STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant

vs.

RACINE UNIFIED SCHOOL DISTRICT
and THE BOARD OF EDUCATION OF
THE RACINE UNIFIED SCHOOL DISTRICT, Respondents

Case 150
No. 55059
MP-3288

Decision No. 29184-A

Appearances:

Weber & Cafferty, S.C., Attorneys at Law, 2932 Northwestern Avenue, Racine, Wisconsin 53404, by **Mr. Robert K. Weber**, on behalf of the Complainant.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, by **Mr. Douglas E. Witte**, on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER HOLDING MATTER IN ABEYANCE

On April 11, 1997, the Racine Education Association filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the Racine Unified School District and its Board of Education had interfered with, restrained and coerced Association representatives in the exercise of their duty of fair representation in violation of Sec. 111.70(3)(a)1, Stats. On September 25, 1997, the District filed its answer wherein it denied it engaged in individual bargaining in order to avoid complying with the terms of a settlement agreement and denied it committed a violation of Sec. 111.70(3)(a)1, Stats. The Commission appointed David E. Shaw, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter. Hearing in the matter was set for October 7, 1997.

On September 30, 1997, the District filed a motion to indefinitely postpone hearing in the matter on the basis that the Association had filed a complaint in Racine County Circuit Court, Case 97-CV-0963, based upon the same facts and circumstances as the complaint filed with the Commission, and a bench decision dismissing the Association's complaint in its entirety had been issued by the Circuit Court on September 29, 1997, which the District felt resolved the issues in the complaint filed with the Commission. The District's motion to postpone was granted over the Association's objection, however, the parties agreed upon a tentative hearing date pending the District's filing of a motion to dismiss and the parties' filing of briefs in response to that motion. Due to the delay in receiving the transcript of the court proceedings, that schedule was extended and the tentative hearing date was changed to December 1, 1997.

On November 4, 1997, the District filed its motion to dismiss based upon the Order of the Circuit Court in Case 97-CV-0963 dismissing the Association's court action in its entirety and with prejudice and the application of the legal doctrine of claim preclusion. On November 17, 1997, the Association filed its brief in opposition to the motion. On November 18, 1997, the District filed its reply brief in support of its motion.

Based upon the record and the arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. On April 9, 1997, the Racine Education Association, hereinafter the Association, and Todd Johnson, an individual teacher employed by the Racine Unified School District and represented by the Association, filed a "Summons" and a "Petition and Complaint For a Declaratory Judgement to Enforce a Settlement Agreement and For Provisional and Preemptory Relief In the Form of a Writ of Mandamus" against the Racine Unified School District, hereinafter the District, and its Board of Education in Racine County Circuit Court, Case 97-CV-0963, attached hereto as "Appendix A" (without attachments) and incorporated herein.

2. On April 11, 1997, the Association filed the complaint of prohibited practice in this case with the Commission against the District and its Board of Education which complaint is attached hereto as "Appendix B" (without attachments) and incorporated herein.

3. The District filed a motion for summary judgement in the proceeding in Case 97-CV-0963, and on September 29, 1997, Judge Simanek issued a bench decision in that case granting the District's motion on the basis that the case was moot. On October 21, 1997, Judge Simanek issued and Order For Judgement in which he dismissed the Association's action with prejudice. The Association has appealed the decision of the Circuit Court to the Court of Appeals.

4. The factual circumstances underlying the Association's action in Circuit Court are essentially the same as those underlying its claims in the complaint filed with the Commission in this case.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The Racine County Circuit Court has concurrent jurisdiction over allegations of violations of the Municipal Employment Relations Act (MERA) pursuant to Sec. 111.07(1), Stats., and Sec. 111.70(4)(a), Stats., and therefore is a court of competent jurisdiction with regard to the violations of MERA alleged in this complaint.

2. The decision of the Racine County Circuit Court in Case 97-CV-0963 is on appeal to the Wisconsin Court of Appeals (District II), and is therefore not a "final judgement" for the purposes of the application of the doctrine of claim preclusion.

3. With the exception of a "final judgement", the factors required for the application of the doctrine of claim preclusion are present, in that (1) there is an identity between the parties in Case 97-CV-0963 and this case, and (2) there is an identity between the causes of action in Case 97-CV-0963 and the causes of action in this case as they arose out of the same fact situation.

4. Interests of administrative efficiency require that proceedings in the complaint of prohibited practice filed by the Racine Education Association in this case be stayed and the matter held in abeyance pending the outcome of the Association's appeal in Case 97-CV-0963.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The proceedings in the complaint of the Racine Education Association filed in this case are hereby stayed and the matter is hereby held in abeyance pending the outcome of the Association's appeal of the decision in Case 97-CV-0963, Racine County Circuit Court.

Dated at Madison, Wisconsin, this 25th day of November, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER HOLDING MATTER IN ABEYANCE

District

The District has moved for dismissal of the instant complaint on the basis that, pursuant to the doctrine of claim preclusion, the Association is precluded from proceeding in this action by the Circuit Court's order granting summary judgement to the District in the Association's action filed in the court. Under the doctrine of claim preclusion, a final judgement is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings. NORTHERN STATES POWER CO. V. BUGHER, 189 Wis. 2d 541, 550 (1995). The District contends that the three elements necessary for the application of the principle of claim preclusion (formerly termed "*res judicata*"), are present in this case. The parties in the court action and this action are the same. A "final judgement" was entered in the circuit court proceeding - summary judgement is sufficient to meet requirement of a conclusive and final judgement. NORTHERN STATES, 189 Wis. 2d at 555; DEPRATT V. WEST BEND MUTUAL INS. CO., 113 Wis. 2d 306, 310-311. The allegations in this complaint could have been litigated in circuit court and there is an identity between the causes of action in the two suits. In this latter regard, the District notes that Wisconsin adopted the "transactional" approach to determining whether two suits involve the same cause of action. DEPRATT, supra, NORTHERN STATES, supra. Under that approach, if the party's claims arise from the same series of events, there will be identity of causes of action regardless of the different legal theories available or the different forms of relief that may be available. The "transaction" here is the parties' entering into the settlement agreement, the implementation of its terms and the alleged breach of that agreement. Both of the Association's complaints are based on that event and all claims should have been brought in one action.

Pursuant to Sec. 111.07(1), Stats., circuit courts have concurrent jurisdiction with the Commission over prohibited practice complaints. Even though the courts often defer such allegations to the Commission, the court can retain jurisdiction. MADISON TEACHERS, INC. V. MADISON METROPOLITAN SCHOOL DISTRICT, 197 Wis. 2d 731, 744-747 (1994). Since the prohibited practices allegations could have been litigated in a circuit court and the Circuit Court dismissed the Association's court action with prejudice, by application of the principle of claim preclusion those allegations must be deemed settled by the Court's Order.

The District also asserts that the "declaratory judgement exception" to claim preclusion does not apply in this case. That exception has an exception, i.e., when the first case includes not only a request for a declaratory judgement, but also a request for coercive relief, such as an injunction, the exception does not apply. STERIYCLE V. CITY OF DELAVAN, 929 F. Supp. 1162, 1163 (E.O. Wis., 1996), aff'd, 102 F.3rd 657 (7th Cir., 1997). In this case, the Association requested a "writ of mandamus" (coercive relief) in addition to the request for a declaratory

judgement. Therefore, the principle of claim preclusion applies and the Association's complaint in this case is barred.

In response to the Association's arguments in opposition, the District asserts that the fact that the Circuit Court did not address the issues in this case is irrelevant under the principle of claim preclusion. Claim preclusion, unlike issue preclusion, requires only that the issue could have been raised in the earlier action, not that it was in fact litigated. The District also asserts that the fact that the Association has appealed the Circuit Court's order does not make claim preclusion inapplicable. The Circuit Court's Order is a "final judgement"; if it were not, the Association could not have appealed it. As it is a "final judgement", claim preclusion applies. NORTHERN STATES, 189 Wis. 2d at 555, DEPRATT, 113 Wis. 2d at 310-311. The District also asserts that because the Commission has primary jurisdiction over prohibited practice complaints, does not mean that there are not cases where it is appropriate for a court to decide such allegations, e.g., where injunctive relief is requested and the court must address the underlying merits to decide whether an injunction is proper. The earlier case involving the parties cited by the Association was an instance where the court did not make a record on the underlying merits and only decided the injunction was not appropriate, and the merits were litigated before the Commission. Further, claim preclusion is a "defense", and the District, as a defendant, can choose whether to raise that defense or to litigate in two forums. The Association could have raised all of its allegations in Circuit Court and thereby forced the District to decide whether to have the court defer the prohibited practice charges to the Commission, but it did not do so. Whether or not the outcome in this case is fair, it is "legally appropriate". The principle of claim preclusion exists to provide an effective means of relieving parties of the cost and vexation of multiple suits. NORTHERN STATES, 189 Wis. 2d at 559.

Association

The Association begins by noting the facts in the case. The parties negotiated a settlement agreement regarding a teacher, Todd Johnson. Based upon the District's actions, the Association subsequently filed its action in Circuit Court for declaratory judgement and a "writ of mandamus" on April 9, 1997, requesting a declaratory judgement that the District violated the settlement agreement by refusing to place Johnson in a full-time teaching position and a "writ of mandamus" compelling the District to place Johnson in a full-time teaching position for the remainder of the 1996-1997 school year. On April 11, 1997, it filed the instant complaint of prohibited practice against the District alleging that the District's Board had reconsidered the settlement agreement and altered its terms as a result of individual bargaining. On September 29, 1997, Judge Simanek dismissed the court action on the basis that Johnson's appointment to a full-time teaching position for the 1997-1998 school year mooted the justiciable issues before the Court. The Association has appealed the Court's Order.

The Association asserts that the Court erred in that the Association has an interest in administering and enforcing the parties' settlement agreement and that issue was not rendered moot by the appointment of Johnson to a full-time position for the 1997-98 school year. That issue was raised by the Association to the Circuit Court during the summary judgment

proceedings. The Association has appealed the Judge's decision. Therefore, unless and until the Court of Appeals affirms the Circuit Court's action, this case should not be dismissed.

The Association also cites the transcript of the summary judgement proceedings, and asserts the District argued in those proceedings that issues of duty of fair representation and unlawful bargaining must be brought before the Commission and that it should therefore be estopped from now arguing to the contrary in this case. The Association also notes that the District has argued in previous court actions, where the Association has requested injunctive relief, that the Commission has primary jurisdiction.

Unlike the cases cited by the District for the application of claim preclusion, here there is a proper forum, i.e. the Commission, for determining violations of MERA. The Wisconsin Supreme Court has consistently recognized that, unlike the courts, the Commission has special competence as to the application and enforcement of Ch. 111, Stats. SCHOOL DISTRICT OF DRUMMOND V. WERC, 121 Wis. 2d 126, 133 (1984). While the factual underpinnings of the court action and this case are similar in some respects, the Commission is the proper forum for determining whether MERA has been violated. Courts have consistently deferred cases involving such issues to the Commission, as the expert agency. LOCAL 913 V. MANITOWOC COUNTY, 140 Wis. 2d 476, 483-484 (Ct. App. 1987), review denied, 141 Wis. 2d 984. In STERICYCLE, cited by the District, clearly both actions had to be filed in the same court as there was no other forum with primary jurisdiction. Unlike the situation in STERICYCLE, here there is another forum that has primary jurisdiction. The District's argument that the Court has concurrent jurisdiction, ignores the realities of what would have happened if the prohibited practice allegation had been filed in court, i.e., it would have been deferred to the Commission, and would have had the opposite effect of judicial economy as it only would have delayed the Commission's hearing the complaint. Thus, where a court only has to entertain a prohibited practice charge on a discretionary basis, the exception to the declaratory ruling exception should not apply and the District's motion should be denied.

DISCUSSION

The District asserts that the application of the doctrine of claim preclusion bars the Association from proceeding in this case and requires the dismissal of the complaint. In NORTHERN STATES, supra, the Wisconsin Supreme Court held that:

> . . .under claim preclusion "a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings.'" LINDAS V. CADY, 183 Wis. 2d 547, 558, 515 N.W. 2d 458, 463 (1994) (quoting DEPRATT V. WEST BEND MUTUAL INS. CO., 113 Wis. 2d 306, 310, 334 N.W. 2d 883, 885 (1983)).
>
> (189 Wis. 2d at 550).

. . .

> In order for the earlier proceedings to act as a claim-preclusive bar in relation to the present suit, the following factors must be present: (1) an identity between the parties and their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction. *Id*. at 311, 334 N.W. 2d at 885; PLISKA V. CITY OF STEVENS POINT, WISCONSIN, 823 F.2d 1168, 1172 (7th Cir. 1987).

(189 Wis. 2d at 551).

There is no question as to the first element, as the Association and the District are parties in both actions.

With regard to the second element, identity between causes of action, Wisconsin has adopted the "transactional approach." NORTHERN STATES, supra, DEPRATT, supra. In DEPRATT, the Court cited the following commentary to Restatement (Second) of Judgements, Sec. 24:

> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

(113 Wis. 2d. at 311), cited with approval, NORTHERN STATES, 189 Wis. 2d at 554.

In NORTHERN STATES, the Court held:

> Thus, "if both suits arise from the same transaction, incident or factual situation, [claim preclusion] generally will bar the second suit.'" (citations omitted).

As the District notes, and the Association somewhat concedes, the same underlying set of facts are relied upon by the Association in both of its actions, i.e., the parties' entering into the settlement agreement and the District's actions with regard to the settlement agreement and its implementation of its terms. Under the transactional approach, regardless of the availability of various substantive legal theories and the variations in evidence needed to support the theories, the underlying transaction that is the basis of the litigation may not be split. Thus, the second element of claim preclusion has been met.

The third element required for claim preclusion to apply is that there has been a "final judgement" on the merits in a court of "competent jurisdiction." While the Association notes that the Commission has primary jurisdiction over allegations of violations of MERA, Sec. 111.07(1), Stats., provides:

> . . .Any controversy concerning unfair labor practices may be submitted to the commission in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.

That provision is made applicable to MERA by Sec. 111.70(4)(a), Stats. While the Commission may be the more appropriate forum, pursuant to Sec. 111.07(1), circuit courts have concurrent jurisdiction to hear allegations of prohibited practices. The Examiner also notes in this regard, that in NORTHERN STATES, supra, the Court held that claim preclusion barred the Company from proceeding on a second suit alleging the unconstitutionality of state statutes because it could have raised the issue in its action before the State's Tax Appeals Commission, which the Court acknowledged had "authority in limited situations to determine whether application of Wisconsin taxing schemes passes constitutional muster." 189 Wis. 2d at 558-559. Thus, for the purposes of claim preclusion, the Association could have litigated its prohibited practice claims in its action in circuit court.

The parties dispute, however, whether the Circuit Court's Order of October 21, 1997, is a "final judgement". The Association asserts that it is not since it has appealed that Order. The District asserts that the fact the Order is being appealed does not affect its being considered "final" for purposes of claim preclusion. In that regard, the District has cited the decisions in NORTHERN STATES and DEPRATT, supra. The Examiner notes that in both of those cases the subsequent suits, found to be barred by claim preclusion, were not filed until after all appeals had been exhausted in the first suit, and that was expressly noted by the Court in NORTHERN STATES. 189 Wis. 2d at 555. In a number of Wisconsin cases dealing with this issue in a *"res judicata"* context, the Wisconsin Supreme Court has expressly held that, "When no appeal is taken, as here, all provisions of a judgement. . .are conclusive and binding upon all parties to the litigation." HAASE V. R & P CHIMNEY REPAIR, 140 Wis. 2d 187, 191 (Ct.App. 1987), citing KREISEL V. KREISEL, 35 Wis. 2d 134, 138 (1967). Therefore, the Examiner has concluded that while the Circuit Court's Order is a "final judgement" for appeal purposes, it is not so for purposes of the application of the doctrine of claim preclusion. Cf. HURON HOLDING CORP. V. LINEDA MINE OPERATING CO., 61 S.Ct. 513 (1941).

There is also a dispute as to whether the declaratory judgement exception to the application of claim preclusion applies in this case. Under the Seventh Circuit's decision in STERICYCLE, supra, applying Wisconsin law with respect to the doctrine of claim preclusion, since the Association's suit for a declaratory judgement included a request for injunctive relief in the form of a writ of mandamus, the exception for declaratory judgement recognized in BARBIAN V. LINDNER BROS. TRUCKING, 106 Wis. 2d 291, 297 (1982), would appear not to apply in this case.

Based upon the foregoing the Examiner has concluded that for the purposes of administrative efficiency (judicial economy), it is appropriate to stay the instant proceeding and hold it in abeyance pending the outcome of the Association's appeal.

Dated at Madison, Wisconsin, this 25th day of November, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

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