STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THE MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. THE MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	Case 199 No. 39201 MP-1999 Decision No. 26437-C

Appearances:
Perry, Lerner and Quindel, S.C., by Mr. Richard Perry and Mr. Peter Guyon Earle, Attorneys at Law, 823 North Cass Street, Milwaukee, Wisconsin 53202-3908, appearing for the Complainant.
Mr. Stuart S. Mukamal, Assistant City Attorney, City of Milwaukee, City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing for the Respondent.

ORDER SETTING ASIDE AND REMANDING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On November 13, 1990, Examiner Christopher Honeyman issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that the doctrine of the "law of the case" required that he dismiss the complaint filed by the Milwaukee Teachers' Education Association. In its complaint, the Association had asserted that the Milwaukee Board of School Directors had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats. by insisting upon continued inclusion of an illegal provision in the parties' collective bargaining agreement. The Association filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. Thereafter the parties filed written argument in support of and in opposition to the Association's petition, the last of which was received on February 28, 1991. Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

1. Pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats., the Examiner's Findings of Fact, Conclusion of Law and Order in the above matter shall be and hereby are set aside and the complaint is remanded to the Examiner for issuance of Findings, Conclusions and Order in the matter consistent with the Memorandum accompanying this Order.

2. In view of the foregoing, the petition for review filed by the Association in the above matter is dismissed, without prejudice to the rights of any party to file a petition for review of the decision issued by the Examiner following this remand.

Given under our hands and seal at the City of Madison, Wisconsin this 4th day of June, 1991.
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

No. 26437-C

THE MILWAUKEE BOARD OF SCHOOL DIRECTORS

MEMORANDUM ACCOMPANYING ORDER SETTING ASIDE AND REMANDING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On April 3, 1989, the Wisconsin Employment Relations Commission issued a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats. which concluded that a portion of a layoff clause in a collective bargaining agreement between the Milwaukee Teachers' Education Association (Association) and the Milwaukee Board of School Directors violated the rights of non-black Board employes under the Fourteenth Amendment of the United States Constitution. Based upon this conclusion, the Commission therein declared that the disputed portion of the layoff clause was a prohibited subject of bargaining within the meaning of Secs. 111.70(1)(a) and (3)(a)4, Stats.

On September 14, 1990, Milwaukee County Circuit Judge William J. Shaughnessy issued an Order which vacated and reversed the Commission's declaratory ruling decision based upon his conclusion that the matter was not ripe for adjudication and that the Commission acted in excess of its authority by determining federal constitutional issues. The Commission and the Association both filed appeals of Judge Shaughnessy's Order and said appeals are presently pending before the Court of Appeals.

At the time of Judge Shaughnessy's Order, Examiner Honeyman had pending before him for decision the Association prohibited practice complaint which alleged that the Milwaukee Board of School Directors had violated Sec. 111.70(3)(a)5, Stats., by insisting upon inclusion in the parties' collective bargaining agreement of the layoff clause the Commission had found to be a prohibited subject of bargaining in the declaratory ruling proceeding. Following receipt of written argument from the parties as to the impact of Judge Shaughnessy's Order, the Examiner concluded that the doctrine of the law of the case required that he dismiss the Association's complaint. The Examiner's rationale stated:

> I agree with the last of the Board's contentions, and find that this matter must now be treated as governed by the "law of the case."
>
> Contrary to the Association, I can find nothing in the record that would justify treating this matter as independent of the parallel declaratory ruling proceeding. The Association's arguments to that effect are directly undercut by two factors. One is the complete absence of any new circumstance of fact, such as an actual layoff, since the completion of the factual record relied on by the Commission and Court alike in the declaratory ruling proceeding. The other is the paired statements of the parties' representatives at the hearing, in which one point clearly agreed on was the relationship between the two cases. 6/ There is nothing in either of the parties' arguments since the Court's decision to make the statements noted above either untrue or no longer relevant; all that has changed is which party is favored by the most recent decision.

6/The Board's position expressed at that time was "The Board views this case as indistinguishable from the other case. . ." (TR. p. 17.) The Association replied: "I agree. . . the cases are virtually identical, the Declaratory Ruling and this one. The only reason we are here is because the Declaratory Ruling has no remedy and we feel, this has been filed over three years now, about three years now. We do need that remedy and that's the difference." (TR. p. 21.)

The primary issue squarely posed -- not by the Court's decision per se but by the fact of a pending appeal of that decision by both the Association and the Commission -- is whether, as an Examiner employed by the Commission, I am obligated to follow the Commission's view; to follow the Court's view; or to render an original opinion on the merits of this case.

I conclude initially that an original opinion on the merits would be improper, in the perhaps-unique circumstances of this case. Here there is no colorable claim that stare decisis should not apply because of alleged differences in the facts between the prior case and its successor. For the reasons discussed above, no two cases more closely related are likely to be found. Thus the cases cannot be distinguished, and any decision commenting on the merits of the underlying claims would inevitably assume something of the character of an attack from below on the reasoning of one or the other of the two conflicting higher tribunals. Due deference to higher authority thus weighs in favor of restraint.

The operative principle accordingly becomes that of the "law of the case." A particular form of stare decisis, this principle holds that "The decision, judgment, opinion or rulings on former appeal or writ of error becomes 'law of the case' (and is binding) on subsequent proceedings or trials (between the same parties) in trial court." 7/

This doctrine applies to decisions on legal questions, 8/ but not to new questions of fact. 9/ As noted above, there are no differences of fact between the two cases here. The doctrine as defined in Black's also "includes all errors relied on for reversal, whether mentioned in the court's opinion or not, and all errors lurking in the record on first appeal, which might have been, but were not, expressly relied on" 10/ as well as "all questions involved in the former appeal, whether or not expressly mentioned in the opinion, unless expressly reserved." 11/ Finally, the doctrine is generally deemed applicable whether the former determination is right or wrong. 12/ While there are cases to the contrary arguing that if the prior decision is "unsound" it should not be followed, in the present circumstances it would be an act of arrogance for an examiner to venture an opinion upon the soundness of two higher tribunals' constitutional interpretations of the identical facts. This is particularly true where an appeal has already invoked the authority of the Court of Appeals.

For these reasons, I conclude that this matter can most properly be decided on the quite technical grounds of the "law of the case." In this instance that requires that I follow the Court's decision, for despite concurrent jurisdiction there is no question that the Court is the higher authority. Notably, in this instance, there is no danger that disposition of the case at this level on technical grounds will have the effect of denying either party a full decision on the merits. It is obvious that the matter will not end here; that the Commission and Court will in turn treat this case consistent with their respective constitutional views on the parallel case; and that the matter will ultimately be determined consistent with

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7/Black's Law Dictionary, Revised Fourth Ed., West Publishing Co., Minneapolis 1968.

8/Haynes Drilling Co. v. Indian Territory Illuminating Oil Co., 185 Okl. 122, 90 P.2d 639, 640.

9/McNeely v. Connell, 87 Cal.App. 87, 261 P. 754, 755.

10/Sowders v. Coleman, 223 Ky. 633, 4 S.W.2d 731.

11/Martin v. Commonwealth, 265 Ky. 292, 96 S.W.2d 1011.

12/Wells v. Lloyd, 21 Cal. 2d 452, 132 P.2d 471, 474.

the pending appeals action.

On review of the Examiner's decision, the Association argues that because the prohibited practice proceeding is separate and distinct from the declaratory ruling case, it was improper for the Examiner to apply the doctrine of the law of the case between the two separate actions. Should the Commission conclude that the law of the case doctrine nonetheless applies, the Association asserts that the prohibited practice proceeding involves an established exception to the doctrine of the law of the case because the decision of the Circuit Court was clearly erroneous and would work a manifest injustice. The Association also contends that the Examiner's Findings of Fact are sufficiently comprehensive to permit the Commission to reach the merits of the case and to grant the relief sought by the Association without remand.

Based on the foregoing, the Association asks that the Commission reverse the decision of the Examiner and grant the following relief:

(1) find that the Board has violated Sec. 111.70(3)(a)5, Stats., by insisting, to the point of impasse, upon inclusion of an illegal subject of bargaining in its collective bargaining agreement with the Association;

(2) order the Board to cease and desist from insisting upon the inclusion of the illegal layoff clause in the collective bargaining agreement; and

(3) order the Board to delete the illegal layoff clause from its collective bargaining agreement and promptly meet with the Association at a mutually convenient time to negotiate a lawful successor to the illegal layoff clause.

In response to the Association's arguments on review, the Board requests that the Commission affirm the Examiner in all respects for the following reasons:

1. The prohibited practice case is identical to the declaratory ruling case, and has no legitimate basis for any independent existence.

2. For the Commission to proceed to any determination in the prohibited practice case other than outright dismissal would violate the mandate of the Circuit Court to the effect that said matter is neither "ripe" for adjudication nor within the jurisdiction and/or authority of the Commission to determine. For the Commission to conclude otherwise would constitute flagrant disregard for its responsibility to acceed to the directives of those superior tribunals exercising the powers of judicial review pursuant to Chapter 227, Stats.

3. The Circuit Court's determination in the declaratory ruling constitutes "the law of the case" with respect to the prohibited practice as correctly concluded by Examiner Honeyman thus precluding any further proceedings in the prohibited practice.

4. The Circuit Court's determination in the declaratory ruling is res judicata as to all matters raised in the prohibited practice, or for that matter, as to all matters connected with the constitutional stauts of the contractual Clause at issue herein, thus mandating that the prohibited practice complaint be dismissed.

5. The MTEA has failed to apply with applicable contractual requisites necessary to establish a refusal to bargaining pursuant to Sec. 111.70(4), Stats., and has not produced any evidence to support its allegation of violation of Sec. 111.70(3)(a)5, Wis. Stats.

Even if the Commission concludes that Examiner Honeyman erred in dismissing the prohibited practice complaint, it lacks jurisdiction and/or authority to proceed to make its own determination as to the merits thereof, and is, under such circumstances, required to remand the case to Examiner Honeyman for determination.

DISCUSSION

In our view, the doctrine of the "law of the case" is not presently

applicable to this prohibited practice proceeding. A fundamental element of the doctrine of the "law of the case" is the presence of a final determination 13/ in a parallel action involving the same parties. Here, as evidenced by the fact that Judge Shaughnessy's Order is currently on appeal before the Court of Appeals, there has been no final determination in the declaratory ruling proceeding. Thus, the Examiner erred when he concluded that the doctrine of the "law of the case" governed the outcome of the proceeding before him.

There remains the question of whether we should proceed to decide the merits of this prohibited practice proceeding or remand the complaint to the Examiner. We note that the Board has raised certain defenses to the complaint which the Examiner deemed unnecessary to address, given his "law of the case" rationale. Included among these defenses is the assertion that the Association has never demanded bargaining over a replacement to the layoff clause in question and has not honored the Association's obligations under the savings clause in the parties' collective bargaining agreement. Under these circumstances, we find it appropriate to remand the complaint to the Examiner for further consideration and additional fact finding, if necessary, to determine the validity of such defenses. On remand, we would also advise the parties and the Examiner that it continues to be the view of the Commission that the layoff clause in question is a prohibited subject of bargaining.

Upon issuance of the Examiner's decision, the parties will have the period established by Sec. 111.07(5), Stats. within which to seek Commission review thereof.

Dated at Madison, Wisconsin this 4th day of June, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
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13/ Univest v. General Split Corp., 148 Wis. 2d 29, 38 (1989); Peterson v. Warren, 31 Wis. 2d 547, 564 (1966); J.I. Case Plow Works v. J.I. Case Threshing Machine Co., 162 Wis. 185 (1915).