

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CRAIG MARCHANT, Complainant,

vs.

**DEPARTMENT OF EMPLOYMENT RELATIONS (UW HOSPITAL AND CLINICS)
and COUNCIL 24, WSEU LOCAL 1942, AFSCME, AFL-CIO**, Respondents.

Case 435
No. 54931
PP(S)-269

Decision No. 29093-B

Appearances:

Mr. Craig Marchant, 101 West 3rd Street, Waunakee, Wisconsin 53597, appearing on his own behalf.

Lawton & Cates, S.C., by **Attorney P. Scott Hassett**, 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of Council 24, WSEU, Local 1942, AFSCME, AFL-CIO.

Attorney David J. Vergeront, Legal Counsel, Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of UW Hospital and Clinics.

**ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT,
MODIFYING EXAMINER'S CONCLUSIONS OF LAW, AND
AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S ORDER**

On August 13, 1998, Examiner Sharon Gallagher issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she concluded that Respondents had not committed any unfair labor practices within the meaning of the State Employment Labor Relations Act. She dismissed the complaint and because she further concluded the complaint was frivolous, she ordered Complainant to pay attorney's fees and costs in an amount not to exceed \$1,500.00 per Respondent.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84(4), Stats. The parties thereafter filed briefs in support of and opposition to the petition, the last of which was received on October 14, 1998. Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

- A. Examiner Findings of Fact 1–17 are affirmed.
- B. Examiner Finding of Fact 18 is modified by deletion of the sentence which reads:

As Complainant provided no evidence to support its allegation that a violation of the duty of fair representation occurred, Complainant's claims are frivolous.

- C. Examiner Conclusions of Law are modified to read:

Respondents did not commit any unfair labor practices within the meaning of Secs. 111.84(1)(a)(c)(d) or (e), Stats.

- D. Examiner's Order is affirmed to the extent it dismissed the complaint and reversed to the extent it directed Complainant to pay attorney's fees and costs to Respondents.

Given under our hands and seal at the City of Madison, Wisconsin this 24th day of November, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

Department of Employment Relations (UW Hospital and Clinics)

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING AND MODIFYING EXAMINER'S FINDINGS OF FACT,
MODIFYING EXAMINER'S CONCLUSIONS OF LAW, AND
AFFIRMING IN PART AND REVERSING IN PART EXAMINER'S ORDER

The focus of Complainant's appeal is that part of the Examiner's Order which directs him to pay costs and attorney's fees to Respondents. Complainant contends that the Examiner lacked the statutory authority to order payment of attorney's fees and costs and that, even if such authority exists, his complaint was not frivolous. Respondents assert that the award of attorney's fees and costs was appropriate.

We have reviewed the matter and conclude that while dismissal of the complaint was appropriate, the award of attorney's fees and costs was not.

The Commission's view as to the award of attorney's fees and costs has evolved over the years. In MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 16471-D (WERC, 5/81), AFF'D IN PERTINENT PART, MTI V. WERC, 115 WIS.2D 623 (CTAPP. 1983), the Commission majority stated the general view that attorney's fees would not be assessed against the "losing party" in complaint cases unless "the parties have agreed otherwise, or unless the Commission is required to do so by specific statutory language." The Commission majority indicated the only exception to this general view was where attorney's fees were necessary to make an employe whole for a breach of the duty of fair representation in the processing of an employe's grievance. SEE UNIVERSITY OF WISCONSIN-MILWAUKEE (GUTHRIE), DEC. NO. 11457-F (WERC, 12/77). The Commission majority noted that if attorney's fees were available where a party was proceeding in "bad faith," the Commission would be faced with requests that **"the defending party be granted attorney's fees and other costs, even though the Commission has no legal basis to do so."**

In MADISON, Commissioner Torosian issued a concurring opinion which indicated that he would award attorney's fees "in exceptional cases where an extraordinary remedy is justified." Torosian indicated that such a remedy would be reserved for instances in which a respondent's defense was "frivolous" rather than "debatable."

In ROCK COUNTY, DEC. NO. 23656 (WERC, 5/86), the Commission adopted the Torosian concurrence from MADISON and additionally indicated a willingness to award attorney's fees in any Commission litigation in which a party took a frivolous position.

Here, Complainant contends that the Commission lacks the statutory authority to award attorney's fees and costs to responding parties in complaint proceedings. We agree. As indicated by the Court in TATUM V. LIRC, 132 WIS.2D 411 (CTAPP 1986), an administrative agency needs statutory authority to award attorney's fees to either complaining or responding parties. Our remedial authority is set forth in Sec. 111.07(4), Stats., (which is applicable to

violations of the State Employment Labor Relations Act by virtue of Sec. 111.84(4), Stats.) and states in pertinent part:

Final orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend the person's rights, immunities, privileges or remedies granted or afforded by this subchapter for not more than one year, and require the person to take such affirmative action, including reinstatement of employes with or without pay, as the commission deems proper. Any order may further require the person to make reports from time to time showing the extent to which the person has complied with the order.

While our remedial authority under Sec. 111.07(4), Stats., is sufficiently broad to allow for the award of attorney's fees and costs in certain duty of fair representation cases (SEE UNIVERSITY OF WISCONSIN-MILWAUKEE (GUTHRIE), SUPRA; and as part of an extraordinary remedy in an exceptional case in which the responding party's defense is "frivolous" (SEE TOROSIAN MADISON SCHOOLS CONCURRENCE, ABOVE), we conclude we have no statutory authority to award attorney's fees or costs to responding parties in complaint proceedings or to any party in other types of Commission proceedings. Thus, we expressly overturn ROCK COUNTY to that extent and return to the view expressed by the Commission majority and Torosian concurrence in MADISON SCHOOLS.

Given the foregoing, we have reversed and set aside that portion of the Examiner's Order which required that Complainant pay attorney's fees and costs to Respondents.

Dated at Madison, Wisconsin this 24th day of November, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

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