

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DOUGLAS HAFER,

Complainant,

vs.

MILWAUKEE COUNTY and LOCAL 882,
MILWAUKEE DISTRICT COUNCIL 48, AFSCME,
AFL-CIO,

Respondents.

Case 408

No. 52626 MP-3026

Decision No. 28525-A

Appearances:

Podell, Ugent, Haney & Delery, S.C., Attorneys at Law, 611 North Broadway Street, Suite 200, Milwaukee, Wisconsin 53202-5004, by Ms. Carolyn H. Delery, appearing on behalf of the Respondent Union.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Office of Corporation Counsel, Milwaukee County, 901 North Ninth Street, Room 303, Milwaukee County Courthouse, Milwaukee, Wisconsin 53233, appearing on behalf of the Respondent County.

Castellani, Sheedy & Associates, Attorneys and Counselors at Law, 829 North Marshall Street, Milwaukee, Wisconsin 53202, by Mr. Michael T. Sheedy, appearing on behalf of the Complainant.

ORDER DENYING PRE-HEARING MOTION TO DISMISS COMPLAINT
AND TO BIFURCATE THE HEARING

On May 9, 1995, Douglas Hafer, hereafter Complainant, filed a complaint with the Wisconsin Employment Relations Commission. On September 14, 1995, the Wisconsin Employment Relations Commission appointed Coleen A. Burns, a member of its staff, as Examiner in this matter, to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.70(4)(a) and 111.07, Stats. On November 6, 1995, Respondent Union filed a Motion to Dismiss the complaint. Thereafter, hearing in the matter was held in abeyance pending the outcome

No. 28525-A

of settlement discussions between the parties. By letter dated March 14,

1997, Complainant requested that the matter be scheduled for hearing. On April 3, 1997, Respondent County requested that the hearing be bifurcated. The Examiner, having considered the record and the arguments of the parties, makes and issues the following

ORDER

1. Respondent Union's pre-hearing Motion to Dismiss is denied.
2. Respondent County's request for bifurcation of hearing is denied.

Dated at Madison, Wisconsin, this 14th day of July, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING
ORDER DENYING PRE-HEARING MOTION TO DISMISS COMPLAINT
AND TO BIFURCATE THE HEARING

In its Motion to Dismiss, the Respondent Union asserts (1) that the complaint, given its most liberal reading, contains no allegations whatsoever of acts or omissions attributed to Local 882, AFSCME, and that, therefore, Douglas Hafer has failed to state a claim upon which relief can be granted against Local 882, AFSCME, and (2) although the complaint refers to matters which took place over the last 17 years, all such claims must be dismissed as untimely filed.

Section 227.01(3), Stats., defines a "Contested case" as "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 Complainant is a request to be employed and to be made whole for lost wages and seniority. Complainant has asserted a substantial interest which is controverted by another party and which, after hearing, will be determined or adversely affected by a decision or order. Thus, this is a contested case within the meaning of Sec. 227.01(3).

As Examiner McLaughlin stated in Oneida County: 1/

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

1/ Dec. No. 28240-A (8/95).

of a meaningful evidentiary hearing on other than jurisdictional grounds or failure of the complaint to state a cause of action. 1/ (footnote omitted)

The Commission has reflected this reluctance to deny hearing in it (sic) 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. 2/ (footnote omitted)

The complaint, on its face, raises a claim against Milwaukee County, a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and Local 882, District Council 48, AFSCME, AFL-CIO, a labor organization within the meaning of Sec. 111.70(1)(h), Stats. Specifically, the complaint alleges that Respondent Union has violated Sec. 111.70(3)(b)1, Stats., and Respondent County has violated Sec. 111.70(3)(a)5, Stats, by denying the Complainant employment rights guaranteed by a grievance settlement agreement. Liberally construed, the complaint alleges a cause of action under the Municipal Employment Relations Act against each Respondent, which, if proved, would entitle Complainant to relief.

The complaint, on its face, alleges that the claimed unlawful conduct occurred within the "last two seasons" preceding the filing of the complaint. Thus, the complaint, on its face, alleges that Respondents have engaged in unlawful conduct within one year from the date of the filing of the complaint. 2/ Accordingly, there is no merit to Respondent Union's argument that all of Complainant's claims are untimely.

Liberally construing the complaint in favor of the Complainant, it cannot be concluded that there is no interpretation of the facts alleged which would entitle the Complainant to relief under the Municipal Employment Relations Act. Accordingly, Respondent Union's Motion to Dismiss is denied.

Respondent County argues that, under the Mahnke doctrine, a failure to prove a duty of fair

2/ The applicable statute of limitations period is set forth in Sec. 111.07(14), Stats., which states that "The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged."

representation claim against the Respondent Union will obviate the need to litigate the Sec. 111.70(3)(a)5, Stats., claim against the Respondent County. 3/ Assuming arguendo, that the Respondent County is correct when it argues that all of the claims against the County fall under the Mahnke doctrine, unnecessary costs and delay would only be avoided if the Complainant would not meet the Mahnke standard. If Complainant would meet the Mahnke standard, then bifurcation would result in unnecessary costs and delays. Given the latter possibility, the Examiner has denied Respondent County's request to bifurcate the hearing.

Dated at Madison, Wisconsin, this 14th day of July, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner

3/ Mahnke v. WERC, 66 Wis.2d 524 (1975).