

DISTRICT IV
Office of the Clerk
COURT OF APPEALS
110 E. MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
WEB SITE: www.courts.state.wi.us

Cornelia G. Clark
Clerk

July 24, 2000

To:

Hon. C. William Foust
Trial Court Judge
City-County Bldg.
210 Martin Luther King, Jr. Blvd.
Madison, WI 53709

David C. Rice
Asst. Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Judith A. Coleman, Trial Court Clerk
Rm GR-10, City-County Bldg
210 Martin Luther King, Jr. Blvd.
Madison, WI 53709

John C. Talis
Shneidman Myers Dowling Blumenfield
Ehlke
P.O. Box 2155
Madison, WI 54701-2155

Scott N. Herrick
Herrick Kasdorf Dymzarov &
Twietmeyer
P.O. Box 169
Madison, WI 53701-0169

Curtis A. Witynski
League of Wisconsin Municipalities
202 State St., #300
Madison, WI 53703-2215

Larry W. O'Brien
Asst City Attorney
City County Bldg., #401
Madison, WI 53709

[Decision No. 28920-E]

[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

You are hereby notified that the Court has entered the following order:

99-0500 City of Madison, et al. v. Wisconsin Employment
 Relations Commission, et al. (L.C. #98-CV-1397)

Before Dykman, P.J., Eich and Vergeront, JJ.

The City of Madison takes this appeal from an order affirming the WERC's decision that it must arbitrate a fire fighter's grievance concerning a personnel decision

by the fire chief. After the time for appeal expired, the City Board of Police and Fire Commissioner (PFC) moved to intervene as an appellant. This court denied that motion. However, the Wisconsin Supreme Court accepted review, reversed our order, and remanded to this court with directions to consider the PFC's motion to intervene under WIS. STAT. RULE 809.13 (1997-98),¹ incorporating the rules of mandatory and permissive intervention contained in WIS. STAT. § 803.09. Upon review of the PFC motion and the response by IAFF Local 311, and applying the standard set forth in § 803.09, we conclude that the PFC has not shown sufficient grounds to intervene as an appellant in this appeal.

Firefighter Chris Gentili was promoted by the chief on January 1, 1995. A PFC Rule authorized the chief to demote him to his former rank at any time within 12 months, without any right of appeal to the PFC. At the end of the eleventh month, the chief demoted Gentili to his prior rank. The firefighters' union filed a grievance which was denied. The PFC denied review and the City refused arbitration. On the union's complaint, WERC ordered the City to arbitrate the grievance.

On judicial review, the trial court affirmed the WERC decision. The union contract with the City provided that "any dispute with respect to management rights shall not in any way be subject to arbitration but any grievance with respect to the reasonableness of the application of said management rights may be subject to the grievance procedure contained therein." The trial court concluded that this provision required arbitration as the reasonableness of the demotion and that no other provision

¹ All references to the Wisconsin Statutes are to the 1997-98 version.

of the contract excluded it. Neither was it excluded by case law or public policy. The court's decision notes that "the board [PFC] has taken itself out of the picture, ... the PFC informed the union that it had no role to play in this situation until the end of the probationary period.... In fact, it is the City's position that the chief's decision is not subject to approval by anyone...." The PFC did not participate in the administrative nor the trial court proceedings.

WISCONSIN STAT. § 803.09 provides that intervention is mandated "when the movement claims an interest relating to the property or transaction ... and ... is so situated that the disposition of the action may as a practical matter impair or impede the movement's ability to protect that interest, unless the movement's interest is adequately represented by existing parties." If the movant cannot meet this standard, the court may permit intervention, in its discretion, if the intervenor's claim or defense and the main action have a question of law or fact in common.

"The interest which entitles one to intervene in a suit between other parties [as a matter of right] must be an interest of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment." *Lodge 78, International Association of Machinist v. Nickel*, 20 Wis. 2d 42, 46, 121 N.W.2d 297 (1963). Here, the PFC will neither gain nor lose anything of a "direct and immediate character" by the ultimate disposition of this appeal. Nothing it did or did not do in Gentilli's case is subject to review. No mandate of this court will require anything of the PFC, nor affect its supervisory or role making authority. The PFC's real concern is with

the potential precedential affect if our decision is published.² That is not a direct and immediate interest in the particular outcome of this particular case that justifies the PFC's participation as an appellant.

Additionally, the PFC allowed the City to defend against the union's claim in the administrative and circuit court proceedings, and has not shown why the City cannot continue to represent the PFC's concerns in appeal. "When determining whether a parties representation is deemed adequate we look to see if there is a showing of collusion between the representative and the opposing party; if the represented interest is adverse to that of the proposed intervenor; or if the representative fails in the fulfillment of his duty. *Armanda Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 476, 516 N.W.2d 357 (1994). The PFC has not claimed, nor could it reasonably claim, that the City has colluded with the WERC or the union, that its interest is adverse to the PFC, or that it has failed in its duty to defend against the union's claim.

The PFC has also failed to demonstrate grounds for permissive intervention. The PFC has no claim to prosecute. Nor does it have a defense to present, because its decisions and authority are not challenged in this proceeding. "A federal or state governmental officer or agency" may also be permitted to intervene when a party to an action relies upon any statute, executive order or rule administered by the officer or

² The PFC's motion states that "both probation itself and the more general relationship of collective bargaining agreements and WERC proceedings to PFC functions are at issue, and the disposition of this case will have serious impact on the PFC, indeed on all such board's throughout the state." That may be true only if our decision becomes precedent through publication.

agency. Wis. Stat. § 803.09(2). We reject the PFC's contention that it is a federal or state agency and must be allowed to intervene as such. It is a municipal agency.

IT IS ORDERED that the PFC's motion to intervene as an appellant is denied for the reasons stated in this order.

Cornelia G. Clark
Clerk of Court of Appeals