STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WILLIAM OAKLEY, Complainant,

vs.

COUNTY OF DOOR, Respondent.

Case 148
No. 64370
MP-4128

Decision No. 31281-B

COUNTY OF DOOR, Complainant,

vs.

WILLIAM OAKLEY, Respondent

Case 149
No. 64486
MP-4129

Decision 31282-B

Appearances:

Aaron N. Halstead, Hawks, Quindel, Ehlke & Perry, S.C., Attorneys at Law, 222 West Washington Avenue, Suite 705, P.O. Box 2155, Madison, WI 53701-2155, appearing on behalf of William Oakley.

Grant P. Thomas, Door County Corporation Counsel, 421 Nebraska Street, P.O. Box 670, Sturgeon Bay, WI 54235-0670, appearing on behalf of Door County.

Thomas J. Parins, Jr., Parins Law Firm, S.C., Attorneys at Law, 422 Doty Street, P.O. Box 817, Green Bay, WI 54305, appearing on behalf of Door County Deputy Sheriff's Association.

ORDER PERMITTING DOOR COUNTY DEPUTY SHERIFF'S ASSOCIATION TO INTERVENE AS A PARTY

In a letter dated December 22, 2004, counsel for William Oakley filed a request concerning County of Door, Case 140, No. 62809, MP-3981, which is referred to below as Case 140, and which is a complaint filed by Door County Deputy Sheriff's Association (the Association) against the Door County Sheriff's Department. The request states:

> . . . Mr. Oakley has retained me for the purpose of filing an additional prohibited practices complaint that involves actions occurring subsequent to the filing of the above-referenced complaint. I have drafted a complaint on his behalf, but before filing same, I write to inquire whether the interests of efficiency would favor adding Sergeant Oakley as a complainant in the already existing proceeding and then amending the existing complaint to include the new allegations. . . .

On January 3, 2005, the Commission informally assigned me to act as Examiner in Case 140. On January 10, I issued a letter to the parties to determine if "Mr. Halstead's request is mutually agreeable." On January 13, William Oakley (Oakley) filed a complaint against the County of Door (the County), which the Commission captioned as Case 148, No. 64370, MP-4118, and which is referred to below as Case 148. Case 148 alleges that the County committed violations of Secs. 111.70(3)(a)1, 4 and 5, Stats., by retaliating against Oakley for the assertion of lawful, concerted activity protected by Sec. 111.70(2), Stats. In a letter filed January 18, Door County noted it had filed a motion to dismiss Case 140, and requested that the motion be decided prior to further processing of Case 148. In a letter to the parties dated January 25, the Commission's General Counsel noted,

> . . . We anticipate assigning this complaint to Examiner McLaughlin. If you believe it is appropriate for the Commission to consolidate the two complaints for any hearing/decision, please so advise me . . .

On February 8, the County filed a response formally opposing consolidation, and requesting a determination of its motion to dismiss Case 140.

On February 9, 2005, the County filed a Motion to Dismiss Case 148; an alternative Motion to Make Complaint More Definite and Certain; an answer; and a counterclaim against Oakley. The Commission captioned the counterclaim as Case 149, No. 64486, MP-4219, and mailed a copy of the complaint to Oakley under a cover letter dated February 22. This complaint is referred to below as Case 149. On February 22, Oakley filed a letter challenging the sufficiency of the County's answer to Case 148. Between February 22 and March 16, the parties and the Commission's General Counsel exchanged correspondence concerning the consolidation of any or all of Cases 140, 148 and 149. On March 22, the Commission issued an Order consolidating Cases 148 and 149 "for the purposes of any necessary hearing."

Between March 30 and May 10, 2005 the parties and I exchanged correspondence to determine what, if any, issues in Cases 148 and 149 could be set for hearing, together with what, if any, issues Case 140 posed for hearing. On May 17, I conducted a conference call with the parties to address these points. I summarized the teleconference in a letter to the parties dated May 18, which states:

> . . . As a result of the conference call, it is my understanding that I can dismiss the matter captioned as Case 140. Further, it is my understanding that Mr. Parins wishes to, at a minimum, observe the processing of Cases 148 and 149, and potentially to assert an interest in those matters if they pose issues implicating the interpretation of the labor agreement between the County and the Door County Deputy Sheriff's Association. Complaint hearings are open [ERC 10.13(1)] meetings, so observation of the hearing poses no issue. However, the timing and nature of the Association's assertion of party-in-interest status in Cases 148 and 149 may present issues, which were discussed, but not resolved. For what it is worth, I will repeat that I see the motion to assert party status to implicate at least ERC 10.12(2) and ERC 12.02 and 12.03. I anticipate that assertion of party-in-interest status, if/when made, will require identification of the Association's interest as a Complainant or as a Respondent and the entry of appropriate pleading. To the extent the Association wishes to assert the interest of a Complainant, filing fee and consolidation issues may be posed. As noted below, Mr. Parins will be filing an indication of the Association's interest in this matter on the same schedule as Mr. Halstead will be filing an amendment to the complaint in Case 148 and an answer to the County's counterclaim in Case 149.
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> Regarding Cases 148 and 149, I noted that Paragraph 15 of the complaint in Case 148 mentions "retaliation", and that a reference to that term typically refers to a violation of Sec. 111.70(3)(a)3, Stats. This allegation is not yet part of the pleadings. Beyond this, it is my understanding that the County and the Association are now in collective bargaining for the successor to an expired labor agreement. The alleged violation of Sec. 111.70(3)(a)5, Stats., thus does not implicate the grievance arbitration process. As I understand it, the pleadings in Case 148 regarding Secs. 111.70(3)(a)4 and 5, Stats., and potentially the pleadings in Case 149 question the County's obligation to maintain the ***status quo*** pending agreement on a successor. Some discussion was had concerning the processing of two grievances of potential relevance to Cases 148 and 149, but action on that discussion will await the amendment process outlined below. . . .

On June 3, 2005, the Association filed a Motion to Intervene in Cases 148 and 149, together with a request for the dismissal of Case 140. The Commission dismissed Case 140 on June 6.

On June 7, Oakley filed a response indicating no objection to the Association's Motion to Intervene, and filed an amended complaint including allegations that the County had violated Sec. 111.70(3)(a)3, Stats. On June 20, the County filed a Motion to Dismiss Case 148, together with an answer and affirmative defenses. On June 20, the County filed a response to the Association's Motion to Intervene, indicating it "can not consent to the . . . request", suggesting "three potential options" regarding intervention, and indicating it "is open to a creative and palatable solution." In e-mails dated June 21, Oakley and the County suggested the possibility of briefing the pending motions, or of another teleconference. On June 24, Oakley filed a Motion to Dismiss Case 149, together with an answer and affirmative defenses.

I conducted another conference call on September 9. I summarized the conference call in a letter to the parties dated September 9, which states:

> . . . There is general agreement that because each of the cases noted above has potential contract interpretation-type questions it is necessary for Mr. Parins to state the Association's interest as a party in the two cases. This needs to be done prior to addressing the pending motions, since those motions could resolve some or all of the issues posed. The statement of the Association's interest can be accomplished in a number of ways, but I believe the most efficient is for Mr. Parins to enter a pleading in each matter. This could conceivably involve his assertion of an interest as a Complainant, a Respondent or some combination of the two. How this is resolved is tactical and thus must, in the first instance, be Mr. Parins' decision. . . . To the extent Mr. Parins asserts a statutory violation by the County or by Mr. Oakley, the pleadings may pose an issue regarding a filing fee. That issue, if posed, will not be posed for decision until after the pleadings are filed. The pleadings can include any motions, affirmative defenses or allegations that Mr. Parins thinks the dispute poses.
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> Before closing, I noted my belief that the pleadings as they now exist include motions, including the alleged untimeliness of certain allegations, which will probably have to be addressed prior to an evidentiary hearing. There is general agreement on this point, but the specifics must await the completion of the pleading process. . . .

On October 3, 2005, the Association filed an Amended Motion to Intervene and Response to Pleadings. In an e-mail dated December 12, I sought to determine whether the parties considered the issues ready for the submission of briefs. After an exchange of e-mails between December 12 and December 29, the parties agreed to the submission of briefs on the Motion to Intervene, which would be addressed prior to the substantive motions concerning Cases 148 and 149. The last of those briefs was filed on January 18, 2006. The Commission formally appointed me Examiner in Cases 148 and 149 on January 20, 2006.

ORDER

The Association's Motion to Intervene is granted, thus allowing the Association to participate in Cases 148 and 149 as a party.

Dated at Madison, Wisconsin this 23rd day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

DOOR COUNTY; WILLIAM OAKLEY

MEMORANDUM ACCOMPANYING ORDER PERMITTING DOOR COUNTY DEPUTY SHERIFF'S ASSOCIATION TO INTERVENE AS A PARTY

The Association's Position

The Association notes that the Motion to Intervene is appropriate under ERC 10.12(2), and is not opposed. Since the Association negotiated the labor agreement that Oakley asserts the County violated and that the County asserts Oakley violated, it "has an interest in these matters." Since the Association has stated "in particularity the matters on which it takes a position", there is no reason not to permit it to intervene "in regards to the areas of the complaint(s), pleadings, and claims in which the Association has taken a position as specifically set forth in the Motion to Intervene as amended and dated June 2, 2005 and September 30, 2005."

William Oakley's Position

Oakley does not object to the Association's Motion to Intervene. However, Oakley argues that "it could become necessary for the Commission to determine the extent of the Association's permissible involvement in these proceeding at one juncture or another: i.e. if the Association seeks to be heard regarding an issue which Oakley believes is unrelated to or has no impact on the collective bargaining agreement."

The County's Position

The Motion is governed by ERC 10.12(2), and the Association "may have an interest in the outcome of these proceedings." That the Association may enter the proceedings as a party is not, in itself, objectionable. However, the Association has yet to articulate its position with sufficient specificity to establish a more than hypothetical interest in Case 148 or 149. It should not be permitted to "sit back and monitor the proceedings, (and) reserve the ability to intervene at a time and in a fashion of its own choosing". The County could be prejudiced by the Association's actions, and the Association "must simply stake out its position and make a strategic judgment as to intervention." More specifically, the motion, if granted, should "occur at the earliest possible stage of the proceedings"; should not result in prejudice to the County; and should avoid unnecessary delay. Two options are available to address these criteria. The first is to deny the Motion to Intervene. The second is to permit the intervention "at present", with the Association having "both the right and obligation to fully participate as a "party." Either option is acceptable.

DISCUSSION

The issue regarding intervention is procedural, with the parties' limited differences focusing as much on how the Association will be permitted to intervene as on whether the intervention is appropriate. To address the procedural point, it is first necessary to establish the legal background.

Sec. 111.07(2)(a), Stats., which is made applicable to MERA at Sec. 111.70(4)(a), Stats., sets the procedural background to a complaint of prohibited practices. Because Sec. 111.07(2)(a), Stats., states a right to hearing, the matter is a contested case under Sec. 227.01(3), Stats. The Commission has historically treated a prohibited practice complaint as a Class 3 proceeding under Sec. 227.01(3)(c), Stats. Section ERC 10.12(2) of the Commission's administrative rules addresses intervention thus:

> TO INTERVENE. 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 10 governs "all proceedings involving municipal employment relations" under Section 10.01, and ERC 12 specifically addresses "prohibited practices" under ERC 12.01. ERC 12 does not, however, address intervention. Thus, under ERC 10.01 and 10.03, the provisions of ERC 10.12(2) govern the motion, since prohibited practice proceedings fall within the "all types of proceedings" references of the these sections. Because ERC 10.12(2) specifically mentions "the individual conducting the proceeding", the intervention motion may be addressed by an examiner, see BOARD OF EDUCATION, CLINTON COMMUNITY SCHOOL DISTRICT ET. AL., DEC. NO. 20081 (WERC, 7/84).

ERC 10.12 permits intervention "upon such terms" deemed appropriate by the trier of fact. The pleadings in Case 148 put Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., at issue. The pleadings in Case 149 put Secs. 111.70(3)(b)4 and 6, Stats., at issue. The pleadings acknowledge that the Association is the exclusive collective bargaining representative for the unit of which Oakley is an individual member. There is, then, an established Association interest in the enforcement of its duty to bargain with the County under Secs. 111.70(3)(a)1 and 4, Stats., as well as in the interpretation of its collective bargaining agreement with the County under Sec. 111.70(3)(a)5, Stats., or the enforcement, under Sec. 111.70(3)b 4 or 6, Stats., of that agreement regarding an arbitration award to which the Association was a party. That the Commission looks to the language of an expired agreement to determine the *status quo* a municipal employer must maintain during a contract hiatus, see SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC, 3/85); VILLAGE OF SAUKVILLE, DEC. NO. 28032-B (WERC, 3/96); and WASHBURN PUBLIC SCHOOLS, DEC. NO. 28914-B (WERC, 6/98), underscores the Association's potential interest in the application of the labor agreement

even if Sec. 111.70(3)(a)5, Stats., is not available as an enforcement mechanism.

The relationship of a status quo determination to the binding determination of contract language is problematic enough that the Association can claim an interest in the determination. The relationship of the Association's interest in the alleged violation of Sec. 111.70(3)(a)3, Stats., is more problematic, prefacing the more troublesome aspects of the motion to intervene. However, that section refers to "a membership in any labor organization", thus establishing on a general level, an Association interest in the litigation.

The more troublesome aspects of the motion concern how, or in the terms of ERC 10.12(2), upon what terms the Association can intervene. At this point, the Association has filed a "Response to Pleadings" in Cases 148 and 149, together with affirmative defenses in Case 149. The responses specifically highlight the facts and generally highlight the issues of law the Association takes a position on. The alleged violations of law committed by Oakley in Case 149 and the alleged County retaliation against Oakley alleged in Case 148 pose areas of potential ambiguity regarding whether the Association's interest is consistent with Oakley's or the County's or whether those interests may conflict with either or both. Oakley and the County question when such ambiguity must be addressed.

At this point, the Association has identified sufficient interest to play a role in the litigation. As the County urges, this role must be that of a party. Sec. 111.07(2)(a), Stats., identifies a litigation participant as a "party in interest" and further specifies, "Any other person claiming interest in the dispute or controversy, as . . . an employee, or their representative, shall be made a party upon application." This provision has a parallel at Sec. 227.44(2m), which states, "Any person whose substantial interest may be affected by the decision following the hearing shall, upon the person's request, be admitted as a party." As noted above, the Association has demonstrated the interest of an employee representative. In sum, the Motion to Intervene must be granted.

Also as noted above, the intervention must be that of a party. In earlier discussion with the parties, I speculated that the role must be that of a Complainant or a Respondent and this may implicate filing fee issues. The pleadings point to a common core of facts underlying each party's interest, thus there is no reason to question the necessity of further complaints beyond those underlying Case 148 and 149. The provisions of MERA and Chapter 227, Stats., which are noted above do not specifically refer to "intervenor" status, but simply to "party" status. The Commission's rules, at ERC 12.02 and 12.03 establish the roles of "complainant" and "respondent". Other than ERC 10.12, the rules governing prohibited practice complaints are silent on the role of intervenor. The statutory background makes it unpersuasive to conclude that "party" status can only be that of a complainant or a respondent, unless those terms are stretched to separately apply to specific issues of fact or law.

Against this background, the terms of the Association's participation must evolve with the litigation. The briefing which will follow the issuance of this decision should highlight what, if any, issues demand hearing. The County and Oakley may raise, during or after the briefing, any concern they have on which factual or legal issue the Association takes a position on and how the Association can assert its interest at hearing, if hearing is ordered. The

Association's pleading to this point is sufficient to establish it must be a party to the resolution

of the pre-hearing motions in Cases 148 and 149. That their role may not fit neatly into the role of complainant or respondent cannot obscure that the Association is obligated to state the legal and factual basis of its interest with sufficient clarity to assist in the hearing process. At this point, its interest warrants its participation in the dispositive motions. Uncertainty regarding its interest will be addressed as necessary as a part of the pleading, briefing and evidentiary process that will develop the record in Cases 148 and 149.

Dated at Madison, Wisconsin this 23rd day of January, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

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