

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ASSOCIATION OF MENTAL HEALTH
SPECIALISTS,

Complainant,

vs.

ROCK COUNTY,

Respondent.

Case 289

No. 52841 MP-3052

Decision No. 28494-B

Appearances:

Mr. John S. Williamson, Jr., Attorney at Law, 103 West College Avenue, Suite 611, Appleton, Wisconsin 54911, appearing on behalf of the Complainant.

Mr. Thomas Schroeder, Corporation Counsel, Rock County, Rock County Courthouse, 51 South Main Street, Janesville, Wisconsin 53545, appearing on behalf of the Respondent.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Marianne Goldstein Robbins, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of Machinists Local 1266.

ORDER DENYING MOTION TO INTERVENE AND
DISMISSING PETITION FOR REVIEW

On January 18, 1996, Examiner Raleigh Jones issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent Rock County had violated Secs. 111.70(3)(a)4 and 1, Stats. by unilaterally moving the position of CHIPS Case Manager from a bargaining unit represented by the Association of Mental Health Specialists to a bargaining unit represented by Machinists Local 1266.

On February 5, 1996, the Commission received a Motion to Intervene and Stay the Examiner's Order as well as a Petition for Review of the Examiner's decision from Machinists.

Machinists and the Association subsequently filed written argument in support of and in opposition to the Motion and Petition, the last of which was received March 8, 1996. The County took no position.

No. 28494-B

On September 17, 1996, Commissioner Hempe wrote the parties and advised them of prior employment relationships with the County and the Association and of his belief he could nonetheless reach an independent judgment as to the merits of the case. By letter dated September 19, 1996, Machinists advised Hempe that they objected to his participation in the case. By letter dated November 1, 1996, Hempe advised the parties that he would participate and noted that if he did not, the matter could not proceed to decision inasmuch as the Commission presently has only two members.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

1. The Motion to Intervene and Stay the Examiner's Order and the Petition for Review are denied and dismissed.

2. By operation of Sec. 111.07(5), Stats., Examiner Jones' Findings of Fact, Conclusions of Law and Order became the Commission's Findings of Fact, Conclusions of Law and Order on February 7, 1996.

Given under our hands and seal at the City of Madison, Wisconsin,
this 18th day of November, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

(Footnote 1/ continues on the next page.)

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227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(Footnote 1/ continues on the next page.)

(Footnote 1/ continues from the previous page.)

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

ROCK COUNTY (MENTAL HEALTH)

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION
TO INTERVENE AND DISMISSING PETITION FOR REVIEW

BACKGROUND AND POSITIONS OF THE PARTIES

On January 18, 1996, Examiner Raleigh Jones issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in which he concluded that the County had violated Secs. 111.70(3)(a)4 and 1, Stats., by unilaterally moving the position of CHIPS Case Manager from a bargaining unit represented by the Association of Mental Health Specialists to a bargaining unit represented by Machinists Local 1266. To remedy the violation, he ordered the County to cease and desist from such conduct, to immediately return the position to the Association bargaining unit, to make the Association whole with interest for lost dues, and to post a specified Notice.

On February 5, 1996, the Commission received written notice from the County of the action being taken to comply with the Examiner's Order.

On February 5, 1996, Machinists Local 1266 filed a Motion to Intervene and Stay the Examiner's Order as well as a Petition for Review of the Examiner's decision.

In its Motion and Petition, Machinists contend that as the collective bargaining representative of the CHIPS Case Manager, it is a party in interest to the complaint case; that it did not receive notice of or participate in the complaint hearing; that removal of the CHIPS position from the Machinists unit violates the obligations of the County to bargain with Machinists and violates the contract between Machinists and the County; that removal of the CHIPS position pursuant to the Examiner's Order without notice to and hearing with Machinists violates Machinists' right to due process and the Wisconsin Administrative Procedures Act; and that the incumbent in the CHIPS position serves in a leadership capacity within the Machinists unit and his removal to a different unit will deprive Machinists of its union leadership.

On February 19, 1996, the Association filed a written response in opposition to the Machinists' Motion and Petition. The Association argues Machinists had actual notice of the complaint and hearing and that a request to intervene after the Examiner issued his decision is thus untimely. The Association contends that correspondence from Machinists in a related election proceeding establishes knowledge of the complaint and that the transcript of the hearing demonstrates that the Machinists' Local President was present at the complaint hearing.

The Association asserts intervention is not a matter of right and that Machinists have not presented any compelling basis for their participation as a party at this late juncture. The Association argues there are no additional facts or argument Machinists can present which have not already been presented by the County whose litigation interests parallel Machinists.

The Association alleges the Commission lacks the authority to grant Machinists' Motion because the 20-day period for Commission action established by Sec. 111.07(5), Stats. expired prior to any Commission action on the Motion.

The Association further argues the Machinists come to the Commission with "unclean hands" which diminish any legitimate interest Machinists may cite to warrant their participation. The Association alleges the Machinists induced the County to violate the County contract with the Association by allowing the Machinists' Local President to leave the Association unit without Association approval. The Association further argues that if the Local President cannot remain in a position of leadership with Machinists, "this alleged wound is self-inflicted", and should not be used as a valid interest allowing intervention.

Machinists respond to the Association's arguments by asserting that their participation would indeed produce new evidence and arguments in the complaint proceeding and that Machinists clearly qualify as a "party in interest" entitled to file a Petition for Review under ERC 12.09 within the 20-day period following issuance of the Examiner's decision.

Machinists also contend that the Motion to Intervene is timely inasmuch as Machinists lacked formal notice of the complaint and hearing.

The County takes no position as to the Motion and Petition.

DISCUSSION

We have reviewed the instant matter and conclude that Machinists' Motion to Intervene is untimely. We further conclude that absent admission into this proceeding as a party through the granting of a Motion to Intervene, Machinists have no independent right to file a petition for review. Therefore, we have dismissed the Machinists' Motion and Petition.

Section 111.07(2)(a), Stats. (which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats.) provides:

(2)(a) Upon the filing with the commission by any party in interest of a complaint in writing, on a form provided by the commission, charging any person with having engaged in any specific unfair labor practice, it shall mail a copy of such complaint to all other parties in interest. Any other person claiming interest in the dispute or controversy, as an employer, an employee, or their representative, shall be made a party upon application. The commission may bring in additional parties by service of a copy of the complaint. Only one such complaint shall issue against a person

with respect to a single controversy, but any such complaint may be amended in the discretion of the commission at any time prior to the issuance of a final order based thereon. The person or persons so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the notice of hearing. The commission shall fix a time for the hearing on such complaint, which will be not less than 10 nor more than 40 days after the filing of such complaint, and notice shall be given to each party interested by service on the party personally or by mailing a copy thereof to the party at the party's last-known post-office address at least 10 days before such hearing. In case a party in interest is located without the state and has no known post-office address within this state, a copy of the complaint and copies of all notices shall be filed in the office of the secretary of state and shall also be sent by registered mail to the last-known post-office address of such party. Such filing and mailing shall constitute sufficient service with the same force and effect as if served upon the party located within this state. Such hearing may be adjourned from time to time in the discretion of the commission and hearings may be held at such places as the commission shall designate.

When read as a whole, we are satisfied that under Sec. 111.07(2)(a), Stats., the Commission did not have an affirmative obligation to serve a copy of the complaint on Machinists. While the statute indicates the Commission "may bring in additional parties", the statute goes on to indicate that "Any other person claiming interest in the dispute or controversy, as an employer, an employee, or their representative, shall be made a party upon application." Thus, we are satisfied that Machinists were obligated to "apply" for "party" status. They have now done so. The question remains whether that application is timely.

The statute itself does not impose any restriction on the timing of a motion to intervene. However, ERC 10.12(2) provides, in pertinent part:

Any person desiring to intervene in any proceeding, shall, if prior to hearing, file a motion with the commission. Such motions shall state the grounds upon which such person claims an interest. Intervention at the hearing shall be made by oral motions stated on the record. Intervention may be permitted and upon such terms as the commission or the individual conducting the proceeding may deem appropriate.

While this administrative rule strongly suggests that a timely motion to intervene (which we

equate with an "application" for party status) can be made no later than during a hearing, it is also fair to conclude that such a restriction on the timing of such a motion presumes prior knowledge of the proceeding by the party wishing to intervene. We are satisfied that such knowledge existed in this proceeding.

The Commission's file reflects that the Association initiated these proceedings by filing the complaint along with a June 22, 1995 cover letter which states, in pertinent part:

Since the complaint relates to conduct that makes a free and fair election impossible, no further action shall be taken on the Petitions filed by the County until the complaint is resolved and, if sustained, until such time as the impact of the prohibited practices have been disapated (sic). I have, as a matter of courtesy, served a copy of this letter on Thomas A. Schroeder, attorney for Rock County and, I assume, Bruce Patterson, on Mary Ann Goldstein Robbins, attorney for Machinists Local 1266 and Teamster Local 579.

The cover letter reflects copies going to Attorney Robbins with enclosures.

By letter dated July 12, 1995, Attorney Robbins advised the Commission as follows:

This letter is in response to your inquiry concerning a response to the recent filing of a prohibited practice complaint by Mr. Williamson and his position of the complaint bars further proceedings in the above-captioned matter.

"I have not been able to reach my client, Teamsters Local 579, and therefore cannot respond at this time, on their behalf.

"District 10, IAMAW, maintains the complaint is completely without merit. The position at issue in the complaint was formally part of the District 10, IAMAW bargaining unit. We note that no complaint was filed at the time the issue arose. Rather, the complaint was filed only in response to the present unit clarification petition.

From these documents, we are satisfied that Machinists had actual knowledge of the existence of the complaint.

The transcript of the hearing also establishes to our satisfaction that Machinists had knowledge of the hearing itself. As asserted by the Association, the hearing transcript reflects the presence of Mr. Hess identified by Machinists herein as its Local President.

Given the foregoing, we are satisfied that Machinists had a reasonable opportunity to intervene in the complaint proceeding prior to or during the hearing. Having failed to file such a motion until after the Examiner issued his decision, we conclude that the Motion to Intervene is untimely in the instant circumstances.

Remaining for resolution is the question of whether Machinists have an independent right to file a petition for review as a "party in interest" within the meaning of Sec. 111.07(5), even if they have not timely filed a motion to intervene. Section 111.07(5), Stats., states in pertinent part:

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 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 such commission 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."

From our review of the above-quoted statutory language, we are satisfied that the right of "any party in interest" to file a petition for review refers only to "the parties in interest" who have participated in the complaint proceeding. Given that view, Machinists have no independent right under Sec. 111.07(5), Stats. to participate in this proceeding through a petition for review. Thus, we have dismissed the Petition Machinists filed.

Given the absence of any petition for review by a party to the proceeding during the 20 days following issuance of the Examiner's decision herein, that decision became the Commission's decision on February 7, 1996 by operation of Sec. 111.07(5), Stats.

Dated at Madison, Wisconsin this 18th day of November, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner