

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2494, AFSCME, AFL-CIO

Complainant,

vs.

WAUKESHA COUNTY

Respondent.

Case 139  
No. 53236 MP-3093  
Decision No. 28726-B

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, by Mr. Bruce F. Ehlke, 217 South Hamilton, P. O. Box 2155, Madison, Wisconsin, 53701-2155, for Local 2494, AFSCME, AFL-CIO, referred to below as the Union.  
Michael, Best & Friedrich, Attorneys at Law, by Mr. Marshall R. Berkoff, 100 East Wisconsin Avenue, Milwaukee, Wisconsin, 53202-4108, for Waukesha County, referred to below as the County.

ORDER DISMISSING PETITION FOR REVIEW

On October 24, 1995, Local 2494, AFSCME, AFL-CIO, filed a complaint against Waukesha County alleging the County had committed prohibited practices within the meaning of the Secs. 111.70(3)(a)1 and 5, Stats., by violating a labor agreement between the parties and refusing to accept the terms of an arbitration award. The parties subsequently agreed to submit written argument on the question of whether the complaint should be deferred to grievance arbitration.

On July 22, 1996, Examiner Richard B. McLaughlin issued an Order Denying Motion to Defer Pending Evidentiary Hearing. In the Memorandum accompanying his Order, the Examiner stated:

The County's Motion questions whether the complaint's allegation should be heard by an examiner or by an arbitrator. Under Commission case law, this question cannot be determined without an evidentiary hearing.

No. 28726-B

...

In sum, hearing on the complaint is appropriate to determine if there is an identity of parties, issue, remedy, and fact between the Award and Grievance #2. If claim preclusion is appropriate, the Award can be enforced under Sec. 111.70(3)(a)5, Stats. If claim preclusion is not appropriate, then Sec. 111.70(3)(a)5, Stats., is not available to enforce the Award, and the merits of Grievance #2 must be determined by a grievance arbitrator.

...

On August 13, 1996, the County filed a Petition for Review with the Wisconsin Employment Relations Commission asking that the Commission review the Examiner's Order. The parties thereafter filed written argument in support of and in opposition to the Petition, the last which was received November 1, 1996.

The Commission has considered the matter and concluded that it will not exercise its discretionary authority to review the Examiner's decision.

NOW, THEREFORE, it is

ORDERED

The Petition for Review is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin,  
this 27th 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

No. 28726-B

MEMORANDUM ACCOMPANYING  
ORDER DISMISSING PETITION FOR REVIEW

The Examiner's decision is not a "final" disposition of the parties' dispute as to which a non-discretionary right to Commission review exists. 1/ At this juncture, the Examiner has neither dismissed the complaint nor concluded that it has merit. He has only determined that the complaint should proceed to hearing. 2/ Under these circumstances, we do not find it appropriate to exercise our discretionary power 3/ to entertain the Petition for Review of the Examiner's interlocutory decision. 4/ Therefore, we have dismissed the Petition.

If the case is ultimately decided by the Examiner in a final manner which either party believes to be incorrect, either party is free to file a Petition for Review at that time raising whatever issues that party deems appropriate.

Given under our hands and seal at the City of Madison, Wisconsin,  
this 27th day of November.

---

1/ G & H Products, Inc., Dec. No. 17630-B (WERC, 1/82); Jefferson Board of Education, Dec. No. 13648-B (WERC, 1/76)

2/ The standard for determining the merit of a pre-hearing motion to dismiss is strict and is summarized in Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 15915-B (Hoonstra with final authority for WERC, 12/77), at 3. as follows:

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.

We note the County and Union disagree over whether the documents and affidavit accompanying the Petition form a sufficient factual basis upon which the legal issues can be decided.

3/ In State of Wisconsin, Dec. No. 24109 (WERC, 12/86), we noted:

The Commission is not well equipped under Chapters 227 or 111, Stats. or with the administrative resources to entertain or to encourage extensive pre-hearing motion practice . . . .

4/ State of Wisconsin, Dec. No. 11457-C, D (WERC, 3/73), aff'd State of Wisconsin v. WERC, 65 Wis.2d 624 (1974); Milwaukee County, Dec. No. 19545-D (WERC, 3/85); Wisconsin Dells School District, Dec. No. 25997-A (WERC, 6/89); City of Beloit, Dec. No. 25917 (WERC, 10/89). No. 28726-B

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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