STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BROWN COUNTY SHERIFF'S DEPARTMENT NON-SUPERVISORY LABOR ASSOCIATION AND JAMES WIESNER, Complainants,

vs.

BROWN COUNTY (SHERIFF'S DEPARTMENT), Respondent.

Case 757
No. 66629
MP-4324

Decision No. 32014-A

Appearances:

Rachel L. Pings, Cermele & Associates, S.C., Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin 53213, appearing on behalf of the Complainants.

John C. Jacques, Corporation Counsel, Brown County, 305 East Walnut Street, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, appearing on behalf of the Respondent.

ORDER

On January 16, 2007, Complainants filed a complaint of prohibited practices in which they alleged that Respondent had violated Sec. 111.70(3)(a)4, and derivatively Sec. 111.70(3)(a)1, Stats., by discharging James Wiesner without just cause during a contract hiatus. On February 9, 2007, Respondent filed a Motion to Stay Proceedings until discovery and fact-findings are made in a Fair Employment claim before the Equal Rights Division, Wisconsin Department of Workforce Development that was filed by James Wiesner against Brown County. On February 9, 2007, Complainants filed a Brief in Opposition to Motion to Stay Proceedings. On February 12, 2007, Attorney JoAnne Breese-Jaeck filed a written response in opposition to Respondent's Motion.

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

ORDER

1) It is ORDERED that Respondent's Motion to Stay Proceedings is hereby denied.

2 It is further ORDERED that, no later than Noon on Friday, February 16, 2007, Respondent is to advise the Examiner, in writing, whether or not Respondent is available for hearing on February 27, 28 and March 1, 2007.

3) It is further ORDERED that, if the written notice ordered in Paragraph Two, supra, advises the Examiner that Respondent is not available for hearing on February 27, 28 or March 1, 2007, then Respondent is to include, in such written notice, a written explanation of why Respondent is not available on February 27, 28 or March 1, 2007, as well as a list of all dates in March, 2007 on which Respondent is available for hearing.

Dated at Madison, Wisconsin, this 14th day of February, 2007.

Coleen A. Burns /s/
Coleen A. Burns, Examiner

BROWN COUNTY

MEMORANDUM ACCOMPANYING ORDER

On January 16, 2007, Complainants filed their complaint of prohibited practices alleging that Respondent has violated Sec. 111.70(3)(a)4 and derivatively Sec. 111.70(3)(a)1, Stats., by violating the status quo on a mandatory subject of bargaining during a contract hiatus when it discharged James Wiesner. That the complaint raises allegations that are within the jurisdiction of the Wisconsin Employment Relations is not disputed.

In the cover letter attached to the complaint that was filed in this matter, Complainants state, *inter alia*:

> Please set a hearing not less than ten days nor more than 40 days, pursuant to §111.07(2)(a), Stats.

Sec. 111.07(2)(a), Stats., includes the following "The commission shall fix a time for the hearing on such complaint, which will be not less than 10 no more than 40 days after the filing of such complaint . . ." 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.

The Examiner was assigned this case on January 26, 2007. On January 29, 2007, the Examiner sent an e-mail offering hearing dates that fell within the 40 day time period set forth in Sec. 111.07(2), Stats. Subsequently, Complainants' representative contacted the Examiner and advised the Examiner that one of these dates, *i.e.*, February 16, 2007, was acceptable to the Complainants, but that Complainants were also available on other dates, *i.e.*, February 27, 28 and March 1, 2007. These dates were provided to Respondent's representative by e-mail dated February 2, 2007, as well as by letters dated February 2 and 8, 2007. In each of these correspondences, the Examiner sought confirmation of Respondent's availability for hearing on the referenced dates. To date, Respondent has not confirmed its availability for hearing on these dates, or on any other date.

On February 9, 2007, Respondent filed a Motion to Stay Proceedings. In this Motion, Respondent asserts that James Wiesner has filed a Fair Employment Claim before the Equal Rights Division, Wisconsin Department of Workforce Development (ERD) which relates entirely to Wiesner's claim against Brown County for wrongful termination. Respondent further asserts that the fact disputes in the instant complaint relate to the same fact disputes before the ERD and involves the same parties.

Respondent argues that the doctrine of issue preclusion should be applied to preclude two sets of fact-findings, by two different State quasi-judicial agencies, which may conflict. Respondent asserts, therefore, that this complaint proceeding should be stayed until discovery and fact-findings are made by ERD.

In response to Respondent's Motion, Complainants argue that the County has provided no legal authority to overcome the mandatory 40 day deadline provided in Sec. 111.07. Noting that the materials attached to Respondent's Motion show that the ERD claim alleges discrimination based upon a disability, Complainants aver that the respective laws and forums are distinct. Complainants deny that there is an identity of issue.

Complainants further argue that "issue preclusion" is a bar to a party relitigating an issue determined against that party in an earlier action. Complainants maintain that there has been no such determination.

On February 12, 2007, Attorney JoAnne M. Breese-Jaeck filed a written response to Respondent's Motion stating that her firm represents James Wiesner in the ERD proceedings referenced in Respondent's Motion. Attorney Breese-Jaeck also stated that she concurs in the Brief Opposing Stay filed by Attorney Pings and argues that, given the mandatory language of Sec. 111.07(2), the relief requested by Respondent is neither authorized nor available.

Attorney Pings, in her letter enclosing Complainants' Brief in Opposition to Motion to Stay Proceedings, states as follows:

> I am authorized to advise you that Attorney JoAnne Breese-Jaeck, the attorney representing Mr. Wiesner in the Equal Rights Division Complaint, joins in this letter and enclosed brief.

As Examiner McLaughlin has stated in DOOR COUNTY, DEC. NO. 31281-B, 31282-B (1/06):

> . . . 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:
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> > 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.
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> 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).
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> ERC 10.12 permits intervention "upon such terms" deemed appropriateby the trier of fact. . . . 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." . . .

Attorney Breese-Jaeck has not filed a Motion to Intervene, nor has she made application to be made a party of interest. Given the assertions of Attorney Pings and Attorney Breese-Jaeck, the Examiner has concluded that Attorney Breese-Jaeck's written response is an extension of the brief filed by Attorney Pings and is not an indicator that Attorney Breese-Jaeck is claiming to be a party in interest in this matter or to be representing Complainant Wiesner in this matter. Unless advised to the contrary, the Examiner will assume that Attorney Breese-Jaeck does not intend to have any further involvement in this matter.

Conclusion

The record to date indicates that Complainant James Wiesner is a party to an ERD proceeding, but that Complainant Brown County Sheriff's Department Non-Supervisory Labor Association is not. Thus, contrary to the claim of Respondent, there is not an identity of parties between the instant complaint proceeding and the ERD claim.

In this complaint, a bargaining representative, *i.e.*, Complainant Brown County Sheriff's Department Non-Supervisory Labor Association, seeks to enforce its statutory right, under the Municipal Employment Relations Act, to maintain the status quo on mandatory subjects of bargaining during a contract hiatus. In the ERD claim, Complainant Wiesner, raises a discrimination claim, under the Wisconsin Fair Employment Law, based upon disability and membership in the national guards or reserves. Although both the ERD claim and the instant complaint arise from Respondent's discharge of Complainant Wiesner, they do not involve the same factual dispute.

In arguing that the doctrine of issue preclusion should be applied, the Respondent relies upon LINDAS V. CODY, 189 WIS.2D 547 (1994). There is no such case at this cite. In LINDAS V.CADY, 183 WIS.2D 547 (1994), the Wisconsin Supreme Court states:

> Issue preclusion, on the other hand, is designed to limit the relitigation of issues that have been *actually* litigated in a previous action. Unlike claim preclusion, an identity of parties is not required. . . . (at 558)
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> . . . issue preclusion is in some respects a narrower doctrine than claim preclusion. For example, issue preclusion requires that the issue sought to be precluded must have been actually litigated previously. . . . (at 559)

In NORTHERN STATES POWER CO. V. BUGHER, 189 WIS.2D 541 (1995), the Wisconsin Supreme Court, defined the doctrine of issue preclusion as follows:

> Issue preclusion refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action. . . . (at 550)

Consistent with the above, in a more recent decision, STATE OF WISCONSIN, DEC. NO. 31240-B (5/06), this Commission has addressed the doctrine of issue preclusion, stating as follows:

> . . . Without dissecting the differences between claim preclusion and issue preclusion, we note that issue preclusion is generally the more apposite concept when considering the effect of an arbitration award in a subsequent grievance. 2/ For issue preclusion purposes (and thus for the second type of Section (1)(e) violation), it does not matter whether the same grievant is involved in the subsequent arbitration. What matters, as the Commission held in its seminal decision in WISCONSIN PUBLIC SERVICE CORPORATION, SUPRA, is whether the precise *issue* has been resolved and subsequent circumstances have not called the resolution into question.
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> 2/ Claim preclusion generally applies to situations where the same temporal events (or "transaction") give rise to more than one cause of action. Claim preclusion is related to the "merger doctrine," requiring that all claims arising out of a single transaction be combined; accordingly, such claims will be precluded whether or not they were actually litigated. See STATE OF WISCONSIN (DER) (METHU), DEC. NO. 30808-A (WERC, 1/06) at 8-9. Issue preclusion, on the other hand, applies to subsequent events or transactions that implicate issues already settled in previous litigation. Unlike claim preclusion, issue preclusion does not require the same parties, but does require that the issue actually have been litigated in the prior proceeding and have been necessary to the outcome. See discussion in WAUPACA COUNTY, DEC. NO. 30882 (WERC, 4/04).

The Commission's discussion in WAUPACA COUNTY, SUPRA, includes the following:

> Issue preclusion is the term now applied to what was formerly referred to as collateral estoppel. It is "a flexible doctrine that is bottomed in concerns of fundamental fairness and requires that one must have had a fair opportunity procedurally, substantively and evidentially to litigate the issue before a second litigation will be precluded." DANE COUNTY v. AFSCME LOCAL 65, 210 WIS.2D 268, 565 N.W.2D 540 (CTAPP, 1997). Although issue preclusion does not require an identity of parties, it does require actual litigation of an issue necessary to the outcome of the first action.

As Complainants argue, under applicable law regarding issue preclusion, this complaint is not "precluded" unless the issues raised in the complaint have actually been litigated in a prior proceeding. Inasmuch as the issues raised in this complaint have not actually been litigated in a prior proceeding, the doctrine of issue preclusion, relied upon by Respondent in arguing its Motion to Stay Proceedings, is not applicable. Accordingly, Respondent's Motion to Stay Proceedings is hereby denied.

Given Complainants' request to "Please set a hearing not less than ten days nor more than 40 days, pursuant to §111.07(2)(a), Stats., " and Respondent's failure to respond to prior Examiner requests to confirm availability for hearing in this matter, the Examiner has ordered Respondent to advise this Examiner, no later than Noon on Friday, February 16, 2007, of its availability for hearing on February 27, 28 and March 1, 2007. If Respondent advises the Examiner that is it not available for hearing on these dates, Respondent must provide written explanation of why it is not available on these dates, as well a list of all dates that it is available for hearing in March, 2007.

Dated at Madison, Wisconsin, this 14th day of February, 2007.

Coleen A. Burns /s/

Coleen A. Burns, Examiner

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