STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JENNIFER A. PESHUT, Complainant,

vs.

**UNIVERSITY OF WISCONSIN MILWAUKEE (UWM);
NANCY L. ZIMPHER, CHANCELLOR;
ERIKA SANDER, ACTING DIRECTOR OF HUMAN RESOURCES;
SHANNON BRADBURY, LABOR RELATIONS MANAGER;
WILLIAM R. RAYBURN, DEAN OF THE GRADUATE SCHOOL;
MARJORIE BJORNSTAD, ASSISTANT DEAN OF THE GRADUATE SCHOOL;
SUSAN BURGESS, DIRECTOR OF THE CENTER FOR WOMEN'S STUDIES,**
Respondents.

Case 465
No. 56793
PP(S)-295

Decision No. 29775-C

JENNIFER A. PESHUT, Complainant,

vs.

**AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, COUNCIL 24,
WISCONSIN STATE EMPLOYEES UNION (WSEU)
MARTIN BEIL, EXECUTIVE DIRECTOR,
KARL HACKER, ASSISTANT DIRECTOR,
JANA WEAVER, FIELD REPRESENTATIVE,**
Respondents.

Case 466
No. 56821
PP(S)-296

Decision No. 29776-C

No. 29775-C
No. 29776-C

Appearances:

Ms. Jennifer A. Peshut, 730 East Burleigh Street, Milwaukee, Wisconsin 53212, appearing on her own behalf.

Mr. Mark J. Wild, Legal Counsel, State of Wisconsin, Department of Employment Relations, 345 West Washington Avenue, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of UWM Respondents.

Lawton & Cates, S.C., Attorneys at Law, by **Mr. P. Scott Hassett** and **Ms. Ellen S. Hughes**, 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of Union Respondents.

ORDER DENYING MOTION FOR FURTHER HEARING

An overview of the procedural posture of the above-noted complaints as of July 20, 2000, can be seen in Dec. Nos. 29775 & 29776 (WERC, 11/99) and in Dec. Nos. 29775-B & 29776-B (WERC, 7/00). Continued evidentiary hearing was conducted on October 11, November 16 and December 8 of 2000. At the close of the December 8 hearing, the parties disputed whether further evidentiary hearing should be scheduled. That dispute prompted the Motion underlying this Order, and is summarized in greater detail below.

ORDER

Complainant's March 20, 2001 amendment to Case 465, No. 56793, PP(S)-295 is denied. The evidentiary portion of the hearing in the consolidated cases noted above is closed. The parties shall, as soon as feasible, state their positions on an appropriate briefing schedule for the submission of closing arguments in the consolidated cases noted above.

Dated at Madison, Wisconsin, this 11th day of April, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS)

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION FOR FURTHER HEARING

BACKGROUND

The December 8, 2000 Hearing

Susan Burgess and the Complainant testified. The Complainant testified after Burgess. After each advocate completed their questioning of Peshut, a dispute arose when Complainant requested the opportunity to submit further testimony and exhibits at a separate day of hearing. Complainant viewed further hearing as a matter of right to rebuttal.

UWM Respondents took the position that rebuttal testimony is permitted solely to respond to situations that could not reasonably be anticipated. Complainant chose not to have Peshut testify prior to UWM Respondents' case. This was a tactical choice that cannot persuasively support taking that testimony as rebuttal. Beyond this, UWM Respondents argued Complainant's request was, in effect, a means of discovery to permit it a "second kick at the cat."

Union Respondents viewed the extensive record already developed as a significant point, particularly in light of Complainant's tactical choices regarding when to call witnesses. Union Respondents argued that, at a minimum, some demonstration of need for further hearing, such as an offer of proof, should precede an order for further hearing.

After some discussion, I directed Complainant to make the demand for further hearing as a motion. I requested that Complainant include with the motion the witnesses to be called, what points the testimony would cover and the documentation to be submitted.

This is a rough summary of the parties' positions at hearing, and states the background to the motion to set further hearing, which is referred to as the Motion.

The Motion

Complainant's motion, filed on December 21, 2000, seeks "a date for hearing." In support of the Motion, Complainant argues she did not testify on direct examination and failed to testify on direct on December 8 only because of the Examiner's rulings. Beyond this, Complainant argues that the Examiner's request for the Motion contradicts earlier rulings adverse to Complainant regarding the setting of reasonable discovery and ground rules for the

litigation. Respondents have each benefited from the Examiner's rulings by withholding witness lists and by failing to be prepared for hearing. On balance, the denial of further hearing "imposes a burden on (Complainant) not applied to the respondents."

Beyond this, "preserving . . . objection" to the request for the Motion, but "fearing the examiner will not otherwise allow her to present testimony and evidence," Complainant states that "Ms. Peshut, Ms. Romenesko, and Mr. David Keach" need to be called to testify. Complainant also attached proposed exhibits numbered from 171 through 188.

Complainant concludes the Motion with a series of detailed arguments supporting the need for the requested testimony and documentation. A substantial portion of the offered documents and testimony highlight common themes. Exhibits 171, 175, 176 and 178 are necessary complements to exhibits submitted by UWM Respondents. In some cases, the exhibits were not admitted into the record due to the objection of UWM Respondents. In each case, the parallel UWM Respondent offered exhibit "is not capable of being corroborated." Certain of the UWM Respondent offered exhibits contain "substantial hearsay" and were not offered to Complainant even upon a subpoena. Similar reasons demand further testimony from Complainant. Exhibits 133, 134, 151, 152, 154 and 162 represent UWM Respondent offered exhibits that cannot be corroborated and contain substantial hearsay demanding Complainant's testimony. Exhibits 172, 173, 174, 177, 179, 184 and 185 are necessary to weigh Burgess' credibility, particularly as contrasted with Complainant's. Exhibits 180, 181, 182, 183 and 186 afford necessary background as to the knowledge and response of managerial personnel at UWM to unfair labor practices. Exhibits 187 and 188 are necessary documentation to illustrate legislative and bargaining history. Other testimony is needed to complete necessary background regarding, among other points, the Open Meetings Law and related claims filed by Complainant with the Attorney General.

UWM Respondents' Response To The Motion

UWM Respondents, in a brief filed on January 2, 2001, contend that the Motion is "without merit." Earlier rulings reflect no more than the Examiner's opinion on the extent of his legal authority. At this point, the "hearing is now over, subject to the examiner re-opening it to allow for rebuttal testimony." The offer of proof simply preserves Complainant's right of appeal if the Motion is denied.

More specifically, UWM Respondents contend that much of the evidence Complainant seeks to enter reflects dissatisfaction with "a strategic decision not to testify in her case-in-chief or admit certain documents." Complainant's advocate could have questioned Complainant further on December 8, but "decided to end his questioning." In off-the-record discussion,

Complainant first took the position that Complainant was not prepared to testify until the next day for hearing. Only after the Examiner voiced concern about not completing testimony that day did Complainant express willingness to proceed. Complainant must be compelled to live with the consequences of strategic choices.

Beyond this, the four to six hours of testimony highlights how little relationship there is between the requested hearing and legitimate rebuttal, making "it clear that (Complainant) does not want rebuttal, (but) wants a re-hearing before her case is even decided." If Complainant's request is honored, then UWM Respondents will be forced to request and be granted "surrebuttal." This reflects no more than Complainant's desire to have the last word, knowing that Burgess now lives in Ohio and is not likely to return to Wisconsin. Beyond this, some evidence Complainant seeks to enter "is merely repetitive in nature." Existing precedent establishes that the denial of the Motion "would not be an abuse of discretion to put an end (to) this hearing now."

Union Respondents' Response To The Motion

Union Respondents contend, in a brief filed January 2, 2001, that the Motion should be denied because Complainant is seeking no more than "another chance at bat after failing to present appropriate evidence during her case-in-chief." Her testimony or Keach's should have come during Complainant's case-in-chief. To permit that testimony at this point "constitutes improper hearing order and an extreme waste of the parties' and the Commission's time and resources." The evidence Complainant seeks to introduce "is not rebuttal evidence" and is unnecessary since "Respondents did not present any surprise evidence." Beyond this, the Motion "creates a situation where there is no just stopping point." To grant the Motion risks unending surrebuttal.

More specifically, Union Respondents object to Complainant's attempt to place Exhibits 187 and 188 into the record. These documents seek to rebut Hacker's testimony "regarding the Union's intent that employees do not have the right to present grievances through representatives of their own choosing." Exhibit 187 "is not new evidence", and is irrelevant to the interpretation of the labor agreement relevant to the complaints.

Exhibit 188 is not clearly authentic; is unclear regarding its source or goal; should have been submitted during Complainant's case-in-chief; and is incomplete as evidence of legislative history. The Motion thus lacks merit and should be denied.

Complainant's Response to Union Respondents

Complainant argues, in a brief filed January 4, 2001, that Union Respondents' failure to disclose their evidence prior to hearing is undisputed. Their citation of case law from civil litigation has no bearing on this proceeding, which is governed by Chapters 111 and 227, Stats. Similarly, argument concerning Complainant's "case-in-chief" is "an invention of the respondents which is not applicable to WERC hearings." Nor can arguments regarding waste of time be credited since Union Respondents "have failed to proceed because they failed to produce witnesses and were unprepared." That the Respondents may seek rebuttal past Complainant affords no basis to discredit the Motion. The asserted concern for unending surrebuttal is unfounded at civil law, and ignores that the Examiner can end the hearing when it is necessary. Surrebuttal, unlike rebuttal, "is neither a right nor a procedural requirement." Exhibits 187 and 188 are admissible as essential parts of establishing legislative and bargaining history. That history is relevant to challenging Union Respondents' mistaken view of Article IV. The need for the rebuttal sought by Complainant was not established until the December 8 hearing, and Complainant cannot be faulted for that.

Complainant's Response to UWM Respondents

In the January 4, 2001 brief, Complainant contends that UWM Respondents misrepresent the record by asserting it is closed and by asserting that the Motion and its supporting documentation are no more than an offer of proof. Similarly, UWM Respondents misrepresent off-the-record discussions and the basis for the close of the November 16 hearing. Beyond this, UWM Respondents mischaracterize the basis for the requested hearing. Complainant seeks not to overcome credibility determinations already made, but to provide the evidence upon which they can be made. Nor can UWM Respondents credibly assert Complainant seeks to take advantage of Burgess' probable unavailability. Complainant repeatedly subpoenaed Burgess and, unlike Respondents, deposed her. The selective memory manifested by Burgess on December 8 warrants the admission of her deposition as Exhibit 189. Assertions that Complainant seeks to introduce repetitive evidence are unsubstantiated. UWM Respondents' citation of case law is irrelevant and inaccurate in any case. Evidence they submitted on December 8 was new, and quite probably manufactured. This does not establish a reason to end hearing. Rather, it demonstrates the need for it. That the hearing has taken seven days to this point cannot be held against Complainant. Respondents have consumed at least one-half of that time.

Post-Briefing Correspondence

In a letter to the parties dated February 8, 2001, I stated:

I write concerning the pending motion. Prior to the formal statement of the close of a record in any hearing, I will verify with the participants my understanding of the sum total of the exhibits admitted into the record. No decision I can make on the motion can obviate the need for this step. If I set further hearing, some clarity on what is to be heard will be necessary, and if I deny further hearing, some clarity on the status of the evidentiary record is necessary.

To achieve any clarity on these points requires that certain threshold issues be resolved to the extent possible. More specifically, the range of the disputed evidence should be narrowed as far as possible. At a minimum, this will clarify the conflict between your positions.

I enclose an updated exhibit list, including the documents attached to Complainant's written argument and numbered from 171 through 189. The enclosed list poses issues other than those addressed in your briefs. More specifically:

1. Exhibit 133 was admitted provided it was made complete by the submission of a page preceding what is currently numbered as page (2). 1 can find no indication that the missing page has been submitted. What is your position on the record status of Exhibit 133?

2. The July 14, 1999, deposition was taken while a motion was pending concerning my removal as Examiner. Certain discussion at hearing indicates the deposition may be viewed as part of the record (See Tr. at 878). If so, the document may not pose a disputed point. It could be taken as part of the transcript of record or as an exhibit. What is your position on the record status of the July 14, 1999, deposition?

The final question for your consideration requires some background. To be admitted into the record, a document must (1) be what it purports to be (i.e. authentic) and (2) be relevant. These tests can be met through testimony and argument or through stipulation. Before addressing the motion on its merits, I would like to determine whether any of the documents numbered from 171 through 189 can be taken via stipulation. The Union's brief specifically states a position on Exhibits 187 and 188, and your answers to question 2 will address Exhibit 189. Thus, the final questions I pose are:

3. Can you agree to the admission into evidence of any exhibit numbered from 171 through 186?

4. If the answer is 'no", which, if any, of the exhibits do you object to based on concerns regarding the document's or documents' authenticity or relevance?

Complainant, as the moving party, need not state a position on questions 3 and 4.

I understand that the briefs question the propriety of any "rebuttal" evidence, but I would like to be clear on the scope of this disagreement before addressing the motion. Your answers will, at a minimum, clarify what issues, if any, demand further hearing. If you believe my consideration of the admission into evidence of any document not already in the record itself demands further hearing, you should state this in your response.

I thank you each for your prompt response.

Complainant responded by a letter filed on February 15, 2001, which asked for "the due date for the reply to your solicitation", and by a letter/motion formally filed on February 21. The letter/motion confirmed an e-mail of February 19. The motion's cover letter states:

Please find enclosed an original and three copies of my Objection and Motion on Exhibits and Testimony. By this letter I am sending copies to the respondents.

I have not had a reply from you for a week to my procedural question sent via e-mail and U.S. mail. I am concerned my communication is not reaching you, therefore I am also sending a copy to Peter G. Davis, WERC General Counsel.

The motion seeks a ruling on scheduling further hearing. Included with the motion was a series of arguments. Complainant contends that the February 8 letter "shows (the Examiner's) intent to close the hearing before Ms. Peshut is afforded the opportunity to present evidence." Complainant further contends the question concerning the deposition "is premature" prior to a ruling on the Motion. Questions 3 and 4 from the February 8 letter "violate the examiner's own briefing schedule" and "flout" Chapter 227. Beyond this, they prejudice Complainant by permitting Complainant's "offer of proof as required by the examiner" to be considered by Respondents at length in contrast to her ability to consider Respondents' evidence at the December 8, 2000 hearing. The February 8 letter is also flawed because it seeks to rule on the exhibits or to obtain a stipulation based on their content prior to a procedural ruling. The

February 8 letter in effect continues a pattern of imposing burdens on Complainant while permitting Respondents to conceal evidence.

In a letter to the parties dated February 19, 2001, I stated:

> I have received in response to my letter of February 8, 2001, two responses from Ms. Peshut. I have not received a response from either Respondent. I will be out of the office more than in over the next two weeks. I write this letter to advise you that any response you wish to file must be postmarked no later than March 2, 2001.
>
> I will address the pending motion based on the argument I have received or receive under the first paragraph. I assume that Ms. Peshut's February 19, 2001 letter does not seek a Commission ruling prior to, or in lieu of, my ruling on the motion. If this assumption is inaccurate, she should so advise me not later than March 2, 2001.

In a letter filed with the Commission on February 21, Complainant stated that she did not seek any Commission ruling prior to determination of the Motion by "the examiner of record".

In a letter filed with the Commission on February 22, 2001, Union Respondents stated:

> . . . The Union does not take any position regarding the record status of the July 14, 1999 deposition nor any Exhibits numbered 171 through 186. However, the Union restates its objections to Exhibit 187 and 188.

In a letter to the parties dated February 23, 2001, I stated:

> Mr. Wild informed me by phone today that he did not have a copy of the deposition that I received attached to Ms. Peshut's reply brief dated January 3, 2001, and labeled as Exhibit 189. My letters of February 8 and 19, 2001 presumed each of you had a copy of this document. Thus, I enclose for Mr. Wild and Ms. Hughes a copy of that deposition.

In a letter filed with the Commission on February 26, 2001, UWM Respondents supplied "the missing first page to Exhibit 133," and stated:

. . .

2. Respondent UW-Milwaukee will stipulate to the admission of the deposition (Exhibit 189) that was taken on July 14, 1999. The deposition should be included as an exhibit instead of as part of the transcript of record since no examiner was present for the deposition.

3. Respondent will also stipulate to the admission into evidence Exhibits 171 through 188.

4. Since we are stipulating to the exhibits, there is no need to answer this question.

In a letter filed with the Commission on February 28, 2001, Union Respondents stated:

> Please accept this letter as a follow-up to Council 24's Brief in Opposition to Complainant's Motion to Set a Hearing Date and my letter dated February 20, 2001. In both submissions, Council 24 stated objections to Exhibits 187 and 188. Although we continue to maintain those objections, upon further consideration, I believe the matter can be addressed through the written submissions of the parties. In the interests of efficiency and economy, I do not believe that additional hearing is necessary on the objections raised to those two exhibits. . . .

In a letter filed with the Commission on February 28, 2001, Complainant stated:

> This is in reply to your February 21, 2001 letter addressed to the respondents about Mr. Wild's telephone call to you regarding Exhibit 189 (the Burgess deposition). My records show that an original and copies were mailed to you and the respondent parties with my reply brief dated January 3, 2001.
>
> Your letter, instead of assuming that Mr. Wild misplaced or misfiled his copy of the deposition, assumes that I did not send copies to the respondents. It implies automatic acceptance of the employer's statements and a concomitant ready acceptance of my lack of credibility. I hope you won't use this same judgment when you make your determination of the above referenced cases.
>
> May I anticipate as prompt a response to my December 19, 2000 and February 19, 2001 motions and other procedural inquiries as to Mr. Wild's telephone call?

On March 6, 2001, Complainant filed an "addendum to Ms. Peshut's objection and motion on exhibits and testimony dated February 19, 2001." In the addendum, Complainant argues that Respondents' stipulations to the admission of exhibits 171 through 186 reversed their prior positions. Such a stipulation cannot "prevent further testimony" under established principles of evidence. Beyond this, Respondents' stipulations cannot obviate the need for further hearing for Complainant to establish that Respondents "concealed documentary evidence", "manufactured documents", or produced witnesses who "gave false testimony."

The March 20, 2001 Amendment to Case 465

On March 20, 2001, Complainant filed an amendment to Case 465, No. 56793, PP(S)-295. The amendment reads thus:

> 1 Shannon Bradbury, for the employer, the University of Wisconsin-Milwaukee (UWM), interfered with Ms. Peshut's right to engage in lawful, concerted activities by delaying hearing and answering a Step 2 grievance.
>
> 2. The complainant, Ms. Peshut, filed a Step 2 grievance February 16, 2001 on behalf of a fellow employee. As of March 19, 2001 the employer has not answered the grievance, nor even set a date for its hearing.
>
> 3. The complainant, asks the Wisconsin Employment Relations Commission to find that the employer violated employees' rights to concerted activity and order the employer to cease and desist.

In a letter to the parties dated March 22, 2001, I stated:

> . . .
>
> I do not believe I can rule on the pending motion for further hearing until you have been afforded the opportunity to address the impact, if any, of this amendment on the motion. Please let me know, as soon as you can, what impact, if any, this amendment should have on the pending motion.

Union Respondents filed a response with the Commission on March 26, 2001. Union Respondents note that the amendment "is directed at the State rather than Council 24," but add that the amendment should be dismissed for two reasons. The first is that the amendment "is a separate claim and should be refiled as an independent action." Since the amendment concerns events far distant from the events prompting the original complaint, conducting hearing "would only serve to prolong the current action." The second basis is that under current Commission

case law, Complainant has no standing to assert the amendment. She advances the amendment as a steward, but only Council 24 or the affected employee would have standing as a "party in interest" under Sec. "110.7(2)(a), Stats. (sic). Union Respondents conclude that the amendment should be dismissed, and that "if a formal motion is required" it should filed by UWM Respondents.

UWM Respondents filed a response with the Commission on March 29, 2001, stated as a formal motion to dismiss. In the event the motion to dismiss is denied, UWM Respondents argue that "the amendment should not have any impact on the pending motion for rebuttal testimony." The amendment either urges to add evidence already in the record or to supplement the record with evidence on an entirely new issue. The amendment may have been filed "in an attempt to get a hearing on the amended complaint in the event the Examiner rules against (Complainant) on the pending motion." In its motion, UWM Respondents urge that Complainant cannot be considered a party in interest in the subject matter asserted in the amended complaint. Beyond this, UWM Respondents argue that the original complaint and the amendment constitute "separate matters." Thus, "the amendment is a separate claim and should be refiled and assigned an independent complaint number."

Complainant filed a response with the Commission on April 3, 2001. In it, Complainant urges that the amendment should have "no impact" on the Motion because "further hearing should proceed without the necessity for a motion." Union Respondents' assertion that the amendment and the original complaint are separated by considerable time ignores that the delay in the current litigation is a causal factor in the events prompting the amendment of the complaint. Beyond this, Complainant asserts that "it is likely that the employer interfered with Ms. Peshut's right to concerted activity . . . because Ms. Peshut filed the instant complaint." Complainant's standing as "party in interest" is not related "to the rights of a fellow employee" but "to her own rights to represent that employee." Complainant concludes by noting that Union Respondents citation of "110.7(2)(a)" refers to a non-existent section of a Chapter entitled "Motor Vehicles."

DISCUSSION

The Law Governing The Motion

At the broadest level, the Commission's hearing processes are governed by Subchapters I and V of Chapter 111, Stats., and by Subchapters I and III of Chapter 227, Stats. More specifically, the right to a hearing is set by Sec. 111.84(4), Stats., which incorporates the provisions of Sec. 111.07, Stats. The consolidated complaints are each a "Contested case" within the meaning of Sec. 227.01(3), Stats. Each complaint is a "class 3 proceeding" under Sec. 227.01(3)(c), Stats. Under Sec. 111.94(1), Stats., the Commission is

granted rule-making

authority, and has used that authority to create Chapters ERC 20 and 22 of the Wisconsin Administrative Code.

These broad statements of authority are further specified regarding the requirements of the hearing process. Sec. 227.44(3), Stats., requires that "Opportunity shall be afforded for all parties to present evidence and to rebut or offer countervailing evidence." Similarly, Sec. 227.45(2), Stats., which is incorporated by ERC 20.16(2), demands that "adequate opportunity to rebut or offer countervailing evidence" be "afforded" to "(e)very party." Also bearing on the Motion are those provisions of ERC Chapters 20 and 22 that specify an Examiner's authority. ERC 20.17 broadly imposes a duty on an Examiner to "obtain a full and complete record." ERC 20.18 states the "Powers of individuals conducting hearings" thus:

> Individuals conducting hearings shall have the authority to take the following action, subject to these rules within the commission's power;
>
> (1) To administer oaths and affirmations;
> (2) To issue subpoenas in the name of the commission;
> (3) To rule upon offers of proof, receive relevant evidence and exclude irrelevant, immaterial, or unduly repetitious evidence;
> (4) To question witnesses;
> (5) To take or cause depositions to be taken and to determine their scope;
> (6) To regulate the time, place and course of the hearing;
> (7) To dispose of procedural requests or other similar matters;
> (8) During the course of the hearing to hold conferences for the settlement, simplification or adjustment of the issues by consent of the parties; and,
> (9) To take any other action necessary under the foregoing or authorized under these rules.

ERC 20.19 addresses the "Close of hearing" thus:

> A hearing shall be deemed closed when the evidence is closed and when any period fixed for filing of briefs, presentation of oral argument, if any, or both has expired. The hearing may be re-opened on good cause shown.

ERC 22.04(1) addresses the "Scope" of hearings thus: "Hearings shall be limited . . . to the litigation of and oral argument on genuine issues of fact or law raised by the parties and remaining for disposition."

Application of the Governing Law to the Motion

The provisions noted above broadly govern the Motion, but afford less than definitive guidance. Secs. 227.44 and 227.45, Stats., create a right to rebuttal, but that right is not unlimited. Sec. 227.45(2), Stats., recognizes this by stating that the "opportunity" to rebut evidence must be "adequate." In any event, too expansive a reading of these sections would mandate unending hearings. ERC Sections 20.18(3), (7) and (9), read in conjunction with ERC Sections 20.17, 20.19 and 22.04(1) demand a determination whether the Motion seeks to supplement the evidentiary record with necessary rebuttal. Ultimately, the determination is whether the evidentiary record should be considered "full and complete" with or without the requested supplemental evidence and testimony. The record cannot be considered "full" or "complete" in the absence of an adequate opportunity for rebuttal.

As preface to an examination of this point, certain threshold issues should be addressed. I agree with Complainant that the evidentiary record should not be considered closed as of the end of the December 8 hearing, with the Motion questioning whether it can be re-opened. Rather, I read ERC 20.19 to pose whether the evidentiary portion of the hearing should be closed on the documents and testimony submitted to this point, thus setting the stage for the submission of closing arguments. Beyond this, I agree with Complainant that the citation of authority from civil litigation is of dubious value in addressing the Motion. As noted above, the governing law flows from Chapters 111 and 227, Stats.

I do not, however, find Complainant's continuing objection to the absence of discovery to afford persuasive assistance in resolving the Motion. Complainant asserts that rulings have consistently denied Complainant's attempt to discover Respondents' evidence, but have consistently opened Complainant's evidence to Respondents. In my view, Complainant has consistently sought to treat the complaint process as a type of civil litigation by which the hearing is the culmination of extended discovery governed by clearly set rules. That view, however persuasive as a civil matter, cannot be applied here. Most fundamentally, the governing statutes do not establish such a procedure. Sec. 111.84(4), Stats., read with Sec. 111.07(2)(a), Stats., do not contemplate hearings following elaborate pre-hearing procedure. Rather, those provisions envision basic pleadings setting the stage for evidentiary hearing. The demand for hearing "not less than 10 nor more than 40 days after the filing of such complaint" does not envision extensive pre-hearing process.

As the record of these complaints demonstrates, however, discovery and pre-hearing process is possible under Chapters 111 and 227. Depositions are authorized in Sec. 111.07(2)(b)1, ERC 20.15, and ERC 20.18(5). This authority, however, is limited and is an adjunct of the hearing process rather than its necessary precursor. Thus, the statutes and

and ERC 20.18(2). Similarly, ERC 20.15 grants the right to depose on "good cause shown." Hearing, not pre-hearing discovery, is the focus. Sec. 227.45(7), Stats., addresses pre-hearing discovery, but such discovery is limited to "any class 2 proceeding." I am aware of no comparable authority for a class 3 proceeding.

Thus, a Commission Examiner's authority flows from the hearing process under Chapters 111 and 227. This reflects a fundamental policy factor unique to the litigation of labor disputes by an administrative agency. Civil litigation typically determines individual transactions between litigants not seeking an ongoing relationship, or seeking to terminate such a relationship. Pre-hearing discovery serves to test whether hearing is necessary and to hone the merit of claims that will be finally determined at hearing. Unlike this, complaint litigation before the Commission typically involves the regulation or creation of an ongoing bargaining relationship. Hearing is, against this background, less the final determination of a single transaction than an adjunct to that relationship. Discovery thus may be necessary, but is treated as the exception rather than the rule for litigation. Hearing as a civil litigation matter more resembles the rehearsal process preceding a final performance. Labor relations litigation throws the parties into the hearing process in the hope they "work it out" as it goes. That litigation should be less formal, less time consuming and less expensive than civil litigation.

Against this background, certain arguments raised by Complainant afford no basis to extend the hearing. Complainant did not testify on direct prior to the close of the December 8 hearing. This states fact, but establishes only that she declined the opportunity. This is a tactical choice, not a demonstration of need. In any event, it falls short of demonstrating need given the informality of the administrative hearing process. UWM Respondents questioned Hacker before Union Respondents did, just as Complainant questioned Weaver prior to Union Respondents. Whether this means the evidence was entered on "direct" or on "cross" examination is of no apparent consequence to the administrative hearing process. In each case, the opportunity to take testimony was afforded each advocate.

Complainant's assertion that my request for the Motion imposes a discovery order on her from which Respondents were exempted has no bearing on the Motion's merit. The Motion does not question discovery. The issue posed under the governing law is not whether pre-hearing rules can be set or whether pre-hearing exchange of documents and witness lists should be ordered. Rather, the issue is whether, under governing statutes and rules, the evidentiary record is "full and complete." The summary of witnesses and documents I sought at the close of the December 8 hearing is the basis to determine if the evidentiary portion of the hearing should be further supplemented. Prior to hearing, the existence of disputed fact in the pleadings establishes the need for hearing. Here, the existence of disputes of fact is not the issue. Rather, the issue is whether sufficient evidence has been gathered to address those disputes. In the absence of the Motion's documentation, there is no basis to determine the

need for further hearing.

This poses whether Complainant has demonstrated that the evidentiary portion of the hearing should be continued. The documents attached to the Motion have been stipulated into the record. As stressed at hearing and through correspondence, I view the admission of a document to indicate that the document is authentic and is relevant to the theory of at least one of the parties, see sec. 227.45(1), Stats., and ERC 20.16(2). The absence of a stipulation thus can require hearing to determine the admissibility of an exhibit. Here, there is no such dispute and the documents have been admitted into the evidentiary record. Thus, the documentary basis for the credibility determination pointed to by Complainant is set without need for further hearing. Exhibits 187 and 188 have been received as exhibits, but could have been submitted in support of an argument concerning legislative history. In any event, their admission obviates the need for evidentiary hearing on them.

On a related point, Complainant urges that further testimony is necessary regarding exhibits 133, 134, 151, 152, 154, 159 and 162 because they are uncorroborated, undiscovered and contain substantial hearsay. The exhibits were admitted into the record without objection (Tr. 936, 939). Further hearing to reconsider that point is unwarranted. The weight appropriate to these documents remains a point for argument, but to open hearing on their admissibility would undercut not just the cited exhibits, but a substantial portion of the documentation received to this point. This would impose additional costs in time and expense for little evident benefit.

Complainant more forcefully argues that these exhibits underlie a significant issue of credibility warranting further testimony. Complainant details a series of conversations that Burgess testified to, and contends that further testimony is necessary to complete the record on these points. Beyond this, Complainant asserts her testimony is necessary to complete the record regarding the application of "the Wisconsin open meetings law", the claims she filed with the Wisconsin Attorney General, her receipt of UWM work rules, and the absence of any claim regarding the duty of fair representation. Her testimony and Romenesko's is also necessary to establish their role in the Women's Center, its staffing and its management structure. Such testimony is also necessary to address the "backlog" of work asserted by Burgess and the use of an outside consultant to address problems within the Women's Center.

Of these claims, the most substantial turn on Complainant's desire to introduce her own testimony to rebut that of Burgess. From Complainant's opening statement, it has been made clear that Complainant does not allege a breach of the duty of fair representation (Tr. at 23-24). Further hearing is not necessary on that point. Keach's and Peshut's testimony is unnecessary to determine whether Burgess could "use matters discussed in a January 26, 1998 meeting for disciplinary purposes." The contract governs this point, without regard to the testimony of any of these witnesses, including Burgess. At numerous points in the hearing,

witness testimony has been cut off where the witness has been asked to interpret contract or

law (e.g. see Tr. at 630-634 regarding Hacker; Tr. 738-739 regarding Peshut). Some testimony may have strayed into these areas, but that does not make the testimony worth getting. The interpretation of contract or law poses a logical point open to advocate argument, but is fruitless regarding the factual knowledge of a specific witness. Further hearing is unnecessary on that point.

The Commission "only has those powers which are expressly or impliedly conferred on it by statute." BROWNE V. MILWAUKEE BD. OF SCHOOL DIRECTORS, 83 WIS.2D 316, 333 (1978). From this, it follows that a complaint, to be enforceable by the Commission, must state rights enforceable through Subchapter V of Chapter 111, Stas., see, MORAINE PARK TECHNICAL COLLEGE ET AL., DEC. NO. 25747-D (WERC, 1/90). Thus, the Commission lacks jurisdiction to determine the Open Meetings law or any legal claim filed by Complainant with the Attorney General. Complainant may wish to contend that Respondents have arguably violated external law and that these arguable violations are relevant to a determination of the basis for the conduct of UWM Respondents under Sec. 111.84(1)(c), Stats. There is, however, no need for Peshut's testimony to assert this legal argument. Even if such testimony could be necessary, it is not apparent why it should come as rebuttal to Respondents, who submitted no evidence on the point.

Nor is there any evident need for Romenesko's testimony. She had the opportunity to testify and did testify regarding the structure of the Women's Center, its staffing and its placement in the UWM management structure. The asserted need for the balance of Romenesko's testimony tracks that for Peshut's.

The strength of Complainant's argument for further hearing is that further evidence could be entered regarding areas of dispute between Burgess' and Peshut's testimony. The weakness of the argument is that it affords no apparent way to close the evidentiary portion of the hearing, since every hearing closes with less detail than possible if hearing is continued. Beyond this, the argument risks continuing hearing on non-essential disputes. The Motion thus questions whether the benefit to be realized by receiving the testimony outweighs the risk of continuing the evidence-gathering process.

In this case, the risk outweighs the benefit. The asserted evidence affects, at most, one of the alleged violations in one of the consolidated cases. That allegation concerns Sec. 111.84(1)(c), Stats., and more specifically whether UWM Respondents acted, at least in part, based on hostility toward Peshut's exercise of lawful, concerted activity, see EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985). Even assuming this allegation poses more significant issues than the remaining allegations, the benefit to be gained by the testimony is further limited. Complainant seeks, in effect, to rebut each portion of

Burgess' testimony regarding a series of personnel matters. The worth of such rebuttal is

tenuous. If Complainant establishes that every action taken by Burgess is without merit as a personnel matter, the issue still remains whether that action is arbitrary, incompetent or discriminatory. Only the latter constitutes a violation of Sec. 111.84(1)(c), Stats. On the other hand, if UWM Respondents acted, at least in part, with proscribed intent, then Burgess' actions, however valid as a personnel matter, violate SELRA.

Against this background, the asserted testimony is of limited worth. It is not necessary either to establish the existence of proscribed hostility or to rebut UWM Respondents' defense to tear down each facet of Burgess' testimony. Presumably, evidence necessary to infer hostility on the part of UWM Respondents came in during Complainant's case or at least through the testimony adduced to this point. If it did not, the asserted need for more testimony cannot be characterized as "rebuttal." That Complainant seeks essentially a full day of testimony undercuts the assertion that it would be rebuttal, since the asserted rebuttal would equal or exceed the length of the testimony it seeks to rebut. Beyond this, there is no evident reason to believe the motivation of UWM Respondents toward Complainant can be made to turn on the testimony of Burgess or Peshut standing alone. If this case clearly turned on a single issue of credibility, Complainant's case for further hearing would be stronger. It does not. The disputed acts span a considerable length of time and include the actions of several individuals. Even assuming that the complaint could be made to turn on the issue of Burgess' credibility as contrasted to the Complainant's, there is no persuasive reason to believe the testimony adduced to this point fails to adequately pose that issue. In sum, Complainant's arguments have some force regarding potential credibility issues that might affect one of the alleged violations in one of the complaints.

Against this must be weighed the risk of granting the Motion. That risk is significant. If a desire for greater detail warrants further hearing, then there is no apparent basis to deny any motion for further testimony from Burgess. As is evident in the record, the difficulty of obtaining that testimony should not be underestimated. Complainant's position that such testimony must be "in-person" before all parties underscores at least one of the potential difficulties. In any event, the difficulty of closing the evidence-gathering process is apparent. Burgess has testified on three occasions, including the deposition. Peshut has testified twice, and has been available at each day of hearing, including the presentation of all of Complainant's case. Against this background, the request appears less a need for rebuttal than a desire to be the last word.

More significantly, granting the Motion adversely impacts the hearing process. The Motion seeks what Complainant has sought throughout the hearing process, which is to discover evidence prior to hearing, then conduct hearing to rebut the discovered evidence. Complainant seeks a full day to rebut testimony that took roughly that long. As noted above,

this view of the hearing process overturns the statutory scheme for Commission hearings. As

the Commission has noted before, it is ill-suited to handle elaborate discovery and extensive motion practice, STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS, DEC. NO. 24109 (WERC, 12/86) AT 8. The files in this case graphically underscore that point.

In sum, the evidentiary record in this case should be considered complete. Taking further testimony can afford somewhat greater detail on a potential issue of credibility affecting one of the alleged violations in one of the complaints. Granting it, however, distorts the administrative hearing process, and risks making the evidence gathering process interminable.

The Order entered above closes the evidence-gathering portion of the hearing and directs the parties to state their positions on an appropriate briefing schedule to enter their closing arguments. In any case in which I serve as Examiner, I afford the parties a chance to stipulate the briefing schedule.

The March 20, 2001 Amendment

The Law Governing The Amendment

Sec. 111.07(2)(a), Stats., states:

> . . . Only one such complaint shall issue against a person with respect to a single controversy, but any such complaint may be amended in the discretion of the commission at any time prior to the issuance of a final order based thereon. . . .

ERC 22.05(5)(a) states:

> Any complainant may amend the complaint upon motion . . . at any time prior to the issuance of an order based thereon by the . . . examiner authorized to issue and make findings and orders.

The Commission has not specified a standard defining the scope of this broad right to amend a complaint. Rather, it has acted on individual examiner decisions on a case-by-case basis. See, for example, MILWAUKEE COUNTY ET. AL., DEC. NO. 28754-C (WERC, 1/98). The Commission has declined to apply a "relatedness" test to post hearing amendments, thus effecting the breadth of ERC 22.02(5), IBID. As Sec. 111.07(2)(a), Stats., demonstrates, however, the breadth of ERC 22.02(5) cannot expand litigation beyond "a single controversy." Among the examiner decisions approved by the Commission in DEC. NO. 28754-C is STATE OF WISCONSIN ET. AL., DEC. NO. 20711-A (HONEYMAN, 1/84), in which the examiner noted (at 2) that "the right to amend cannot be presumed to be absolute . . . some showing of reasonableness is warranted." The reasonableness standard fits well within the "discretion" authorized by

Application Of The Governing Law To The Amendment

Whether the evidence gathering portion of the consolidated complaints is continued for rebuttal or for the purposes of litigating the amendment, the same risks and benefits discussed in resolving the Motion must be weighed. The amendment adds nothing to that process, and thus the considerations noted above militate against considering the amendment a reasonable modification of the consolidated complaints.

The amendment, however, poses further complications than those discussed above. There is no evident factual relationship on the face of the amendment between the amendment and the consolidated complaints. The amendment may underscore Complainant's desire to continue the evidence gathering process, but the evidence relevant to the amendment bears no relationship to the consolidated complaints. Thus, there is no apparent efficiency to be gained by hearing the amendment as part of the consolidated complaints. The pleading and hearing process would have to begin again for the amendment.

Nor will focusing on the legal implications of the amendment alter this conclusion. In support of the amendment, Complainant argues that it highlights a continuing pattern of discrimination. Even if this were the case, it underscores the need to close the consolidated complaints. Complainant argues in support of the amendment that the delay in the processing of the consolidated complaints "militates against the commission's duty to administer the law and allows the employer to continue to violate Ms. Peshut's rights to concerted activities over the last two-and-one-half-years." This only underscores the need for closure. If proscribed hostility has been proven in this litigation, delaying that determination continues the complained of delay, perhaps indefinitely.

Focusing on the amendment as opposed to its argued implications underscores this conclusion. The amendment poses distinguishable issues from the consolidated complaints. The right of an individual unit member to representation of their own choosing arguably poses an issue of unit-wide significance with statutory implications. This prompted a waiver by Respondents of the application of the grievance arbitration process to the contractual issues posed in the consolidated complaints (See summary of pre-hearing conference dated February 29, 2000). The amendment questions compliance with the time lines of the grievance procedure. This has no evident bearing on the issues of the consolidated complaint, and throws the underlying waiver of the grievance arbitration process into question. There is no apparent reason an issue of compliance with grievance time lines should not be left to the contractual dispute resolution process.

More significantly, the consolidated complaints pose an awkward procedure to determine the factual or legal implications of the amendment. If it is assumed that the amendment poses a common issue of contract interpretation with the consolidated complaints so that the contract interpretation necessary to the consolidated complaints spans the facts underlying the amendment, there is no apparent reason to hear the facts underlying the amendment. If the facts of the amendment pose a distinguishable contractual issue, then there is no apparent reason to throw the issue into a proceeding in which Complainant and Union Respondents are adverse parties. Similar considerations concern any legal implications. If the issue involves Complainant's rights as a steward or anti-union hostility, it is not apparent why those issues should be heard in this proceeding, which turns on distinguishable facts and on procedures in which Complainant and Union Respondents have been placed in at least partially adverse roles.

The amendment does not complement, but adds to the issues posed in the consolidated complaints. If it is to be heard, it should be heard as the distinct matter that it is. Whether or not Complainant has standing to assert the claims made by the amendment, the amendment has no role to play in the determination of the consolidated complaints. The Order denies the amendment. UWM Respondents seek a dismissal of the amendment "with prejudice." Presumably, this means a determination that Complainant lacks standing to advance the amendment as a separate complaint. My conclusion that the amendment has no proper role in this matter, however, exhausts my authority. The denial of the amendment removes it from the evidence gathering portion of the consolidated complaints. My authority as Examiner can go no further than that.

Dated at Madison, Wisconsin this 11th day of April, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

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