

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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GERHARDT STEINKE, :
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Complainant, :
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vs. : Case 315
 : No. 43317 MP-2303
 : Decision No. 26322-A
MILWAUKEE AREA VOCATIONAL, TECHNICAL :
AND ADULT EDUCATION DISTRICT and :
LOCAL 212, AMERICAN FEDERATION :
OF TEACHERS, :
 :
Respondents. :
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Appearances:
Mr. Gerhardt Steinke, 4642 West Bernhard Place, Milwaukee, Wisconsin 53216, on behalf of himself.
Dr. Glenn H. Petrick, 1785 Spring Valley Road, Jackson, Wisconsin 53037 on behalf of himself.
Schneidman, Myers, Dowling & Blumenfield, Attorneys at Law, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, by Mr. Timothy E. Hawks, on behalf of Local 212, American Federation of Teachers.
Mulcahy & Wherry, S.C., Attorneys at Law, Suite 1600, 815 East Mason Street, Milwaukee, Wisconsin 53202-4080, by Mr. Mark L. Olson and Mr. Ronald S. Stadler, on behalf of Milwaukee Area Technical and Adult Education District.

ORDER GRANTING MOTION TO INTERVENE AND DENYING MOTIONS TO DISMISS

Mr. Gerhardt Steinke having, on December 12, 1989, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Respondents had committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and Dr. Glenn H. Petrick having, on March 6, 1990, filed a request to be recognized as a party to the complaint filed against the Respondents (motion to intervene); and Steinke having by letter of March 16, 1990 indicated he did not object to Petrick's motion to intervene; and the Respondent Milwaukee Area Technical and Adult Education District having, on April 2, 1990, filed its answer wherein it denied it had committed any prohibited practices and raised certain affirmative defenses and objected to Petrick's motion to intervene; and the Respondent Local 212, American Federation of Teachers having, on April 2, 1990, filed a Motion to Dismiss; and the Respondent District having, on April 6, 1990, filed a Motion to Dismiss; and Petrick having, on April 13, 1990, filed his response to the respective Motions to Dismiss and the objection to his motion to intervene; and the Examiner having by letter of April 17, 1990, directed Steinke to clarify his complaint; and the Respondent Federation having, by letter of April 17, 1990, requested that the hearing in this matter set for May 1, 1990 be indefinitely adjourned so that the parties may explore a resolution of the dispute; and the Respondent District by letters dated April 17 and 18, 1990 having indicated it joined in the request for an indefinite adjournment; and Steinke having, by letter of April 18, 1990, indicated he objected to any delay in the hearing in this matter; and Petrick having, by letter of April 19, 1990, indicated that he would not object to a short postponement under certain conditions set forth in his letter; and the Examiner having, on April 24, 1990, issued a notice postponing hearing in this matter to May 17, 1990; and Steinke by letters dated April 19, 20 and 21, 1990, and received by the Examiner on April 26, 1990, attempted to clarify his complaint; and the Examiner having considered the motions, positions and arguments of the parties, hereby issues the following

ORDER

1. That the motion to intervene filed by Dr. Glen H. Petrick is hereby granted.
2. That the motion to dismiss filed by Respondent Milwaukee Vocational, Technical and Adult Education District is hereby denied.
3. That the motion to dismiss filed by Respondent Local 212, American Federation of Teachers is hereby denied.

Dated at Madison, Wisconsin this 4th day of May, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____

David E. Shaw, Examiner

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO
INTERVENE AND DENYING MOTIONS TO DISMISS

Petrick filed a motion to intervene in this complaint as a co-complainant asserting that, as a steward for Respondent Federation, his ability to carry out his duty to fairly represent the members of the bargaining unit is hampered by the inclusion of the allegedly supervisory Instructional Chairs in the bargaining unit. He asserts that the foregoing constitutes violations of Secs. 111.70(3)(a) 1 and 2, Stats., and Sec. 111.70(3)(b)1, Stats., by the Respondent District.

The Respondent District has opposed Petrick's motion to intervene on the following bases:

1. The Intervener-Petitioner characterizes his complaint as a "subset of the Gerhardt Steinke complaint" and has not raised any new or different allegations
2. The Intervener-Petitioner has not shown that he will suffer substantial prejudice if his motion to intervene is denied.
3. Intervener-Petitioner has not demonstrated that his interests are not being adequately represented by the existing parties.
4. The Intervener-Petitioner has not shown any unusual circumstances which would necessitate his inter-vention.

The Respondent Federation has not objected to Petrick's motion to intervene, but has asserted that his additional allegations do not state a prohibited practice by the Federation and ought to therefore be either dismissed or clarified.

The applicable statute is Sec. 111.07(2)(a), Stats., which, in relevant part, reads as follows:

(2)(a) Upon the filing with the commission by any party in interest of a complaint in writing, on a form provided by the commission, charging any person with having engaged in any specific unfair labor practice, it shall mail a copy of such complaint to all other parties in interest. Any other person claiming interest in the dispute or controversy, as an employer, an employee, or their representative, shall be made a party upon application.

. . . .

The Examiner has found no authority for imposing the requirements the Respondent District asserts Petrick has not met, and the obvious bias in the applicable statutory provision is to make any person claiming an interest in the dispute as an employer, employee or their representatives a party upon application. Petrick's motion to intervene asserts he is a steward for the Respondent Federation and that his claimed interest in the dispute is that the presence of the Instructional Chairs, allegedly supervisors, interferes with his ability to carry out his duty of fair representation to the employees in the bargaining unit represented by the Respondent Federation. That appears at this point to meet the requirements of Sec. 111.07(2)(a), Stats. Therefore, Petrick's motion to intervene has been granted.

MOTIONS to DISMISS

Both the Respondent Federation and the Respondent District have moved that the Steinke complaint be dismissed on the grounds that it fails to state a claim upon which relief may be granted, and that the relief sought may only be granted by the Commission pursuant to its statutory grant of authority to determine the appropriate unit for collective bargaining under Sec. 111.70(4)(d), Stats., as opposed to its statutory grant of authority to decide prohibited practices complaints under Sec. 111.70(4)(a), Stats. In essence, the Respondents assert that the complaint, as well as Petrick's allegations, seek the removal of certain positions from the bargaining unit on the basis of their alleged supervisory status, i.e., that this amounts to individuals seeking a unit clarification.

The Respondents' arguments might have merit if this were a case of individual employees seeking a determination of their own status as to whether they held supervisory positions. In a case like this, however, where employees are claiming that certain employees presently in the bargaining unit are "supervisors" and that this violates MERA, the Commission has previously held that individual employees may bring such a complaint. In City of Madison 1/ the Commission refused to entertain certain allegations in an election proceeding and expressly held that:

Claims that an organization's membership criteria unlawfully interfere with employee rights can be pursued by employees or a rival organization in a prohibited practice complaint proceeding. Claims that a municipal employer is permitting its agents (e.g., supervisors) to participate in (be a member of, dominate, or assist, etc.) employee organizations can similarly be pursued by employees or a rival organization in a prohibited practice complaint proceeding. Moreover, a municipal employer can protect itself against complaints of the latter sort (or from conflicts of interest generally) by exercising self-help measures to require its supervisors or confidential employees to cease membership in or activities on behalf of labor organizations that it considers potentially unlawful or contrary to its interests, and can obtain a Commission determination of the non-municipal-employee status of any such individual before taking such action, either by the representation case eligibility determinations or in a sub-sequent unit clarification or ch. 227 declaratory ruling. See generally, Milwaukee County, supra, Dec. Nos. 12534-B, 12534-C.

(Emphasis added) At 13. Petrick, and Steinke in his clarification dated April 21, 1990, cite Sec. 111.70(3)(a)2, Stats., in regard to an alleged prohibited practice by the Respondent District, specifically citing the following from that provision: "After January 1, 1974, said supervisors shall not remain members of such organizations." Given the foregoing, it cannot be said with certainty that the allegations contained in Steinke's complaint and Petrick's motion fail to state a claim upon which relief may be granted. Therefore, the respective motions to dismiss on that basis have been denied.

The Respondent District, noting the original complaint alleged violations of Secs. 111.70(o), 111.70(3)(a) and 111.70(3)(b)1, Stats., has also moved to dismiss the Steinke complaint on the basis that "said claims are not based upon any specific violation of law that may constitute a prohibited practice." By letter of April 17, 1990 the Examiner directed Steinke to clarify his complaint and specifically directed Steinke to cite the statutory sections he is alleging the respective Respondents have violated. By his letter of April 21, 1990, Steinke specified that he is alleging that the Respondent District has violated Secs. 111.70(3)(a)1, 2 and 5, Stats.; that certain employees have violated

Secs. 111.70(3)(b)1, 2 and 4, Stats.; and that the Respondent Federation has violated Sec. 111.70(3)(c), Stats. That further clarification is deemed sufficient to meet the minimum requirements of ERB 12.02(2)(c), Wis. Adm. Code.

It is noted that in his clarification of April 21, 1990 Steinke refers to his complaint dated February 28, 1990 and another subsequent complaint he has filed with the Commission, as well as a number of grievances he has pending, as examples of prohibited practices. In that regard, the Examiner further notes for the parties' information that the substantive charges that are the subject of other prohibited practices complaints or grievances that Steinke has filed will not be litigated in this proceeding.

Dated at Madison, Wisconsin this 4th day of May, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner