

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO, MILWAUKEE AND SOUTHERN DISTRICT
COUNCIL, Complainant,**

vs.

**BUILDING AND CONSTRUCTION TRADES COUNCIL OF
SOUTH CENTRAL WISCONSIN, Respondent.**

Case 1
No. 58070
Ce-2197

Decision No. 29809-A

Appearances:

Attorney Thomas Erickson, 611 North Broadway, Suite 200, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainant.

Lawton & Cates, by **Attorney Kurt C. Kobelt**, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of Building and Construction Trades Council of South Central Wisconsin.

**FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER
DISMISSING COMPLAINT FOR FAILURE TO STATE A
CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Daniel J. Nielsen, Examiner: On October 11, 1999, the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Milwaukee and Southern District Council (hereinafter referred to as either the Carpenters or the Complainant) filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission, alleging that the Building and Construction Trades Council of South Central Wisconsin (hereinafter referred to as either the Trades Council or the Respondent) had violated the Wisconsin Employment Peace Act (WEPA) by refusing to allow the Carpenters to represent employees in the carpentry craft

No. 29809-A

who were included in the Trades Council's public sector bargaining units in the Madison area. The Respondent filed a Motion to Dismiss and/or For a More Definite Statement, in response to which the Complainant submitted a clarification and amended the complaint to allege a violation of the Municipal Employment Relations Act (MERA). The Examiner subsequently wrote to the Complainant, seeking to clarify the basis for the complaint, and the Complainant confirmed the accuracy of the Examiner's summary. The Respondent subsequently submitted a Motion to Dismiss for Failure to State a Claim. The Examiner directed the parties to submit any arguments or citations of legal authority relevant to the Motion no later than January 7, 2000. That deadline passed without the submission of any further material.

Now having considered the evidence, the arguments of the parties, the statutes and the record as a whole, the Examiner makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Milwaukee and Southern District Council, hereinafter referred to as either the Carpenters or the Complainant, is a labor organization representing persons employed in the carpentry trade. The Carpenters maintain an office at N25 W23055 Paul Road, Suite 1, Pewaukee, Wisconsin. The mailing address is Post Office Box 790, Pewaukee, Wisconsin 53072-0790.

2. That the Building Construction Trades Council of South Central Wisconsin (hereinafter referred to as either the Trades Council or the Respondent) is a labor organization maintaining its offices at 1602 South Park Street, Room 204, Madison, Wisconsin 53715.

3. That the Trades Council is the exclusive bargaining representative for several public sector bargaining units in the Madison area, including bargaining units at the City of Madison, Dane County and the Madison Metropolitan School District.

4. That among the employees represented by the Trades Council in its capacity as exclusive bargaining representative for the aforementioned bargaining units are persons who are also members of the Carpenters.

5. That, on October 11, 1999, the Carpenters filed the instant complaint alleging that the Trades Council had violated Sec. 111.06, Stats. The Carpenters alleged that the facts giving rise to the complaint were:

Complainant has members in Madison, Wisconsin, who are employed by the City of Madison, Madison Metropolitan Public School District, and Dane County, respectively.

Currently, the carpenters in these locals are being denied their choice of representative. A majority of Complainant's members have expressed a desire to be represented by Complainant.

Respondent has prevented Complainant from representing its (sic) members, despite (sic) Complainant's requests that it be recognized as a joint (?) bargaining representative.

6. On October 19, 1999, the Respondent's counsel submitted a "Motion to Dismiss and/or For a More Definite Statement" to the Commission's General Counsel:

Respondent, Building and Construction Trades Council of South Central Wisconsin ("Council"), by and through counsel, hereby moves that the above case be dismissed for failure to state a claim and/or that Complainant be ordered to provide a more definite statement, pursuant to Wis. Admin. Code, Sec. ERC 12.03(3), based upon the following:

1. The Complaint avers that Complainant United Brotherhood of Carpenters and Joiner (sic) of America, Milwaukee and Southern District Council ("Carpenters") has members in Madison who are employed by the Madison Metropolitan School District, Dane County and the City of Madison. It then alleges that, "the carpenters in these locals are being denied their choice of representative," and have expressed a desire to be represented by the Carpenters. It concludes by asserting that the Council has prevented it from representing its members and seeks recognition as a "joint(?) bargaining representative."

2. The Carpenters allege generally that this conduct violates Section 111.06, Stats. But as provided in Section 111.02(6) Stats., Section 111.06 only applies to private sector employees. The Carpenters do not allege any violation of Section 111.70, the statute that governs the municipal employees at issue here. Accordingly, the complaint must be dismissed for failure to state any cognizable claim under the statute that applies to the employees in question.

3. Alternatively, the ambiguous allegations fail to comply with the requirement set forth in ERC 12.02(2) that a complaint contain a set forth the "time and place of occurrence of particular acts and the sections of the statute violated thereby." The Complaint is bereft of any description of any specific acts and any dates which the acts are alleged to have occurred involving the purported denial of any employees' choice of representative, or the Council's

alleged prevention of the Carpenters from representing their members. This sloppy draftsmanship makes it impossible to provide any meaningful response to the complaint.

4. Indeed, the Carpenters appear to be confused about what they were even asking the Council to do. Its use of the term "joint (?) bargaining representative" evidences a complete lack of investigation by its counsel of the underlying facts and a failure to conduct even minimal legal research regarding the propriety of its apparent desire to become a "joint bargaining representative. These derelictions, together with the Carpenter's failure to even cite the proper statute, compel a conclusion that the complaint is frivolous and "demonstrates extraordinary bad faith." HAYWARD COMMUNITY SCHOOL DISTRICT, DEC. NO. 24259-B (WERC, 3/88), AT P. 5.

WHEREFORE, for the foregoing reasons, the Complaint should be dismissed and the Complainant be directed to reimburse the Council for its attorneys fees and costs on the grounds that the complaint is frivolous and filed in bad faith. Alternatively, the Carpenters should be directed to provide a more definite statement of the facts.

7. On October 21, 1999, counsel for the Complainant submitted a response to the Respondent's Motion, stating that the "(?)" in the phrase "joint (?) bargaining representative" was a typographical error, and that the Complainant wished to be the sole bargaining representative for its members. The Complainant also amended its complaint to cite Sec. 111.70, MERA, rather than WEPA, and provided details of the specific incidents alleged to have given rise to the complaint, to wit, (1) an incident in the summer of 1999 when a representative of the Carpenters was told to leave a contract information meeting run by a representative of the Trades Council for its Madison Schools bargaining unit; and (2) "numerous" occasions on which the Carpenters asked to represent their members in the Trades Council's city, county and school district units in disputes with those employers, and were denied. The Complainant also alleged that there were two instances in which the Trades Council gave it permission to represent carpenters-members in grievance arbitration.

8. On October 25, 1999, counsel for the Respondent wrote to the General Counsel, asserting that the Complainant should not be allowed to amend its complaint to cure any deficiencies noted in the Motion to Dismiss and/or Make More Definite and Certain, and thus his October 21st submission should not be considered. Counsel for Respondent further submitted that the clarification raised more questions than it answered, because the Complainant now sought to be an exclusive bargaining representative of employees who were already represented, a result not permitted under the law. Further he asserted that the claim

that the Respondent had violated Sec. 111.70 was too broad a claim to permit a defense. He asserted that the dispute was an internal disagreement among unions and outside of the Commission's jurisdiction.

9. On November 4, 1999, the Examiner wrote to the parties, advising them that he had been appointed Examiner in the case, and had received the Respondent's Motions. The Examiner went on to request confirmation of his understanding of the Complainant's allegations:

As I read the complaint and the subsequent letter of clarification, the allegation is that there are various Madison area public sector bargaining units for which the Trades Council is either certified or recognized as the bargaining representative. The Carpenters assert that they have the right to represent members of the Carpenters' Union who are included in these bargaining units, either as a joint representative or as the exclusive representative, and that the Trades Council has generally refused to allow them to act as the representative for Carpenter-members of the Trades Council's bargaining unit. In support of this representational claim, the Carpenters assert that there have been two issues involving School District employees that the Carpenters' Union, rather than the Trades Council, has taken to arbitration. This was done with the consent of the Trades Council. As evidence of a denial of their right to represent members of the Carpenters Union, the Carpenters assert that a representative of the Carpenters was denied the opportunity to participate in a contract information meeting conducted by the Trades Council for employees in the Trades Council's bargaining unit at the Madison Metropolitan School District, including some employees who hold memberships in the Carpenters' Union.

I would appreciate it if Mr. Erickson would let me know whether this is an accurate statement of the Complainant's case.

On November 12th, the Complainant's attorney sent a facsimile to the Examiner confirming the accuracy of the November 4th summary of the case.

10. On November 16th, the Examiner wrote to the parties, and advised them that the factual allegations were sufficiently clear to allow the Respondent to organize a defense, but directing the Complainant to clarify its theory of the case:

Mr. Erickson has confirmed the accuracy of the summary statement of the Complainant's case contained in my letter of November 4th. Treating the October 21st letter to General Counsel Davis as an amendment to the complaint,

I do not believe the complaint is so vague as to warrant summary dismissal, and I am denying the Respondent's Motion. I do believe, however, that the Respondent and the Examiner are entitled to clarification of the complaint as to what specific provisions of Section 111.70, MERA have been violated and how the Complainant believes the Respondent has violated them.

The Complainant should provide this clarification no later than the close of business on November 24th, and should at the same time provide a copy to Mr. Kobelt.

11. On November 18th, the Complainant's counsel responded, specifying that the Respondent had violated Sec. 111.70(2) by refusing to allow the carpenter-members of the Respondent's bargaining units to be represented by the Carpenters, even though they had expressed a desire for such representation.

12. On December 6th, counsel for the Respondent filed a motion styled as a "Renewed" Motion to Dismiss for Failure to State a Claim:

1. On October 19, 1999, the Council filed a Motion to Dismiss for Failure to state a claim and/or for a more definite statement. The introduction to the Motion states that the motion seeks dismissal for failure to state a claim.

2. By letter dated October 21, counsel for the Carpenters submitted a response purporting to provide a more definite statement.

3. On October 25, the Council responded that the Carpenters (sic) effort to clarify their complaint was still too vague to permit a meaningful response and renewed its motion to dismiss the complaint.

4. On November 4, the Examiner provided his understanding of the facts being alleged and asked counsel for the Carpenters if this understanding was correct. On November 12, counsel replied that the Examiner's summary was correct. The revised facts acknowledge the Council is the only certified or recognized representative for the employees in question and that the claim is representational in nature.

5. On November 16, the Examiner requested that the Carpenters specify which statutory provisions are violated based upon the version of the facts to which the Carpenters had agreed.

6. On November 24, the Carpenters responded with an allegation that Respondent has violated Section 111.70(2), Stats., (sic) Consistent with the facts alleged, the Carpenters assert that, "a majority of Complainants (sic) members have expressed a desire to be represented by Complainant, and not respondent."

7. To date, the Examiner has refrained from ruling on the motion to dismiss for failure to state a claim pending the Carpenters (sic) repeated efforts to clarify their Complaint. Respondent submits that this Complaint, even as amended with the assistance of the Examiner, still fails to state a claim on which relief can be granted.

8. The Carpenter's cite language from Section 111.70(2) providing that employees have the right to "bargain collectively through representatives of their own choosing." The Complaint, **now for the third time**, fails to cite the appropriate section of the law. Section 111.70(2) is a general statement of the rights of employees to organize. There is no statutory basis to allege a violation of Section 111.70(2), standing alone. Rather such allegations of a violation of Section 111.70(2) must be tied in to either an employer or a union prohibited practice. It is inexcusable negligence for the Carpenters to fail to cite the appropriate section involving union prohibited practices--Section 111.70(3)(b)(1), which makes it unlawful for a union to coerce an employee in the exercise of rights protected by Section 111.70(2).

9. Even if the Carpenters are again **for the third time** allowed to amend their Complaint to allege a violation of Section 111.70(3)(b)(1), they are still way off base. There is little question that the Carpenter's claim that "a majority of [its] members have expressed a desire to be represented by Complainant indicates that this dispute is representational in nature. The Complainant seeks to represent the employees in question in some fashion that they remain unable to explain. Nevertheless, it is clear that representational disputes are resolved through separate procedures set forth in Section 111.70(4)(d).

10. The Examiner lacks jurisdiction to resolve such a representational dispute. Therefore, the Complaint must be dismissed on this basis.

11. Respondent is fully aware that the Commission is inclined to grant Complainants the right to a hearing even if their Complaint is inartfully drafted. But the Carpenters, who are represented by counsel, have been given three opportunities to state a cognizable claim. They have failed each time, despite the Examiner's generous but futile efforts to permit the Carpenters to amend their Complaint.

12. Enough is enough. It would serve no purpose whatsoever to require Respondent to incur the expenses of preparing for a hearing that cannot result in the relief the Carpenters seek.

13. Moreover, this is a case calling for the imposition of sanctions. The Examiner should award Respondents their legal fees for having to defend this patently frivolous action filed by an attorney who has failed to do his homework.

13. That there is no evidence nor any allegation that a demand for representation of the carpenter-members of the Respondent's bargaining units has ever been made by the Complainant to the City of Madison, Dane County or the Madison Metropolitan School District.

14. That there is no evidence nor any allegation that a representation petition of any kind has ever been filed by the Complainant, seeking to supplant the Respondent in its Madison-area public sector bargaining units, or to sever the carpenter crafts from those units.

15. That there is no evidence nor any allegation that any of the Respondent's Madison-area public sector bargaining units are not appropriate units within the meaning of MERA.

16. That there is no evidence nor any allegation that the Respondent has abandoned its representational responsibilities with respect to any of its Madison-area public sector bargaining units.

17. That there is no allegation nor any evidence that the Complainant is the majority representative for any of the certified or recognized Madison-area public sector bargaining units represented by the Respondent.

18. That the Complainant is not the majority representative for any of the certified or recognized Madison-area public sector bargaining units represented by the Respondent.

On the basis of the above and foregoing findings of fact, the Examiner makes and issues the following

CONCLUSION OF LAW

The complaint fails to state a claim upon which relief can be granted.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

IT IS HEREBY ORDERED that the instant complaint of prohibited practices be, and the same hereby is, dismissed in its entirety.

Dated at Racine, Wisconsin, this 25th day of January, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner

SOUTH CENTRAL WISCONSIN BUILDING AND CONSTRUCTION TRADES COUNCIL

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER
DISMISSING COMPLAINT FOR FAILURE TO STATE A
CLAIM UPON WHICH RELIEF CAN BE GRANTED

The Complainant stipulated to the accuracy of the Examiner's November 4, 1999 summary of its case:

. . . the allegation is that there are various Madison area public sector bargaining units for which the Trades Council is either certified or recognized as the bargaining representative. The Carpenters assert that they have the right to represent members of the Carpenters' Union who are included in these bargaining units, either as a joint representative or as the exclusive representative, and that the Trades Council has generally refused to allow them to act as the representative for Carpenter-members of the Trades Council's bargaining unit. In support of this representational claim, the Carpenters assert that there have been two issues involving School District employees that the Carpenters' Union, rather than the Trades Council, has taken to arbitration. This was done with the consent of the Trades Council. As evidence of a denial of their right to represent members of the Carpenters Union, the Carpenters assert that a representative of the Carpenters was denied the opportunity to participate in a contract information meeting conducted by the Trades Council for employees in the Trades Council's bargaining unit at the Madison Metropolitan School District, including some employees who hold memberships in the Carpenters' Union.

The complaint, in its ultimate form, asserts that the Respondent labor organization has violated Sec. 111.70(3)(b)1 by refusing to cede representation rights over carpenter members of its Madison area bargaining units to the Complainant. That provision makes it a prohibited practice for a municipal employe or a labor organization to "coerce or intimidate a municipal employe in the enjoyment of the employe's legal rights, including those guaranteed in sub. (2)." Subsection 2 of MERA defines the rights of municipal employes, including ". . . the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . the right to refrain from any and all such activities. . ."

The complaint attempts to raise an issue of whether the carpenter-members of the Respondent's bargaining units are being denied the right to bargain "through representatives of their own choosing" because the Trades Council insists on representing them rather than allowing the Complainant to represent them. It appears that the Trades Council insists on representing the carpenter-members of the bargaining units because it is their exclusive bargaining representative and is legally obligated to represent them. The Complainant does not assert that the existing units are inappropriate, does not question the majority status of the Respondent in the existing bargaining units, does not claim majority status in the existing units, and does not claim to have ever made any demand for recognition to any of the municipal employers involved. The Complainant does claim majority status among the carpenters who are included in the larger Trades Council bargaining units, but has not attempted to test its claim through the filing of any petition to sever the carpenter craftsmen from the overall units.

In effect, the Complainant is asking the Examiner to order the creation of new bargaining units, carving out the carpenter-members of the existing bargaining units and conferring upon the Complainant the status of exclusive bargaining representative. It seeks this extraordinary remedy as relief for conduct by the Trades Council -- representation of employees in its bargaining units -- that is not only legally permissible, but legally required. There is nothing in the complaint that even suggests the commission of prohibited practices by the Respondent. Inasmuch as the Complainant would not be entitled to any relief if it proved every factual allegation of the complaints, there is no requirement that a hearing be held and dismissal of the complaint on the pleadings is the appropriate course of action.

As to the Respondent's request for attorney's fees, that remedy is not available to respondents in complaint proceedings. See, MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 29502-A (BURNS, 7/9/99); CITY OF LACROSSE, DEC. NO. 29613-A (CROWLEY, 5/27/99); WISCONSIN STATE EMPLOYEES UNION, DEC. NO. 29177-C (WERC, 5/25/99).

Dated at Racine, Wisconsin, this 25th day of January, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner