STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CURTIS J. HELM, Complainant,

v.

DENNIS BOWERS, DIANE KNECHT and HENRY PARISI, Respondents.

Case 1
No. 64414
Ce-2239

Decision No. 31267-A

Appearances:

Curtis J. Helm, 12603 North Park Drive, Mequon, WI 53092, appearing *pro se*.

Sean Scullen, Attorney at Law, Quarles and Brady, S.C., 411 East Wisconsin Avenue, Suite 2040, Milwaukee, WI 53202-4426, appearing on behalf of the Respondents.

ORDER DISMISSING COMPLAINT WITH ACCOMPANYING MEMORANDUM

Daniel Nielsen, Examiner: On January 19, 2005, the above-named Complainant, Curtis J. Helm, filed with the Commission a complaint, alleging that the above-named Respondents violated the provisions of Ch. 111, Wisconsin Employment Peace Act, by committing crimes and/or misdemeanors in connection with a controversy as to employment relations. The Commission appointed Daniel Nielsen, an examiner on its staff, to conduct a hearing and to make and issue appropriate Findings, Conclusions and Orders. On February 4, 2005, the Examiner wrote to the Complainant reviewing the complaint, and advising him of the Examiner's intention to dismiss the complaint on his own motion for failing to state a case upon which relief could be granted, based upon the request for relief in the form of findings of criminal conviction and assessment of criminal penalties. The Complainant thereafter amended the complaint to remove the request for entry of criminal conviction and assessment of criminal penalties, seeking instead a finding of criminal conduct. A hearing was scheduled for March 21, 2005.

The Respondents, on March 4, 2005, submitted Motions to Dismiss based upon failure to state a claim under WEPA, failure to properly plead the alleged criminal conduct and lack of proper service on the Respondents. The Examiner postponed the previously scheduled hearing pending resolution of the Motions. The Complainant submitted a response to the Motions which was received on May 20, 2005, whereupon the record was closed.

On the basis of the pleadings, the arguments of the parties and the record as a whole, the Examiner makes and issues the following, Findings of Fact.

FINDINGS OF FACT

1. On January 19, 2005, Curtis J. Helm filed with the Wisconsin Employment Relations Commission a complaint alleging that Dennis Bowers, Diane Knecht and Henry Parisi had committed unfair labor practices. The relevant portions of the complaint are as follows:

> A. What is the name, address and phone number of the person/party against whom the complaint is being made?
>
> Rockwell Automation (the employer of the Complainant and Respondents) has a Corporate Policy B-09 that deals with the "Arbitration of Employee Disputes".
>
> Appendix A, Section 1 "Required Notice of All Claims" states that:
>
> "Written notice to the Company, or its officers, directors, employees or agents, shall be sent to its Secretary at 777 E. Wisconsin Avenue, Suite 1400, Milwaukee, Wl 53202 (or such address as the Company may hereafter designate in writing)."
>
> If you need the actual home addresses of the Respondents then you will need to contact Rockwell Automation at the address listed above and request that Rockwell Automation supply the WERC with the Respondents home address information.
>
> Other address and telephone information is as follows:
>
> . . .
>
> Dennis Bowers . . .
>
> Diane Knecht . . .

Henry Parisi . . .

. . .

C. What are the facts which constitute the alleged unfair labor or prohibited practices?

Incident 1 - Performance Improvement Plan

Facts related to the violations of Wis. Statutes 942.01 and 134.01:

1. On November 19th, 2003 Dennis Bowers, Diane Knecht and Henry Parisi put Curtis Helm on a PIP (Performance Improvement Plan).
2. The PIP document contained numerous statements that were false or unsubstantiated (ref: 941.01).
3. The PIP document did not follow the prescribed standard for such documents as laid down by the Company (Rockwell Automation).
4. Curtis Helm was given a rating of "Needs Improvement" on his FY 2003 PADR.
5. As the result of being placed on the PIP - Curtis Helm was not permitted to apply for / transfer to other positions within the Company (ref: 134.01).
6. As the result of being given a rating of "Needs Improvement" on his FY 2003 PADR - Curtis Helm did not receive a Merit Pay Increase and was not eligible to receive a FY 2003 CSMIP Bonus (ref: 942.01 and 134.01).
7. References to the PIP document were also made in Curtis Helm's FY 2003 PADR (Performance and Development Review).
8. The information on Curtis Helm's FY 2004 PADR is accessible to individuals within the Company with the appropriate access so both the "Needs Improvement" rating and the existence of the PIP were communicated to other people within the Company (ref: 942.01).
9. Curtis Helm contacted Human Resources about this matter on several occasions.
10. Curtis Helm contacted The Office of the Ombudsman about this matter on several occasions.
11. Curtis Helm contacted Business Integrity & Compliance about this matter on several occasions.
12. The Office of the Ombudsman and Pat Sanjenis (Manager - Business Integrity & Compliance) stated that the matter was not appropriate for the Ombudsman process and should be dealt with via The Company's EIR (Employee Issue Resolution) Process.

13. Curtis Helm filed a complaint under The Company's EIR Process.
14. The EIR Process started at Phase II and proceeded through Phase IV.
15. Phase II of the EIR Process (Human Resources Facilitated Resolution) was conducted on May 17th, 2004 and presented for Curtis Helm's signature on May 21st, 2004.
16. Phase III of the EIR Process (Business Group Review) was conducted on June 4th, 2004 and presented for Curtis Helm's signature on June 17th, 2004.
17. Phase IV of the EIR Process (Board of Review) was conducted on August 13th, 2004 and presented for Curtis Helm's signature on September 1st, 2004.
18. The Board ordered that Curtis Helm's FY 2003 PADR be changed to reflect the rating of "Achievement", that the Performance Improvement Plan be administratively purged from the employee's file, that the employee be paid the CSMIP bonus that he was denied, and that he be given his merit pay retroactive to the date that he would have received the same. All other relief and/or remedies sought by the employee were denied.

Incident 2 - Performance Memo

Facts related to the violations of Wis. Statutes 942.01, 134.01 and 134.03:

1. On June 10th, 2004 Henry Parisi scheduled a meeting with Curtis Helm for June 21st, 2004 to "Review current role/performance/team interaction".
2. The invitees for the meeting were limited to Henry Parisi and Curtis Helm.
3. Upon receiving the invitation to the meeting - Curtis Helm contacted Henry Parisi asking if there were any performance issues to be discussed - because if that were the case Curtis Helm wanted to discuss them as soon as possible in order to try to correct any such issues. Henry Parisi stated that the meeting was to discuss Curtis Helm's current role and not to discuss performance issues.
4. On June 21st, 2004 the meeting was held.
5. In attendance were Curtis Helm, Henry Parisi and Diane Knecht - despite the fact that Diane Knecht had not been included on the invitation to the meeting.
6. Henry Parisi and Diane Knecht then presented Curtis Helm with a memo regarding his performance.
7. Diane Knecht stated that she had made an appointment for Curtis Helm with Joan Modrinski of Lee Hecht Harrision to review the

outplacement benefits that Curtis Helm would receive if Curtis Helm decided to accept a mutual separation package (ref: 134.01 and 134.03).

8. Curtis Helm informed Diane Knecht that he was not interested in any kind of mutual separation package.
9. Diane Knecht made statements that Curtis Helm understood to mean that if he did not accept the mutual separation package he might not have a job when he returned from his vacation, which was scheduled to begin on June 25th, 2004 (ref: 134.01 and 134.03).
10. Diane Knecht sent an e-mail to Curtis Helm later that same morning further urging him to meet with Lee Hecht Harrison (ref: 134.01 and 134.03).
11. The document presented at the meeting contained statements that were false (ref: 942.01).
12. One of the statements related to an incident where Curtis Helm was forced to report a violation of separation of responsibilities to The Company's Internal Audit department. In the context in which this statement was made it constituted harassment / retaliation which is a violation of The Company's policies.
13. Curtis Helm contacted Human Resources, The Office of the Ombudsman, and Business Integrity & Compliance about this matter but no action has been taken.
14. Note that Incident 2 occurred between Phases II and III of the EIR (Employee Issue Resolution) Process pertaining to Incident 1 and that the Diane Knecht and Henry Parisi were both named in the compliant that was the subject of the EIR process (ref: 134.01 and 134.03).

D. What part or parts of the applicable statute defining unfair labor or prohibited practices are alleged to have been violated?

111.06 What are unfair labor practices.

(2) It shall be an unfair labor practice for an employee individually or in concert with others:

(j) To commit any crime or misdemeanor in connection with any controversy as to employment relations.

The crimes and / or misdemeanors are as follows:

942.01 Defamation. (1) Whoever with intent to defame communicates any defamatory matter to a third person without the consent of the person defamed is guilty of a Class A misdemeanor. **(2)** Defamatory matter is anything which exposes the other to hatred, contempt, ridicule, degradation or disgrace in society or injury in the other's business or occupation.

134.01 Injury to business; restraint of will. Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his or her reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his or her will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by time not exceeding $500.

134.03 Preventing pursuit of work. Any person who by threats, intimidation, force or coercion of any kind shall hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or herself or as a wage worker, or who shall attempt to so hinder or prevent shall be punished by fine not exceeding $100 or by imprisonment in the county jail not more than 6 months, or by both fine and imprisonment in the discretion of the court. Nothing herein contained shall be construed to prohibit any person or persons off of the premises of such lawful work or employment from recommending, advising or persuading others by peaceful means to refrain from working at a place where a strike or lockout is in progress.

Additional Information related to Incident 1:

The following paragraphs were copied from the **"WERC Hearing Examiner Complaint Manual"** by Lionel L. Crowley and Peter G. Davis:

III. STATUTE OF LIMITATIONS: (M541)

The statute of limitations as set forth in Sec. 111.07(14) is that the right to file a complaint shall not extend beyond one year from the date of the specific act or unfair labor practice (prohibited practice) alleged. However, the statute is tolled in certain circumstances. For instance, in Harley-Davidson Motor Company, Dec. No. 7166 (WERC, 6/65) the Commission held that, where a collective bargaining agreement contains procedures for the voluntary settlement of disputes arising thereunder and the parties have attempted to resolve such disputes under such procedure, a complaint alleging a violation of said agreement does not arise until the exhaustion of the grievance procedure. Thus, the one year period of limitation is computed from the date the grievance procedure is exhausted.

See Guzniczak vs. State of Wisconsin, Dec. No. 26676-B (WERC, 4/91) and Johnson v. AFSCME Council 24, Dec. No. 21980-C (WERC, 2/90) for additional examples where the statute is tolled.

The respondents may try to argue that Incident 1 falls outside the statute of limitations set forth in Sec. 111.07(14) since the PIP was initiated on November 19th, 2003.

The complainant attempted to resolve Incident 1 by following the Company's prescribed procedures for resolution of employee disputes.

This included contacting Human Resources, contacting the Office of the Ombudsman, and ultimately filing a compliant under The Company's EIR (Employee Issue Resolution) process.

Phase IV of the EIR process was not concluded until September 10th, 2004.

Therefore - the one-year period of limitation should be computed from the date of September 10th, 2004 and Incident 1 falls within the statute of limitations.

E. What remedy to you seek?

Criminal prosecution and conviction of the respondents as follows:

1. Dennis Bowers should be convicted of one count of violating Wisconsin Statute 942.01.

2. Dennis Bowers should be convicted of one count of violating Wisconsin Statute 134.01 and fined $500.00.

3. Diane Knecht should be convicted of two counts of violating Wisconsin Statute 134.01 and fined $500.00 for each count for a total of $1,000.00.

4. Diane Knecht should be convicted of one count of violating Wisconsin Statute 134.03 and fined $100.00.

5. Henry Parisi should be convicted of two counts of violating Wisconsin Statute 942.01.

6. Henry Parisi should be convicted of two counts of violating Wisconsin Statute 134.01 and fined $500.00 for each count for a total of $1,000.00.

7. Henry Parisi should be convicted of one count of violating Wisconsin Statute 134.03 and fined $100.00.

All convictions should appear on the respondents' criminal records.

Please note that I am not seeking any civil remedies in this complaint.

I reserve the right to pursue any and all civil remedies by any and all means legally available to me.

2. On February 4, 2005, the Examiner wrote to Mr. Helm, informing him that the complaint as filed did not state a claim upon which relief could be granted by the WERC:

. . .

I am the Examiner appointed by the Wisconsin Employment Relations Commission in the complaint you have filed against the three named individuals listed above.

Your complaint seeks "Criminal prosecution and conviction of the respondents" for allegedly violating various Wisconsin Statutes. It further requests that "All convictions should appear on the respondents' criminal records" and asks for the imposition of criminal penalties against the respondents. Finally, it states that ". . . I am not seeking any civil remedies in this complaint." [See Complaint, Page 6 of 6].

The Wisconsin Employment Relations Commission has no jurisdiction to prosecute criminal cases, nor do we have any jurisdiction to enter a judgment of guilt on any criminal offense nor to impose any criminal penalty. Your complaint as it stands does not state a claim upon which relief can be granted by the WERC. Were I to attempt to proceed with a hearing on this matter, I would be engaging in an act which could not be defended as a good faith exercise of the agency's authority.

If you desire an entry of criminal conviction and/or the imposition of criminal sanctions, your recourse is to the police. If you do not get satisfaction from the police, you can go to the District Attorney. If you do not get satisfaction from the District Attorney, you may be able to persuade a circuit court judge to intervene. However, there is no theory under which the WERC can give you what you seek. You may wish to review Layton School of Art & Design v

WERC, 82 Wis.2d 324 (1978) as an example of a case where a counterpart of Sec. 111.06 (2) j, Stats. was applied. I have asked WERC General Counsel Peter Davis to send you a copy of that decision.

Unless I somehow misunderstand your complaint, it is my intention to dismiss this case. If I do misunderstand the case, please advise me of that in writing by the end of business on February 16th, and provide the particulars of what you believe the misunderstanding to be. Any correspondence should simultaneously be copied to the Respondents. If you wish to submit a clarification or amendment, I will review it and make a determination as to whether you have stated a claim on which relief can be granted.

If I dismiss the case, you have the right to appeal the dismissal to the full Commission in Madison within twenty days of the Order of Dismissal. That appeal should be directed to the attention of Peter G. Davis, General Counsel, WERC, at Post Office Box 7870, Madison WI 53707-7870. If you have questions about this letter, or about the procedures to be followed in this matter, you should feel free to contact Mr. Davis. I am copying him on this letter so that he will know what I intend to do, and will be able to respond to any questions you may have. Please do not telephone me, as I cannot speak with you without having all of the parties to this complaint present for the conversation.

. . .

3. On February 14, 2005, the Complainant amended his complaint to remove the request for findings of conviction and the entry of fines, and instead requested as relief a finding that the Respondents had engaged in unfair labor practices.

4. The complaint does not allege, and the Respondent specifically denies, that any labor organization is involved in any way in this dispute.

5. The complaint does not allege, and the Respondent specifically denies, that any aspect of this dispute concerns the exercise of the rights enumerated in Section 111.04, WEPA.

CONCLUSIONS OF LAW

1. The conduct alleged in the instant complaint of unfair labor practices does not involve a "controversy as to employment relations" within the meaning of Section 111.06(2)(j) of the Wisconsin Employment Peace Act.

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

ORDER

It is ORDERED that:

The instant complaint be, and the same hereby is, dismissed in its entirety.

Dated at Racine, Wisconsin, this 21st day of June, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

DENNIS BOWERS, ET. AL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

The Complainant alleges that three co-workers have engaged in various forms of criminal misconduct in connection with his employment. Specifically, he asserts that these co-workers are guilty of criminal defamation, injury to business, and preventing pursuit of work, all in connection with characterizations and statements contained in his performance evaluation and subsequent exchanges. Noting that Section 111.06(2)(j) of the Wisconsin Employment Peace Act makes it an unfair labor practice for an employee "to commit any crime or misdemeanor in connection with any controversy as to employment relations," the Complainant seeks to have the Commission adjudge these co-workers guilty of an unfair labor practice. He does not allege, and the Respondents specifically deny, that any labor organization represents him or any of the other persons involved in the case, or that there is any element of protected concerted activity present. The central question in the Motion to Dismiss is whether WEPA's reference to a "controversy as to employment relations" includes disputes having no connection to labor relations.

The Wisconsin Employment Relations Commission is an administrative agency of limited jurisdiction. Administrative agencies typically have authority in areas in which special expertise is required. The power of such agencies is limited by the express grant and the fair implication of the governing statutes.[1] Historically, the area of the Commission's special expertise has been collective bargaining and associated issues of labor-management relations.[2]

The Complainant asserts that his is a "controversy as to employment relations" since it involves his employment, and thus it falls within the plain meaning of Section 111.06(2)(j). Read in isolation from the remainder of the statute, and without reference to the historical mission and purpose of the Employment Relations Commission, the Complainant's theory would be correct. However, the statutory scheme by which the Commission is established and within which it operates must be viewed as a coherent whole, not as a series of loosely connected legislative whims. A review of the statutory language, the prior holdings of the

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[1] KRAUS V. WAUKESHA PFC, 2003 WI 51, at Para. 32: "We acknowledge that the powers of government agencies are generally limited to those conferred expressly or by fair implication by statute. See GTE N. INC. V. PUB. SERV. COMM'N, 176 WIS. 2D 559, 564, 500 N.W.2d 284 (1993) (citing MID-PLAINS TELEPHONE V. PUB. SERV. COMM'N, 56 WIS. 2D 780, 786, 202 N.W.2d 907 (1973))..." See also, INTERNATIONAL UNION V. WERB, 258 WIS. 481: "Courts proceed to hear, try and determine all sorts of cases at law and equity that are brought before them. The administrative boards and commissions, however, are limited in their exercise of judicial power to the exercise of such as is incidental to their administration of the particular statutes the legislature has given them to administer…" ID. at 494, citing HOLLAND V. CEDAR GROVE, 230 WIS. 177. 202 (1939).

[2] In COUNTY OF LA CROSSE V. WERC, 180 WIS.2D 100, 508 N.W.2d 9 (1993), the supreme court commented on the deference accorded to the Commission in its area of expertise: "[N]ormally, WERC's rulings with respect to the bargaining nature of proposals are entitled to 'great weight.' That deference is predicated on the commission's perceived expertise in collective bargaining matters." ID. at 107.

courts, and the Commission's own case law, persuasively establishes that the legislature's purpose in establishing the WERC was to provide for the regulation of labor-management relations within the state of Wisconsin, not to provide a venue for individual tort actions against co-workers.

The Language of the Act

The legislative purpose to regulate labor-management relations is expressed throughout the text of the Employment Peace Act. The "Declaration of Policy" with which the Act begins speaks of employment relations in what is clearly a labor-management context:

> **111.01 Declaration of policy.** The public policy of the state as to *employment relations and collective bargaining*, in the furtherance of which this subchapter is enacted, is declared to be as follows:
>
> **(1)** It recognizes that there are 3 major interests involved, namely: the public, the employee and the employer. These 3 interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.
>
> **(2)** Industrial peace, regular and adequate income for the employee, and uninterrupted production of goods and services are promotive of all of these interests. *They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise.*
>
> . . .
>
> **(3)** Negotiations of terms and conditions of work should result from voluntary agreement between employer and employee. *For the purpose of such negotiation an employee has the right, if the employee desires, to associate with others in organizing and bargaining collectively through representatives of the employee's own choosing, without intimidation or coercion from any source.*
>
> **(4)** It is the policy of the state, in order to preserve and promote the interests of the public, the employee, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated. *While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat.*

While given sentences in the Declaration of Policy can be excised from the whole and read as if they are aimed at the employment relationship between an individual and his or her employer, the entire declaration and the statute that follows leave little doubt that the legislature intended to regulate collective rather than individual relations. This conclusion is reinforced throughout, as for example by the specialized definition of "employee" in Section 111.02(6)(a):

> **111.02 Definitions.** When used in this subchapter:
>
> . . .
>
> **(6)** (a) "Employee" shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a nonconfidential, nonmanagerial, nonexecutive and nonsupervisory capacity, and shall not be limited to the employees of a particular employer unless the context clearly indicates otherwise.
> (b) "Employee" shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer and who has not:
> 1. Refused or failed to return to work upon the final disposition of a labor dispute or a charge of an unfair labor practice by a tribunal having competent jurisdiction of the same or whose jurisdiction was accepted by the employee or the employee's representative;
> 2. Been found to have committed or to have been a party to any unfair labor practice hereunder;
> 3. Obtained regular and substantially equivalent employment elsewhere; or
> 4. Been absent from his or her employment for a substantial period of time during which reasonable expectancy of settlement has ceased (except by an employer's unlawful refusal to bargain) and whose place has been filled by another engaged in the regular manner for an indefinite or protracted period and not merely for the duration of a strike or lockout.
> (c) "Employee" shall not include any individual employed in the domestic service of a family or person at the person's home or any individual employed by his or her parent or spouse or any employee who is subject to the federal railway labor act.

If, as the Complainant posits, the Act concerns itself with general controversies in employment, rather than labor-management controversies, there is no plausible reason for the exclusion of confidential, managerial, supervisory and executive employees. Those exclusions have historical and practical significance in a bilateral relationship between labor and management, but little or none in the multilateral relationship between company and individual employees.

Throughout the remaining text of the Act, every one of the substantive provisions is focused on the rights of employees relative to their employer and their exclusive bargaining representative, and the obligations of those institutions to one another and to the public. A review of the titles of the ensuing substantive provisions leaves little doubt that this is a labor relations act, not a general employment regulation:

. . .

111.04	Rights of employees.
111.05	Representatives and elections.
111.06	What are unfair labor practices.
111.07	Prevention of unfair labor practices.
111.075	Fair–share and maintenance of membership agreements.
111.08	Financial reports to employees.

. . .

111.10	Arbitration.
111.11	Mediation.
111.115	Notice of certain proposed lockouts or strikes.

. . .

A review of the companion Acts regulating municipal employment (Sec. 111.70, the Municipal Employment Relations Act ("MERA")) and state employment (Sec. 111.80, the State Employment Labor Relations Act ("SELRA")) reveals an identical focus on refereeing the relations between employees, bargaining representatives and employers in the context of collective bargaining. In each of the traditional areas of its jurisdiction,[3] the Wisconsin Employment Relations Commission is a labor relations agency.

Layton School of Design

This analysis of the statutory scheme is buttressed by prior cases in which the courts and the Commission have described the Commission's mandate as being limited to labor-management relations, notwithstanding the somewhat broader readings that the statutory language can be given. In the leading case on the application of this same provision of WEPA, the Wisconsin Supreme Court commented that:

[3] This discussion does not include the Commission's recently added responsibilities for administering certain portions of the State Personnel Code.

> We believe this interpretation of the statute *is consistent with its purpose*. The legislature intended to provide a convenient and expeditious tribunal to adjudicate the rights and obligations of *parties to a labor dispute*. . . .The WERC's ability to determine conduct which constitutes an unfair labor practice (and which is also subject to criminal prosecution) is incidental and reasonable necessary to *furthering state labor policy*.
> LAYTON SCHOOL OF ART & DESIGN V. WERC, 82 WIS.2D 324 (1978), at 341 [emphasis supplied].

This echoes the Court's explanation in COUNTY OF LA CROSSE, SUPRA, that the deference the courts pay to the Commission is due to its specialized expertise in matters of collective bargaining.

The Court made it clear in LAYTON that it viewed "employment" controversies in the context of the Act to mean "labor relations" controversies: "The WERC is empowered to make a finding that certain acts, described in a 'criminal statute,' were committed in an *employment controversy; it is thus limited in imposing its sanctions to those instances of misconduct which occur in labor relations over which the WERC has jurisdiction.*" ID. at 347 [emphasis supplied]. This again is consistent with the notion of administrative agencies having authority only within their areas of expertise.

Racine Policemen

A similar line of argument to that presented here was raised by the Complainant in HARRIS V. RACINE POLICEMEN'S PROFESSIONAL AND BENEVOLENT CORPORATION, DEC. NO. 12637 (FLEISCHLI, 4/18/74), a case arising under MERA. There the Complainant was a police officer whose exclusive bargaining representative sought to have discipline imposed upon him for a newspaper interview in which he was critical of the racial policies of the Police Department. He filed a complaint, asserting among other things, that the action violated his constitutional right of free speech, and thereby violated Section 111.70(3)(b)1:

> (b) It is a prohibited practice for a municipal employee, individually or in concert with others:
>
> 1. To coerce or intimidate a municipal employee in the enjoyment of the employee's legal rights, including those guaranteed in sub. (2).

Harris asserted that the reference to "the employee's legal rights" included all legal rights, not simply those connected with collective bargaining. In rejecting that reading of the statute, the Examiner noted the problems posed by reaching beyond the WERC's traditional areas of expertise and interpreting the statute as a general protection of employee rights unconnected with protected concerted activity:

The Examiner has been unable to find any case where the Commission has construed the language in question in the way suggested by the Complainant. There are numerous Commission cases holding that employes individually or acting in concert, are prohibited from attempting to interfere with, or induce an employer to interfere with, another employe's right to refrain from joining the union or engaging in other protected activities. The legal rights protected in these cases are the rights that stem from the Act and not from the United States Constitution or other sources.

If the Commission were to adopt the interpretation of Section 111.70(3)(b)l and 2 urged by the Complainant, it could be called upon to entertain complaints wherein an employe alleges that another employe, (acting individually or in concert), was interfering with any of his legal rights or seeking to persuade the employer to do so, not withstanding the fact that the Commission lacks expertise in defining and protecting those rights and the fact that the courts and other administrative agencies have such expertise. It is obvious that the legislature did not intend that the Wisconsin Employment Relations Commission seek to protect all legal rights of individuals who happen to be employes from interference by other individuals who also happen to be employes. The first question that must be answered then is whether the legal rights sought to be protected herein, which are undeniably important and cherished, are protected from interference through the prohibited practice procedures of the MERA.

Section 111.70(3)(b)l and Section 111.70(3)(b)2 of the MERA are parallel, in that they both seek to protect an employe from interference with his protected legal rights by other employee acting individually or in concert, and read as follows:

> "(b) It is a prohibited practice for a municipal employe, individually or in concert with others:
>
> 1. To coerce or intimidate a municipal employs in the enjoyment of his legal rights, including those guaranteed in sub. (2).
>
> 2. To coerce, intimidate or induce any officer or agent of a municipal employer to interfere with any of its employes in the enjoyment of their legal rights, including those guaranteed in sub. (2), or to engage in any practice with regard to its employee which would constitute a prohibited practice if undertaken by him on his own initiative."

Unlike Section 111.70 (3)(4)1, which applies to municipal employers and states that it shall be a prohibited practice for a municipal employer to interfere with, restrain or coerce municipal employes in the exercise of their rights

guaranteed by Section 111.70(2), Sections 111.70(3)(b)l and 2 appear to outlaw interference with legal rights other than those specifically enumerated in Section 111.70(2). This same asymetry (sic) appears in the prohibited practice provisions contained in Section 111.84 of the State Employment Labor Relations Act (SELRA) and apparently stems from the unfair labor practice provisions of the Wisconsin Employment Peace Act (WEPA) set out in Section 111.06 of the Wisconsin Statutes.

According to an acknowledged authority on the subject, WEPA, unlike the National Labor Relations Act, (Wagner Act) initially sought to protect the rights of Individual employes not only against infringement by the employer but by other employee acting individually or in concert:

> "The points in which the Wisconsin Employment Peace Act departs from the scheme of the National Labor Relations Act represent a distinct difference in philosophy as to what practices need to be prevented for the avoidance of industrial conflict. This difference in philosophy is apparent in the very first provisions of the two laws containing their declarations of policy. The National Labor Relations Act is introduced by a recital that the denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to industrial strife or unrest which burden and obstruct interstate commerce, that inequality of bargaining power between employees and employers likewise burdens commerce and tends to aggravate recurrent business depressions, and that those results are to be avoided by encouraging collective bargaining and protecting the workers' freedom of association. Pursuant to this declaration of policy, the national act is designed to protect the employees' rights against infringement by employers only. The Wisconsin Act, on the other hand, recognizes in its declaration of policy the interrelated interests of 'the public, the employees, and the employer.' It seeks to guarantee the fundamental rights of employees not only against infringement by the employer, but also against infringement by employees, labor unions, and other parties." (Footnotes omitted).
>
> . . .
>
> Wisconsin turned its back upon the reasoning which motivated Congress to reject regulation directed against employees. It provided protection of the individual's right of free choice on

matters of labor activity as against all challengers, and furnished some degree of protection to employers themselves..." /2 (Emphasis Supplied).

2/ Lampert, "The Wisconsin Employment Peace Act", 1946 Wisconsin Law Review 194 (1946) pp. 195-196.

Section 111.06(2)(a) of the WEPA contains some example of the kinds of legal rights the legislature evidently had in mind in outlawing the conduct in question. It reads as follows:

> "(2) It shall be an unfair labor practice for an employe individually or in concert with others:
>
> (a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed fn section 111.04, or to intimidate his family picket his domicile or injure the person or property of such employe or his family." (Emphasis Supplied).

Viewed in its historical context, it appears that although the language in question may have been intended to extend protection to legal rights other than those specifically enumerated in the rights section of the three statutes involved (Section 111.04 of WEPA; Section 111.70(2) of MERA; and Section 111.82 of SELRA), it is also clear that the legislature did not create the Wisconsin Employment Relations Commission for the purpose of protecting all the legal rights of persons who happen to be employes within the meaning of the three acts. If Sections 111.06(2)(a) and (b), Sections 111.70(3)(b) 1 and 2 and Sections 111.84 (2)(a) and (b) are construed in such as way as to protect employes from interference with any of their legal rights regardless of the origin of those rights or the motivation for the interference, the Commission could be called upon to entertain complaints alleging interference with legal rights under circumstances bearing no relationship to the employment situation.

For these reasons, the Examiner concludes that the legislature did not intend to protect the exercise of legal rights other than those specifically set out in the rights section of the three statutes unless it can be said that the legal rights sought to be protected are rights established by other provisions of the statute or the employe or employes who are allegedly interfering with the employe's other legal rights (such as the right of free speech) are motivated by the employe's exercise of his rights under the statute.

The rights which were allegedly interfered with herein, according to the Complainant's argument, are not rights protected by Section 111.70(2) which are essentially the rights to engage in lawful concerted activity or refrain therefrom. . . .

ID. at pps. 7-9

Examiner Fleischli's thoughtful analysis is, I believe, equally persuasive in this case. While the labor relations provisions of Chapter 111 contain some language that can be read to suggest that the legislature granted the WERC authority over disputes beyond the labor-management arena, the prior expressions of the statute, the courts and the Commission itself make it evident that a "controversy as to employment relations" within the meaning of WEPA requires some implication of the rights of employees as defined in the various Acts. As the conduct complained of in this case has no such implication, I conclude that the Complainant's recourse, if any, lies with the police or the civil courts. Accordingly, I have dismissed the complaint in its entirety.

Dated at Racine, Wisconsin, this 21st day of June, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

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