STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WAUKESHA COUNTY EMPLOYEES UNION, LOCAL 135, AFSCME, AFL-CIO, Complainant,

vs.

COUNTY OF WAUKESHA, Respondent.

Case 153
No. 56677
MP-3445

Decision No. 29477-A

Appearances:

Ms. Christine Bishofberger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, W237 S4626 Big Bend Road, Waukesha, Wisconsin 53189, on behalf of the Complainant, Waukesha County Employees Union, Local 1365, AFSCME, AFL-CIO.

Michael, Best & Friedrich, L.L.P., Attorneys at Law, by **Mr. Marshall R. Berkoff**, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, on behalf of Respondent, Waukesha County.

ORDER DENYING MOTION TO DISMISS COMPLAINT

Waukesha County Employees Union, Local 1365, AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission on July 17, 1998, alleging that Waukesha County had committed prohibited practices by refusing to bargain with the Union separately from other County bargaining units. Thereafter, the complaint was held in abeyance pending efforts to resolve the dispute. Those efforts were unsuccessful and on September 2, 1998, Waukesha County filed a motion to dismiss the complaint, along with supporting arguments, affidavit and exhibits. On October 1, 1998, the Union filed its response in opposition to the motion to dismiss. The Examiner, having considered the record to date and the arguments of the parties, makes and issues the following

ORDER

The prehearing motion to dismiss is denied.

Dated at Madison, Wisconsin this 19th day of October, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

WAUKESHA COUNTY

**MEMORANDUM ACCOMPANYING ORDER
DENYING MOTION TO DISMISS COMPLAINT**

Waukesha County Employees Union, Local 1365, AFSCME, hereinafter the Union, filed a complaint with the Commission alleging that Waukesha County, hereinafter the County, had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 4, Stats., by refusing to bargain with the Union separately from the County's other bargaining units. Thereafter, the County filed a motion to dismiss the complaint along with supporting argument, affidavit and exhibits.

In its motion and supporting argument, the County asserts the affidavit of its Labor Relations Manager and attached exhibits establish that the Parks and Land Use employes who now seek to negotiate a separate collective bargaining agreement have been covered by the Master Contract since they were voluntarily recognized by the County in 1969, and that this has continued to be the case after these employes were determined by the Commission in 1975 to be a separate bargaining unit. In addition to said historical inclusion in the Master Unit, Sections 3.02 and 3.03 of the Master Contract expressly provide for inclusion of such groups and amendment of the Recognition Clause by the voluntary agreement of the parties, as was done with this group. Further, this group, as have other groups, by virtue of that contract language and a long and unified bargaining history, have been merged into the Master Unit and considered and treated as one unit for bargaining purposes. The County asserts that to now permit this group of employes to split off would be an inappropriate establishment of a new unit contrary to the antifragmentation directive in Sec. 111.70(4)(2)(d)2, Stats., and Commission policy of considering that directive and bargaining history in considering unit questions. County employes in this same department are included in the Master Unit and referred to as "units" in the Master Contract. Last, the composition or establishment of a bargaining unit is a permissive subject of bargaining and the Union has no right to declare a particular group of employes who have been merged into a Master Contract to be a separate unit and demand bargaining for that separate group. Relying upon decisions of the National Labor Relations Board, the County asserts that as a matter of law, it cannot be found to have committed a prohibited practice by refusing to recognize this group of Department of Parks and Land Use employes as a separate unit.

The Union responds that this matter is covered by Chapters 111 and 227, Stats., with the latter establishing the framework for administrative proceedings. Chapter 227 does not provide for summary judgment. Further, the right to a hearing under Chapter 227 is explicit and the dismissal of a case prior to an evidentiary hearing is not. To grant the motion to dismiss would also be contrary to Commission case law. The Union requests that the motion

be denied and hearing on the complaint be scheduled immediately in accord with ERC 12.04(2), Wis. Adm. Code.

DISCUSSION

The complaint alleges the County violated Secs. 111.70(3)(a)1 and 4, of the Municipal Employment Relations Act. Pursuant to Sec. 111.70(4)(a), Stats., Sec. 111.07, Stats., governs the procedures by which prohibited practice complaints are to be heard. Chapter 227 of Wisconsin Statutes states the general framework for administrative agency proceedings.

Sec. 227.01(3), Stats., defines a "Contested case" to mean "an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order."

The Commission is an "Agency" under Sec. 227.01(1), Stats., thus making this proceeding an "agency proceeding." To be a contested case under Sec. 227.01(3), Stats., the proceeding must involve a controverted, substantial interest which will be determined after a hearing required by law. In this case, the Union is seeking an order requiring the County to bargain separately with the Union as to these employes, which the County opposes. The Union's interest is, therefore, "substantial" and is "controverted by another party." As Sec. 111.07(2)(a), Stats., mandates hearing of alleged prohibited practices, this matter constitutes a "contested case" as defined by Sec. 227.01(3), Stats.

Dismissing a contested case prior to hearing is appropriate only in limited circumstances:

> 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.
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> 68 OAG 31, 34 (1979).

Similarly, the Commission has held that:

> 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.
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> UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3; RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27982-B (WERC, 6/94).

The complaint alleges: That the Union is the certified exclusive bargaining representative of employes of the County's Park and Planning Department in the Park Maintenance and Golf Course Superintendents classifications; that the Union and the County have been parties to a series of collective bargaining agreements, the latest of which expires December 31, 1998; that notice of intent to file a successor agreement must be filed by August 1, 1998; that the Union notified the County on May 19, 1998 that it was exercising its right to bargain separately from other County units in the upcoming negotiations; that on May 22, 1998, the County notified the Union that the County would not negotiate with the Union separately from the other units, and that the County has therefore violated Secs. 111.70(3)(a)1 and 4, Stats., by its refusal.

Sec. 111.70(3)(a)4, Stats., states, in relevant part, that it is a prohibited practice for a municipal employer:

> 4. To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit.

The Union's allegations, if proved, could be found to constitute a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats. It would therefore be improper to dismiss the complaint for failure to state a cause of action under MERA. In this case, the County has alleged additional facts which it asserts justifies its refusal to bargain separately with the Union as to these employes. The County will have the opportunity at hearing to submit evidence in that regard, as will the Union. Contrary to the County's assertion, the fact that the Union does not address the County's allegations and submissions in its response to the County's motion does not constitute an admission or a waiver of the Union's right to submit evidence in rebuttal of these allegations.

For these reasons, the County's motion to dismiss is denied.

Dated at Madison, Wisconsin this 19th day of October, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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