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

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

No. 29775
No. 29776

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 GRANTING MOTION TO INTERVENE AND CONSOLIDATING COMPLAINTS FOR PURPOSES OF HEARING

On September 10, 1998, Complainant Jennifer A. Peshut filed a complaint with the Wisconsin Employment Relations Commission alleging UWM Respondents had committed unfair labor practices within the meaning of Secs. 111.84(1)(a), (b), (c) and (e), Stats. On September 21, 1998, Complainant filed a complaint with the Commission alleging that Union Respondents had committed unfair labor practices within the meaning of Secs. 111.83(1), (2)(a) and (d), Stats., as well as "the usual and common practice of the Wisconsin Department of Employment Relations (DER) concerning grievances."

On October 8, 1998, Union Respondents filed motions to intervene and consolidate. On October 15, 1998, Complainant filed motions opposing intervention and consolidation.

On November 24, 1998, Complainant filed an amendment to her complaint against Union Respondents alleging violation of Secs. 111.84(2)(a), (b) and 111.84(3), Stats. On December 30, 1998, Complainant filed an amendment to her complaint against UWM Respondents alleging violation of Secs. 111.82, 111.84(1)(e), and 111.84(3), Stats.

On March 18, 1999, the Commission assigned Richard B. McLaughlin, a member of its staff, to act as Examiner in each complaint. After informal attempts to contact each party, the Examiner summarized the status of the complaints in a letter dated May 4, 1999, which states:

. . .

> It is also my understanding that Mr. Wild represents all of the respondents in Case 465, and that Mr. Hassett represents all of the respondents in Case 466.

> It is my understanding that Ms. Peshut is representing herself in each of the above-noted matters. From the files, it would appear that the first order of business is a pending motion to consolidate. Please advise me if there are other issues which need to be addressed. . . .

In a letter to the parties, dated May 12, 1999, the Examiner stated the status of the complaints thus:

> The first matter to be addressed . . . is a motion to consolidate. As I read Commission case law, only the Commission can consolidate cases. Your positions on whether or not the files should be consolidated can be made to me. I will review them, and file a proposed decision with the Commission, which must make the ultimate determination. Please see if you can agree on a briefing schedule. . . .

In a letter filed with the Commission on May 13, 1999, UWM Respondents asserted that certain allegations of the complaint should be considered moot. By May 20, 1999, the parties agreed upon a briefing schedule. In a letter to the parties dated May 24, 1999, the Examiner confirmed the agreed upon schedule and suggested that the contention that certain allegations were moot should "be included in the briefing of the consolidation issue."

The parties filed briefs and reply briefs by August 25, 1999. In a letter filed with the Commission on September 1, 1999, Union Respondents stated:

> Our office is in receipt of Ms. Peshut's reply brief in which she references on page 15 a motion to dismiss filed by Council 24. Please be advised that such language was inadvertently included in Council 24's initial brief. Council 24 does plan to file such a motion upon resolution of the pending motions to intervene and for consolidation. However, a motion to dismiss is not before the Commission at this time. . . .

On September 8, 1999, Complainant filed a motion to strike and a motion opposing Respondent's motion to dismiss. The Examiner supplied copies of the September 8 motions to UWM and Union Respondents in a letter dated September 9, 1999, which asked the Respondents to advise the Examiner "if you wish to make any comments." On September 9, 1999, Union Respondents filed a letter which "withdraws the motion to dismiss, as it is our right." On September 21, 1999, Complainant filed an amendment to her complaint against Union Respondents alleging violation of Secs. 111.83(1), 111.84(2)(a), (b) and 111.84(3), Stats.

Having considered the matter and being fully advised in the premises, we make and issue the following

ORDER

1. Union Respondents' motion to intervene is granted. Union Respondents may participate in Case 465, No. 56793, PP(S)-295 as a party in interest.

2. Union Respondents' motion to consolidate is granted. Case 465, No. 56793, PP(S)-295 and Case 466, No. 56821, PP(S)-296 are consolidated for the purpose of hearing.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of November, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

I concur.

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS)

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO INTERVENE AND CONSOLIDATING COMPLAINTS FOR PURPOSES OF HEARING

BACKGROUND

Case 465

Complainant filed this complaint on September 10, 1998. In it, she alleges that UWM Respondents committed unfair labor practices from January of 1998 through the yet to be completed processing of a number of grievances filed on her behalf. Her complaint alleges that she was then employed as a Program Assistant 2 in the Center for Women's Studies in the Graduate School of UWM. While so employed, WSEU was the exclusive representative for the bargaining unit of which she was a member. During at least part of the period of time covered by the complaint, she served as a WSEU Steward. Her complaint alleges that the WSEU filed a series of grievances on her behalf. Various management personnel at UWM made a series of "misleading and/or false" allegations about her conduct as a steward, then acted to interfere with the normal and contractually specified procedure for processing grievances. The complaint also alleges that UWM management personnel disciplined Complainant without recognizing her right to representation, and adversely altered her conditions of employment in reprisal for her assertion of protected rights. Her December 30, 1998, amendment to the complaint alleges that UWM management personnel failed to provide her information concerning her still pending grievances, and failed to hold contractually required Step One and Step Two meetings on those grievances.

Case 466

Complainant filed this complaint on September 21, 1998. In it, she alleges that Union Respondents acted to deny her ability to be represented by her attorney for the Step Two meeting required to process grievances noted in Case 465. The Step Two meeting had been set for August 26, 1998, but was postponed indefinitely by a WSEU Field Representative, who refused to "go ahead with the meeting if Peshut's attorney were present." The complaint alleges the Step 2 meeting has yet to be conducted. The complaint adds that Complainant unsuccessfully appealed the Field Representative's action through an internal WSEU procedure. Her November 24, 1998 amendment alleges that a WSEU Field Representative, acting on behalf of the WSEU, acted to have Complainant removed as Steward in a Step Two meeting set for November 12, 1998, regarding a grievance involving another unit member. The amendment alleges her removal constituted retaliation for her filing the September 21, 1998 complaint. Her September 21, 1999 amendment alleges that a WSEU Field Representative "violated Peshut's

right to present grievances to her employer . . . in a grievance hearing scheduled by the employer for October 6, 1998." The amendment alleges the action was taken on behalf of WSEU officers, and was done in retaliation for her processing the September 21, 1998 complaint.

THE PARTIES' POSITIONS

Union Respondents' Initial Brief

As part of its review of the procedural background to the motions, Union Respondents state that "Council 24 hereby moves to dismiss Peshut's amended complaint in Case 466 on the basis that her removal as a steward does not constitute an unfair labor practice, but rather is subject to the internal procedures of the union."

After its review of the procedural background, Union Respondents contend that the complaints "should be consolidated" and that Union Respondents should be permitted to intervene in Case 465. Union Respondents note that Sec. 803.04, Stats., "allows persons to be joined in one action as defendants if the claims asserted against them arise out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action" and should be applied here. Since both complaints "involve interpretation of the collective bargaining agreement which is in effect between Council 24 and the State of Wisconsin," Union Respondents conclude the complaints should be considered together. Beyond this, Union Respondents contend that both complaints arise from the "same series of occurrences" since "Case 465 serves as the basis for the violations of the collective bargaining agreement which are alleged in Case 466." Since "much of the evidence in both cases will be the same" Union Respondents conclude that "consolidation will avoid unnecessary duplication and waste of . . . resources."

UWM Respondents' Initial Brief

UWM Respondents note that Complainant's original motion to oppose intervention contends that Union Respondents failed, under ERC 20.12.(2), to "state the grounds upon which such person claims an interest." This assertion is without basis, since Union Respondents' original motion states that as "the certified bargaining representative, WSEU is a necessary party in disputes involving the potential interpretation of its contract." Because the complaint in Case 465 alleges a violation of that agreement, the motion to intervene is well founded. Beyond this, UWM Respondents contend that Complainant's opposition to intervention is inconsistent with the terms of Appendix A of the complaint, which acknowledge that the labor agreement grants WSEU the right to participate in grievance meetings involving employes who have chosen not to use WSEU-selected representatives. Her opposition to the motion to intervene is, therefore, "inconsistent and unreasonable." The motion to intervene thus must be granted.

Nor can Complainant's opposition to the motion to consolidate be considered reasonable. UWM Respondents argue that a review of the pleadings establishes that "appendices to Ms. Peshut's complaint against WSEU refer to the exact same matters about which Ms. Peshut complains in her complaint against UW-Milwaukee." Since the two complaints "clearly refer to he exact same facts and circumstances" they should be consolidated.

Complainant's Initial Brief

The Complainant notes that the motions question whether Union Respondents should be permitted to intervene in Case 465, whether Cases 465 and 466 should be consolidated, and whether any allegations of Case 465 can be considered moot. After a review of the background to the two complaints, Complainant contends that Union Respondents' motion "seeks to join two unrelated complaints." Consolidation is discretionary under governing administrative rules, and that discretion should not be extended to the pending motion. An examination of the rules and statutes governing the Commission and federal courts establishes that consolidation "is properly employed when contested cases present substantially the same issues of fact and law and so long as consolidation would not prejudice any party."

The motions to intervene and to consolidate "can hardly be said . . . (to) serve the interests of judicial economy or efficiency." Applied to Cases 465 and 466, "(i)ntervention and consolidation are mutually exclusive procedures." The practical effect of Union Respondents' motions is to make two complaints into a single proceeding. This is illogical and threatens Complainant's right to a fair hearing on distinguishable matters. Union Respondents' interest in either matter remains a disputed issue of fact and law, which points more toward a hearing on the asserted interest than toward combination of the two complaints.

Nor can it be said that the two complaints pose the same issues of fact or law. Commission precedent will permit consolidation in such cases, but the complaints posed here do not share issues of fact and law. More specifically, Complainant notes that the "complaint against the union did not arise from any grievance, as well it could not since Ms. Peshut cannot file a grievance against the union." There is no alleged breach of the WSEU's duty of fair representation, and thus the allegations against UWM Respondents pose independent issues from those posed against the Union Respondents. The sole apparent similarity between the complaints is the Step Two meeting once set for August 26, 1998. The circumstances which caused the grievances which became the subject of that meeting cannot be considered the same as the circumstances which prompted Union Respondents to refuse Complainant a representative of her own choosing.

Commission precedent requires determining "the identity of causes of action" through a three-factored test. Complainant argues that "(t)he instant complaints fail all three tests." The remedies sought against UWM Respondents are not the same as those sought against Union Respondents; the same evidence will not support both claims; and any "judgment against either the union or employer would not bar the other."

Consolidating the complaints would not produce any administrative efficiency, but would prejudice Complainant's right to a hearing on distinct matters. The sole allegation against the WSEU is that it failed to permit Complainant the use of a representative of her own choosing. Evidence will show the UWM Respondents expressly denied any interest in this matter, but in any event the allegation is direct and simple. The allegations against UWM Respondents are more complex. Beyond this, granting the motions would put the litigation in the awkward posture in which the WSEU becomes either a respondent or a complainant/respondent. The specific allegations make this prejudicial, since the complaint against UWM Respondents alleges they acted to prevent Complainant from asserting rights in part created and defended by the WSEU. To make Union Respondents a respondent in these allegations undermines the allegations of the complaint.

The assertion that allegations in Case 465 may be moot is fatally flawed. Procedurally, the assertion was made informally by letter and not through the motion and pleading practice established in the Commission's rules. Beyond this, the assertion is vague. UWM Respondents fail to state which allegations or which remedies advanced in the complaint can be considered moot. Significantly, the request "asks the examiner to make a ruling prior to an evidentiary hearing," which is inappropriate since Complainant challenges the facts asserted by UWM Respondents. Even if the allegations could be considered properly posed for consideration, governing case law makes it obvious that no portion of the complaint can be considered moot. If the asserted removal of a reprimand could render the complaint moot, any "employer could engage in the same conduct in the future . . . with the foreknowledge that the commission could not act before the expiration of the reprimand."

Union Respondents' Reply Brief

ERC 20.12(2) permits intervention as a matter of discretion, "upon such terms as the commission or the individual conducting the proceeding may deem appropriate." The interest of the Union Respondents cannot, however, be doubted. WSEU, "as the bargaining representative for Ms. Peshut, has exclusive agency over the enforcement of its collective bargaining agreement." Since the complaint prompting Case 465 demands "an interpretation of the collective bargaining agreement," Union Respondents are "a party in interest in this case and must be permitted to intervene." This result has solid support in Commission precedent.

Complainant's arguments, however artful, cannot obscure that consolidation under Wisconsin law is appropriate "when the claims arise out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." Here, "both Cases 465 and 466 involve interpretation of the collective bargaining agreement which is in effect between Council 24 and the State of Wisconsin." Beyond this, "both cases arise . . . out of (the) same series of occurrences." In fact, "Case 465 serves as the basis for the violations of the collective bargaining agreement which are alleged in Case 466." At a minimum, it is apparent both cases will demand the same set of witnesses, and consolidation "will prevent these individuals from being forced to testify on multiple occasions regarding the same factual issues." In sum, "consolidation of the two cases will avoid unnecessary costs, duplicative proceedings, inconvenience and delay."

UWM Respondents' Reply Brief

UWM Respondents note that the "simple solution to avoid" the confusion argued by Complainant "is to create two separate issues and for the examiner to make two separate findings, one for each cause of action." This solution "is certainly preferable to having two separate hearings that could each last days."

Nor can potential issues of prejudice be restricted to Complainant. Case 465 asserts Complainant "can bring claims against the employer without the union's consent or involvement." This issue cannot be determined in the absence of Union Respondents without prejudice to "the administration of their own contract." No analogous prejudice can occur to Complainant who inevitably will get "her day in court against both respondents and on both issues." Beyond this, Complainant asserts in Case 465 that UWM Respondents must be ordered to cease interfering with her exercise of concerted activity. That this activity occurred when she was a WSEU Steward cannot be taken as a basis to exclude WSEU from the hearing.

That the State of Wisconsin and WSEU have successfully maintained a collective bargaining relationship spanning years of collective bargaining establishes that "(t)here is a long history of past practice that WSEU and the State have experienced in implementing the contract." This warrants intervention by Union Respondents "in order for the examiner to have a complete record."

Complainant cannot credibly assert the complaints assert distinct claims when she "has already offered the same evidence in both cases." The grievances included as Appendix A of the complaint prompting Case 466 "are included as appendices to the complaint against the employer." The exclusion of Union Respondents from Case 465 cannot be justified on the bases asserted by Complainant. In fact, the "real reason Ms. Peshut doesn't want WSEU to intervene is because Ms. Peshut fears that WSEU will not view the employer's actions as

wrongful and instead WSEU may view Ms. Peshut as advancing claims that are either contrary to the WSEU contract or contrary to past practice between the State and WSEU." Precedent binding Union Respondents in future cases should not be set without their participation. Thus, Union Respondents are "clearly a necessary party to the case against the employer."

Complainant's Reply Brief

Complainant asserts that UWM Respondents' brief manifests the danger of prejudice and confusion by its failure to state any interest beyond those of Union Respondents. There is no explanation for this beyond the obvious – "the employer has no interest in the case against the union." UWM management personnel have already acknowledged they lack any interest in Complainant's choice of advocates. That UWM Respondents characterize the pending motions as separate matters should not obscure that the motions seek to turn two claims into one.

Opposition to intervention by Union Respondents is not inconsistent with contractual provisions granting WSEU rights to participate in grievance hearings conducted by employe selected advocates. Grievance arbitration is not statutory litigation. The complaint hearing will be public, and Union Respondents can attend if they wish. This falls short of establishing the right of Union Respondents to participate in a hearing that does not concern them.

UWM Respondents have failed to state reasons supporting consolidation and have improperly construed the complaints as involving no more than the processing of certain grievances. More accurately viewed, Case 465 involves "a pattern of prohibited practices over a period of twelve months." The mere mention of the grievances in both complaints falls short of establishing a basis to join them.

Union Respondents' brief argues solely for consolidation and bases the claim on statutes outside of those governing the Commission. This ignores applicable Commission rules, and expands the Commission's authority beyond its proper confines within Chapters 111 and 227. However, a reasoned view of Secs. 803.04 and 805.05, Stats., supports Complainant's position. Those provisions establish two forms of discretionary consolidation. Neither is appropriate here. Permissive joinder demands consent of "the plaintiff, or in the instant proceeding, the complainant." There is no such consent, and thus there can be no consolidation through permissive joinder. Beyond this, there is no identity of subject matter in the two complaints.

Nor is "true consolidation" appropriate here. There is no common action against the UWM and the Union Respondents. Since "actions that could not be joined may not be consolidated," the Commission "should not consolidate the instant complaints because the actions should not be joined."

That the two complaints involve "the same collective bargaining agreement" cannot support consolidation. The complaints "involve different requirements of the collective bargaining agreement," and turn on allegations beyond the labor agreement. Complainant bases her action in Case 466 on statute and on contract. The contractual aspect of the allegations against Union Respondents is narrow and unrelated to the allegations against UWM Respondents. Beyond this, the statutory allegations against the UWM and the Union Respondents are not the same.

Nor can the allegations of the two complaints be traced to a shared set of occurrences. The complaints share little in common beyond the Step Two meeting scheduled for August 26 and October 6 of 1998. The appendices attached to each complaint establish that little, if any, evidence will be common to the two matters.

The Commission "should deny the Union's motion to dismiss Ms. Peshut's Amended Complaint." The motion failed to afford Complainant due notice and "(o)ne can only assume that this was an oversight, not a bad faith abuse of the commission's administrative procedure." In any event, the motion ignores that there has yet to be any definitive ruling permitting or denying the amendment. Thus, "the union is asking the commission to dismiss a complaint that does not exist." Beyond this, the motion ignores governing precedent and the clear provisions of Chapter 227, Stats. More significantly it misconstrues the concerted activity evident in the position of steward as "an internal union matter." Protection of concerted activity invokes the Commission's jurisdiction, not the union's internal processes.

Consolidation will not further any legitimate purpose, and will prejudice Complainant's case. Case 466 poses significant issues of law on basic fact. Case 465 is more complex factually, but poses more basic claims of unfair labor practices. The procedural issues raised by UWM and by Union Respondents are no more than hurdles thrown in the way of hearing the straightforward, but distinct, claims of the two complaints.

BACKGROUND

Complainant Peshut has filed two complaints with us. In one she seeks relief against UWM Respondents; in the other, relief against Union Respondents.

Each complaint has been filed with the Commission as provided in Secs. 111.07 and 111.84(4), Stats.

Before us now are two motions filed by Union Respondents. 1/ Through one motion, Union Respondents seek to intervene in the complaint Peshut filed against UWM Respondents. The other motion seeks to consolidate both cases.

1/ UWM Respondents question whether complaint allegations concerning a written reprimand are moot, alleging the reprimand has been withdrawn. We view the asserted withdrawal as a disputed fact. Moreover, even if the withdrawal took place, it is not apparent which allegations of the complaint UWM Respondents view as moot. Thus, we presently have nothing to decide as to mootness.

Further, there is no viable pending motion to dismiss. Even if Union Respondents' initial brief could be seen to pose such a motion, such motion has been withdrawn.

Read in conjunction with Sec. 111.07, Stats., ERC 20.12(2) and 20.07 govern the motion to intervene and the motion to consolidate, respectively.

> Section 111.07 (2)(a), Stats. provides in pertinent part:
> Any other person claiming interest in the dispute or controversy, as an employer, an employe, or their representative, shall be made a party upon application.
>
> ERC 20.12(2) provides:
>
> Any person desiring to intervene in any proceeding, shall, if prior to hearing, file a motion with the commission. Such motions shall state the grounds upon which such person claims an interest. Intervention at the hearing shall be made by oral motion stated on the record. Intervention may be permitted and upon such terms as the commission or the individual conducting the proceeding may deem appropriate.
>
> ERC 20.07 provides:
>
> Whenever the commission deems it necessary, in order to effectuate the purposes of subch. V, ch. 111, Stats., or to avoid unnecessary costs or delay, it may remove or transfer any proceeding before a single commission member or examiner. Proceedings under several sections of such subchapter may be combined or severed.

As the Complainant observes, the motion to intervene and the motion to consolidate are closely related in terms of their practical impact on how the two complaints proceed. Granting the motion to intervene would permit Union Respondents to participate in both cases (whether or not the complaints are consolidated) as a party in interest. Granting the motion to consolidate (at least for the purposes of hearing) would permit both Respondents to participate in a single hearing on both cases.

However, contrary to Complainant's contentions, we think it appropriate to separately address and decide the two motions. While the effect of granting either motion produces similar practical results in terms of an evidentiary hearing, each motion involves separate statutes/administrative rules and differing considerations. Thus, we proceed to consider each motion.

DISCUSSION

Motion to Intervene

The Commission treats a motion to intervene in a complaint case as an application for "party in interest" status under Sec. 111.07(2)(a), Stats. ROCK COUNTY, DEC. NO. 28494-B (WERC, 11/96).

When considering motions to intervene as a party in interest under Sec. 111. 07(2), Stats., we have generally held that "the applicant's claim of interest must relate to issues in controversy before a motion to intervene will be granted." ASHLAND COUNTY, DEC. NO. 14461-A (WERC, 4/76). In MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 16635-B (WERC, 1/83), relying in large part on CHAUFFEURS, TEAMSTERS & HELPERS GENERAL UNION V. WERC, 51 Wis. 2D 391 (1971), we held that "interest" as used in Sec. 111.07(2), Stats. "means something more than to be affected by or interested in the outcome."

Against this background, we proceed to consider the "interest" identified by Union Respondent in support of its request for party status.

In the Motion to Intervene, Union Respondents identify their interests as follows:

> . . . in Section II, paragraphs 2 & 4, of Peshut's allegations against UW-Milwaukee, et al., the complainant makes claims giving rise to interpretation of the Collective Bargaining Agreement (Agreement) between the WSEU and the

> State of Wisconsin. As the certified bargaining representative, WSEU is a necessary party in disputes involving the potential interpretation of its contract before the WERC.

In Section II, paragraph 2 of her complaint, Peshut asserts UWM Respondents:

> Interfered with the administration of the Wisconsin State Employees Union with respect to the represented employee Peshut in violation of Section 111.84(1)(b), of the Wisconsin Statutes.

In Section II, paragraph 4 of her complaint, Peshut asserts UWM Respondents:

> Violated the Agreement between the State of Wisconsin and the Wisconsin State Employees Union (hereinafter, The Agreement) in violation of section 111.84(1)(e), of the Wisconsin Statutes.

Applying ASHLAND and MILWAUKEE to the interests identified by Union Respondents, we conclude Respondent WSEU is a "party in interest" because it is part of and directly affected by the "controversy" posed by paragraphs 2 and 4 of Peshut's complaint.

As argued by Union Respondents, we have generally held that a labor organization's status as the exclusive collective bargaining representative of employes involved in the "controversy" raised by the complaint is a "party in interest" entitled to intervene. STATE OF WISCONSIN, DEC. NO. 28072-B (WERC, 8/97). More specifically, where, as in paragraph 2 of the complaint, it is alleged that the employer is interfering with the administration of a labor organization, it is clear the labor organization in question (in this case Respondent WSEU) is part of and directly affected by the "controversy" raised by this allegation. Where, as in paragraph 4 of the complaint, it is alleged that the employer is violating a collective bargaining agreement, it is clear that the labor organization which is party to that agreement (again Respondent WSEU) is part of and directly affected by the "controversy" raised by this allegation. See STATE OF WISCONSIN, DEC. NO. 28936-B (GRECO, 2/98) AFF'D BY OPERATION OF LAW, DEC. NO. 28936-C (WERC, 3/98).

In reaching our conclusion, we have considered and rejected Complainant's argument that Respondent WSEU's "interest" in her complaint against UWM Respondents cannot be ascertained until after an evidentiary hearing. Respondent WSEU has identified "interests" as Peshut's exclusive collective bargaining representative and as party to the applicable collective

bargaining agreement. Peshut has not disputed that Respondent WSEU is her exclusive collective bargaining representative or that it is a party to the agreement she asserts has been violated. Thus, no evidentiary hearing is needed.

We have also considered and rejected Complainant's argument that as an inexperienced litigant proceeding without the assistance of counsel, she is improperly prejudiced by the granting of a motion which allows both Respondents to participate in a single hearing against her. In our view, the strategic advantages or disadvantages to litigants are not relevant considerations when considering a motion to intervene. Section 111.07(2)(a), Stats. and ERC 20.12(2) establish the law which we are to apply when ruling on a motion to intervene and we have applied that law to the motion before us.

Motion to Consolidate

Having granted Union Respondents party status in the case in which only UWM Respondents have been named (Case 465), we now address Union Respondents' motion that seeks to consolidate that matter with the case in which Union Respondents have been named as the respondents (Case 466). The provisions of ERC 20.07 govern the motion.

Where the Commission has not obtained agreement between the parties as to a consolidation issue, the Commission will address the motion for consolidation on its merits. ERC 20.07 highlights the significance of economic considerations as well as the potential of delay to the hearing process.

We begin with the obvious: no hearing has yet been scheduled in either of these matters. Thus, potential delay in the hearing process poses no issue herein. Cf. MILWAUKEE AREA VTAE DISTRICT ET AL. DEC. NO. 26322-B, 26482, 26483 (WERC, 5/90).

Interests of efficiency and hearing economy are also considerations. "As a general matter the Commission has ordered consolidation of cases where the facts and circumstances underlying the cases are sufficiently interrelated and the witnesses are substantially the same." CITY OF LACROSSE, DEC. NO. 28081, 28082 (WERC, 6/94 at 3).

In each of the instant matters, a contract violation is alleged. [In one case the contract violation allegedly consists of a violation of Sec. 111.84(1)(e), Stats.; in the other the contract violation allegedly consists of a violation of Sec. 111.84(2)(d), Stats.] In both matters the same labor agreement is posed, to which the same bargaining history applies, and from which the same past practices can be extracted. Moreover, the same grievances underlie at least a part of the allegations in the two complaints.

Beyond this, each complaint alleges that the actions of the named Respondents were based in part on their hostility to Complainant's exercise of concerted activity. The area of the alleged proscribed hostility will inevitably overlap in the two cases. This is obvious if Complainant contends the hostility reflects joint UWM/Union retaliatory action, but is also true even if Complainant does not accuse them of acting in concert.

For example, the September 10, 1998 complaint alleges UWM managerial personnel "effectively instructed" WSEU representatives "to control the employee and WSEU union steward Peshut." Witness testimony on this point will overlap. Even if Complainant does not intend to use the processing of the underlying grievances as a basis to prove proscribed hostility, UWM and Union Respondents will have to defend the allegation by demonstrating the grievance processing was in compliance with their respective duties. Since the same grievances span the two cases, witness testimony regarding the alleged hostility will overlap.

Beyond this, the Commission often employs a single examiner to hear multiple cases to avoid duplication of effort. This is a concern of greater significance to an administrative agency such as the WERC that travels to the litigating parties than to a court of law that summons the litigating parties to it, and has been expressly noted by us in the past. MILWAUKEE AREA VTAE DISTRICT ET AL. SUPRA.

Against these concerns must be weighed the concerns urged by the Complainant. We agree it is important not to overstate the overlap between the two cases. One complaint challenges a pattern of behavior by UWM Respondents only a part of which appears to directly involve Union Respondents. While the relief requested and legal issues posed in each matter may overlap, the requested relief and legal issues of the one are not identical with that in the other. Certainly, Complainant has a legitimate interest in avoiding a procedural ruling that makes two distinguishable complaints into one.

On balance, we believe consideration of these factors warrants consolidation of the two complaints for hearing purposes only. In our view, the overlap between the two cases is sufficient to warrant hearing each matter at the same time before the same examiner. No delay will be caused. The economy for the Commission and the parties is apparent.

We believe that Complainant's concerns can be met by consolidating the complaints *for hearing purposes only*. CITY OF LACROSSE ET AL. DECS. NO. 17076-B, 17084-C (LACROSSE COUNTY CIRCUIT COURT, 10/82 AT 1.) We further believe that consolidation to this limited extent also avoids Complainant's apparent fear that consolidation would meld the two cases into one. Whether separate decisions should issue can be left to the examiner. See MILWAUKEE AREA VTAE ET AL. SUPRA, and CITY OF LACROSSE, DECS. NO. 16380-C, 16341-C, 16570-C (Yaeger, 10/79).

The Order entered above thus permits Union Respondents to intervene in Case 465 and consolidates Cases 465 and 466 for hearing purposes. The Commission will, in a separate order, appoint a single hearing examiner in the two cases.

Dated at Madison, Wisconsin, this 29th day of November, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

STATE OF WISCONSIN (DEPARTMENT OF EMPLOYMENT RELATIONS)

**CONCURRING OPINION OF
COMMISSIONER A. HENRY HEMPE**

I agree with the result and rationale expressed by my colleagues.

Ch. 227, Wis. Stats. provides additional support. 2/

Clearly, each matter (motions for intervention and consolidation) before us are "contested cases" within the meaning of Sec. 227.01(3). 3/

2/ We have long used Ch. 227, Wis. Stats., as a point of reference to assist us in sorting out procedural issues in contested cases. See, e.g., Guthrie v. Local 82 and University of Wisconsin-Milwaukee Housing Department, Dec. No. 11457-F (WERC, 12/77).

3/ (3). "Contested case" means "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. . ."

Complainant Peshut argues that as to intervention Union Respondents' rights are no greater than those of the general public.

Examination of this assertion against the standards set forth in Sec. 227.42(1) leads to a different conclusion:

> **227.42(1)** In addition to any other right provided for by law, any person filing a written request with an agency for a hearing shall have a right to a hearing which shall be treated as a contested case if:
>
> (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction.
>
> (b) There is no evidence of legislative intent that the interest is not to be protected.
>
> (c) The injury to the person requesting the hearing is different in kind of degree from the injury to the general public caused by the agency action or inaction.

(d) There is a dispute of material fact.

In its pleadings, Respondent WSEU identifies its interests in this dispute as arising from its status as the certified bargaining representative. "As the certified bargaining representative, WSEU is a necessary party in disputes involving the potential interpretation of its contract before the WERC."

Even Complainant Peshut asserts that the Respondent UW-Milwaukee "interfered with the administration of the Wisconsin State Employees Union with respect to the represented employee Peshut in violation of Sec. 111.84(1)(b) of the Wisconsin Statutes." 4/ (Emphasis supplied).

4/ Section 2, paragraph 2, Complaint.

Under these circumstances, it seems clear that all of the conditions or standards set forth in Sec. 227.42(1) have been satisfied.

Subs. (a) requires that a substantial interest of the person be injured or be threatened with injury by agency action or inaction. Clearly, Respondent WSEU has a substantial interest in protecting a collective bargaining agreement that it negotiated and under which it has continuing contract administration responsibilities. Just as obvious is that an interpretation of that contract document by this agency offers potential injury to Respondent WSEU from which it is entitled to defend itself.

Subs. (b) requires there be no evidence of legislative intent that the interest is not be protected. Not only is this standard satisfied, but the Legislature has affirmatively asserted Respondent Union's interest in matters of this sort as a declaration of public policy. 5/

5/ See Sec. 111.80, Stats.

The potential injury to Respondent Union is substantially different in kind and degree from the injury to the general public caused by the agency action or inaction as required by subs. (c). The general public has neither the right nor the duty to administer the collective bargaining agreement for which agency interpretation is sought. Respondent Union has both the right and the duty to do so and its failure to do so may subject it to severe sanctions of law.

Finally, although an answer to the complaint has not yet been filed, a reading of the complaint as well as the other pleadings that follow makes abundantly pellucid that there exists a dispute of material fact, thus satisfying the standard contained in subs. (d).

Dated at Madison, Wisconsin this 29th day of November, 1999.

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

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