STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PULASKI BUS DRIVERS' ASSOCIATION, Complainant,

vs.

PULASKI COMMUNITY SCHOOL DISTRICT
and MEL E. LIGHTNER, Respondents.

Case 44
No. 69690
MP-4581

Decision No. 33037-B

Appearances:

Melissa Thiel Collar, Legal Counsel, Wisconsin Education Association Council, 2256 Main Street, Green Bay, Wisconsin 54311, for the Complainant.

John E. Thiel, John E. Thiel Law Office, LLC, P.O. Box 7560, Appleton, Wisconsin 54912-7075, for the Respondents.

ORDER ON REVIEW OF EXAMINER'S DECISION

On July 23, 2010, Wisconsin Employment Relations Commission Examiner John R. Emery issued an Order on Motion to Dismiss Complaint which: (1) dismissed the allegation of the Pulaski Bus Drivers' Association (Complainant) that Pulaski Community School District and Mel E. Lightner (Respondents) had violated Secs. 111.70(3)(a) 1 and 3, Stats., by refusing to follow a contractual grievance procedure; and (2) held in abeyance pending completion of a grievance arbitration proceeding the Complainant's allegations that Respondents violated Secs. 111.70(3)(a)1 and 3, Stats. by disciplining an employee and Sec. 111.70(3)(a)4, Stats. by charging the Complainant for the costs of responding to an Association document request.

On July 27, 2010, Wisconsin Employment Relations Commission General Counsel Peter G. Davis sent the following e-mail to Examiner Emery and counsel for both Complainant and Respondent and forwarded a copy of said e-mail to the three Wisconsin Employment Relations Commission Commissioners:

From: Davis, Peter G. - WERC

Sent: Tuesday, July 27, 2010 1:32 PM

To: Emery, John R. – WERC; 'Thiel Collar, Melissa'; 'John Thiel'

Subject: Pulaski Schools – Dec. No. 33037-A

In my role as WERC General Counsel, I review all decisions issued by WERC examiners. One purpose of that review is to determine whether the examiner made an error or errors of law that the Commission may want to review on its own motion (both to correct the errors and to avoid waste of time and resources for the parties and the WERC created by any such errors).

I have done so as to Examiner Emery's July 23, 2010 Dec. No. 33037-A and concluded it was appropriate to share my observations with all of you.

1. As a matter of law, viewing the pleadings in the matter most favorable to Complainant, there are no circumstances in which it was correct for Examiner Emery to dismiss the Sec. 111.70(3)(a) 1 and (3), Stats. allegations. The allegation of animus cannot be resolved without a hearing.

2. There does not appear to be any basis for believing that a grievance arbitrator will resolve the Sec. 111.70(3)(a)4, Stats. claim re payment for document production.

3. Where there is a precedent (cited by the Examiner) for holding the two suspension allegations in abeyance pending grievance arbitration, issues of alleged hostility are of such high statutory importance that there are circumstances in which the Commission or examiner's have decide (sic) not to hold them in abeyance. Particularly where, as here, there are other portions of the complaint that should proceed to hearing and are potentially related to the questions of hostility, holding this allegation in abeyance doesn't seem sensible.

Other than that, how did you like the decision Mrs. Lincoln?

I am aware that the parties have set aside two days in early August to hear this complaint or the grievance arbitration matter. Given the foregoing, hearing all complaint allegations on those two days seems like a wise move for all.

Examiner Emery has at least 20 calendar days from July 23 to reconsider his decision if he wishes to do so. WERC has 20 calendar days from July 23 to set aside the Examiner decision on its own motion. If WERC exercised that option, WERC would then ask the parties to brief the matter before deciding how the case should proceed.

If there is interest, I'd be happy to have a conference call with everyone.

Peter Davis
General Counsel
WERC

On August 5, 2010, Complainant filed a petition with the Commission seeking review of the Examiner's Order pursuant to Secs. 111.07(5) and 111.70 (4)(a), Stats. and on August 30, 2010 filed brief in support of the petition.

On September 20, 2010, Respondents filed a brief in opposition to the petition for review as well as motions and supporting argument asking that the Commission recuse itself from consideration of the petition and that portion of Complainant's August 30, 2010 brief be stricken.

On September 29, 2010, Complainant filed a reply brief and response to Respondents' motions.

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

ORDER

1. Respondents' motion to recuse is denied.

2. Respondents' motion to strike is denied.

3. The Examiner's Order is reversed in its entirety.

Given under our hands and seal at the City of Madison, Wisconsin, this 1st day of November, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Commissioner Terrance L. Craney did not participate.

PULASKI COMMUNITY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

The Motion to Recuse

Respondents contend that because we received a copy of General Counsel Davis' July 27, 2010 e-mail, we have been "tainted" and thus cannot provide a fair and unbiased decision as to Complainant's petition for review. We disagree for several reasons. First, we are entitled to consider the views of our General Counsel on any legal issue that comes before us-whether those views are communicated to us before or after a petition for review is filed. Second, we reach our own conclusions as to the merits of a petition for review and thus can and sometimes do reach results that are at odds with his views on a legal issue. Thus, we deny the motion to recuse.

The Motion to Strike

Respondents assert that portions of the Complainant's August 30, 2010 brief should be stricken because said portions refer to matters not before the Examiner when he issued his Order. Our review of the Examiner's July 23, 2010 Order will be based on the record before him at the time of issuance. However, we find it unnecessary to formally "strike" those portions of Complainant's brief that refer to matters that occurred during the post-July 23, 2010 period when the Examiner was being asked by Complainant to reconsider his decision. Such portions will simply not be considered in our analysis.

The Examiner's Decision

In the Memorandum that accompanied his Order, the Examiner correctly cited ERC 12.04 (1)(f) which provides in pertinent part:

> A motion to dismiss shall not be granted before an evidentiary hearing has been conducted except where the pleadings, viewed in the light most favorable to the complainant, permit no interpretation of the facts alleged that would make dismissal inappropriate.

The "pleadings" filed by Complainant assert that 21 separate actions by Respondents (including Respondents' conduct when responding to the Complainant's request for information which is also pled as a breach of the Respondents' duty to bargain under Sec. 111.70(3)(a) 4, Stats.) constituted retaliation against individual employees and Complainant for having exercised their rights under the Municipal Employment Relations Act (MERA), and that Respondents thereby committed prohibited practices within the meaning of Secs. 111.70(3)(a) 1 and 3, Stats. Viewing the pleadings "in the light most favorable to complainant", it must be assumed that Respondents engaged in the conduct alleged and had the alleged retaliatory

motives. Retaliating against individual employees and the Complainant for having exercised MERA rights violates Secs. 111.70(3)(a) 1 and 3, Stats. Nonetheless, the Examiner dismissed two of the 21 alleged violations because he concluded that there was a non-retaliatory explanation for Respondents' conduct. It is possible that the record produced at an evidentiary hearing will be insufficient to establish a retaliatory motive. However, for the purposes of ruling on a pre-hearing motion to dismiss, consistent with ERC 12.04 (1)(f), we must assume the truth of the Complainant's assertion that Respondents were motivated by illegal considerations. Thus, the Examiner erred by dismissing these two complaint allegations.

As to the remaining 19 alleged prohibited practices, the Examiner held, contrary to the arguments of Respondents, that said complaint allegations could not be dismissed without an evidentiary hearing and should not be deferred to a pending grievance arbitration proceeding because they involved "important issues of law." However, the Examiner decided to hold said allegations in abeyance pending completion of a grievance arbitration proceeding because:

> To the extent these issues are not resolved in arbitration, the prohibited practice complaint process can address them later, if need be. However, in the interests of economy and optimal allocation of resources it makes sense to await the resolution of the arbitration process before moving forward with the prohibited practice complaint.

We reverse the Examiner for the following reasons.

At least four of the alleged prohibited practices held in abeyance assert that the Respondent District failed to bargain in good faith in violation of Sec. 111.70(3)(a) 4, Stats. There is nothing in the record before the Examiner at the time he issued his Order that would indicate that a pending grievance arbitration proceeding had the potential to resolve these issues. Thus, there was no valid basis for holding these allegations in abeyance.

As to the multiple alleged violations of Secs. 111.70 (3)(a) 1 and 3, Stats., the Examiner correctly noted that the statutory rights Complainant seeks to vindicate are of great importance. Nothing is more central to the Municipal Employment Relations Act than the right to be free from retaliation for the exercise of rights granted by the Act. On the other hand, as the Examiner also correctly noted, there have been occasional and unusual circumstances where it has been appropriate to hold such complaint allegations in abeyance, but only if " . . the record satisfies us that there is sufficient potential" that an ongoing grievance arbitration proceeding may resolve the dispute. STATE OF WISCONSIN, DEC. NO. 31384-B (WERC, 11/05). However, the Examiner erred when he concluded that the record before him in this case warranted holding these multiple alleged violations in abeyance. While there was a grievance arbitration proceeding that might have resolved some of the alleged violations, there was nothing in the record before the Examiner that indicated "sufficient potential" for all of said violations to be resolved by the pending arbitration. On the contrary, given the multiplicity of claims, we think it highly likely that prohibited practice litigation would be inevitable over several of them, regardless of the outcome of any related grievance proceeding.

Given the likelihood of at least some litigation here and the factual overlap among the claims, we do not perceive an economy of resources that would favor holding any of the (3)(a)1 and 3 claims in abeyance. Further, as noted above, there was "no potential" for the alleged violations of Sec. 111.70(3)(a) 4., Stats. to be resolved through grievance arbitration. Thus, the Examiner erred by holding in abeyance any of the claims in this case.

Given all of the foregoing, the complaint will now proceed to hearing on the merits. [1]

Dated at the City of Madison, Wisconsin, this 1st day of November, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Commissioner Terrance L. Craney did not participate.

[1] As to the portions of the complaint the Examiner wrongly dismissed, his order was a "final" disposition of those complaint allegations and thus triggered a statutory right to obtain Commission review. As to the portions of the complaint that were wrongly held in abeyance, the Examiner's order was "interlocutory" because it did not produce a "final" disposition and thus our exercise of jurisdiction over that portion of Complainant's petition for review is discretionary. The Commission generally does not exercise jurisdiction over petitions seeking review of interlocutory orders. NORTHLAND PINES SCHOOL DISTRICT, DEC. NO. 30602-B (WERC, 11/03). However, in the context of the mixed "final" and "interlocutory" nature of the Examiner's Order, we conclude it is appropriate to assert jurisdiction over all portions of the Complainant's petition.