and :
 :
 CITY OF GREEN BAY :
 :

Case CVIII
 No. 29587 MED/ARB-1622
 Decision No. 19841-B

Appearances:

Mr. Mark A. Warpinski, Assistant City Attorney, City of Green Bay, Law Department, Room 300, City Hall, Green Bay, Wisconsin 54301, filing petition for rehearing on behalf of the City.
 Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, Tenny Building, 110 East Main Street, Madison, Wisconsin 53703, filing brief on behalf of the Union.

ORDER DENYING PETITION FOR REHEARING

The Wisconsin Employment Relations Commission issued an August 17, 1982 order requiring mediation-arbitration in the above matter and an August 23, 1982 order appointing Jos. B. Kerkman as the mediator-arbitrator in the matter. On February 24, 1983, the City of Green Bay filed a pleading with the Commission styled as the petition for rehearing pursuant to Section 227.12, Stats., seeking an order from the Commission directing a rehearing on a Union motion granted in part by Kerkman which directed the City to allow the Union's expert witness access to the job site for evaluation of the duties performed by certain employes of the City. The Commission has received and considered written statements of position in the matter filed by both parties and has concluded for the reasons set forth in the attached Memorandum that the petition for rehearing should be denied.

NOW, THEREFORE, it is

ORDERED

That the instant petition for rehearing is hereby denied.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of April, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Gary L. Covelli*
 Gary L. Covelli, Commissioner

Marshall L. Gratz
 Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING ORDER DENYING
PETITION FOR REHEARING

On August 23, 1982, the Wisconsin Employment Relations Commission appointed Jos. B. Kerkman as the mediator-arbitrator of a dispute between the Green Bay Municipal Employees (Public Health R.N.'s) Local 1672-A, WCCME, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Green Bay, hereinafter referred to as the City. This appointment authorized Kerkman to act as mediator-arbitrator to resolve an impasse between the parties by endeavoring to mediate the issues in dispute and, should such endeavor not result in a resolution of the impasse, to issue a final and binding award to resolve said impasse by selecting the total final offer of the Union or the total final offer of the City.

Prior to a scheduled combination mediation-then-arbitration session, the Union filed a motion with the mediator-arbitrator which sought an order directing the City to allow an expert witness access to the work site of the employees in question for the purpose of conferring and consulting with various employees with respect to their job duties and responsibilities. Prior to filing said motion the Union had sought the City's permission for such access and said permission had been denied. Both parties subsequently filed written argument on the motion in question and on February 2, 1983, mediator-arbitrator Kerkman issued an order which directed the City to permit an individual to have access under certain conditions to various employees with respect to their job duties and responsibilities.

On February 24, 1983, the City filed a pleading with the Commission styled as a petition for rehearing pursuant to Sec. 227.12, Stats., seeking an order from the Commission directing a rehearing on the motion in question.

In its petition to WERC for rehearing the City asserted, among other things, that the mediator-arbitrator lacked jurisdiction to rule on procedural matters such as the motion herein prior to the mediation phase of mediation-arbitration between the parties; that the mediator-arbitrator had failed to properly define the scope of his order; and that the mediator-arbitrator had exceeded his authority. The City further asserted that the mediator-arbitrator's order is a final decision within the meaning of Sec. 227.10, Stats., and therefore properly subject to a petition for rehearing under Sec. 227.12, Stats.

On March 3, 1983, the Union submitted a response to the City's petition for rehearing. The Union therein asserted that the mediator-arbitrator's order is interlocutory and further asserted that the WERC has no jurisdiction or authority to grant such a petition in the instant circumstances. The Union therefore requests that the Commission dismiss the petition for lack of subject matter jurisdiction.

DISCUSSION

The Commission has considered the positions of the parties and has decided to deny the City's petition for rehearing for the following reasons. We do not agree with the Union that the Commission is without a subject matter jurisdiction in this matter. On the contrary, Sec. 111.70(4)(cm)8, Stats., vests in the Commission the responsibility for establishing rules for the conduct of all mediation-arbitration proceedings. Included among the rules adopted by the Commission pursuant to that authority is ERB 31.17(5), pursuant to which Arbitrator Kerkman has acted in issuing the instant order.

Nevertheless, we are faced in this matter with a determination of whether the Commission should intercede in the ongoing mediation-arbitration case at the request of a party dissatisfied with an interlocutory order of the mediator-arbitrator. In our view, the statutory scheme is designed to make the mediation-arbitration process as expeditious as possible. It appears to us more consistent with that purpose to decline the City's unilateral request for WERC review at this time of the instant interlocutory order.

The validity of the mediator-arbitrator's order could, of course, become a matter for WERC determination in the event that the lawfulness of issuance of the award, if any, ultimately issued in the matter by Kerkman, were to come before the

WERC following its issuance. We do not choose, at this time, however, to undertake a review of that question where the party prevailing on the motion before the mediator-arbitrator has objected to our doing so.

In many respects, our determination here is parallel to a decision by the Agency to decline to consider the merits of a ruling on a motion during the course of an examiner proceeding in a contested case. See, University of Wisconsin-Milwaukee, Housing Department, 11457-C (3/73), aff'd 65 Wis 2d 624, 624, 628, (1974), wherein the Commission stated:

"Since the Order issued by the Examiner is not a final determination of any of the issues involved in the instant matter, the Commission will not at this time entertain a Petition for Review of the Examiner's Order setting the matter for further hearing. Under the Respondent State's theory any party who is dissatisfied with a ruling made by an Examiner during the course of a hearing could petition the Commission for a review of the Examiner's ruling. Such a procedure is not contemplated either under Chapter 227 of the Wisconsin Statutes or under the rules of the Commission."

In sum, we do not consider the matter--in its present posture--to be ripe for Commission consideration and we have therefore denied the City's petition.

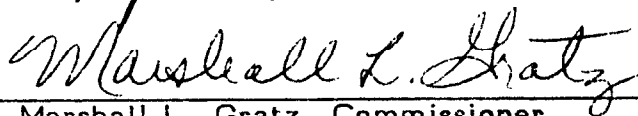
Dated at Madison, Wisconsin this 7th day of April, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By



Gary L. Covelli, Commissioner



Marshall L. Gratz, Commissioner