

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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LOCAL UNION NO. 2490, :  
AFSCME, AFL-CIO, :  
: :  
Complainant, : Case 96  
: No. 37812 MP-1898  
vs. : Decision No. 24110-A  
: :  
COUNTY OF WAUKESHA, :  
: :  
Respondent. :  
: :  
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Appearances:  
Lawton & Cates, S.C., by Mr. Bruce F. Ehlke, 214 W. Mifflin Street,  
Madison, Wisconsin 53703-2594, appearing on behalf of Complainant.  
Michael, Best & Friedrich, Attorneys, by Mr. Marshall R. Berkoff, 250 East  
Wisconsin Avenue, Wisconsin, 53202-4286, appearing on behalf of  
Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW  
AND ORDER GRANTING MOTION TO DISMISS

On November 14, 1986 Local Union No. 2490, AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission alleging that Waukesha County had violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by subcontracting the operation of its Northview Nursing Home and by related actions. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter. Respondent, on January 2, 1987, filed its answer to the complaint, together with a Motion to Dismiss or, in the alternative, stay proceedings in the matter. The Examiner postponed hearing in the matter during the pendency of a parallel circuit court action between the same parties; on October 1, 1987, Respondent renewed its Motion to Dismiss; and on October 13, 1987 Complainant filed a letter in opposition to the Motion. The Examiner, having considered the evidence and arguments of the parties, and being satisfied that the complaint should now be dismissed, makes and files the following Findings of Fact, Conclusion of Law and Order Granting Motion to Dismiss.

FINDINGS OF FACT

1. Complainant Local Union No. 2490, AFSCME, AFL-CIO is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal place of business at 5 Odana Court, Madison, Wisconsin.
2. Respondent Waukesha County is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal place of business at Waukesha County Courthouse, Waukesha, Wisconsin.
3. At all times material hereto, Complainant and Respondent were parties to a collective bargaining agreement covering employes of the Northview Nursing Home, which is effective from January 1, 1986 through December 31, 1987.
4. On or about September 23, 1986, counsel for Complainant sent a letter to Respondent demanding that Respondent collectively bargain any decision, as well as the impact of any decision, concerning subcontracting at the Northview Nursing Home.
5. On November 14, 1986, Complainant filed the instant complaint, contending that Respondent County had, by its County Board, voted to subcontract out the entire operation of its Northview Nursing Home; Respondent's answer, filed January 2, 1987, denied that the County had voted to subcontract the operation of the Nursing Home and raised several affirmative defenses, among them that Complainant had filed a complaint in Waukesha County Circuit Court covering the same allegations, among others, and with the same potential effect as the complaint herein. Filed together with Respondent's answer was a Motion to

Dismiss, or in the alternative to stay proceedings, in which Respondent moved that the complaint pending in Waukesha County Circuit Court be deferred to by the Examiner. After receiving arguments on the Motion, the Examiner twice postponed hearing in this matter pending determination of the parallel issues raised in Waukesha County Circuit Court.

6. On July 13, 1987 the Circuit Court for Waukesha County granted Respondent's Motion for Summary Judgment on the issues raised in Court which parallel the issues present here, and dismissed Complainant's court complaint in its entirety. On October 1, 1987, Respondent filed a renewed Motion to Dismiss the complaint herein on the grounds that Complainant had appealed portions of the Circuit Court's Order of Dismissal related to claims under Chapter 49, Stats., by not appealing the Court's determination to dismiss claims made under Chapter 111.70, Stats., and that the time for said appeal had run. On October 13, 1987, Complainant responded to the Motion, stating in substance that it took the position that the Circuit Court was not competent to hear the Chapter 111.70 issues, and that the proceeding before the Examiner should therefore be maintained.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and issues the following

#### CONCLUSION OF LAW

That because the Circuit Court for Waukesha County has concurrent jurisdiction with the Wisconsin Employment Relations Commission to determine claims of violation arising under Chapter 111, Stats., and has done so with respect to all issues raised in this proceeding, this matter is res judicata.

Upon the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and renders the following

#### ORDER GRANTING MOTION TO DISMISS 1/

That the Motion filed by Respondent that the complaint in this matter be dismissed is hereby granted, and the complaint is hereby dismissed.

Dated at Madison, Wisconsin this 21st day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
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Christopher Honeyman, Examiner

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1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with

(Footnote 1 Continued on Page 3)

(Footnote 1 Continued)

the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

WAUKESHA COUNTY

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSION OF LAW  
AND ORDER GRANTING MOTION TO DISMISS

The date originally set for hearing in this matter was January 16, 1987. On January 2, Respondent filed its answer to the complaint, together with a Motion to Dismiss or, in the alternative, to stay proceedings in the matter. The Motion was based on the fact that Complainant had also filed a complaint in Waukesha County Circuit Court alleging that Respondent had violated Chapter 111.70, Stats., as well as Chapter 49, Stats., by its actions in connection with Northview Nursing Home.

The Chapter 111 allegations duplicated Complainant's allegations before the Commission, which placed the parties in a position litigating the same case in two forums simultaneously. Respondent argued that this was improper, and noted that as the Commission lacks jurisdiction to determine the Chapter 49 allegations, the Court was the only forum in which these matters could be heard at one time. Complainant, in a reply filed January 10, alleged that the claims are unrelated and proposed to sever them by withdrawing its Chapter 111 claims before the Court. Respondent objected that the claims were interrelated and that it would argue to the Court that the Court should deny severance. Hearing in this matter was postponed until early March in order to permit the parties to make this argument in Court.

The Complaint filed its Motion to sever with the Court on or about January 27. The Court subsequently scheduled a hearing on that Motion for March 31; on February 24, Respondent filed a Motion for Indefinite Postponement in the instant case, arguing that this would permit the Court opportunity to rule. I granted the Motion insofar as an extension of time, but set a date certain for hearing; that date was subsequently postponed indefinitely after the Court ruled that it intended to assert jurisdiction over all matters related to the original Court complaint.

On October 1, 1987, Respondent renewed its Motion to Dismiss, on the grounds that the Circuit Court had, on July 13, issued an Order Granting the County's Motion for Summary Judgment on all of the Sec. 111.70 issues. Respondent filed together with that Motion a copy of the Court's Order, in which the Court clearly states its view that the County had no duty under Sec. 111.70, Stats., to bargain collectively with Complainant over the decision concerning Northview Nursing Home, and characterized that decision not as subcontracting but as a decision to discontinue ownership and operation and to sell the Home outright. Respondent alleged in its Motion that Complainant had appealed portions of the Circuit Court's Order which related to Chapter 49, Stats., which are not under the Commission's jurisdiction, but that Complainant had not appealed the sections of the Order related to Chapter 111.70. Complainant's reply, filed October 13, 1987, states in its entirety:


We have received a copy of Attorney's Berkoff's letter to you of September 29, 1987. It is the position of AFSCME Local 2490 that the Circuit Court for Waukesha County was not competent to hear the labor issues that it purported to decide in its Case Number 86CV3597. A hearing in the above-indicted (sic) prohibited practices case should be scheduled forthwith.

It is clear on the face of the statute in Sec. 111.07(1) that "any controversy concerning unfair labor practices may be submitted to the Commission in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction." Sec. 111.70(4)(a) specifies that Sec. 111.07 shall govern procedure in all cases involving prohibited practices, except to substitute "prohibited practices" for "unfair labor practices." It is plain from this statutory language that the circuit court of the county in which a violation of the statute allegedly occurred is competent to decide issues arising under this statute. As noted in the memorandum accompanying the notice rescheduling the hearing which I issued on March 9, 1987, the Sec. 111.70 issues raised before the

Court exactly duplicated those raised before the Commission. Complainant does not dispute Respondent's assertion that the Court did, in fact, issue the Order attached to Respondent's renewed Motion; nor does Complainant dispute Respondent's assertion that the Order of the Court was not, in fact, appealed by Complainant. On these facts, I can only conclude that the entire subject matter of this proceeding has been decided by a Court of competent jurisdiction, and that it is therefore res judicata. The complaint is accordingly dismissed.

Dated at Madison, Wisconsin this 21st day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Christopher Honeyman, Examiner