

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS LOCAL 953,

Complainant,

vs.

CITY OF MEDFORD,

Respondent.

Case 28

No. 53935 MP-3152

Decision No. 28748-A

CITY OF MEDFORD,

Complainant,

vs.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 953,

Respondent.

Case 29

No. 54278 MP-3192

Decision No. 28795-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, by Ms. Marianne Goldstein Robbins, appearing on behalf of International Brotherhood of Electrical Workers Local 953.

Ruder, Ware & Michler, Attorneys at Law, 500 Third Street, P. O. Box 8050, Wausau, Wisconsin 54402-8050, by Mr. Jeffrey T. Jones, appearing on behalf of the City of Medford.

No. 28748-A

No. 28795-A

ORDER GRANTING PRE-HEARING MOTION TO HOLD IN ABEYANCE
AND DENYING PRE-HEARING MOTION TO DISMISS
AND DENYING PRE-HEARING MOTION FOR SUMMARY JUDGMENT

On March 19, 1996, the International Brotherhood of Electrical Workers Local 953, hereafter Union, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, hereafter Case 28, in which it alleges that the City of Medford, hereafter City, has violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by unilaterally renewing a contract for payroll services with Anderson Tachman and by refusing to provide the Union with advance notice and opportunity to bargain over any further reduction in hours of Cathi Jackson. On June 25, 1996, the City filed an Answer to the complaint filed by the Union denying that it has violated Secs. 111.70(3)(a)1, 3 and 4, Stats. On July 9, 1996, the City filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, hereafter Case 29, in which the City alleges that the Union has violated Sec. 111.70(3)(b)3, Stats., and other applicable statutory provisions, by filing the prohibited practice complaint in Case 28. On July 9, 1996, the City filed a Motion for Summary Judgment, a Motion to Dismiss, and a Motion to Hold in Abeyance on the complaint filed in Case 28. The Commission has appointed Coleen A. Burns, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in Case 28 and Case 29. On August 1, 1996, the Union filed a brief in response to the City's motions, requesting that the motions be denied. The Examiner being fully advised in the premises, makes and issues the following

ORDER

1. The City's Motion to Dismiss is hereby denied.
2. The City's Motion for Summary Judgment is hereby denied.
3. The City's Motion to Hold in Abeyance is hereby granted.
4. The hearing in Case 28 and Case 29, previously scheduled for August, 29, 1996 at 10:00 a.m. in Medford, Wisconsin, is hereby indefinitely postponed pending the issuance of the Examiner decision in City of Medford, Case 26, No. 52399, MP-3013.

Dated at Madison, Wisconsin, this 22nd day of August, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

CITY OF MEDFORD

MEMORANDUM ACCOMPANYING
ORDER GRANTING PRE-HEARING MOTION TO HOLD IN ABEYANCE
AND DENYING PRE-HEARING MOTION TO DISMISS
AND DENYING PRE-HEARING MOTION FOR SUMMARY JUDGMENT

In the Motion to Dismiss, the City argues that the portion of the complaint in Case 28 which alleges that the City committed a prohibited practice by refusing to provide 15 to 30 days notice of any meeting at which City officials might consider a future reduction in the work hours of Cathi Jackson fails to state a cause of action under Sec. 111.70(3)(a), Stats., because such a meeting may never be conducted. In the Motion for Summary Judgment, the City argues that the parties' collective bargaining agreement addresses the reduction of work hours and layoff of employees; that the duty to bargain collectively during the term of a labor agreement does not extend to mandatory subjects of bargaining already addressed by a labor agreement or to matters on which a union has waived its right to bargain; and that, as a matter of law, the City is entitled to Summary Judgment with respect to whether it committed a prohibited practice by refusing to agree to provide the Union with 15 to 30 days advance notice of any City meeting at which the possible reduction of an employee's work hours may be discussed.

In the Motion to Hold in Abeyance, the City argues that the Union and the City are parties to a prohibited practice proceeding in Case 26, No. 52399, MP-3013; that Case 26 has been heard and fully briefed; that to proceed to hearing on Case 28 would be to re-litigate many of the same issues and evidence of Case 26; that such re-litigation would be unnecessary following the issuance of the decision in Case 26; and, thus, the hearing in Case 28 should be held in abeyance pending the issuance of the decision in Case 26. The Union opposes all of the City's pre-hearing motions.

Procedurally, the Commission is bound both by the provisions of Sec. 111.07, Stats., 1/ and by Chapter 227. Both tend to encourage the granting of hearing.

Section 111.07(2)(a), Stats., propels complaints toward a hearing of "not less than 10 nor more than 40 days after the filing." Although this has been found to be a waivable right, the provision does point the Commission toward prompt hearings.

Chapter 227 reinforces a statutory preference for the granting of a hearing. Complaints of

1/ Section 111.70(4)(a), Stats., makes the procedures of Sec. 111.07 applicable "in all cases involving prohibited practices under this subchapter."

prohibited practice are contested cases under Sec. 227.01(3), Stats. Section 227.44(1), Stats., states in such cases "all parties shall be afforded an opportunity for hearing." That Sec. 227.42, Stats., provides a right to hearing for certain cases not otherwise meeting the Sec. 227.01(3), Stats., definition of a contested case indicates a legislative intent in favor of processing matters, such as the complaint, toward hearing. The Commission has itself noted it "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." 2/

These general considerations, however, do not establish that hearing cannot be denied through a pre-hearing motion, but rather, indicate that such motions must be granted with concern for the statutory rights to a hearing. 3/ As Examiner McLaughlin stated in Oneida County: 4/

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. 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

2/ State of Wisconsin, Department of Employment Relations, Dec. No. 24109 (WERC, 12/86) at 8.

3/ See Moraine Park Technical College et. al., Dec. No. 25747-B (McLaughlin, 3/89), aff'd Dec. No. 25747-D (WERC, 1/90).

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

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)

In the complaint filed in Case 28, the Union alleges that the City has violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by unilaterally renewing a contract for payroll services with Anderson Tachman and by refusing to provide the Union with advance notice and opportunity to bargain over any further reduction in hours of Cathi Jackson.

The allegation that the City has violated Secs. 111.70(3)(a)1, 3 and 4, Stats., states a cause of action under the Municipal Employment Relations Act. The conduct which gives rise to the complaint is alleged to have occurred in November of 1995, and January of 1996, and, thus, falls within the one year statute of limitations period.

Liberal construed, the complaint filed in Case 28 alleges a timely cause of action under Secs. 111.70(3)(a)1, 3 and 4, Stats., which, if proved, would entitle the Union to relief. 5/ Accordingly, the undersigned has denied the City's pre-hearing Motion to Dismiss and the City's pre-hearing Motion for Summary Judgement.

City of Medford, Case 26, No. 52399, MP-3013, hereafter Case 26, is pending before a Commission Examiner. 6/ The complaint filed in Case 26 alleges, inter alia, that the City violated Secs. 111.70(3)(a)1, 3 and 4, Stats., when it subcontracted payroll work to Anderson Tachman and reduced the hours of Cathi Jackson.

The complaint in Case 28 alleges that the City has violated Secs. 111.70(3)(a)1, 3 and 4, Stats., by unilaterally renewing the contract for payroll services with Anderson Tachman and by

5/ As the Union argues, the City's Motion to Dismiss and Motion for Summary Judgment have focused on the allegation that the City has violated Sec. 111.70(3)(a)4, Stats., and have not addressed the alleged violation of Sec. 111.70(3)(a)1 and 3, Stats. Moreover, the City's argument that there has been a waiver of the statutory duty to bargain raises a question of fact, requiring an evidentiary hearing.

6/ The case has been heard and briefed.

refusing to provide the Union with advance notice and opportunity to bargain over any further reduction in hours of Cathi Jackson.

ERC 12.04(1) requires that "[h]earings shall be limited . . . to the litigation of . . . genuine issues of fact or law raised by the parties and remaining for disposition." The undersigned is persuaded that issues raised in Case 26 are closely related to, and may be dispositive of, issues raised in the present case.

By delaying the hearing on Case 28 until such time as the Commission Examiner issues a decision in Case 26, the undersigned will be limiting the hearing on Case 28 to genuine issues of fact and law remaining for disposition. Accordingly, the undersigned has granted the City's Motion to Hold in Abeyance.

In Case 29, the City filed a cross complaint in which the City alleges that the Union's action in filing the prohibited practice complaint in Case 28 was taken for the purpose of intimidating and coercing City officials to not consider or further reduce the work hours of Cathi Jackson. Given the relationship between the City's cross complaint and the Union's complaint, the undersigned is persuaded that the cross complaint can be more effectively processed by hearing Case 28 and 29 together. Thus, the hearing on Case 29 has also been postponed until such time as the Commission Examiner issues a decision in Case 26.

Dated at Madison, Wisconsin, this 22nd day of August, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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