STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RICHARD J. SHAWL,

Complainant,

vs.

ONEIDA COUNTY, a Municipal Corporation, and WISCONSIN PROFESSIONAL POLICE ASSOCIATION - LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION,

Respondents.

Case 103
No. 51630 MP-2944
Decision No. 28240-A

Appearances:

Mr. Michael F. Roe, O'Melia, Schiek & McEldowney, S.C., Attorneys at Law, 4 South Stevens Street, P. O. Box 1047, Rhinelander, Wisconsin 54501, appearing on behalf of Richard J. Shawl.

Mr. Kevin E. Wolf, Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street, P. O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of Oneida County.

Mr. Gordon E. McQuillen, Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, appearing on behalf of Wisconsin Professional Police Association - Law Enforcement Employee Relations Division.

ORDER DENYING MOTION TO DISMISS AND REQUIRING COMPLAINT TO BE MADE MORE DEFINITE AND CERTAIN

On October 4, 1994, the Clerk of the Circuit Court for Oneida County filed with the Wisconsin Employment Relations Commission a file including an Order for Transfer of Proceeding to Wisconsin Employment Relations Commission. That Order states:

> NOW, THEREFORE, it is hereby ordered, pursuant to Sections 111.07(1) and 807.11(1) of the Wisconsin Statutes, that the above-entitled matter be and hereby is transferred to the State of Wisconsin, Wisconsin Employment Relations Commission . . .

The Commission, on October 10, 1994, informally designated Richard B. McLaughlin, a member of its staff, to act as Examiner. On November 18, 1994, the Commission issued an Order formally confirming this designation. In a letter to the parties dated November 18, 1994, I stated:

. . .

> I have had difficulty reaching all of you by phone, thus I write this letter.
>
> I have confirmed with Mr. McQuillen that WPPA/LEER still intends to file a motion to dismiss. I would ask that this motion be filed within 30 days of receipt of this letter. I would ask Mr. Wolf and Mr. Roe to advise me, after your review of the motion, whether the motion requires evidentiary hearing . . .

On December 20, 1994, WPPA/LEER (the Association) filed a motion to dismiss with an accompanying Memorandum. In the cover letter to this filing, the Association noted:

> Although we have filed a MEMORANDUM BRIEF in support of our MOTION TO DISMISS, WPPA-LEER also reserves the right to file a responsible brief in the event that either the Complainant or the County files a reply brief setting forth their respective positions on the WPPA's motion. We would ask that there be a briefing schedule set in the event the other parties do wish to be heard on our motion.

In a letter to the Complainant and the County dated February 21, 1995, I noted that I had received no response to the Association's Motion, and I asked to be advised "of your position on whether the pending motion requires evidentiary hearing." In a letter filed on February 27, 1995, the Complainant noted "that there is no factual dispute which would require evidentiary hearing for purposes of resolving (the Association's) Motion." The Complainant also requested that "a briefing schedule be set in the above matter." In a letter to the parties dated March 15, 1995, I stated:

> . . . Mr. Wolf is to file any motion to dismiss on the County's behalf postmarked not later than March 31, 1995.

> Mr. Roe will have thirty days from his receipt of the County's motion to file a brief responding to each motion to dismiss.
>
> Mr. McQuillen and Mr. Wolf will have twenty days from their receipt of Mr. Roe's brief to file their responsive brief.
>
> I presume you will exchange copies of these documents directly. I also note the briefing schedule stated above presumes Mr. Wolf's motion raises no issue of fact requiring evidentiary hearing.

In a letter filed with the Commission on March 31, 1995, the County noted that it "has decided not to file a motion to dismiss . . . and will not be taking any position with regard to the motion brought by (the Association)." In a letter to the parties dated April 4, 1995, I noted that "(t)he briefing schedule set in my letter of March 15, 1995, remains in effect." In a letter filed with the Commission on May 10, 1995, the Association noted, among other points, that Complainant had yet to file its brief and requested "that the record in this case be closed and that Respondent WPPA's Motion to Dismiss be granted." In a letter to the Complainant dated May 12, 1995, I requested that Complainant file any response it had to the Association's request to close the record "as soon as possible." I again asked for a response from the Complainant in a letter dated May 26, 1995, but noted that if I received no response by June 12, 1995, "I will close the record." The Complainant filed its brief on June 12, 1995. In a letter to the parties dated August 8, 1995, I stated:

> I have received no response to Mr. Roe's brief, which was filed on June 12, 1995. I have presumed no responsive briefs will be filed. If this is not the case, please advise me as soon as possible.

No response to this letter has been filed.

ORDER

The Association's motion to dismiss filed on December 20, 1994, is denied.

Before hearing is ordered, however, the Complainant shall amend the complaint to specify:

1. the specific subsections of Sec. 111.70(3)(a), Stats., it alleges the County to have violated in its termination of Shawl's employment; and

2. if the Complainant seeks to enforce the duty of fair representation against the Association, the specific subsections of Sec. 111.70(3)(b), Stats., it alleges the Association to have violated in breaching that duty; and

3. whether the Complainant alleges the Association and/or some other "person" has acted "on behalf of or in the interest of" the County in violation of Sec. 111.70(3)(c), Stats.;

4. any facts, beyond those already stated in the complaint, necessary to establish a violation noted in 1, 2 or 3 above.

Dated at Madison, Wisconsin, this 25th day of August, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

ONEIDA COUNTY

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO DISMISS AND
REQUIRING COMPLAINT TO BE MADE MORE DEFINITE AND CERTAIN

THE PARTIES' POSITIONS

The Association's Position

The Association's motion to dismiss rests on two primary bases. The first is that the Complainant was not a member of a bargaining unit represented by the Association, thus depriving the Complainant of standing to assert an action against it and thus depriving the Commission of jurisdiction to hear the matter. Beyond this, the Association contends that even if the Commission has jurisdiction to hear the matter, the Complainant has failed to allege a prima facie case against the Association for a breach of the duty of fair representation.

Noting that the complaint acknowledges the Complainant was not a member of a bargaining unit represented by the Association, the Association concludes that no contractual duty under a collective bargaining agreement enforced through Sec. 111.70(3)(b), Stats., can have arisen between it and the Complainant. Because the Complainant seeks to assert contractual rights, and because no labor agreement covering him has been alleged, the Association concludes the Commission lacks the jurisdiction the Complainant seeks to invoke. That the Complainant retained the Association to represent him in a unit clarification matter shows no more, according to the Association, than that a personal contract may have existed between him and the Association. Such a contract is not a collective bargaining agreement and is thus not enforceable by the Commission, according to the Association.

Even if the Commission has jurisdiction to hear the matter, the Association argues that the Complainant has failed to state a claim upon which relief can be granted. Citing Commission case law, the Association argues that Complainant has not alleged any of the elements stated by the Commission to constitute a breach of the duty of fair representation. More specifically, the Association argues that the Complainant has failed to allege "that he is a member of the union such that the union owes him any representation at all." That Complainant has acknowledged he is not a member of a bargaining unit only underscores this deficiency, according to the Association. Beyond this, the Association avers that Complainant alleges contradictory lines of argument by contending both that he has been denied rights afforded under the labor agreement between the County and the Association while also asserting the Association improperly failed to have him included in the unit covered by that agreement.

The Association then contends that the Complainant has failed to allege any act on its part which would reflect the "arbitrary, discriminatory or . . . bad faith" decision making necessary to establish a breach of the duty of fair representation. The Association contends that even the most generous reading of the complaint establishes only a circular argument that the Association acted in bad faith by breaching its duty to fairly represent the Complainant. This argument is, without specific acts of bad faith, only a tautology, according to the Association.

Because no factual issues are posed by the complaint, and in light of the arguments noted above, the Association requests that the complaint be dismissed.

The County's Position

The County elected not to file written argument on the motion to dismiss.

The Complainant's Position

After a review of the Association's arguments, the Complainant notes that the facts alleged in the complaint must be taken as true for purposes of addressing the motion. A review of those facts establishes, according to the Complainant, that his discharge "was motivated, solely or in part, by an intent to punish him for seeking Union status." The Union's contention that it cannot have acted in bad faith toward the Complainant since its owes him, as a non-member, no duty at all, "ignores the fact that (Complainant) was terminated solely to prevent him from becoming a member of the Collective Bargaining Unit." This contention, according to the Complainant, "cannot be, and should not be, sanctioned under the law."

The assertion that the complaint fails to state a claim within the Commission's jurisdiction is, the Complainant argues, "both disingenuous and inconsistent." The assertion glosses over the fact that the action was started as a civil matter in the Circuit Court for Langlade County which "clearly has jurisdiction over 'garden variety breach of contract' actions." This fact is, the Complainant contends, significant since the Association moved to have the action deferred from that forum to the Commission. Even if the Commission lacks jurisdiction over the complaint, the remedy available "is not dismissal," according to the Complainant. Rather, the remedy is "referral of . . . (the) Complaint back to the Circuit Court, where the action was originally filed."

DISCUSSION

The Association's motion to dismiss is governed by Chapters 111 and 227. The amended complaint filed in Langlade County Circuit Court alleges County and Association violations of Secs. 111.70(3)(b) and (c), Stats. Through the operation of Sec. 111.70(4)(a), Stats., Sec. 111.07,

Stats., governs the procedures by which those allegations must be heard. Chapter 227 states the framework common to administrative agency proceedings.

Sec. 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. Included in the remedy sought by the complaint is a request to return Shawl to the position he was discharged from. His interest in the position is "substantial," and is, as the County's and the Union's answers to the amended complaint demonstrate, "controverted by another party." Hearing of alleged prohibited practices is mandated by Sec. 111.07(2)(a), Stats. Thus, this is a contested case.

Chapter 227 does not provide a summary judgement procedure. The right to hearing is explicit, and the dismissal of a contested case prior to evidentiary hearing is not. Pre-hearing dismissal of a contested case is, then, an uncommon result:

> Dismissal prior to evidentiary hearing would be proper if based on lack of jurisdiction, lack of timeliness and in certain other cases . . . (I)t would be a rare case where circumstances would permit dismissal of the proceedings prior to the conclusion of a meaningful evidentiary hearing on other than jurisdictional grounds or failure of the complaint to state a cause of action. 1/

The Commission has reflected this reluctance to deny hearing in it own case law:

> Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the

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1/ 68 OAG 31, 34 (1979). The opinion letter was requested by the Wisconsin Real Estate Examining Board and concerned the "denial, limitation, suspension or revocation of licenses."

complainant be entitled to relief. 2/

The Commission has, with judicial approval, approved the granting of pre-hearing motions to dismiss. 3/

The issues posed regarding the motion to dismiss against the County are more straight-forward than those posed by the motion against the Association. If Shawl's discharge "was motivated, solely or in part, by an intent to punish him for seeking Union status," as the Complainant's brief asserts, it violates Sec. 111.70(3)(a)3, Stats. The difficulty posed by the motion is that the complaint states no such allegation. The amended complaint does assert a violation of "Section 111.70(3), Stats.," but does not specifically refer to anti-union motivation in its factual allegations. Rather, the factual allegations appear to point to a violation by the County of its own personnel policies.

By statute 4/ and by rule 5/ a liberal pleading practice governs the amendment of the complaint. Against this background, it cannot be said that "under no view of the facts alleged would the complainant be entitled to relief." If the County's failure to follow its personnel policies can be proven to be based on a desire to punish Shawl for attempting to become a represented employe, then Shawl may be entitled to relief. On this basis alone, the complaint against the County cannot be dismissed. It should also be stressed that the Court granted the County's motion to defer this matter to the Commission. This presumes the complaint has a MERA-based component. It must be presumed open to amendment to clarify that component.

The Association posits two bases for its motion to dismiss. The first is that Complainant lacks standing to bring an action against the Association. Sec. 111.07(2)(a), Stats., requires only that Shawl be a "party in interest" under the complaint. That he has an interest in his discharge is

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2/ Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3.

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).

4/ Sec. 111.07(2)(a), Stats., which states: "any such complaint may be amended in the discretion of the commission at any time prior to the issuance of a final order . . ."

5/ See ERC 12.02(5)(a), Wis. Adm. Code.

apparent, as is his interest in the Association's role in that discharge, if any. The Association questions less this interest than whether it owed him any legal duty. This issue is posed by the second basis for the Motion, but does not persuasively pose an issue regarding Shawl's standing.

The second basis for the Association's motion poses troublesome issues. The Association persuasively contends it is not apparent what duty it owed the Complainant. The complaint and amended complaint were drafted as civil actions, and the pleadings point to an estoppel-like action. The Commission does not, however, exercise the Court's jurisdiction, and the right asserted by the Complainant must have a demonstrated basis in the statutes administered by the Commission to warrant hearing. 6/

The Complainant points to Sec. 111.70(3)(b) or (c), Stats., as the basis of a duty breached by the Association. The Commission does enforce the duty of fair representation owed by a labor organization to members of a bargaining unit it represents. This duty was "judicially developed as a necessary corollary to the status of exclusive representative . . ." 7/ It has not been, as applied by the Commission, a surrogate for a negligence standard. 8/

This brief overview of the doctrine points out the difficulties in extending the duty to the allegations of the amended complaint. It is not apparent, from the amended complaint, when or how the Association came to owe a duty of fair representation to Shawl. Shawl was not a member of a bargaining unit represented by the Association, but sought to become one. Even if Shawl is owed a duty by the Association, it is not apparent the complaint alleges any act beyond negligence against it.

It is, however, no less difficult to deny the Complainant any hearing on this point. The duty of fair representation is, at root, an equitable doctrine. It has been noted to be fluid in its application by the forums which enforce it. 9/ The Commission's treatment of the unit status of positions can also be fluid. It has, for example, stated:

> Here, we are dealing with positions which are (a) newly created and (b) fall within the bargaining unit, instead of existing but previously

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6/ Moraine Park Technical College et al., Dec. No. 25747-B (McLaughlin, 3/89), aff'd, Dec. No. 25747-D (WERC, 1/90).

7/ The Developing Labor Law, Hardin (BNA, 1992) at 1409.

8/ See AFSCME, Council 24, WSEU, AFL-CIO, Local No. 1, Dec. No. 22320-A (McLaughlin, 12/85), aff'd, Dec. No. 22320-B (WERC, 7/86).

9/ Ibid.; see also The Developing Labor Law, at 1442 et. seq.

unrepresented positions which were accreted to the bargaining unit. In effect, these positions and the employes who fill them have been represented by the Association since the inception of the position. 10/

10/ City of Oak Creek, Dec. No. 27074-C (WERC, 5/93) at 10.

This statement cannot be presumed applicable to the facts posed here. It underscores, however, that ambiguity may surround when and how the duty of fair representation attaches to a represented position. At a minimum, ambiguity surrounds the contractual rights or duties of an accreted position.

The allegations of the amended complaint do not make out a clear action against the Association under Sec. 111.70(3)(b), Stats., but the ambiguity surrounding the duty of fair representation makes the risk of denying hearing greater than the risk of granting it.

The amended complaint also alleges an Association violation of Sec. 111.70(3)(c), Stats., which makes it "a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employer or municipal employes, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b)." The Association arguably is a "person" under this subsection. 11/ Beyond this, however, the complaint is unclear on how the Association, or any other person, acted to violate this section. If the Association acted to further the County's wrongful discharge, it is at least conceivable that it could have violated this section. The allegation is, then, sufficient to withstand the motion to dismiss.

In sum, it cannot be said that under no view of the facts is the Complainant entitled to relief under Secs. 111.70(3)(a), (b) or (c), Stats. The ambiguity surrounding the complaint does, in a sense, insulate the alleged violations from dismissal. It does not, however, follow from this that the complaint states an adequate basis for hearing.

The Order entered above seeks to establish a basis for hearing by requiring the complaint to be clarified before hearing is ordered. The clarification will, at a minimum, clarify the subsections of the law alleged to have been violated. The clarification should also produce greater specificity of the factual basis for those allegations.

Before closing, it is necessary to touch on the clarification sought in the Order. The duty of fair representation, where not specifically pleaded, has been treated by the Commission to fall within Sec. 111.70(3)(b)1, Stats. 12/ At a minimum, this point should not be left implicit. If the Complainant alleges violations beyond that subsection, such allegations should be made explicit. Beyond this, the facts underlying any such violations should be specified. The duty of fair

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11/ Sec. 111.70(1)(k), Stats.

12/ Local 950, International Union of Operating Engineers, Dec. No. 21050-C (WERC, 7/84).

representation proscribes conduct which is "arbitrary, capricious or in bad faith." 13/

13/ See, generally, Mahnke v. WERC, 66 Wis.2d 524 (1975).

The amended complaint should specify conduct on the Association's part which falls within that standard. If the Complainant contends negligence on the Association's part meets that standard, then specific acts of negligence should be specified.

Sec. 111.70(3)(c), Stats., has no subsections, and thus requires no further specification. However, the factual basis for that allegation is unclear. If the Complainant asserts the Association has acted "on behalf of or in the interest" of the County, the complaint should be amended to say so and to indicate how. If a "person" other than the Association is involved, the complaint should be amended to clarify the point.

The only allegation against the County appears to involve anti-union hostility. If this is the case, the complaint must be amended to state a violation of Sec. 111.70(3)(a)3, Stats. The Order also contemplates the specification of sufficient facts to establish a violation of that section. 14/ If the Complainant wishes to allege a violation of any other subsections of Sec. 111.70(3)(a), Stats., the Order requires that such allegations be specified.

Dated at Madison, Wisconsin, this 25th day of August, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

14/ The "in-part" test applied to violations of Sec. 111.70(3)(a)3, Stats., was applied by the Wisconsin Supreme Court to MERA cases in Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540 (1967) and is discussed at length in Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).