STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**AFSCME, LOCAL 742, AFL-CIO,
AFFILIATED WITH MILWAUKEE
DISTRICT COUNCIL 48,** Complainant,

vs.

**CITY OF CUDAHY and
LIBRARY BOARD OF CUDAHY,** Respondents.

Case 10
No. 64458
MP-4124

Decision No. 31408-A

Appearances:

Mark Sweet, Attorney, Law Offices of Mark A. Sweet, 705 East Silver Spring Drive, Milwaukee, Wisconsin 53217, on behalf of the Complainant.

Elizabeth Drew, Attorney, Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, on behalf of the Respondents.

ORDER DENYING MOTIONS TO DISMISS COMPLAINT

On February 2, 2005, AFSCME Local 742 filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the City of Cudahy and the Library Board of Cudahy. The Union alleges that both Respondents violated their duty to bargain with the Union concerning a custodial position and interfered with employee rights. The Union contends that by this action, both Respondents violated Secs. 111.70(3)(a)1 and 4, Stats. The Union also alleges that the City violated its collective bargaining agreement with the Union by refusing to process a grievance. The Union contends that by this action, the City violated Sec. 111.70(3)(a)5, Stats. On April 25, 2005, both Respondents filed Motions to Dismiss. On May 3, 2005, the Complainant filed its response in opposition to the Motions to Dismiss. On July 21, 2005, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.07(5) and 111.70(4)(a), Stats. Hearing on the complaint is

scheduled for September 28, 2005. Neither Respondent has filed an Answer to the complaint. Having considered the facts alleged in the complaint and the arguments of the parties, the Examiner makes and issues the following

ORDER

The Motions to Dismiss are denied.

Dated at Madison, Wisconsin, this 8th day of August, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

CUDAHY PUBLIC LIBRARY BOARD

MEMORANDUM ACCOMPANYING ORDER DENYING MOTIONS TO DISMISS COMPLAINT

As noted in this decision's prefatory paragraph, the Respondents have filed Motions to Dismiss the complaint.

POSITIONS OF THE PARTIES

Complainant

The Complainant contends that the Respondents' Motions to Dismiss should be denied for the following reasons.

First, the Complainant responds to the Respondents' contention that the Commission lacks jurisdiction over the claims raised in the complaint. It disputes that assertion. It characterizes the complaint as alleging that the Respondents violated their duty to bargain with the Union under MERA and interfered with employee rights. The Union believes it to be well settled that the Commission has jurisdiction to hear these allegations. The Union further characterizes the complaint as alleging that the City violated its collective bargaining agreement with the Union. Once again, the Union believes it to be well settled that the Commission has jurisdiction to hear such an allegation. Building on the foregoing, the Union avers that it should be permitted to present facts through a hearing that will show that in this particular case, the City has a duty to bargain with the Union and that the City breached its collective bargaining agreement with the Union.

Second, the Union avers that both Respondents base their Motions to Dismiss, in part, on requests that the Commission consider certain evidence in their favor. The Union contends that is improper because the focus should not be on the facts alleged in the Respondents' Motions or other "extraneous matters", but rather should be on the facts alleged in the complaint. The Union asserts that there is obviously a factual dispute over this evidence and its importance, and a hearing is necessary to present evidence on same.

Third, the Union addresses the Respondents' claim that an issue herein (namely, the creation of a new position within the Library bargaining unit) is a permissive subject of bargaining. According to the Union, by making this claim, the Respondents are implicitly asserting that neither of them has a duty to bargain (about the creation of a new custodial position within the Library bargaining unit) because the matter involves a permissive subject of bargaining. The Union responds to this contention by asserting that when an "issue in any contested case involves a permissive or mandatory subject of bargaining", it "should be resolved through the hearing process."

Fourth, the Union responds to the Library's factual assertion that it repeatedly offered to bargain with the Union over the creation of a new position at the library. The Union characterizes that factual assertion as an affirmative defense which is fact intensive, and as a result, should be left for a hearing.

Fifth, the Union notes that in its complaint, it alleged in paragraph 4 that "the City of Cudahy and its Library Board hired a custodian." According to the Union, this claim alleges that the City and the Library Board acted as joint employers regarding the custodian in question. In support thereof, it notes that Exhibits 2 and 3 (which the Library attached to its Motion to Dismiss) show that the Library Board hired Ewert, whom the Union characterizes as a "nominal employee of the (Library) Board", as the "replacement" for Kisch, who was an employee of the City. The Union argues that if the Library Board hired a replacement for a City employee, the Union should be allowed to demonstrate through a hearing that the City and the Library Board were acting as joint employers at least with regard to this (one) position.

Finally, in the alternative, even if the City and the Library Board did not act as joint employers of the new custodian hired as a replacement for the former City employee, the Union avers that the City illegally transferred or eliminated bargaining unit work out of its bargaining unit (namely, the custodial work formerly performed by an employee of the City bargaining unit) and that this violated MERA and the parties' collective bargaining agreement.

In sum, the Union believes that the claims raised in its complaint are fact intensive and best left to a full evidentiary hearing. It therefore asks that both Motions to Dismiss be denied.

Respondents

Both Respondents contend that their Motions to Dismiss should be granted. They elaborate on this contention as follows.

The City disputes the Union's assertion that it committed a prohibited practice by refusing to bargain with the Union over the Library's creation of a new custodial position and the vacancy of a City bargaining unit position. In the City's view, the Union is just plain wrong. According to the City, it has no duty to bargain with the Union over the Library's decision to create a new position for the Library's bargaining unit because the Library is a separate municipal employer from the City. It maintains that the Library's duty to bargain with the Union cannot be imputed to the City. In addition, the City contends that it has no duty to bargain with the Union over the vacant position created in the City bargaining unit when Ewert was hired by the Library. It asserts that decisions regarding when and if vacancies are refilled are questions of management of public policy, and thus, permissive subjects of bargaining. Building on that premise, the City avers that it has no duty to bargain with the Union concerning when (and if) the vacant position created by Dave Kisch's retirement will be refilled.

Next, the City addresses the Union's claim that it improperly refused to process the Union's November 2, 2004 grievance. According to the City, that grievance is fatally flawed because the City's contractual grievance procedure only covers City employees; it does not extend to employees of other municipal entities, such as the Library. The City avers that since the grievance in question concerns the Library's decision to create a new position, and in reality is nothing more than a demand that the City bargain with the Union over the Library's decision to add a position, the City had no duty to process that grievance. Elaborating further, the City argues that in this case, the City's grievance procedure did not apply because no terms and conditions of a City employee were affected by the Library's decision to create a new position. Building on the foregoing, the City maintains that the Commission lacks jurisdiction over the Union's claim that the City's grievance procedure was not followed.

The Library also disputes the Union's assertion that it committed a prohibited practice by refusing to bargain with the Union over its decision to create a new custodial position in the Library bargaining unit. Like the City, the Library contends that it has no duty to bargain with the Union over its decision to create a new position because the creation of a new position within the bargaining unit is a permissive subject of bargaining. Building on that premise, the Library asserts that it has no duty to bargain with the Union over the creation of Tim Ewert's custodial position.

The Library argues in the alternative that even if it did owe a duty to bargain with the Union over the creation of that new position, the fact of the matter is that the Library offered to bargain with the Union three times, but the Union failed to respond to the Library's repeated offers to bargain. To support this contention, it cites the affidavit of the Library Director which accompanied its motion. The Library avers that it is the Union that failed to bargain in this case.

In sum, both Respondents ask that their Motions to Dismiss be granted.

DISCUSSION

The Respondents' Motions to Dismiss are governed by Chapters 111 and 227. Through the operation of Sec. 111.70(4)(a), Stats., Sec. 111.07, Stats. governs the procedures by which prohibited practice complaints are handled. Chapter 227 of the Wisconsin Statutes states the framework common to administrative agency proceedings.

Sec. 227.01(3), Stats., defines a "Contested case" to mean "an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order." This case is a contested case within the meaning of that section.

Chapter 227 does not provide a summary judgment procedure for dismissing a contested case prior to hearing. The right to a hearing under Chapter 227 is explicit, and the dismissal of a case prior to evidentiary hearing is not. That is also the case under MERA (Sec. 111.70, Stats.), and its implementing regulations (ERC 12). That being so, a pre-hearing dismissal of a contested case, whether it is characterized as a motion to dismiss or a motion for summary judgment, is an uncommon result. It is rare that circumstances permit dismissal of a case prior to the conclusion of an evidentiary hearing unless there is a lack of jurisdiction or a lack of timeliness.

In UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, the Examiner opined as follows when ruling on a pre-hearing motion to dismiss:

> Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief.

DEC. NO. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3.

Other Commission examiners have applied that same standard in numerous subsequent decisions. This Examiner will do likewise.

When ruling on a motion to dismiss, an examiner obviously has to consider the underlying facts. Based on the standard just noted, the facts which will be considered here are those alleged in the complaint. While the Respondents supplied additional facts in their submissions beyond those contained in the complaint, the Examiner has not relied on same in making the instant ruling.

The facts alleged in the complaint can be summarized thus. The Union has collective bargaining agreements with both the City and the Library. These are separate labor agreements with differing terms. The recognition clauses in both collective bargaining agreements describe the bargaining unit as "all regular full-time and regular part-time employees" of the City and Library, respectively. The unit descriptions in the two collective bargaining agreements just referenced include custodial employees. A city employee was formerly the custodian at the Library. That city employee retired sometime in 2004. After that custodial employee retired, the City did not refill that custodial vacancy. Instead, the Library hired someone to be the custodian at the Library. After that person was hired, the City did not apply the terms of its collective bargaining agreement with the Union to that custodian (i.e. the one who works at the Library). The Union grieved the City's action on November 2, 2004. The City has not processed that grievance.

My discussion begins with the following comments concerning the Commission's jurisdiction. The complaint contends that both Respondents violated their duty to bargain with the Union and interfered with employee rights. Sections 111.70(3)(a)1 and 4 of MERA give

the Commission jurisdiction to hear refusal to bargain and interference claims. The complaint also contends that the City violated its collective bargaining agreement with the Union by refusing to process a grievance. Section 111.70(3)(a)5 of MERA gives the Commission jurisdiction to hear claims involving refusal to process grievances. Given the foregoing, the Commission clearly has jurisdiction over the claims raised in the complaint.

That said, the claims raised in the complaint are atypical in the following sense. Typically, such claims are made by a union against a single employer. Here, though, the claims are made by the Union against two Respondents – the City and the Library. That alone makes this case unique.

Not surprisingly, the Respondents contend they are separate legal entities and that, as a result, the legal duties of one cannot be imputed to the other. More specifically, the City argues that since it was the Library that hired the new custodian, it (i.e. the City) did not have to bargain with the Union over the Library's decision or process a grievance which related thereto.

While the City's position relative to those matters may ultimately be sustained, I decline to make that determination now. In my view, it's premature to do so. Here's why. One of the Union's theories herein is that the City and the Library acted as joint employers when they hired the new custodian who now works at the Library. If the Union can prove that the Respondents acted as joint employers when they hired that person (i.e. the custodian who now works at the Library), then the Union may be entitled to relief/remedy from the City, the Library, or both. That being so, it cannot be said that "under no interpretation of the facts alleged would the complainant be entitled to relief." On that basis alone, the complaint against the Respondents cannot be dismissed without an evidentiary hearing.

Aside from that, another of the Union's theories herein is that the City unilaterally moved a Library custodial position out of the City's bargaining unit and into the Library's bargaining unit. Once again, if the Union can prove that, then the Union may be entitled to relief/remedy from the City, the Library, or both.

Accordingly, the Examiner has denied the Respondents' Motions to Dismiss.

The parties' contentions which are not addressed above will be addressed in the decision which will follow the evidentiary hearing.

Dated at Madison, Wisconsin, this 8th day of August, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner
REJ/gjc
31408-A