STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of WISCONSIN HOUSING & ECONOMIC DEVELOPMENT AUTHORITY Requesting a Declaratory Ruling Pursuant to Section 227.06, Stats., Involving a Dispute Between Said Petitioner and DANE COUNTY, WISCONSIN, MUNICIPAL EMPLOYEES, LOCAL 60, AFSCME, AFL-CIO	Case II No. 32873 DR(M)-341 Decision No. 21780

Appearances:

DeWitt, Sundby, Huggett, Schumacher & Morgan, S.C., 121 South Pinckney Street, P.O. Box 2509, Madison, Wisconsin 53701, by Jon P. Axelrod and Pamela B. Anderson, and Executive Director Ed Jackamonis, Wisconsin Housing & Economic Development Authority, 131 West Wilson Street, Madison, Wisconsin 53703, for the Authority.

Lawton & Cates, 110 East Main Street, Madison, Wisconsin 53703, by Richard V. Graylow and Greg Crinion, for the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Dane County, Wisconsin, Municipal Employees, Local 60, AFSCME, AFL-CIO (herein Union), having filed on January 9, 1984, a "Petition For Election Involving Municipal Employes", involving certain employes of the Wisconsin Housing & Economic Development Authority (herein Authority or WHEDA); 1/ and the Authority having filed on January 31, 1984, a "Petition For Declaratory Ruling" pursuant to Sec. 227.06, Stats., to determine whether it is private employer within the meaning of Sec. 111.02(2), Stats., or a municipal employer within the meaning of Sec. 111.70(1), Stats.; and the Union having withdrawn its initial objection to the Commission processing of that petition; and the parties having waived hearing; and the parties having submitted briefs and reply briefs, the last of which was received on March 30, 1984; and at WHEDA's request the full Commission having heard oral arguments on April 10, 1984, in Madison, Wisconsin; and the Commission, having considered the record and the arguments of the parties, makes and issues the following

FINDINGS OF FACT

1. That the Authority was created as the Wisconsin Housing Finance Authority by the Wisconsin Legislature in Chapter 287, Laws of 1971, which is codified in Chapter 234, Stats., and has its principal offices at 131 West Wilson Street, Madison, Wisconsin 53703.

2. That the Union is a labor organization within the meaning of Sec. 111.70(1), Stats., with its principal offices at 5 Odana Court, Madison, Wisconsin 53719.

3. That the Union filed a "Petition For Election Involving Municipal Employes" to represent "all regular full-time and regular part-time employes, excluding all supervisory, confidential, and craft employes" of the Authority on January 9, 1984; and that the Authority filed the instant petition on January 31, 1984, and argues herein for a ruling that the Authority is neither a municipal employer nor a state employer.

1/ Case I, No. 32760, ME-2312

4. That the stated legislative purpose in originally creating the Authority was to provide loans for housing construction and to provide mortgage loans directly to low and moderate income persons and families in order to alleviate the inadequate supply of both urban and rural housing for such persons.

5. That the Wisconsin Legislature has since amended Chapter 234, Stats., to permit the Authority to make loans to banking institutions which would in turn make long-term mortgages to or provide residential housing for persons of low and moderate income, to establish lending programs in conjunction with the Wisconsin Department of Development to encourage economic development in Wisconsin, and to finance loans for Wisconsin businesses to export products to purchasers outside of the United States.

6. That the Authority is a public body corporate and politic with nine members, six of whom are public members appointed by the Governor for four-year terms with the advice and consent of the Senate; that the the other members are the Secretary of Development or his or her designee, one State Senator and one State Representative; that all members of the Authority serve without compensation; and that the Authority employs a full-time paid executive director appointed by the Governor with the advice and consent of the Senate.

7. That the Authority employs 53 employes and determines their qualifications, duties and compensation outside of the classified service of the State of Wisconsin civil service system.

8. That the Authority exists at the discretion of the Legislature; that it receives assistance from the State of Wisconsin in issuing its bonds and notes; that it is required by statute to submit an annual report to various state officials and committees; and that it is required by statute to abide by state uniform travel schedule amounts, purchasing specifications and political activity limitations.

9. That the Authority is not a territorial subdivision of the state; that it is a public corporation outside the formal structure of state government; that it cannot levy taxes to pay for its operations; that it has never received an appropriation from the State of Wisconsin; that its operating expenses are paid by current or retained earnings generated by the interest rates and fees it charges for its loans and services; and that its employes are paid from a payroll system independent from the State of Wisconsin.

10. That Legislature has granted the Authority the powers necessary to implement its public purpose, including the power to sue and be sued, to make and execute contracts, and to issue notes and bonds, which notes and bonds are not a debt of the State of Wisconsin.

11. That the Authority as a public body corporate is subject to the Public Records Law, Sec. 19.32(1), Stats., and the Open Meetings Law, Sec. 19.82(1), Stats.; and that the Authority is named specifically as being subject to the Code of Ethics for Public Officials and Employes, Sec. 19.42(10)(h), Stats., and the Public Employe Trust Fund, Sec. 40.02(54)(b), Stats.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW AND DECLARATORY RULING 2/

1. That WHEDA is not a "municipal employer" and its employes are not "municipal employes" within the meaning of Sec. 111.70(1) of the Municipal Employment Relations Act.

2/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for (Continued on Page 3)

2. That WHEDA is not an "employer" and its employes are not "employes" within the meaning of Sec. 111.81 of the State Employment Labor Relations Act.

3. That because the question of possible federal preemption was not fully litigated, we decline to determine herein whether WHEDA is an "employer" and whether its employes are "employes" within the meaning of Sec. 111.02 of the Wisconsin Employment Peace Act.

Given under our hands and seal at the City of Madison, Wisconsin this 12th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

2/ (Continued)
judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Background

The underlying dispute in this matter arose when, on January 9, 1984, the Union filed a "Petition For Election Involving Municipal Employes" with the Commission pursuant to Sec. 111.70(4)(d), Stats. In that petition, the Union requested that the Commission conduct an election among "all regular full-time and regular part-time employes (of WHEDA), excluding supervisory, confidential, and craft employes."

The Authority responded by filing the instant Petition for a Declaratory Ruling pursuant to Sec. 227.06, Stats. Under that statutory provision, the Commission is authorized but not required to conduct a hearing and render a declaratory ruling "with respect to the applicability to any person, property or state of facts of any rule or statute enforced by it." As filed, the Authority's petition sought declaratory rulings that the Authority is a (private sector) "employer" within the meaning of Sec. 111.02(2) of the Wisconsin Employment Peace Act and that it is not a "municipal employer" within the meaning of Sec. 111.70(1)(a) of the Municipal Employment Relations Act (MERA). The Union at first objected but then withdrew its objection to the Commission's processing of the Authority's petition for declaratory ruling.

Positions of the Parties

In its briefs, the Union argues generally that the Authority is a public employer, emphasizing the theory that if it is not a municipal employer under MERA then it is an employer under the State Employment Labor Relations Act (SELRA). In its reply brief, the Union did not respond specifically to the Authority's arguments against finding it a municipal employer. At the oral argument, the Union again argued that the Authority was a public sector employer either subject to MERA or to SELRA.

In its initial brief, the Authority argued that the Commission should declare that the Authority is not a municipal employer. In its reply brief the Authority argued that because the Petition For Election filed involved municipal employes and because the Petition For Declaratory Ruling framed the issue as whether the Authority is a private or a municipal employer, no controversy was pending before the Commission as to whether the authority is an employer subject to SELRA. In the alternative the Authority argued in its reply brief that the Authority is neither a state employer subject to SELRA nor a municipal employer subject to MERA. At oral argument before the Commission, the Authority acknowledged that the question of whether the Authority is subject to SELRA was arguably before the Commission. The Authority argued that it was not subject to SELRA.

In regard to MERA, the Authority argues specifically that classifying it as a municipal employer is contrary to legislative intent in several ways. First, the Authority asserts that it does not come within the definition of the term "municipal employer" in that it is not a city, county, village, town, metropolitan sewerage district, school district, or any other political subdivision of the state. Second, the Authority contends that when the Legislature wants to include the Authority within the scope of a statute, it does so expressly, but it did not do so in MERA. Third, the Authority contends that since MERA abrogates the right to strike, it must be strictly construed so as not to abrogate that right absent clear legislative intent which, it asserts, is not present in this case.

In addition, the Authority asserts that the compulsory arbitration mechanism in MERA is inconsistent with the Authority's function in that a potential compulsory arbitration award would have to be disclosed to bond purchasers, thus reducing the bonds marketability. Fifth, the Authority contends that since it is not a unit of local government, it would be impossible to apply the comparability standard required by MERA for no comparable employing unit exists. Finally, the Authority contends that denominating it as a political subdivision of the state would threaten the constitutionality of its enabling statute.

Although the Union filed its Petition For Election under MERA, it did not present in any detail arguments to the effect that the Authority's employes were

municipal employes. Instead, in its brief and reply brief and at oral argument, the Union's position has emphasized the theory that the Authority is an "employer" under SELRA and that its employes are state employes under that statute.

As to SELRA the Union specifically argues that because of the similarities between MERA and SELRA, the criteria developed by the Commission to determine if an Authority formed by a municipality is a municipal employer under MERA is applicable to the determination of whether an Authority formed by the state is a state employer under SELRA. In addition, the Union argues that the Authority is a state employer even though it is independent of the state; that the statutes show a clear legislative intent that the Authority is a public employer, and that a determination that the Authority is a state employer is consistent with SELRA.

In response to those Union contentions, the Authority argues that it is not the State of Wisconsin but an independent entity not subject to SELRA, and that its employes are excluded from the coverage of SELRA in that they are not in the classified service of the state as defined in Sec. 230.08, Stats.

Discussion

As presented and argued by the parties, this case presents questions of whether the Authority's employes are protected by either MERA or SELRA. 3/ Under MERA, "municipal employer" is defined as "an city, county, village, town, metropolitan sewerage district, school district, or any other political subdivision of the state which engages the services of an employe . . . ", Sec. 111.70(1), Stats.

The Authority is clearly not a city, county, village, town, metropolitan sewerage district or school district. The only question facing the Commission in regard to MERA is whether the Authority is a political subdivision as that term is used in MERA. We conclude that it is not.

In MERA the types of municipal employers specified are as follows: city, county, village, town, metropolitan sewerage district and school district. This denomination of municipal employers is followed by the general term "any other political subdivision". As the Authority argues, the maxim ejusdem generis limits the term "any other political subdivision" to entities similar to those listed; that is, to entities with territorial boundaries which are able to levy taxes and were created to perform essential governmental services for its citizens. 4/

The principal characteristics common to the listed examples of municipal employers are that they are local governmental entities which are supported and maintained by taxes and which administer the internal affairs of the community. The Authority, on the other hand, is a statewide entity which receives no taxes and which is not limited to any community, locality or geographic area of the state.

Thus the structure of the Authority is not similar to those listed examples. Nor is the Authority's structure consistent with the common meaning of political subdivision. Subdivide is defined in the dictionary as "to divide into several parts; especially, to divide a tract of land into buiding lots." A subdivision is "one of the subdivided parts." 5/ The Authority is not a subdivided part of the state as is a city, county, village, town, metropolitan sewerage district or school district.

3/ For reasons noted in the concluding paragraph of this decision we have declined to address the WEPA jurisdiction question herein.

4/ See Swanson v. Health & Social Services Department, 105 Wis. 2d 78, 85 (Ct. App. 1981), and La Barge v. State, 74 Wis. 2d 327 (1976): "When a statue is passed which enumerates several specific items encompassed in the purview of the statute and then follows the specifics with a general phrase, it is reasonable to conclude that the general phrase was intended to cover only other items that fall within the general category of those enumerated." 74 Wis. 2d at 332.

5/ American Heritage Dictionary of the English Language, New College Edition.

Moreover, when the Legislature captions an act, that caption "may be considered in determining the content of the legislation." 6/ Black's Law Dictionary defines "municipal" as "pertaining to a local governmental unit, commonly, a city or town." A "municipality" is defined as "a legally incorporated or duly authorized association of inhabitants of limited area for local governmental or other public purposes." Again these definitions are inconsistent with the structure and purpose of the Authority.

Since the Authority is therefore neither a political subdivision nor a municipality as those terms are used in MERA, the Commission concludes that the Authority is not a municipal employer within the meaning of MERA.

As to SELRA, the Union notes that in Dane County Housing Authority, 17130, (7/79) the Commission held that the Dane County Housing Authority (DCHA) was a municipal employer under MERA based on the following factors: the DCHA was created by the legislative branch; the DCHA constituted a public body corporate and politic; the members are appointed by the chief executive with the consent of the legislative branch; and the members have ultimate responsibility for the functioning of the DCHA, the employment and discipline of employes, and the setting and administration of the wages, hours and conditions of employment of its employes. Because all of these conditions are met by the WHEDA in this case, the Union argues that it is, by analogy, a state employer under SELRA.

This argument fails to recognize that the definitions for "employer" are different under MERA and SELRA. The analysis in Dane County Housing Authority, supra, was used to determine if the DCHA was a political subdivision of the state and, thus, a municipal employer under MERA. But the Union is not using this analysis to show that WHEDA is a political subdivision of the state. Instead it would have the Commission accept an analysis which determines that the Dane County Housing Authority is a political subdivision of the state as the same analysis to determine if WHEDA is the State of Wisconsin. The Commission does not. The definition of employer under MERA is broad enough to include many entities created by the state and, as noted above, by other municipalities. But the definition of employer under SELRA is specific to one employer - the State of Wisconsin. Whereas under MERA the term employer covers a class of employers so that the analysis must show that an employer is a member of the classes listed, under SELRA the analysis must show that the employer is the State of Wisconsin.

When the Legislature created WHEDA, it did not create another state or another state employer. Instead the state created an "independent going concern", as the Supreme Court called the Authority in Warren v. Nusbaum, 59 Wis. 2d 391, 425 (1973). The Court continued, "The powers conferred upon the Authority support the legislative declaration that the Authority is an independent entity, denominated a public body corporate and politic. 59 Wis. 2d at 424-425.

But, the Union argues, the Commission has held that an employer may be a public employer even though it is independent of the entity that created it. In Village of Hales Corners, 15229-A, (4/78) and City of Clintonville Utility Commission, 18747, (6/81), the Union notes that the Commission held that the Hales Corners Library Board and the Clintonville Utility Commission were municipal employers even though independent of the municipalities which created them. This was so, according to the Union, because both the Library Board and the Utility Commission had the power to employ and set the wages, hours and conditions of employment of its employes. The Union argues that the WHEDA is a public employer, even though independent of its creating entity, because it has the same powers.

However, whereas an entity independent of the municipality could still be a municipal employer under MERA, an entity independent of the State of Wisconsin is outside the definition of employer under SELRA. The contention that the Authority is something other than the State of Wisconsin is supported by legislative declaration. In the 1981 amendments to Chapter 234, the Legislature said, "The Authority can best achieve its public purpose if its existence continues as a public corporation outside the formal structure of state government. Nothing in this act is intended to make the Authority a part of the state government." Laws of 1981, Ch. 349, subsections 1(2)(c) and (d). The Supreme Court has confirmed

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6/ Department of Natural Resources v. Clintonville, 53 Wis. 2d 1, 9 (1971).

this position, stating "(T)he Authority is neither an arm nor agent of the state." Warren v. Nusbaum, 59 Wis. 2d 391, 425 (1973).

The Union also argues that the following statutes clearly show a legislative intent to include the Authority as a state employer: under Chapter 234, Stats., the Authority is subject to some of the same regulations as are the general state departments; as a public body corporate and politic, the Authority is subject to the Public Records and Open Meeting Laws, Secs. 19.32(1) and 19.82(1), Stats.; members and employes of the Authority are subject to the Code of Ethics for Public Officials and Employes, Sec. 19.42 (10)(h), Stats.; and the Authority is included in the definitions of state agency in the Public Employe Trust Fund, Sec. 40.02(54)(b), Stats.

There is no doubt that the Authority is a public body corporate and politic and, as such, it is subject to some of the same statutes as other public entities. This does not mean that the Authority is the State of Wisconsin within its meaning in SELRA. For instance, the Public Records Law covers some non-profit corporations which are not part of the State of Wisconsin. The legislative note to Chapter 234 specifically refers to the Ethics Code in saying that even though subject to the Ethics Code, the Authority is still "a public corporation outside the formal structure of state government." Laws of 1981, Ch. 349, subsection 1(2)(c). Also the Ethics Code states that nothing in that act "is intended to make the Authority a part of state government." Laws of 1981, Ch. 349, subsection 1(2)(d). And while subject to the retirement fund, the employes of the Authority are paid from a payroll system separate from the state and which does not include any state appropriations.

What these statutes do tend to show is that when the Legislature wants to include the Authority within a statue, it does so by defining the terms in the statutes to include a public body corporate and politic or it specifically names the Authority. The Legislature did neither of these in SELRA.

Even if the Commission was to find that the Authority is an employer within the meaning of SELRA, the Authority would still not be subject to SELRA because, contrary to the Union's argument, such a finding would be inconsistent with SELRA. Specifically, Sec. 111.81(15), Stats., limits the definition of employe to those state employes "in the classified service of the state as defined in s. 230.08." Section 230.08, Stats., is the classified service of the civil service system. Section 234.02(3), Stats., states that the Authority shall employ "employes, permanent and temporary, as it may require, and shall determine their qualifications, duties and compensation, all notwithstanding subch. II of ch. 230," which includes Sec. 230.08, Stats.

Thus, for its employes to come within SELRA's definition of "employe", they must be state employes in the classified service. Since all of its employes are clearly outside the SELRA definition of "employe" it follows that the Authority could not, in any event, be found subject to SELRA as regards any part of its current employe complement.

For the foregoing reasons, the Commission has concluded that the Authority is not an "employer" and its employes are not "employes" within the meaning of SELRA.

We are denying the additional request in the Authority's petition for a declaratory ruling as to whether the Authority is an "employer" within the meaning of the Wisconsin Employment Peace Act. As the Authority argued at the oral argument, the question of whether WEPA jurisdiction is preempted by the federal law jurisdiction of the National Labor Relations Board has not been fully explored in the instant record. For that reason, we are declining to address in this proceeding the additional question of whether WERC has jurisdiction of the Authority's relationship with its employes under WEPA.

Dated at Madison, Wisconsin this 12th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner