

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TOWN OF MADISON,

Complainant,

vs.

WISCONSIN PROFESSIONAL POLICE  
ASSOCIATION and CHRISTIAN  
THOMSEN,

Respondents.

Case 51

No. 52750 MP-3038

Decision No. 28647-A

Appearances:

Lathrop & Clark, Attorneys at Law, 122 West Washington Avenue, Suite 1000, P. O. Box 1507, Madison, Wisconsin 53701-1507, by Mr. Kirk Strang and Ms. Malina R.P. Fischer, appearing on behalf of the Complainant Town of Madison.

Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, by Mr. Gordon E. McQuillen, appearing on behalf of Respondent WPPA/LEER.

Lawton & Cates, S.C., 214 West Mifflin Street, P. O. Box 2965, Madison, Wisconsin 53701-2965, by Mr. John C. Talis and Mr. P. Scott Hassett, appearing on behalf of Respondent Christian Thomsen.

ORDER DENYING PRE-HEARING MOTION TO DISMISS

On June 7, 1995, the Town of Madison filed a complaint with the Wisconsin Employment Relations Commission in which the Town alleged that the Wisconsin Professional Police Association (WPPA) and Christian Thomsen have engaged in prohibited practices. 1/ On February 6, 1996, the Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. On February 6, 1996, Respondent Thomsen, by his counsel, filed a Motion to

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1/ Complainant alleges that WPPA is the Respondent, but the Examiner is persuaded that the Respondent is more correctly identified as WPPA/LEER.

Dismiss the unfair labor charge against Respondent Thomsen. On February 23, 1996, the Complainant filed a Statement Opposing Respondent Thomsen's Motion to Dismiss. On April 1, 1996, Respondent WPPA/LEER filed an Answer to the Complaint. On April 18, 1996, Respondent Thomsen, by his counsel, filed a Reply Brief in Support of Motion to Dismiss. On April 29, 1996, the Complainant filed a Statement Opposing Respondent Thomsen's Supplemental Motion to Dismiss. The Examiner, having considered the record and the arguments of the parties, makes and issues the following

ORDER

Respondent Christian Thomsen's pre-hearing Motion to Dismiss is denied.

Dated at Madison, Wisconsin, this 14th day of June, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

TOWN OF MADISON (POLICE)

MEMORANDUM ACCOMPANYING  
ORDER DENYING PRE-HEARING MOTION TO DISMISS

BACKGROUND

On June 7, 1995, Complainant filed a complaint with the Wisconsin Employment Relations Commission. The gravamen of the complaint is that, by refusing to execute a Memorandum of Understanding which accurately reflects a settlement agreement reached during a grievance mediation session mandated by the collective bargaining agreement, Respondents have refused to execute a collective bargaining agreement, refused to bargain in good faith, and/or violated the terms of a collective bargaining agreement previously agreed upon. Complainant alleges that the conduct of Respondents violates Sec. 111.70(3)(b)3 and 4, Stats., and Sec. 111.70(3)(c), Stats. On February 6, 1996, Respondent Thomsen filed a pre-hearing Motion to Dismiss, which Motion is the subject of this Order and Accompanying Memorandum.

POSITIONS OF THE PARTIES

Respondent Christian Thomsen

In the Motion to Dismiss filed on February 6, 1996, Respondent Thomsen argues that the complaint should be dismissed because 29 U.S.C. 158 prohibits the filing of an unfair labor charge against an individual; alleges that he refused to sign the written Memorandum of Understanding because it did not accurately reflect the understanding and agreement between the parties; and argues that, inasmuch as Respondent Thomsen was not acting as an agent of WPPA/LEER when he refused to sign the written Memorandum of Understanding, Respondent Thomsen was acting as an individual and, as such, cannot commit an unfair labor practice.

Respondent Thomsen's Reply Brief in Support of Motion to Dismiss asserts that Respondent Thomsen cannot be found to have violated Sec. 111.70(3)(b)3 or 4, Stats., because he is not an "individual" within the meaning of the prefatory statement of Sec. 111.70(3)(b); that "individuals" within the meaning of Sec. 111.70(3)(b) are agents of the collective bargaining representative; that Respondent Thomsen is not an agent of the collective bargaining representative; that an individual who is not an agent of the collective bargaining representative does not have a duty to bargain with the Complainant and, therefore, cannot be found to have breached the statutory duty to bargain in violation of Sec. 111.70(3)(b)3, Stats.; that, under Wisconsin law, the collective bargaining representative, and not the individual grievant, owns the grievance; that WPPA/LEER, who has authority to settle the grievance, ultimately withdrew

the grievance; that the Memorandum of Understanding relied upon by Complainant asks the union and/or grievant to release the employer from state or federal law claims which are external to the collective bargaining agreement; that claims which are external to the collective bargaining agreement cannot be waived in collective bargaining; and that the Memorandum of Understanding is not a collective bargaining agreement within the meaning of Sec. 111.70(3)(b)4, Stats. Respondent Thomsen further asserts that, since Respondent Thomsen cannot be found to have violated Sec. 111.70(3)(b)3 and 4, Stats., the derivative violation of Sec. 111.70(3)(c), Stats., must also be dismissed.

Respondent Thomsen denies that his Motion to Dismiss is offered in bad faith and argues that he has relied upon substantial, and often controlling authority, for the positions taken. Respondent Thomsen asserts, therefore, that Complainant's request for attorney fees must be denied.

#### Respondent WPPA/LEER

Respondent WPPA/LEER filed an Answer to the Complaint in which Respondent WPPA/LEER asserts that the Memorandum of Understanding relied upon by the Complainant is a tri-lateral agreement between the Town, WPPA/LEER and Christian Thomsen which, on its face, requires the signature of each of the three parties; that Respondent WPPA/LEER can represent Respondent Thomsen only as to rights conferred upon Respondent WPPA/LEER by the collective bargaining agreement and by relevant Wisconsin labor law; that elements of the Memorandum of Understanding purport to resolve disputes between Respondent Thomsen and the Complainant as to matters over which Respondent WPPA/LEER cannot exercise agency authority and has no right to negotiate pursuant to Sec. 111.70, Stats.; that Respondent WPPA/LEER has no authority to enter into an agreement over non-labor matters; that Respondent WPPA/LEER does not have any power to compel Respondent Thomsen to sign the Memorandum of Understanding or to sign the Memorandum of Understanding on behalf of Respondent Thomsen; that Respondent WPPA/LEER has notified Complainant that it was withdrawing the grievance and, by such conduct, made the draft Memorandum of Understanding moot as to the grievance; that Respondent WPPA/LEER no longer has any responsibility to execute the Memorandum of Understanding; and that the Complaint should be dismissed as to Respondent WPPA/LEER for lack of WERC jurisdiction and failure to state a claim upon which relief can be granted.

#### Complainant

Complainant argues that a pre-hearing motion to dismiss can be granted only if the facts alleged in the complaint, assumed to be true, would fail to make out a violation of MERA; that since the Motion to Dismiss incorporates and depends upon challenges to facts alleged in the

complaint, the Motion to Dismiss is fatally defective; that ERB 10.11 authorizes motions and statements in opposition, but does not authorize reply briefs; that Respondent Thomsen's reply brief raises new arguments in an attempt to rehabilitate the baseless Motion to Dismiss; and that the Examiner should strike the "Reply Brief" of Respondent Thomsen, except for the portion which purports to address the attorney fees issue.

Complainant further argues that the Motion to Dismiss filed on February 6, 1996, raises only the question of whether an individual employee can be charged with a prohibited practice pursuant to 29 U.S.C. 158; that the Wisconsin Employment Relations Commission is not charged with interpreting that statute; and that, since this claim is frivolous, the Motion to Dismiss should be denied and Complainant should be awarded reasonable attorney fees.

Complainant asserts that the Municipal Employment Relations Act (MERA) is applicable to this complaint; that MERA makes it a prohibited practice "for a municipal employee, individually, or in concert with others" to refuse to bargain collectively (emphasis added); that, under MERA, the refusal to bargain collectively includes the refusal to execute a collective bargaining agreement previously agreed upon; and, thus, the language of MERA clearly permits a prohibited practice charge to be filed against an individual.

Complainant further asserts that, under Commission case law, a settlement of a grievance, be it oral or written, is a collective bargaining agreement within the meaning of MERA; that to hold that a prohibited practice charge cannot be filed against an individual for failure to execute a settlement agreement, would effectively overrule WERC decisions in this area; and that, if an employee cannot be required to sign a settlement agreement, the contract provision mandating grievance mediation and the duty to bargain in good faith would be frustrated; and that such a policy would conflict with the purpose of MERA, which is to encourage the voluntary settlement of disputes through collective bargaining.

Complainant denies that it has ever argued that, as a general matter, individual employees have a duty to bargain collectively and asserts that it participated in a grievance mediation session required by the collective bargaining agreement; that Respondent Thomsen reneged on the settlement agreement; that to allow Respondent Thomsen to renege on an agreement which settles a grievance would be to overturn WERC precedent which treats such settlements as collective bargaining agreements; and that the case relied upon by Respondent Thomsen does not state that claims based upon external law cannot be precluded by a collective bargaining agreement, or by grievance settlements pursuant to a collective bargaining agreement.

## DISCUSSION

As Complainant argues, the Reply Brief of Christian Thomsen in Support of Motion to Dismiss raises issues which were not raised in the Motion to Dismiss filed on February 6, 1996.

The effect of the "Reply Brief" is to amend the Motion to Dismiss. The provision of the administrative code relied upon by Complainant does not preclude Respondent Thomsen from amending his Motion to Dismiss.

Complainant requested, and was granted, an opportunity to respond to the new issues raised in the "Reply Brief." Contrary to the argument of the Complainant, the Examiner does not consider it appropriate to strike any portion of the "Reply Brief."

Turning to the merits of the Motion to Dismiss, Sec. 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 require the Respondents to execute the Memorandum of Understanding, which Memorandum waives a variety of claims arising out of Respondent Thomsen's employment with the Complainant. Complainant's interest in having the Memorandum of Understanding executed is "substantial" and, as the Answer and Motion to Dismiss demonstrate, Complainant's right to have the Memorandum of Understanding executed by the Respondents is "controverted by another party." Thus, this is a contested case within the meaning of Sec. 227.01(3).

As Examiner McLaughlin stated in Oneida County: 2/

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

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2/ 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 its 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)

Complainant alleges that it is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.; that Respondent Thomsen is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.; that WPPA is a labor organization within the meaning of Sec. 111.70(1)(h), Stats, and is the exclusive certified collective bargaining representative of a bargaining unit of employees of the Complainant; and that Respondent Thomsen was a member of this bargaining unit, as well as the President of the WPPA local. Complainant further alleges that Respondent Thomsen filed a grievance on his termination from employment; that, during a grievance mediation session required by the collective bargaining agreement, Complainant and both Respondents reached a settlement agreement; that the Respondents have refused to execute the settlement agreement; and that, by such conduct, Respondents have refused to execute a collective bargaining agreement, refused to bargain in good faith, and/or violated the terms of a collective bargaining agreement previously agreed upon contrary to Sec. 111.70(3)(b)3 and 4, and 3(c), Stats.

As Complainant argues, the Commission's jurisdiction over the prohibited practices alleged herein is governed by Sec. 111.70, Stats., and not by 29 U.S.C. 158. Sec. 111.70(3)(b), Stats., states that:

It is a prohibited practice for a municipal employee, individually or in concert with others:

...

3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or certified exclusive collective bargaining

representative of employees in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously agreed upon.

4. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them.

...

As Complainant further argues, grievance settlement agreements are collective bargaining agreements within the meaning of MERA. 3/ Under Commission case law, a collective bargaining representative who refuses to execute a grievance settlement agreement violates Sec. 111.70(3)(b)3, Stats., and a collective bargaining representative who violates a grievance settlement agreement violates Sec. 111.70(3)(b)4, Stats. 4/

Respondent WPPA/LEER argues that, since it has notified the Complainant that it was withdrawing the grievance, the prohibited practice claim against Respondent WPPA/LEER is moot.

The Examiner disagrees. If Complainant and Respondent WPPA/LEER have entered into a valid grievance settlement agreement, then Respondent WPPA/LEER, as the recognized or certified

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3/ Brown County, Dec. No. 27624-A (Nielsen, 4/93); Oneida County, Dec. No. 15374-B (Yaeger, 12/77), aff'd, Dec. No. 15374-C (WERC, 6/78)

4/ Madison Metropolitan School District, Dec. No. 17514-C (McGilligan, 2/82); aff'd, Dec. No. 17514-D (WERC, 2/83).



exclusive collective bargaining representative, would have a statutory duty to execute the settlement agreement and a statutory duty to not violate that settlement agreement. 5/ Respondent WPPA/LEER cannot avoid these statutory duties by unilaterally withdrawing the grievance which gave rise to the settlement agreement. The Examiner is satisfied that MERA provides the Commission with jurisdiction over the allegation that Respondent WPPA/LEER has violated Sec. 111.70(3)(b)3 and 4, Stats.

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5/ Respondent WPPA/LEER claims to be the sole and exclusive collective bargaining representative of the bargaining unit of Complainant's employees which included the position which had been occupied by Respondent Thomsen.

As set forth in the proviso to Sec. 111.70(3)(b)3, Stats., it is the recognized or certified exclusive collective bargaining representative of municipal employees which has the statutory duty to bargain with a municipal employer. 6/ Thus, the Examiner is persuaded that an "individual municipal employee" within the meaning of Sec. 111.70(3)(b)3, Stats., is one who is acting on behalf of the recognized or certified exclusive collective bargaining representative.

Complainant alleges that Respondent Thomsen was President of the WPPA/LEER local,

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6/ As Examiner McLaughlin has stated in Amery School District, Dec. No. 26138-A (2/90):

Section 111.70(1)(a), Stats., defines "Collective bargaining" as the "mutual obligation of a municipal employer . . . and the representatives of its employees . . . to resolve questions arising under . . . an agreement, with respect to wages, hours and conditions of employment". Section 111.70(3)(a)4, Stats., enforces the duty defined in Sec. 111.70(1)(a), Stats., by making a refusal of a municipal employer to "bargain collectively with a representative of a majority of its employees" a prohibited practice. The duty defined and enforced by the Municipal Employment Relations Act thus extends to the District as a municipal employer and to the NUE as the majority representative of the bargaining unit composed of the District's teachers. In the absence of a valid defense, collective bargaining by a municipal employer with individual members of a bargaining unit is proscribed by Sec. 111.70(3)(a)4, Stats.

i.e., Town of Madison Professional Police Association (TMPPA). Thus, the complaint, on its face, presents a claim that Respondent Thomsen has acted on behalf of the recognized or certified exclusive collective bargaining representative. The Examiner is satisfied that MERA provides the Commission with jurisdiction to hear and decide the allegation that Respondent Thomsen, acting on behalf of the recognized or certified exclusive collective bargaining representative, has violated Sec. 111.70(3)(b)3, Stats.

On its face, the complaint presents a claim that Respondent Thomsen, acting individually or on behalf of the certified exclusive collective bargaining representative, has violated Sec. 111.70(3)(b)4, Stats. Sec. 111.70(3)(b)4, Stats., does not contain the proviso which is present in Sec. 111.70(3)(b)3, Stats. Moreover, it has been held that a grievant who violates a grievance settlement agreement also violates Sec. 111.70(3)(b)4, Stats. 7/ The claim that Respondent Thomsen, acting as an individual grievant, or on behalf of the certified exclusive collective bargaining representative, has violated Sec. 111.70(3)(b)4, Stats., does state a cause of action under MERA.

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7/ South Shore School District, Dec. No. 16935-A (Hawks, 12/79); aff'd by operation of law, Dec. No. 16935-B (WERC, 1/80).

The complaint also alleges a 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 employers or municipal employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b)." Respondent WPPA/LEER and Respondent Thomsen are each arguably a "person" under this subsection. 8/ If Respondents acted to violate Sec. 111.70(3)(b)3 and/or 4, Stats., it is at least conceivable that Respondents could have violated this section. The allegation is, then, sufficient to withstand the motion to dismiss.

### Summary

Liberally construed, the complaint alleges a cause of action under Sec. 111.70(3)(b)3 and 4, and (3)(c), Stats., against each Respondent which, if proved, would entitle Complainant to relief. Respondents' challenges to the agency status of Respondent Thomsen, the scope of the grievance settlement agreement, the accuracy of the Memorandum of Understanding, and the validity of the grievance settlement agreement raise questions of fact, requiring an evidentiary hearing. It is not appropriate to dismiss the complaint or to dismiss either Respondent as a party to the complaint. Accordingly, Respondent Thomsen's Motion to Dismiss is denied.

The Complainant has requested an award of attorney fees on the basis that Respondent Thomsen's Motion to Dismiss is frivolous. The Commission has held that attorney fees are warranted only in exceptional cases where the allegations or defenses are frivolous, as opposed to debatable. 9/ The Examiner is persuaded that Respondent Thomsen has raised arguments which are debatable, as opposed to frivolous. Accordingly, Complainant's request for reasonable attorney fees is denied.

Dated at Madison, Wisconsin, this 14th day of June, 1996.

### WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

9/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90) citing Madison Metropolitan School District, Dec. No. 16471-D (WERC, 5/81).