STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SONJA McCLURE, Complainant, vs. DAIRYLAND GREYHOUND PARK, INC., Respondent.	Case 6 No. 51031 Ce-2153 Decision No. 28134-B

Appearances:

Ms. Dinah M. Crayton, Crayton Law Offices, S.C., 524 South Main Street, Suite 202, P. O. Box 1404, Racine, Wisconsin 53401-1404, appearing on behalf of Sonja McClure, referred to below as McClure or as the Complainant.

Mr. Jonathan O. Levine, Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, appearing on behalf of Dairyland Greyhound Park, Inc., referred to below as Dairyland.

ORDER DENYING MOTION TO INDEFINITELY POSTPONE HEARING

On May 23, 1994, McClure filed a complaint of prohibited practices alleging Dairyland had violated Secs. 111.04, 111.06(a), (b) and (c), Stats., by terminating her "for Union organizing activities." Dairyland, on May 31, 1994, filed its answer and a series of affirmative defenses. On June 24, 1994, Dairyland filed a complaint against "Sonja McClure and Tim Sears, Individuals, and TEAMSTERS LOCAL 744" and requested that its complaint "be consolidated with that filed on May 23, 1994 by Sonja McClure." On July 27, 1994, the Commission issued an "Order Denying Motion to Consolidate." On September 22, 1994, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as Examiner. Hearing on the complaint was set for November 9 and 10, 1994. On October 24, 1994, Dairyland filed an amended answer and affirmative defenses. With the consent of the parties, the November 9 and 10, 1994 hearing dates were postponed to November 30, December 8 and December 9, 1994. Hearing was conducted, with the consent of the parties, on November 30 and December 8, 1994. With the consent of the parties, further hearing was conducted on February 28, March 1 and March 2, 1995.

Complainant concluded its case in chief on March 2, 1995. Dairyland then moved that the

complaint be dismissed on its merits prior to Dairyland's presentation of its evidence. In response to the motion, I affirmed a conclusion stated during the February 28, 1995 hearing that the evidentiary record would not be complete until Complainant's case had been fully presented and Dairyland either presented its case or waived its right to present evidence. I then noted I would set dates to complete the hearing process. I also noted that I would consider any motion filed in the time between March 2, 1995, and the adjourned hearing dates to consider dispositive motions. Further hearing was set for June 12, 13 and 14, 1995.

On May 3, 1995, Dairyland filed a motion which included the citation of authority Dairyland alleged established that "(t)he Hearing Examiner has the authority to postpone the hearings scheduled for June, and set a briefing schedule" to determine the motion to dismiss. Attempts by all parties to address, by phone, the procedural issues proved impossible due to my own and the parties' conflicting schedules. As a result, in a May 22, 1995 fax to the parties I stated:

> . . . It is my understanding that Mr. Levine seeks a postponement of the June hearing dates without regard to the status of the pending motion to dismiss.
>
> I ask Ms. Crayton to discuss with Mr. Levine whether she objects to the postponement of the June hearing dates. Beyond that, I ask each of you to discuss whether you wish to argue the motion in writing and/or by conference call. . . .

Complainant responded in a May 25, 1995 fax which states:

> In response to your motion for dismissal I would prefer to file a brief because of my unavailability during the day for a conference call. Additionally, Mr. McLaughlin asked whether I object to an adjournment to the continued hearing in this matter which is scheduled for 6/12/95 through 6/19/95 and my response is that I do not object.

In a June 7, 1995 fax to the parties I stated:

> I write to state the status of the above noted matter. I have postponed the hearing set for June 12, 13 and 14.

> Mr. Levine's motion will be briefed as follows: His letter dated May 3, 1995, will be treated as the initial brief on whether I have the authority to indefinitely adjourn the hearing to determine the motion to dismiss the complaint on its merits. Ms. Crayton should file a responsive brief postmarked not later than three weeks from her receipt of this letter. Mr. Levine should then file a responsive brief postmarked not later than two weeks from his receipt of Ms. Crayton's brief. You should exchange these briefs directly, supplying me with a copy.
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> During the briefing schedule, I will set dates for further hearing. Ms. Crayton should advise me of dates in August or September on which she is available to continue the hearing set for June 12-14.
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> If I determine to grant Mr. Levine's motion, then I will cancel the continued hearing dates and will establish a briefing schedule on the merits of the complaint. If I deny Mr. Levine's motion, the continued hearing dates will be used to complete the evidentiary record.

Complainant submitted its brief on July 5, 1995. In a letter to the parties dated July 13, 1995, I stated the status of the matter thus:

> I received a voice mail message from Mr. Levine stating his concern that Ms. Crayton's brief prematurely addresses the merits of the motion to dismiss at the expense of addressing the issue of my authority to indefinitely postpone the hearing process to address the motion.
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> I take Ms. Crayton's brief to assert that even if I have the authority to indefinitely postpone the hearing, I should not exercise it because the Complainant's evidence meets the Commission standard governing pre-hearing motions to dismiss.
>
> I will not address the merits of the motion to dismiss prior to researching and addressing my statutory/case law authority to indefinitely postpone the hearing to address a motion to dismiss.
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> If Mr. Levine wishes to enter further argument on the narrow

> issue of my authority to indefinitely postpone the hearing to address the motion to dismiss, he may. Any such argument should be postmarked not later than two weeks from his receipt of this letter. If he does not wish to enter further argument on that point, I would ask that he so advise me.
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> . . .

In a letter to the parties dated July 19, 1995, I confirmed that Dairyland "would not file further argument on the motion."

ORDER

Dairyland's motion to indefinitely postpone the hearing pending resolution of its motion to dismiss the complaint is denied.

Dated at Madison, Wisconsin, this 20th day of October, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

DAIRYLAND GREYHOUND PARK, INC.

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO INDEFINITELY POSTPONE HEARING

DAIRYLAND'S POSITION

Dairyland contends that research of "the issue of whether there is precedent under the Wisconsin Employment Peace Act . . . for Hearing Examiners to indefinitely postpone hearings pending the resolution of potentially dispositive motions" demonstrates that "this has been done in numerous cases."

Noting that ERC 2.07 provides for the "filing, and presumably resolution, of motions made at any stage of the litigation," Dairyland argues that the case law permitting an indefinite postponement "makes sense." Although Sec. 111.07(2)(a), Stats., mandates hearing within forty days of the filing of a complaint, Dairyland urges that the statute "does not require that a hearing be completed" in that time span. Since the statute also provides that a hearing may be "adjourned from time to time" Dairyland concludes that its motion has solid statutory support.

Dairyland concludes by seeking an indefinite postponement so that a briefing schedule on the merits of its motion to dismiss can be established.

COMPLAINANT'S POSITION

After an extensive review of the evidentiary background, Complainant asserts that the standard to be applied to Dairyland's motion is that applied by the Commission to pre-hearing motions to dismiss. 1/ Complainant poses the standard thus:

> (L)iberally construing the Complaint in favor of the complainant, the hearing examiner should grant the motion only if under no interpretation of the facts alleged would she be entitled to relief.

Concluding that the "factual evidence in the record supports an inference that the Respondent has

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1/ Citing Unified School District No. 1 of Racine County, Dec. No. 15915-B (Hoornstra, with final authority from WERC, 11/77).

engaged in a prohibited practice against the complainant for exercising her right to engage in lawful, concerted activities . . ." Complainant asserts the motion must be dismissed.

Complainant then notes that McClure engaged in substantial concerted activity in attempting to form and to certify Wisconsin Independent Gaming Local 711 (WIGL). Noting that the protected rights stated at Sec. 111.04, Stats., parallel those stated at Sec. 111.70(2), Stats., Complainant contends that established MERA case law affords insight into how WEPA allegations should be analyzed. With this as background, Complainant asserts a Sec. 111.06(1)(a), Stats., violation has been proven because, without regard to Dairyland's motivation, their employes "could reasonably perceive McClure's discipline and termination as retaliatory based upon the timing of that discipline in relation to her activities with WIGL during the organizing campaign from 1993 until her termination . . ."

Beyond this, Complainant contends that the circumstances surrounding McClure's discipline establishes that she was disparately treated and that this treatment "is partially based upon her union activities." That another employe was disciplined for associating with McClure underscores this conclusion and establishes that Dairyland's conduct violates Secs. 111.06(1)(a) and (c), Stats. Complainant contends that a review of the evidence establishes as a matter of fact and of law that Dairyland bore proscribed anti-union animus toward McClure.

Viewing the record as a whole, Complainant concludes that the motion must be denied and that "the matter proceed accordingly and be scheduled for an additional hearing."

DISCUSSION

Dairyland's motion to dismiss poses two issues which are threshold to a determination of the merits of its motion to dismiss. The first is whether an examiner has the authority to indefinitely postpone a hearing to permit the determination of a potentially dispositive motion. The second is whether any such authority should be applied to the motion posed here.

Dairyland accurately points out that Commission examiners have, in cases arising under WEPA, granted similar motions. 2/ Beyond this, Dairyland accurately points out that Sec. ERC 2.07 of the Commission's rules implies that motions can be made, and presumably ruled upon, at any point in the hearing process.

This citation of authority is, however, less than explicit in upholding the authority Dairyland asserts an examiner can exercise. In none of the cases cited by Dairyland did the examiner address

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2/ See Hennes Erecting Company, Inc., Dec. No. 19675-A (Bernstone, 1/83) and Kenosha Auto Transport Corporation, Dec. No. 19081-B (Bielarczyk, 1/83).

the legal authority for the action taken. Beyond this, none of the cited cases involved Commission review of the examiner's conclusions. The most that can be said of the Commission's rules is that they are sufficiently broad to support the implication Dairyland

asserts. That the Commission has, with judicial affirmance, approved the granting of pre-hearing motions to dismiss affords some additional support for Dairyland's view of an examiner's authority. 3/

For the purposes of this motion, it is best to assume that an examiner has the authority to indefinitely postpone a hearing, at the close of a complainant's case in chief, to permit the determination of a motion to dismiss. The issue thus becomes whether that authority should be exercised in this case. I conclude it should not.

As preface to examination of this conclusion, it is necessary to highlight what the motion seeks. Based on the Complainant's case in chief, Dairyland seeks to have the complaint dismissed and, if the motion is denied, to present its own case in chief. The motion to dismiss was originally advanced during the hearing.

The request for a dismissal during the hearing underscores the need to highlight the statutory background to the motion. A motion to dismiss is governed by Chapters 111 and 227. Sections 111.06(1)(a), (b) and (c), Stats, state the unfair labor practices alleged. Section 111.07, Stats., governs the procedures by which those allegations are to be heard. Chapter 227 states the framework common to administrative agency proceedings.

Section 227.01(3), Stats., defines a "Contested case" to mean "an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order."

The Commission is an "Agency" under Sec. 227.01(1), Stats., thus making this proceeding an "agency proceeding." To be a contested case under Sec. 227.01(3), Stats., the proceeding must involve a controverted, substantial interest which will be determined after a hearing required by law. The complaint seeks to return McClure to the position she was discharged from. Her interest in the position is "substantial," and is, as Dairyland's motion demonstrates, "controverted by another party." Hearing of alleged unfair labor practices is mandated by Sec. 111.07(2)(a), Stats. Thus, this matter constitutes a contested case.

Chapter 227 does not provide a procedure for challenging the sufficiency of a complainant's

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3/ See County of Waukesha, Dec. No. 24110-A (Honeyman, 10/87), aff'd Dec. No. 24110-A (WERC, 3/88); and Moraine Park Technical College et. al., Dec. No. 25747-C (McLaughlin, 9/89), aff'd Dec. No. 25747-D (WERC, 1/90). For judicial approval, see Village of River Hills, Dec. No. 24570 (WERC, 6/87), aff'd Dec. No. 87-CV-3897 (Dane County Cir. Ct., 9/87), aff'd Dec. No. 87-1812 (CtApp, 3/88). The procedural history of the case is summarized in Village of River Hills, Dec. No. 24570-B (Greco, 4/88).

evidence prior to the close of hearing. The right to hearing is explicit, and the dismissal of a contested case prior to the completion of evidentiary hearing is not. Dismissal of a contested case prior to the culmination of hearing is, then, an uncommon result. Beyond this, both Chapters 111 and 227 require written "findings of fact" as part of a final determination. 4/ The Wisconsin Supreme Court has underscored the significance of this requirement: "findings help protect against careless or arbitrary action . . . on the part of administrative agencies." 5/

4/ Sec. 111.07(4), Stats., and Sec. 227.47(1), Stats.

5/ State ex. rel. Ball v. McPhee, 6 Wis.2d 190, 202 (1959), citation omitted. See also Hixon v. Public Service Commission, 32 Wis.2d 608 (1966).

The motion to dismiss during the hearing sought, then, a result poorly rooted in the statutes governing the hearing process. The motion would have required the entry of findings of fact on the record, with no chance to review the transcript. 6/ The reiteration of the motion in the interim between hearing dates addresses in significant part the weaknesses of the earlier motion by seeking an indefinite postponement for full consideration of the record and development of written findings of fact.

Although better rooted in the underlying statutes than the motion to dismiss during the hearing, Dairyland's renewed motion to dismiss poses problems which undercut its persuasive force. The source of its persuasive force is the economy the motion seeks. If Complainant has not presented a case which stands without rebuttal, it is not apparent why Dairyland should be compelled to enter any rebuttal.

The reasons for rejecting Dairyland's motion are rooted both in the circumstances surrounding this case and in considerations concerning Commission litigation generally. The Commission has noted it is ill-equipped to handle extensive motion practice. 7/ This motion highlights some of the reasons why. The hearing process could have been completed in the time devoted to resolution of this motion. This reflects no fault on the parties' part, but does highlight that adding motions onto a hearing caseload can prompt otherwise unnecessary delay. Beyond this, it must be underscored that the completion of hearing on the "trial" level does serve a purpose. Appeal from an examiner decision is a matter of right. 8/ Commission decisions are in turn reviewable in court. 9/ The creation of a complete evidentiary record should obviate the need for, and delay resulting from, a remand from any of these appellate levels.

6/ See Sec. 227.44(6), Stats. Presumably, the statutory definition of what a record includes requires its review prior to the entry of written findings.

7/ State of Wisconsin, Department of Employment Relations, Dec. No. 24109 (WERC, 12/86) at 8.

8/ Sec. 111.07(5), Stats.

9/ Sec. 227.53, Stats.

Beyond this, the motion poses more significant tactical points than is appropriate to the administrative hearing process. Any motion poses tactical points. Denying a motion to dismiss but granting a motion to make more definite and certain strengthens an otherwise weakly pleaded complaint. Dairyland's motion, however, poses significant concerns whether viewed on the present record or from the perspective of Commission litigation generally. The motion to dismiss after complainant's case in chief inevitably permits a respondent the luxury of delay preceding the presentation of its own case. The intervening examiner decision on the motion will highlight for the respondent those aspects of a complainant's case which pose a need for rebuttal. This is not, in itself, improper. It does, however, add a gloss to the hearing process not well rooted in the underlying statutes. Those statutes point to prompt hearings. 10/ Even granting the persuasive force of Dairyland's contention that the hearing process must start, not necessarily end, in the statutory time frame cannot obscure that the process envisioned by Dairyland points complainants to quick hearings and respondents to a more leisurely response. The tactical basis for this is more evident than its statutory basis.

The final consideration bearing on the motion is more pragmatic. The transcript of the hearing to this point is over seven hundred pages long. The exhibits add more volume to the record. As noted above, the statutes underlying the hearing process require this record to be reviewed prior to the entry of findings of fact. Dairyland urges that this effort be undertaken at the close of Complainant's case and, if the motion is denied, a second time at the close of its own case. Applied as a rule to Commission litigation generally, this procedure imposes a crushing burden.

The bulk of the considerations stated above arguably point to the granting of a motion such as Dairyland's on a judicious basis. More aptly put, the motion seeks an extraordinary result. I am not persuaded the present case stands on a footing other than that posed by other Commission cases, and am unwilling to grant an extraordinary remedy in this case, which if extended to other cases, would impose an inappropriate burden to the hearing process. If the Complainant's case does not stand in the absence of rebuttal, Dairyland may choose not to enter rebuttal or to limit the rebuttal it chooses to present. The economy the motion seeks can then be secured without damage to the hearing process generally.

Whether Dairyland chooses to limit its case in chief or not, the evidentiary hearing will be completed before the merits of the complaint are addressed.

Dated at Madison, Wisconsin, this 20th day of October, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/

10/ Sec. 111.07(2)(a), Stats.

Richard B. McLaughlin, Examiner