

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CALUMET COUNTY, Complainant,

vs.

**CALUMET COUNTY COURTHOUSE EMPLOYEES UNIT,
LOCAL 1362, AFSCME, AFL-CIO**, Respondent.

Case 109
No. 58937
MP-3651

Decision No. 29944-A

Appearances:

Davis & Kuelthau, S.C., Attorneys at Law, by **Attorney James R. Macy**, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, on behalf of Calumet County.

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, Attorneys at Law, by **Attorney Bruce F. Ehlke**, 217 South Hamilton Street, P.O. Box 2155, Madison, Wisconsin 53701-2155, on behalf of Calumet County Courthouse Employees Unit, Local 1362, AFSCME, AFL-CIO.

**ORDER DENYING MOTION TO DEEM MATERIAL FACTS
IN CROSS-COMPLAINT ADMITTED AND TO DECLARE HEARING ON
MATERIAL FACTS WAIVED**

On January 27, 2000, Calumet County Courthouse Employees Unit Local 1362, AFSCME, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondents Calumet County, John Keuler, Elizabeth Davey and Melody Buchinger had committed prohibited practices within the meaning of the Municipal Employment Relations Act by taking actions in response to a grievance arbitration award which constituted a refusal to comply with the award. (Case 107).

On June 6, 2000, Calumet County filed a cross-complaint with the Commission alleging that Calumet County Courthouse Employees Unit, Local 1362, AFSCME, AFL-CIO had committed prohibited practices within the meaning of the Municipal Employment Relations Act by refusing or otherwise failing to implement the grievance arbitration award. (Case 109).

No. 29944-A

On July 20, 2000, the Commission issued its Order Appointing Examiner And Consolidating Cases For Purposes of Hearing. Also on July 20, 2000, the Examiner issued a Notice of Hearing On Complaints in the matters for September 27, 2000 and which also directed the respondents in the respective cases to file an answer, which was to be served on the Commission and the complainants on or before August 18, 2000. Calumet County filed its answer in Case 107 on July 28, 2000.

On August 1, 2000, a notice was issued by the Examiner postponing hearing in the cases to October 18, 2000.

On September 8, 2000, Calumet County, hereinafter Complainant, filed a Motion To Deem Material Facts In Cross-Complaint Admitted And To Declare Hearing On Material Facts Waived in this case. In support of the Motion, it noted that Calumet County Courthouse Employees Unit, Local 1362, AFSCME, AFL-CIO, hereinafter Respondent, had failed to file an answer in this case as of September 6, 2000, and cited Wis. Adm. Code ERC 12.03(6).

By letter of September 13, 2000, the Examiner advised the parties that Respondent was being given fourteen (14) days to respond to Complainant's motion. By letter of September 11, 2000, received by the Examiner on September 13, 2000, Respondent's legal counsel advised the Examiner that Respondent opposed the motion and asserted that he had not yet had the opportunity to meet with Respondent's representatives, but that a meeting was scheduled later in that week, and requested that Respondent be given until the end of September to file its answer.

On September 19, 2000, Respondent filed its answer in this case with the Commission, wherein it denied certain material facts alleged in the complaint in this case.

Having considered the matter and being fully advised in the premises, the Examiner now makes and issues the following

ORDER

The Motion To Deem Material Facts In Cross-Complaint Admitted And To Declare Hearing on Material Facts Waived is denied.

Dated at Madison, Wisconsin this 28th day of September, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

CALUMET COUNTY

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DEEM
MATERIAL FACTS IN CROSS-COMPLAINT ADMITTED AND TO DECLARE
HEARING ON MATERIAL FACTS WAIVED

Complainant filed a Motion To Deem Material Facts In Cross-Complaint Admitted And To Declare Hearing On Material Facts Waived based upon Respondent's failure to file its answer by August 18, 2000, the time designated in the Notice of Hearing issued in this matter and citing ERC 12.03(6), Wis. Adm. Code.

Respondent opposed Complainant's motion and indicated its legal counsel had been unable to meet with Respondent's representatives for the purpose of formulating its answer. Respondent subsequently filed its answer with the Commission on September 19, 2000.

It is noted that the Notice of Hearing initially issued in this case and companion Case 107 set hearing for September 27, 2000 and directed the parties to file their respective answers by August 18, 2000. Subsequently, by notice dated August 1, 2000, hearing was postponed to October 18, 2000.

ERC 12.03(6), Wis. Adm. Code, provides:

(6) ADMISSIONS BY FAILURE TO ANSWER. Failure to file a timely answer, in the absence of extenuating circumstances recognized by the commission, constitutes an admission of and a waiver by such party of a hearing as to the material facts alleged in the complaint.

The Commission has previously held in CITY OF MILWAUKEE 1/ that this rule must be read in

1/ DEC. NO. 8017 (WERB, 5/67). The Commission was then the "Board", and the rules were ERB 12.03(6) and ERB 10.01, but the wording of those regulations remained unchanged.

conjunction with ERC 10.01 Wis. Adm. Code, which sets forth the "purpose and construction" of the Commission's rules and states, in relevant part:

These rules shall be liberally construed to effectuate the purposes and provisions of subch. IV of ch. 111, Stats. The commission, or fact finder, as the case may be, may waive any requirements of these rules unless a party shows prejudice thereby.

In CITY OF MILWAUKEE, the Respondent did not timely file an answer, but submitted its answer orally at hearing. The Commission held that there had been no showing of prejudice by complainant, and therefore, ERC 12.03(6) was deemed waived.

The Examiner finds the Commission's decision in CITY OF MILWAUKEE more on point than its decision in STATE OF WISCONSIN, DEC. NO. 29318 (WERC, 3/98), relied upon by Complainant. Unlike this case, the respondent in STATE OF WISCONSIN never filed an answer, written or oral, at any time in that proceeding. While Respondent's answer in this case was not timely filed, it was still filed almost a full month prior to hearing. Further, the instant case is a cross-complaint filed in response to the complaint previously filed by respondent. Given the circumstances, the parties are assumed to be fairly well versed in the other's position on the law and the facts.

There being no showing of prejudice to Complainant by Respondent's late filing of its answer, ERC 12.03(6) Wis. Adm. Code is deemed waived.

Dated at Madison, Wisconsin this 28th day of September, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

