

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**PRAIRIE DU CHIEN EDUCATION ASSOCIATION, Complainant,**

vs.

**PRAIRIE DU CHIEN SCHOOL DISTRICT, Respondent.**

Case 18  
No. 60826  
MP-3794

**Decision No. 30301-B**

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**Appearances:**

**Michael Julka** and **Mark A. Herman**, Attorneys at Law, Lathrop & Clark, 740 Regent Street, Suite 400, P.O. Box 1507, Madison, Wisconsin 53701-1507, appearing on behalf of the Prairie du Chien School District.

**Christine L. Galinat** and **Melissa A. Cherney**, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Prairie du Chien Education Association.

**ORDER DENYING MOTION TO DISMISS**

On May 19, 2003, Complainant, though Legal Counsel Galinat and Cherney, filed a petition with the Wisconsin Employment Relations Commission pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats., seeking review of Findings of Fact, Conclusions of Law and Order issued by Examiner Raleigh Jones.

On May 30, 2003, Respondent filed a motion to dismiss that portion of the petition that seeks review of the Examiner's Findings of Fact. The motion asserts that the petition for review has been prejudiced by an *ex parte* communication from Complainant's representative Roberts and that the petition fails to comply with ERC 12.09(2)(a).

On June 23, 2003, Complainant filed a statement in opposition to the motion.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

Dec. No. 30301-B

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

**ORDER**

The motion to dismiss is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of September, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate.

**City of Prairie du Chien**

**MEMORANDUM ACCOMPANYING  
ORDER DENYING MOTION TO DISMISS**

**Background**

On May 1, 2003, the same day Complainant's representative Roberts received a copy of the Examiner's decision dismissing all allegations in the complaint, Roberts wrote a letter to Commission Chairperson Neumann (copy to the Examiner but not to Respondent's attorney) asserting that the Examiner was biased against unions and that even Respondent's legal counsel had commented that "there was no way the Union could lose the emergency leave issue." Roberts therein asked that the Examiner never be assigned to any future cases involving the South West Education Association.

On May 5, 2003, the Examiner mailed a copy of the Roberts letter to Respondent's attorney.

On May 8, 2003, Respondent's attorney wrote Chairperson Neumann asking that the Roberts letter be stricken from the record if a petition for review is filed and denying the statement Roberts attributed to him.

On May 19, 2003, Complainant attorneys Galinat and Cherney filed a petition for review with the Commission. The petition asserts that:

. . . the above-referenced decision contains clearly erroneous findings of material fact in Findings of Fact 18, 31, 32, 34, 43, 45 and 56 that prejudicially affect the rights of the Association as provided in Wis. Admin. Code sec. ERC 12.09(2)(a). In addition, a substantial question of law or administrative policy is raised by Conclusions of Law 1, 3 and 4, as provided in Wis. Admin. Code sec. 12.09(2)(b).

On May 29, 2003, the Commission's General Counsel wrote Roberts and Respondent's attorney as follows:

. . .

This will acknowledge receipt of Mr. Roberts' letter dated May 1, 2003, in which he expresses concerns about Examiner Raleigh Jones' handling of the above-captioned matter, as well as receipt of Mr. Herman's related letter dated May 8, 2003, both addressed to Chairperson Judith Neumann.

The Commission is committed to providing trustworthy dispute resolution services and values its reputation in that regard. To that end, the Commission appreciates feedback from the parties regarding its handling of cases. However, it is also important that the Commission respond to such feedback in a manner that maintains the integrity of Commission processes.

Complainant has filed a petition seeking Commission review of Examiner Jones' decision. To the extent the petition and subsequent briefs raise issues that parallel those expressed in Mr. Roberts' letter, those issues will be addressed by the Commission in its decision in response to the petition. Your recent letters to Chairperson Neumann are not part of the record that will be considered by the Commission in response to the petition for review. Nor will those letters be shared with other Commissioners.

To the extent the petition and subsequent briefs do not raise issues that parallel those expressed in Mr. Roberts' letter, the Commission will address those concerns as part of its internal personnel system, but only after it has issued its decision in response to the petition. William Houlihan, Examiner Jones' supervisor, will be contacting you in that regard -- but again, only after the Commission has issued its decision.

. . .

On May 30, 2003, Respondent filed its motion to dismiss.

**Compliance with ERC 12.09(2)(a)**

ERC 12.09(2)(a) provides:

(2) PETITION FOR REVIEW: BASIS FOR AND CONTENTS OF. The petition for review shall briefly state the grounds of dissatisfaction with the findings of fact, conclusions of law and order, and such review may be requested on the following grounds:

(a) That any finding of material fact is clearly erroneous as established by the clear and satisfactory preponderance of the evidence and prejudicially affects the rights of the petitioner, designating all relevant portions of the record.

Respondent argues that Complainant's petition for review is defective because it does not refer to any "relevant portions of the record" when asserting that certain Examiner Findings are erroneous. Thus, Respondent asks the Commission to dismiss the portion of the petition that seeks reversal of certain Examiner Findings.

Complainant responds by contending that the Commission has routinely waived the requirements of ERC 12.09(2)(a) where, as here, there is no prejudice because Complainant's post-petition brief will put Respondent and the Commission on notice as to the portions of the record that warrant reversal of the Examiner's Findings.

Both Complainant and Respondent have cited GRAFTON SCHOOL DISTRICT, DEC. NO. 27981-B (WERC, 9/96) which states in pertinent part:

. . .

Further, we have repeatedly held that the procedural requirements of ERC 12.09 are not jurisdictional and that waiver of the requirements of ERC 12.09 is appropriate under ERC 10.01 ("The Commission . . . may waive any requirements of these rules unless a party shows prejudice thereby. . . .") where, for instance, the post-petition briefs permitted the opposing party to know the bases for the petitioning parties' dissatisfaction with the Examiner's findings. WEYAUWEGA JT. SCHOOL DISTRICT, DEC. NO. 14373-C (WERC, 7/77); WAUNAKEE JT. SCHOOL DISTRICT, DEC. NO. 14749-B (WERC, 2/78); CESA #4, DEC. NO. 13100-C. (WERC, 5/78); SCHOOL BOARD OF WAUWATOSA, DEC. NO. 14985-B (WERC, 9/78); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 20941-B (WERC, 1/85); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 21893-B (WERC, 10/86), AFF'D CIR. CT. MILW. CASE NO. 721-287, 7/87.

. . .

We find it appropriate to follow this precedent and waive the requirements of ERC 12.09(2)(a) where, as here, Respondent will not be prejudiced because the relevant portions of the record will be identified by Complainant in its post-petition brief.

### **The Ex Parte Communication**

Respondent asserts that Roberts' *ex parte* communication was an attempt to taint the review process; that Respondent justifiably fears that the Commission's decision will be

influenced by the Roberts letter; and that the credibility of the review process is undermined unless the Commission adopts the Examiner's Findings as its own. In support of its position, Respondent cites decisions by Wisconsin courts indicating the sanction of dismissal can be imposed where egregious conduct has occurred.

Complainant responds by arguing that adoption of the Examiner's Findings would effectively dismiss the entire petition; that Roberts' "intemperate" response upon his receipt of the Examiner's decision was not an attempt to influence the review process; that Sec. 227.50, Stats., provides a process as to *ex parte* communications which has already been followed by the WERC; and that unlike the discovery statutes underlying the cases cited by Respondent, Sec. 227.50, Stats., does not provide for dismissal as a sanction. Given the foregoing, Complainant asserts that the "extraordinary and harsh result" sought by the Respondent should be rejected.

As argued by Complainant, Sec. 227.50, Stats., 1/ extensively regulates *ex parte* communications in the context of administrative proceedings and does not provide sanctions for such conduct. Thus, we conclude there is substantial doubt as to whether we have the authority to impose the sanction sought by Respondent here – dismissal of a portion of a subsequently filed petition for review. Assuming we have that authority, we would not exercise it here. The review process has not been tainted because we are confident of our ability to disregard the Roberts letter when reviewing the Examiner's decision. Although the Roberts letter of necessity became part of the record we considered when ruling on this motion, the letter continues to be outside the scope of the record we will consider when evaluating the Examiner's decision. If Complainant pursues the issue of bias in written argument filed in support of the petition, we will address that issue in our decision.

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1/ Section 227.50, Stats., provides:

**227.50 Ex parte communications in contested cases.**

**(1)(a) In a contested case, no ex parte communication relative to the merits or a threat or offer of reward shall be made, before a decision is rendered, to the hearing examiner or any other official or employee of the agency who is involved in the decision-making process, by:**

**1. An official of the agency or any other public employee or official engaged in prosecution or advocacy in connection with the matter under consideration or a factually related matter; or**

**2. A party to the proceeding, or any person who directly or indirectly would have a substantial interest in the proposed agency action or an authorized representative or counsel.**

**(b) Paragraph (a) 1. does not apply to an advisory staff which does not participate in the proceeding.**

**(c) This subsection does not apply to an ex parte communication which is authorized or required by statute.**

**(d) This subsection does not apply to an ex parte communication by an official or employee of an agency which is conducting a class 1 proceeding.**

*(e) This subsection does not apply to any communication made to an agency in response to a request by the agency for information required in the ordinary course of its regulatory functions by rule of the agency.*

*(f) (2) A hearing examiner or other agency official or employee involved in the decision-making process who receives an ex parte communication in violation of sub. (1) shall place on the record of the pending matter the communication, if written, a memorandum stating the substance of the communication, if oral, all written responses to the communication and a memorandum stating the substance of all oral responses made, and also shall advise all parties that the material has been placed on the record; however, any writing or memorandum which would not be admissible into the record if presented at the hearing shall not be placed in the record, but notice of the substance or nature of the communication shall be given to all parties. Any party desiring to rebut the communication shall be allowed to do so, if the party requests the opportunity for rebuttal within 10 days after notice of the communication. The hearing examiner or agency official or employee may, if deeming it necessary to eliminate the effect of an ex parte communication received, withdraw from the proceeding, in which case a successor shall be assigned.*

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Given all of the foregoing, we have denied Respondent's motion.

Dated at Madison, Wisconsin, this 2nd day of September, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Chairperson Judith Neumann did not participate.