STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION NO. 2490, AFSCME, AFL-CIO, Complainant, vs. COUNTY OF WAUKESHA, Respondent.	Case 96 No. 37812 MP-1898 Decision No. 24110-B

Appearances:

Lawton & Cates, S.C., by Mr. Bruce F. Ehlke, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Complainant.

Michael, Best & Friedrich, Attorneys, by Mr. Marshall R. Berkoff, 250 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4286, appearing on behalf of Respondent.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER GRANTING MOTION TO DISMISS

Examiner Christopher Honeyman having on October 21, 1987, issued Findings of Fact, Conclusion of Law and Order Granting Motion to Dismiss in the above-entitled matter, wherein he concluded that because the Circuit Court for Waukesha County had issued a final decision as to all issues raised in the complaint before him, the complaint should be dismissed under the doctrine of res judicata; and Complainant AFSCME having on November 6, 1987, timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Sec. 111.07(5), Stats.; and the parties having submitted written argument in support of and in opposition to said petition, the last which was received on February 25, 1988; and the Commission having considered the matter makes and issues the following

ORDER 1/

That the Examiner's Findings of Fact, Conclusion of Law and Order Granting Motion to Dismiss are hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

Footnote 1/ found on page 2.

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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.

WAUKESHA COUNTY

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER GRANTING MOTION TO DISMISS

BACKGROUND

On November 14, 1986, AFSCME filed a complaint of prohibited practice against the County alleging that the County had failed to bargain over the decision to "contract-out" the Northview Nursing Home or the impact thereof and had thereby violated Secs. 111.70(3)(a)1, 3 and 4, Stats. AFSCME subsequently made the same allegations as part of a declaratory judgment action filed in Waukesha County Circuit Court. On January 2, 1987, the County filed an answer to the AFSCME complaint, as well as a Motion to Dismiss or, in the alternative, to Stay the Proceedings. The County's Motion was based upon AFSCME's having filed the declaratory judgment action in Waukesha County Circuit Court. At the time the County's answer and Motion were received by the Commission, the Commission had appointed Christopher Honeyman as Examiner in the matter who had on December 3, 1986, issued a Notice of Hearing which scheduled hearing for January 16, 1987. In response to the County's answer and Motion, the Examiner issued a Notice on January 22, 1987, which rescheduled hearing to March 3, 4, and 5, 1987.

Thereafter, AFSCME filed motions with the Court seeking dismissal of that portion of the declaratory judgment action which paralleled the complaint pending before the Examiner. The County then advised the Examiner that it was filing a Counterclaim with the Court which would seek a ruling as to the same matters which AFSCME was now seeking to have dismissed. Based upon these developments, the County asked the Examiner to indefinitely postpone hearing until the Court had an opportunity to rule on the AFSCME request to amend its action before the Court and on the County's Counterclaim. The Examiner thereafter telephonically advised the parties that he would postpone his hearing to allow the Court to take action. On February 27, 1987, AFSCME filed a Motion to Compel Hearing with the Commission seeking an order directing Examiner Honeyman to proceed with hearing as scheduled on March 3-5, 1987. On February 27, 1987, the Commission, through its General Counsel, telephonically advised the parties that the Commission 2/ was denying AFSCME's Motion because it had elected not to exercise its discretionary authority to intervene in the Examiner's scheduling determinations. Thereafter, the Examiner issued a Notice which rescheduled hearing for April 20, 21, and 22, 1987. Attached to the Notice was a Memorandum which stated in part

> The original date formally set for hearing in this matter was January 16, 1987. On January 2, 1987 Respondent filed its answer to the complaint, together with a motion to dismiss or, in the alternative, 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 49, Stats., as well as Chapter 111.70, Stats., by its actions in connection with Northview Nursing Home.
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> The Chapter 111 allegations duplicated Complainant's allegations before the Commission, thus placing the parties in the position of litigating the same case in two forums simultaneously. Respondent argued that this was improper and noted that as the Commission lacked jurisdiction to determine the Ch. 49 allegations, the Court was the only forum in which these matters could be heard at one time. Complainant, on January 10, alleged that the claims are unrelated and proposed to sever them by withdrawing its Ch. 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. I then postponed the hearing until March 3, 4, and 5 in order to permit the parties to make their argument in Court.

2/ The Commission at that time consisted of Chairman Torosian and Commissioners Gratz and Davis-Gordon.

> Complainant sent its motion to sever on January 27. The Court subsequently scheduled a hearing on the motion for March 31; and on February 24, Respondent filed a motion for indefinite postponement in this matter, arguing this would permit the Court an opportunity to rule, without prejudicing Respondent's claims by proceeding to hearing in the matter prior to the Court's hearing on the motion to sever. Complainant, by letter dated February 25, objected that further postponement would be unjustified because the Commission has "primary jurisdiction" to hear the prohibited practice allegations.
>
> I find that a fine balance must be maintained in this situation in order to avoid prejudicing either party's interests. Were this matter postponed indefinitely, the stage might be set for extended delays, and apparent lack of action by the WERC might itself become a factor in the parties' arguments concerning the appropriateness of initial litigation of the Ch. 111 claims in court. At the same time, to proceed immediately to hearing on the merits, despite the fact that the court has scheduled a hearing on the motion to sever, would potentially subject the parties to litigation in two forums, which even Complainant now concedes is undesirable. It would also be discourteous to the Court.
>
> I conclude that the requisite balance is best maintained by granting Respondent's motion in part, but specifying a date certain for hearing to commence within a reasonable time after the Court's hearing on the motion to sever claims. The attached Notice specifies that three days, which have been agreed on by the parties, are set for hearing this matter.

On April 1, 1987, the County advised the Examiner that the Court had denied AFSCME's request that the Court defer to the Wisconsin Employment Relations Commission as to the portion of the dispute involving interpretation of the Municipal Employment Relations Act and that the Court had asserted jurisdiction over all matters pending before the Examiner. On April 15, 1987, the Examiner issued a Notice wherein he indefinitely postponed hearing on the complaint pending before him. The Notice was accompanied by a brief Memorandum which stated in pertinent part:

> On January 22 and March 9, 1987 this matter was previously postponed, in each case to a new scheduled hearing date, because Complainant had filed duplicate allegations in Waukesha County Circuit Court and the Court had not yet decided whether or not to proceed to hearing in that matter. On April 13, 1987 both parties advised me that the court had, on March 30, 1987, taken actions indicating an intent to assert the Court's jurisdiction over issues involving Chapter 111.70, Stats., as well as Chapter 49, Stats. Though the parties dispute the exact effect of the Court's orders, it is plain that the Court has asserted jurisdiction at least as to part of the issues before me. The parties also advised me that Complainant has moved the Court of Appeals for leave to appeal the Circuit Court's order. Respondent has renewed its motion to dismiss this proceeding, and Complainant has moved that the hearing proceed, but I conclude from these facts that neither course can be followed without prejudicing one or the other party's rights, essentially for the same reasons stated in the Memorandum Accompanying the March 9, 1987 Notice Rescheduling Hearing. Accordingly, the hearing scheduled for April 20, 21 and 22, 1987 is postponed indefinitely pending court determination of the extent to which, and/or the purposes for which, jurisdiction is asserted.

On October 1, 1987, the County submitted to the Examiner a copy of the Court's July 13, 1987 Order which it asserted resolved all issues before the Examiner and as to which it asserted AFSCME had not sought an appeal. The County renewed its request to the Examiner that the complaint pending before him be dismissed because all issues before him had been "finally determined." AFSCME opposed the County's request by letter received by the Examiner on October 13,

1987, wherein AFSCME asserted "that the Circuit Court for Waukesha County was not competent to hear the labor issues that it purported to decide in its Case No. 86 CV3597. A hearing in the above indicated prohibited practices case should be scheduled forthwith."

EXAMINER'S DECISION

On October 21, 1987, the Examiner issued Findings of Fact, Conclusion of Law and Order Granting Motion to Dismiss. The Examiner concluded that because all matters pending before him had been decided by a Court of competent jurisdiction, the doctrine of res judicata required dismissal of the complaint.

PETITION FOR REVIEW

On November 6, 1987, AFSCME filed a petition for review which stated in pertinent part

1. The Examiner abused his discretion by choosing a course of procedure whereby he abdicated his primary responsibility to protect the rights of workers and decide labor cases using his expertise;

   a. On November 14, 1986, Complainant filed a complaint with the WERC alleging Respondent violated Secs. 111.70(3)(a)1, 3, and 4, Wis. Stat. A public hearing was scheduled for January 16, 1987; the hearing then was rescheduled by the Examiner, for March 3, 4, and 5, 1987, and again rescheduled for April 20, 21 and 22, 1987. On April 15, 1987, the public hearing was postponed indefinitely.

   b. The Examiner had several opportunities to hear the evidence and decide the labor issues in this case but purposely failed to do so by continually postponing the scheduled public hearing.

   c. On July 13, 1987, the Circuit Court for Waukesha County issued its decision granting Respondent's Motion to Dismiss on parallel issues. On October 21, 1987, Christopher Honeyman, Examiner, issued his Findings of Fact, Conclusion of Law and Order granting the Respondent's Motion to Dismiss, based upon the res judicata effect of the Circuit Court decision.

   d. The Examiner abdicated his primary responsibility to utilize his expertise and decide the labor issues, after which a circuit court would give great weight to the Examiner's decision, by "holding out" his decision until the Circuit Court issued its decision.

2. The procedure chosen by the Examiner in this case, by which the Examiner abdicated his primary responsibility, raises the substantial question of administrative policy whether the WERC will defer its power and expertise in labor issues to local circuit courts: if all Examiners were to follow the procedure followed by the Examiner here, the development of the labor law and the rights of all employees, like those in Waukesha County, would turn on the peculiar qualities and abilities of the particular local court that chose to hear the case.

POSITIONS OF THE PARTIES ON REVIEW

In support of its petition for review, AFSCME asks that the Commission determine that it is poor administrative policy to invite circuit courts to make determinations regarding labor issues which were first raised before the Commission where, as here, the result is that the complaining party is denied the right to have its claim heard and decided by the specialized administrative tribunal of its choosing. AFSCME asserts that as a result of the way in which the Examiner abdicated his responsibility in this matter, the merits of the complaint

have not been heard by the Commission. As a result, AFSCME asserts that the only labor issues "that were given any hearing were those raised by Waukesha County in its counterclaim, and with respect to those issues the Circuit Court made no intelligible, nor specific findings of fact. Under these circumstances the Circuit Court's decision was not res judicata as applied to the issues raised by the Union in the Complaint that it filed with the WERC, and it was error for the Examiner to dismiss the Complaint without a hearing on the merits."

The County asserts that the Examiner appropriately followed long-standing and reasonable WERC policy in deferring its proceedings pending decision by the Court as to whether the Court would retain jurisdiction over the labor law issues. The County asserts that the Circuit Court, consistent with decisions of the Wisconsin Supreme Court, found that under the particular circumstances, exercise of the Court's jurisdiction was proper. The County asserts that the decision of the Circuit Court on labor issues was final and constituted res judicata as a matter of law. Thus, the County urges the Commission to affirm the Examiner.

In its reply brief, AFSCME asserts that the Court acted improperly when it exercised jurisdiction to hear and decide the Municipal Employment Relations Act issues and that when the Examiner "deferred to and encouraged the Court's usurpation of the Commission's responsibility to hear and decide, at least in the first instance, issues raised under Sec. 111.70, Wis. Stat., and when he refused to hear the issues presented to him first by the union, he committed prejudicial error and established a bad administrative policy."

DISCUSSION

When AFSCME filed its Sec. 806.04, Stats., judgment action in Waukesha County Circuit Court after having filed its prohibited practice complaint with the Commission, it created a circumstance in which the statutory issues involving the Municipal Employment Relations Act had been submitted both to the Court and the Commission. 3/ In such circumstances, under the doctrine of comity, it is the Commission's policy not to proceed but instead to allow the Court to apply the doctrine of primary jurisdiction 4/ to determine whether it is most appropriate for the Court to proceed or to refer the matter to the Commission. Pierce County, Dec. No. 16067 (WERC, 1/78). Thus, when he issued Notices on January 22 and March 9, 1987 which postponed hearing pending action by the Court, the Examiner properly acted in compliance with Commission policy. Contrary to AFSCME's claims herein, the Examiner's actions did not "force the court's hand." By establishing contingent hearing dates, the Examiner sought to make it clear to the parties and the Court that he was prepared to promptly proceed should the Court decide to defer to the Commission. When apprised of the Court's April 1, 1987 Order denying AFSCME's motion to defer the Sec. 111.70 issues to the Commission, the Examiner again acted properly on April 15, 1987 when he indefinitely postponed hearing pending further Court action. As noted by our Supreme Court in Browne and Pierce County, see footnote 4 herein, AFSCME is correct that the legislature established the Commission "to afford a systematic method of factfinding and policymaking and . . . the WERC's jurisdiction should be given priority in the absence of a valid reason for judicial intervention." As we remain confident that circuit courts will honor the Supreme Court's admonitions in this regard, we will continue our policy of deferring our proceedings pending the circuit court's application of the primary jurisdiction doctrine.

3/ Under Sec. 111.07(1), Stats., the jurisdiction of a circuit court and the Commission are concurrent as to alleged violations of the statutes the Commission administers. See Browne v. Milwaukee Board of School Directors, 83 Wis. 2d 328 (1978); Local 913 v. Manitowoc County, 140 Wis. 2d 476 (Ct. App. 1987).

4/ When applying the doctrine of primary jurisdiction, the Wisconsin Supreme Court in McEwen v. Pierce County, 90 Wis. 2d 256, 271, provided the following guidance to circuit courts:

> This court has in numerous cases discussed the doctrine of primary jurisdiction and distinguished those issues best left to the agency from those best left to the

(Footnote 4/ continued on page 7)

The relevant orders, pleadings and transcript of proceedings before the Court establish that the Court determined all issues before the Examiner. 5/ As the doctrine of res judicata is applicable in the context of a declaratory judgment action as to matters actually decided therein, 6/ we conclude that the Examiner correctly applied the doctrine of res judicata when he dismissed the complaint.

Dated at Madison, Wisconsin this 29th day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

4/ (continued)

> court. We have said that where factual issues are significant the better course may be for the court to decline jurisdiction; where statutory interpretation or issues of law are significant, the court may properly choose in its discretion to entertain the proceedings. However, we have cautioned that the circuit court must exercise its discretion with an understanding that the legislature created the WERC in order to afford a systematic method of factfinding and policymaking and that the WERC's jurisdiction should be given priority in the absence of a valid reason for judicial intervention. Browne v. Milwaukee Board of School Directors, 83 Wis. 2d 316, 328, 329, 265 N.W.2d 559 (1978).

5/ Had AFSCME sought an appeal, it would have been appropriate for the Examiner to continue to hold the matter in abeyance for the duration of the appeal process because of the potential for reversal of the Court's decision not to defer to the Commission.

6/ See Barbian v. Lindner Bros. Trucking Co., Inc., 106 Wis. 2d 291, 297 (1982).