

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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WISCONSIN STATE BUILDING TRADES :
  
NEGOTIATING COMMITTEE and :
  
STEAMFITTERS LOCAL UNION NO. 394, :
  
: Case 316
  
Complainants, : No. 46805 PP(S)-185
  
: Decision No. 27365-A
  
vs. :
  
:
  
STATE OF WISCONSIN, :
  
:
  
Respondent. :
  
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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. John J. David J. Vergeront, Legal Counsel, Department of Employment Relations, 137 East Wilson Street, Madison, Wisconsin 53707-7855, appearing on behalf of the Respondents.  
Lawton & Cates, S.C., by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Intervenor.

ORDER GRANTING MOTION TO INTERVENE,  
SCHEDULING HEARING ON MOTION TO DISMISS,  
AND GRANTING MOTION TO AMEND COMPLAINT

The above-named Complainants on December 30, 1991, filed a complaint with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin, herein Respondent, has committed unfair labor practices within the meaning of Section 111.80, particularly Section 111.84(1)(d) and (e). On August 26, 1992, the Wisconsin Employment Relations Commission appointed Mary Jo A. Schiavoni, a member of its staff, as Examiner to hear the instant dispute, and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sections 111.07 and 111.84(4), Stats. On March 26, 1992, AFSCME, District Council 24 filed a Motion to Intervene, alleging that it is currently the exclusive bargaining agent for employes in the civil service classification identified as HVAC. Notice of hearing and a date for submission of an answer was sent on August 26, 1992. Hearing was scheduled for December 8, 1992 due to the parties' scheduling difficulties. On November 23, 1992, Respondent State filed a Motion to Dismiss, an Answer, and Defenses requesting that said motion be decided prior to the hearing scheduled for December 8.

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On November 25, 1992, the Examiner solicited the written positions of the parties regarding Defendant's Motion to Dismiss and request to rule on said motion prior to the scheduled hearing. By letter dated November 25, 1992, but received on November 27, 1992, Complainants objected to any postponement of said hearing. On December 1, 1992, AFSCME, District Council 24, concurred with Respondent and advised that said motion should be considered prior to hearing.

On December 2, 1992, Complainants responded to Defendant's Motion to Dismiss and filed a First Amended Verified Complaint. The Examiner, having considered the matter;

NOW, THEREFORE, it is

ORDERED

1. That AFSCME, District Council 24's Motion to Intervene is granted.
2. That Respondent's Motion to Dismiss Complaint is taken under advisement pending hearing on said motion.
3. That Complainants are permitted to file an amended complaint.
4. That hearing on said Motion to Dismiss will be held in concert with hearing on the complaint on Tuesday, December 8, 1992 as previously set forth in the Notice of Hearing.

Dated at Madison, Wisconsin this 3rd day of December, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni /s/  
Mary Jo Schiavoni, Examiner

STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS)

MEMORANDUM ACCOMPANYING  
ORDER GRANTING MOTION TO INTERVENE,  
SCHEDULING HEARING ON MOTION TO DISMISS,  
AND GRANTING MOTION TO AMEND COMPLAINT

Neither party has objected to AFSCME, District Council 24's Motion to Intervene. Moreover, because AFSCME, District Council 24 alleges that it currently represents employees in the disputed classification, it is a proper party in the instant proceeding before the Commission. It has accordingly demonstrated a satisfactory showing of interest in the controversy as required by ERB 2.09. 1/

Respondent's Motion to Dismiss contains two jurisdictional objections. It argues that Complainants have not commenced a proceeding over which the WERC has jurisdiction because there is no verified complaint. Complainants seek to remedy this infirmity by the filing of a First Amended Verified Complaint on December 2, 1992.

In anticipating objections to the filing of said amended complaint, the Examiner looks to ERB 22.02(5) which provides as follows:

**(5) AMENDMENT.** (a) Who may amend. Any complainant may amend the complaint upon motion, prior to the hearing by the commission; during the hearing by the commission if it is conducting the hearing; or by the commission member or examiner authorized by the commission to conduct the hearing; and at any time prior to the issuance of an order based thereon by the commission, or commission member or examiner authorized to issue and make findings and orders.

Said administrative rule makes it clear that the Examiner may accept such an amendment in the absence of any showing of prejudice to the Respondent or Intervenor prior to hearing.

In a strikingly similar case, 2/ where there was no verified complaint but the Examiner granted Complainant's motion to amend the complaint at hearing by adding a sworn certification, the Examiner concluded that verification was not a statutory requirement and that the filing of an unverified complaint was sufficient to toll the statute of limitations. Noting that ERB 22.02(1) does require verification but that ERB 22.02(5)(a) allows for amendment prior to or during the hearing, he found the amendment to bring said complaint into compliance with ERB 22.02(1) sufficient to grant jurisdiction in the absence of a showing of prejudice to the respondent and denied the motion to dismiss.

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1/ See, City of Green Bay, Dec. No. 26535-A (Schiavoni, 8/90).

2/ State of Wisconsin (Department of Administration), CVIII, Dec. No. 15716-B (Davis, 4/1978).

The second ground for dismissal, according to Respondent, rests upon the Commission's lack of subject matter jurisdiction over the alleged controversy.

Both Complainant's assertions and Respondent's responses make it clear that this argument is premised upon facts, documents, and acts not yet in evidence.

In light of the requirement that pleadings be construed liberally in favor of the complainant because of the dramatic consequences of denying a hearing on the complaint and the mandate that such a motion to dismiss be granted only if under no interpretation of facts alleged would Complainant be entitled to relief, 3/ the Examiner cannot find that under no set of facts could Complainants prevail on the basis of the information presented at this time. She, accordingly, will not rule on Respondent's motion without a hearing on said motion. The parties are free to adduce evidence at said hearing to support their respective positions. She expressly declines to rule on Respondent's second grounds until she has received evidence at the upcoming hearing. Any inferred request to hold the hearing in abeyance is denied and hearing on the motion is scheduled in concert with hearing on the complaint. 4/

Dated at Madison, Wisconsin this 3rd day of December, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni /s/  
Mary Jo Schiavoni, Examiner

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3/ Racine Unified School District, Dec. No. 15915-B (Hoorstra, 12/77); City of Beloit (Fire Department), Dec. No. 25917-B (Crowley, 8/89).

4/ City of Whitewater, Dec. No. 26099-A (Engmann, 8/89).