STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2771, AFSCME, AFL-CIO, Complainant, vs. WAUPACA COUNTY, Respondents.	Case 95 No. 51204 MP-2909 Decision No. 28401-A

Appearances:

Mr. Bruce F. Ehlke, Shneidman, Myers, Dowling & Blumenfield, Attorneys at Law, 217 South Hamilton, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of Local 2771, AFSCME, AFL-CIO, referred to below as the Union.

Mr. James R. Macy, Godfrey & Kahn, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, appearing on behalf of Waupaca County, referred to below as the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 20, 1994, the Local 2771, AFSCME, AFL-CIO filed a complaint of prohibited practices alleging Waupaca County had violated Secs. 111.70(3)(a)1 and 5, Stats., by discharging Denise Morack from employment because of a handicap or of a perceived handicap. After informal attempts to resolve the matter proved unsuccessful, the Wisconsin Employment Relations Commission, in January of 1995, informally designated Richard B. McLaughlin, a member of its staff, to act as Examiner. In a letter to the parties dated March 16, 1995, I stated:

> I write to confirm the status of the above-noted matter. It is my understanding that Mr. Macy represents the County, and that he intends to file pre-hearing motions. I would ask that those motions be filed promptly so that a determination can be made on what, if any, impact the motions may have on the setting of a hearing.

On March 21, 1995, Waupaca County filed a Motion to Dismiss with a supporting Memorandum. I

asked Local 2771, AFSCME, AFL-CIO, in a letter dated March 29, to state its position on the Motion to dismiss. Local 2771, AFSCME, AFL-CIO did so in a brief filed on April 25, 1995. On May 8, 1995, the Commission formally confirmed my appointment as Examiner.

FINDINGS OF FACT

1. On June 20, 1994, Local 2771, AFSCME, AFL-CIO, referred to below as the Union, filed a complaint of prohibited practice which included, among its allegations, the following:

. . .

> 1. The Complainant, AFSCME Local 2771, is a labor organization as defined at Sec. 111.70(1)(h), Wis. Stat. AFSCME Local 2771 is the duly certified and exclusive bargaining representative for "all regular full-time and regular part-time employees of the Waupaca County Department of Human Services, including all regular full-time and regular part-time professional employees of Waupaca County Human Services, Courthouse and the social workers at Lakeview Manor, excluding supervisor, confidential, managerial, casual, seasonal, temporary and farm employees." The Staff Representative for said employees is Jeff Wickland, who has his offices at P.O. Box 44, Stevens Point, Wisconsin 54481-0044. The Steward for AFSCME Local 2771 is Michael Phelan who resides at 810 Parkview Way, Waupaca, Wisconsin 54981.
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> 2. The Respondent, Waupaca County, is a political subdivision and agency of the State of Wisconsin and an employer as defined at Sec. 111.70(1)(j), Wis. Stat. Among its department the County maintains a Department of Human Services. The Chairman of the Waupaca County Board of Supervisors is Duane Brown, who has his offices at c/o Waupaca County Personnel Department, Waupaca County Courthouse, 811 Harding Street, Waupaca, Wisconsin 54981-2077.
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> 3. At all times material hereto there was in force and effect a Collective Bargaining Agreement between Waupaca County and AFSCME Local 2771, for the term January 1, 1993 through December 31, 1995. Among other things, this Agreement included a Preamble, which provided in pertinent part, as follows:

> "...The policy of this County prohibits any employment practice which in any way discriminates or tends to discriminate against any person, employee or applicant for employment with respect to compensation, terms, conditions or privileges of employment because of an individual's race, color, religion, national origin, handicap, marital status, eligibility for military service, sex or age, as provided by law"

In addition, said Agreement contained the following pertinent provisions:

> "6.01 All newly hired employees shall be considered probationary for the first six (6) months of their employment. A probationary employee may be discharged at the discretion of the Employer without regard to cause and without recourse to the grievance procedure. Continued employment beyond the first six (6) months of employment shall be evidence of satisfactory completion of the probationary period."
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> "18.01 There shall be no discrimination on the part of the Employer or the employee as set forth and defined in Chapter 111 of the Wisconsin Statutes of 1961."

4. At all times material hereto Denise Morack was a regular full-time employee of the Waupaca County Department of Human Services and a member of the bargaining unit represented by AFSCME Local 2771. Effective as of June 18, 1993, Waupaca County discharged Ms. Morack from her employment with the County. Thereafter, the County restored Ms. Morack to said employment and, then, again discharged her from her employment, effective as of September 24, 1993. At all times material hereto, and to date, Waupaca County has taken the position that, on both occasions, when Ms. Morack was discharged from her employment she was a probationary employee and that the dispute concerning her discharges was, and is, not subject to the grievance and arbitration provisions set forth at Article 10 of the Collective Bargaining Agreement between the County and AFSCME

Local 2771, and that there is no grievance and arbitration procedure available to which the parties may resort in order to resolve said dispute.

5. Waupaca County's discharge of Denise Morack from her employment, effective as of June 18, 1993 and, again, effective as of September 24, 1993, constituted discrimination against her because of a handicap or because of a perceived handicap, in violation of the Wisconsin Fair Employment Act, Sec. 111.321, Wis. Stat., and, therefore, was in violation of the Preamble and Section 18.01 of the Collective Bargaining Agreement between the County and AFSCME Local 2771. Said actions by the County constitute a violation of a collective bargaining agreement previously agreed upon by the parties and prohibited practices in violation of Secs. 111.70(3)(a) 1 and 5, Wis. Stat.

. . .

2. On March 21, 1995, Waupaca County, referred to below as the County, filed a "Motion to Dismiss and Memorandum in Support of Motion to Dismiss." That motion includes, among its allegations, the following:

. . .

1. The Complainant, AFSCME Local 2771, is a labor organization within the meaning of sec. 111.70(1)(h), Wis. Stats. AFSCME Local 2771 is the certified bargaining representative for "all regular full-time and regular part-time professional employees of the Waupaca County Department of Human Services, including regular full-time and regular part-time employees of the Waupaca County Department of Human Services, Courthouse and the social workers at Lakeview Manor, excluding supervisor, confidential, managerial, casual, seasonal, temporary and farm employees."

2. The Respondent, Waupaca County, is a municipal employer within the meaning of sec. 111.70(1)(j), Wis. Stats.

3. At all times material hereto, there was in force and effect a Collective Bargaining Agreement between Waupaca County and AFSCME Local 2771, for the term of January 1, 1993 through December 31, 1995. A copy of the 1993-1995 Agreement is attached as Exhibit 1. Among other things, this Agreement included

the following:

. . .

ARTICLE 31 - SETTLEMENT OF PROHIBITED PRACTICE PROBLEMS, which provided in pertinent part:

31.01 In the event either party desires to file a prohibited practice charge with the Wisconsin Employment Relations Commission against the other **for any reason** authorized under state law, it shall so notify the other party in writing by certified mail summarizing the details surrounding the potential charge. **Such charge may not be filed for a period of twenty (20) days following delivery to the other party and upon receipt of this notice**, the parties agree to meet and confer in an attempt to resolve the dispute during the twenty (20) day period. (Emphasis added).

4. Denise Morack was a regular full-time employee of the Waupaca County Department of Human Services and a member of the bargaining unit represented by AFSCME Local 2771. Ms. Morack was terminated from her employment with Waupaca County on September 24, 1993, during her probationary period.

5. On September 30, 1993 and October 29, 1993, Denise Morack filed a Discrimination Complaint against Waupaca County with the State of Wisconsin, Department of Industry, Labor and Human Relations, Equal Rights Division, alleging that her termination from her employment was discrimination on the basis of handicap and perceived handicap, ERD Case No. 9304296. The Complaint is cross-filed with the United States, Equal Employment Opportunities Commission, EEOC Case No. 266940179. A copy of said Complaint is attached hereto as Exhibit 2.

6. In regards to the pending Discrimination Complaint, a hearing was scheduled by the Equal Rights Division of the Department of Industry, Labor and Human Relations for February 1, 1995. Denise Morack notified the Division that she had elected to pursue the discrimination matter in Federal Court, a copy of her election is attached as Exhibit 3. In response, the State Equal Rights Division ordered her state claim to be dismissed because the matter was to now be heard in Federal Court, a copy of that Order is attached as Exhibit 4.

7. On November 23, 1993, Denise Morack filed a Complaint against Waupaca County with the United States Department of Health & Human Services, Office of Civil Rights, alleging that her termination from employment was discrimination on the basis of a disability protected by Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans With Disabilities Act. That Complaint is currently pending before that agency, a copy of said Complaint being attached hereto as Exhibit 5.

8. Prior to the Prohibited Practice Complaint now pending before the Wisconsin Employment Relations Commission as this immediate case, AFSCME Local 2771 never gave notice to Waupaca County that it believed the termination of Ms. Morack represented an alleged prohibited practice, as required by Article 31 of the bargaining agreement.

9. Waupaca County maintains a policy which prohibits any employment practice which in any way discriminates or tends to discriminate against any person, employee or applicant for employment with respect to compensation, terms, conditions or privileges of employment because of an individual's race, color, religion, national origin, handicap, marital status, eligibility for military service, sex, and/or age as provided by law, a copy of said policy which is attached hereto as Exhibit 6. Denise Morack filed a Discrimination Complaint under this policy and an external determination found no merit to the complaint. A copy of that determination is attached as Exhibit 7.

NOW THEREFORE, the Respondent, Waupaca County moves to dismiss this Complaint for the following reasons:

10. The allegation in reference to the Preamble of the bargaining agreement must be dismissed as the County does maintain a policy as referenced, as a matter of undisputed fact. Denise Morack utilized that policy and a determination was made that there was no merit to her claim.

11. The allegation in reference to Article 18.01 is without merit as the Article is without force and effect in that Chapter 111 of the **Wisconsin Statutes of 1961**, are no longer in effect and as such are no longer a matter of law.

12. Prohibited practice complaints in violation of Secs. 111.70(3)(a) 1 and 5, Wis. Stats., are available where parties do not maintain final and binding grievance arbitration procedures. The parties in this case maintain a final and binding grievance arbitration procedure, which thereby waives the right to proceed under Secs. 111.70(3)(a) 1 and 5, Stats.

13. The filing of this instant Complaint is without jurisdiction in that no notice has been given to Waupaca County as a necessary prerequisite negotiated in Article 31 of the collective bargaining agreement between the parties.

14. The complete and full Complaint filed in this case is entirely encompassed within the prior and pending multiple Complaints filed by Denise Morack against the Respondent with the State of Wisconsin, Department of Industry, Labor and Human Relations, Equal Rights Division, the United States Equal Employment Opportunities Commission and the United States Department of Health and Human Services, Civil Rights Division. Such complaints all fall within the specific expertise of the other investigating agencies for reviewing matters of discrimination. As such, this matter is not appropriate for jurisdiction before the Wisconsin Employment Relations Commission.

. . .

3. Primary jurisdiction over allegations of violations of the Fair Employment Act (Subchapter II, Chapter 111, Stats.) lies with the Department of Industry, Labor and Human Relations.

CONCLUSIONS OF LAW

1. The June 20, 1994, complaint states a "Contested case" within the meaning of Sec. 227.01(3), Stats.

2. The violations of Secs. 111.70(3)(a)1 and 5, alleged by the June 20, 1994 complaint are premised on a violation of the Fair Employment Act.

3. The determination of a violation of the Fair Employment Act falls within the primary jurisdiction of the Department of Industry, Labor and Human Relations.

ORDER 1/

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by

The Union's complaint, filed on June 20, 1994, is deferred to the Department of Industry, Labor and Human Relations. Because litigation before that agency has been dismissed in deference to litigation in federal court, the deferral requires the dismissal of the Union's complaint. The complaint is, therefore, dismissed.

Dated at Madison, Wisconsin, this 22nd day of June, 1995.

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such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

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

THE PARTIES' POSITIONS

The County's Position

The County argues initially that the complaint should be dismissed because "the Union did not follow the clear required contractual obligations necessary for maintaining this action." More specifically, the County contends Section 31.01 of the labor agreement requires notice and preliminary discussions prior to the filing of a complaint with the Commission. The complaint does not allege these procedures were followed, and the County concludes that allowing the complaint to go forward "would negate the clear language" of Section 31.01.

The County then argues that the labor agreement does no more than refer to external law, and that the governing provisions do not create the independent forum the complaint asserts. More specifically, the County contends that the Preamble "states no more than that the County maintains a policy against discrimination, by law." That procedure exists, and was utilized. The County concludes it affords the Union no greater benefit. Nor does Article 18 afford the Union substantive rights. It refers to State statute, but its reference "is clearly outdated." The County concludes that Article 18 does no more than refer to the existence of external law, and affords the Union "no substantive right to proceed in a duplicitous forum on the exact same matter reserved for the other forums."

To the extent the labor agreement is relevant, the County argues that it demonstrates only that the parties have set forth a grievance procedure and have denied recourse to that procedure to probationary employes. That the grievance procedure exists at all defeats, according to the County, the availability of the Sec. 111.70(3)(a)5, Stats., forum. Section 6.01 of the agreement unambiguously denies Morack, as a probationary employe, access to the grievance procedure. To provide the Union the forum it seeks under Sec. 111.70(3)(a)1 and 5, Stats., would, according to the County, "circumvent the express intent of the parties to limit review rights of probationary employees."

Noting the existence of litigation before Wisconsin's Equal Rights Division, the United States Department of Health & Human Services, Office of Civil Rights, and the Equal Employment Opportunities Commission, the County argues that the complaint should be deferred. Such a deferral would, the County contends, put the matter before "agencies with specific expertise regarding discrimination matters . . ." Beyond this, the County contends such a deferral is

consistent with Commission case law and would avoid wasting limited public resources.

For any or for all of these reasons, the County concludes that the complaint should be dismissed.

The Union's Position

The Union contends initially that the issue of whether it has complied with the notice provisions of Section 31.01 "presents a factual issue." Noting its position that it gave the County such notice, or in the alternative that "it otherwise substantially met the contractual requirements" the Union concludes that this issue requires hearing to be resolved.

In light of the County's reading of the Preamble to the labor agreement, the Union concludes that "an issue of contract interpretation" is presented. The Union argues that such an issue "only can be addressed and resolved after a full evidentiary hearing and on the basis of evidence of record."

Noting that there is no dispute "that Denise Morack did not enjoy the protection of the parties' contractual "just cause" provision, nor have recourse to the grievance procedure," the Union concludes that "(t)his . . . does not mean that she did not enjoy the protection of other contractual provisions." The interpretation of such other provisions is the basis of the allegations concerning Secs. 111.70(3)(a)1 and 5, Stats., according to the Union. That Morack lacks recourse to the grievance procedure does not preclude, but makes available, the forum of Sec. 111.70(3)(a)5, Stats.

The Union's final major line of argument is that "there is nothing in the parties' collective bargaining agreement that limits a bargaining unit employee's collectively bargained rights . . . merely because she may have similar statutory rights." Noting that none of the agencies cited by the County for a deferral have any expertise in the interpretation of labor agreements, the Union concludes that the requested deferral would be inappropriate.

The Union concludes that the County's Motion to Dismiss "should be denied and this matter now should be scheduled for hearing forthwith."

DISCUSSION

The County's Motion to Dismiss is governed by Chapters 111 and 227. Secs. 111.70(3)(a)1 and 5, Stats, state the prohibited practices alleged. Through the operation of Sec. 111.70(4)(a), Stats., Sec. 111.07, Stats., governs the procedures by which those allegations are to 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. The complaint seeks to return Morack to the position she was discharged from. Her interest in the position is "substantial," and is, as the County's motion demonstrates, "controverted by another party." Hearing of alleged prohibited practices is mandated by Sec. 111.07(2)(a), Stats. Thus, this matter constitutes 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. 2/

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 complainant be entitled to relief. 3/

2/ 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."

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

The Commission has, with judicial approval, approved the granting of pre-hearing motions to dismiss. 4/

The standard stated above directly applies to that portion of the County's motion which seeks dismissal of the complaint on its merits and indirectly to that portion of its motion which seeks to defer the complaint. The issue posed regarding a dismissal on the merits is not whether the County's reading of the contract has merit, but whether the merit of its reading can be determined prior to evidentiary hearing.

The County and the Union differ on whether Morack's discharge was colored by handicap discrimination and on whether the contract permits her a basis to challenge the discharge. Whether she was discharged based on a handicap or a perceived handicap poses a factual dispute requiring hearing. The County's motion to dismiss the complaint on its merits turns on whether, presuming the discharge was tainted by proscribed discrimination, the contract grants her any remedy.

The County contends that the agreement's Preamble, Articles 6, 18 and 31 are sufficiently unambiguous that no interpretive issues are posed. If interpretive issues are posed, hearing on the existence of relevant bargaining history, past practice and other potential issues of fact would be appropriate.

Because the Union's reading of the disputed provisions cannot be dismissed as implausible, the County's motion to dismiss the complaint on its merits cannot be granted. Regarding Article 31, the Union contends that the County received notice of its intent to file a prohibited practice. This poses a factual issue requiring hearing. Even if notice could not be proven, the propriety of dismissing the complaint for non-compliance with Section 31.01 is not self-evident. It is arguable that a remand to the parties for the "meet and confer" procedure would be a more suitable remedy. Whether past practice or bargaining history exists on the point poses potential issues of fact.

The Union plausibly contends that the Preamble and Section 18.01 insulate an employe from discharge based on a discriminatory motivation. Here too, bargaining history and past practice pose potential issues of fact. The same applies to Section 6.01. The County cites City of Wauwatosa, Dec. Nos. 19310-C, 19311-C & 19312-C (WERC, 4/84) as authority for reading Section 6.01 to require dismissal of the complaint. This contention ignores that Wauwatosa was

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4/ 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).

decided after a hearing on the merits. At that hearing, evidence of bargaining history was adduced which was considered by the Examiner, the Commission and the Court of Appeals. Even if Wauwatosa supports the County's interpretation of Section 6.01, it does not support the County's view that the section can be interpreted without a hearing.

In sum, the County's motion to dismiss the complaint on its merits prior to evidentiary hearing cannot be granted. It is now necessary to address the County's motion to defer the complaint. This poses the more forceful aspect of the County's motion since it acknowledges the right to hearing on the complaint's discrimination allegations, but asserts that right should be addressed in a different forum.

Some background is necessary as preface to addressing the motion to defer. The County alleges, and the Union does not dispute, that Morack has filed actions challenging her discharge before the Equal Rights Division of the Department of Industry, Labor and Human Relations (ERD), two federal agencies and a federal court. The forum choice relevant here is the ERD. The County's motion alleges, and the Union does not dispute, that ERD dismissed Morack's claim in an Order, dated February 3, 1995, which states:

> The Complainant has made a written request to withdraw the complaint which was filed with the Equal Rights Division. The Complainant has, however, indicated an intent to pursue claims in another forum. Therefore, the Administrative Law Judge issues the following:
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> ORDER
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> That the complaint in this matter is hereby dismissed with prejudice with respect made to the claims made before the Equal Rights Division. The dismissal of the claims filed with the Equal Rights Division is without prejudice to any right the Complainant may have to pursue these claims in any other forum.
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> . . .

The Union was not listed as a party to the ERD action. The determination of handicap discrimination could be made by the Commission by interpreting the parties' labor agreement under Secs. 111.70(3)(a)1 and 5, Stats. ERD has, under the terms of the Fair Employment Act (FEA),

primary jurisdiction to determine allegations of handicap discrimination. 5/

5/ See Secs. 111.32(4) and 111.375, Stats.

The Commission has addressed the issue of deferral to the ERD of FEA allegations. In Louis Allis Company, 6/ the Commission noted that it "must harmonize the administration of its laws with other state enactments such as the FEA," and posited the doctrine of primary jurisdiction as the basis for the harmonization. 7/ This doctrine is a judicial construct governing a court's relationship to an administrative agency, and requires a court to act "in respect to the primary jurisdiction of administrative agencies" thus:

> The trial court should exercise its discretion with an understanding that the legislature has created the agency in order to afford a systematic method of fact-finding and policy-making and that the agency's jurisdiction should be given priority in the absence of a valid reason for judicial intervention. 8/

This set the appropriate standard, the Commission concluded, because "(u)nquestionably, the commission must respect the primary jurisdiction of DILHR as much as should the courts." 9/ Turning to the matter before it, the Commission concluded:

> While in certain circumstances an FEA allegation may be only one element among many advanced as a reason why the Union breached its duty of fair representation, in which case deferral to DILHR would be less compelling, here the sole allegation against the employer and the union is that they have discriminated on the basis

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6/ Dec. No. 11017-E (WERC, 1/78), cited with approval in Racine Unified School District, Dec. Nos. 15809-E and 15914-E (Hoornstra, with final authority for WERC, 2/78).

7/ Ibid., at 6.

8/ Ibid., citation omitted.

9/ Ibid.

> of handicap in violation of the FEA. In this circumstance, we believe the commission should defer to DILHR which has primary jurisdiction over the question presented. 10/

The Commission dismissed the complaint then before it, noting, among other points, that "the commission declines to rule on the discrimination by handicap theory because the legislature has chosen another agency to be primarily responsible for finding the facts and developing the law in that area." 11/

The reasoning from Louis Allis Company is applicable here. While the Union argues that other agencies lack expertise in interpreting labor agreements, the complaint turns on the application of the FEA. Paragraph 5 of the complaint details the law in question and premises, through the use of the terms "and, therefore," a violation of the labor agreement on a "violation of the Wisconsin Fair Employment Act." Whatever expertise is gained before this agency regarding the application of labor agreements is, then, a function of a finding of discrimination under the FEA. That finding is within the primary jurisdiction of the ERD. Without a reason to conclude the contractual forum was intended to enhance the administrative forum, the primary jurisdiction of the ERD must be deferred to.

That ERD has dismissed Morack's action without prejudice to claims in any other forum does not undercut the persuasive force of Louis Allis Company. The Commission's concern in Louis Allis Company was the relationship of two agencies with jurisdiction over the same claim. Its deferral was based, presumably, on the conservation of its own and the parties' resources, and on the adverse implications of conflicting results arising from the application of the same act in multiple forums. Against this background, the "without prejudice" reference of the ERD Order has no bearing on the County's motion. The reference clarifies that the dismissal did not address the merits of Morack's litigation, thus preserving her action in federal court. To apply the reference to this complaint would render the ERD dismissal meaningless. The ERD dismissal limited Morack's "day in court" to the action pending in federal court. To extend the "without prejudice" reference to the Commission litigation reopens the administrative action ERD sought to close. This contradicts the rationale of Louis Allis Company.

That the Union was not a party to the ERD action is not dispositive here. There is no apparent basis to conclude the Union has any interest in this litigation independent of Morack's.

In sum, the County's motion to dismiss is unpersuasive to the extent it asserts the Union's

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10/ Ibid., at 6-7.

11/ Ibid., at 7-8.

allegations of a contract violation can be decided prior to hearing. The County's motion to defer the action to the ERD is, however, persuasive. This reflects that the complaint hinges on a violation of the FEA. Since any violation of MERA is contract based, and can only be derived from a violation of the FEA, there are no meaningful MERA or contract interpretation issues independent of a finding of discrimination under the FEA.

With this as background, the only remaining issue is whether the deferral should be effected through a final order dismissing the complaint, as was the case in Louis Allis Company, or through an interim order including a retention of jurisdiction. Because no independent MERA based claim is apparent in the complaint, a final order of dismissal is appropriate. This also assures prompt access to the appellate process.

It should be stressed this dismissal is not a determination of the merits of the alleged discrimination. Rather, the dismissal reflects that the merits of the claim and the procedural protection of Chapter 227 are available through the FEA. Hearing has not been denied, but has been deferred to another forum. That the ERD has already dismissed Morack's action is not

significant. That dismissal was itself not a denial of a hearing, but a determination that Morack's due process rights were available through another forum. The dismissal of the complaint does no more than respect the exercise of ERD's primary jurisdiction over this matter.

Dated at Madison, Wisconsin, this 22nd day of June, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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