STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 742, AFSCME, AFFILIATED WITH MILWAUKEE DISTRICT COUNCIL 48, Complainant,

vs.

CITY OF CUDAHY, Respondent.

Case 118
No. 70809
MP-4670

Decision No. 33616-A

Appearances:

Mark A. Sweet, Sweet and Associates, LLC, Attorneys at Law, 2510 East Capitol Drive, Milwaukee, Wisconsin, appears on behalf of the Complainant.

Robert W. Mulcahy, Michael, Best & Friederich, LLP, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee, Wisconsin, appears on behalf of Respondent.

ORDER DENYING MOTION TO DISMISS

On June 10, 2010, Local 742, AFSCME, Affiliated with Milwaukee District Council 40, herein referred to as "Complainant" filed a complaint of prohibited practices against the City of Cudahy, herein referred to as the "Respondent," with the Wisconsin Employment Relations Commission, herein referred to as the "Commission," in which it alleged that since February 1, 2011, the Respondent refused to bargain with Complainant in violation of Section 111.70(3) of the Municipal Employment Relations Act (herein "MERA"). Respondent filed a motion on October 6, 2011, to dismiss the complaint filed herein. On October 14, the parties notified the Examiner that they had agreed to a deadline of November 4, 2011, for Complainant to respond to the motion. On November 14, 2011, Attorney Sweet contacted the Examiner by e-mail and requested a two-week extension to file his response and stated that he made the motion to the Examiner because he was unsuccessful in contacting Attorney Mulcahy. The Examiner by e-mail dated November 14, 2011, extended the time to November 28 for Complainant to answer and correspondingly extended the time for Respondent to reply to that answer. Complainant filed its reply to the motion on

November 28, 2011, and Respondent replied on December 12, 2011, in part, asking that Complainant's reply be stricken. The Examiner has determined that the motion to strike Complainant's response be denied and that the motion to dismiss be denied with leave to renew it after hearing.

NOW, THEREFORE, it is

ORDERED

1. The motion to strike complainant's response to the motion is denied.

2. The motion to dismiss filed by Respondent is denied with leave to renew the same after hearing.

Dated at Madison, Wisconsin, this 24th day of January, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Examiner

CITY OF CUDAHY

MEMORANDUM ACCOMPANYING ORDER DENYING MOTIONS

POSITIONS ON MOTION

The Respondent takes the position that the complaint should be dismissed with prejudice for two reasons. First, it alleges that the Union breached an agreement reached during settlement discussions conducted after the complaint was filed by failing take a proposal which was not substantively agreed-upon by the representative of the Complainant for consideration and potential vote by the employees. Second, it alleges the "union's representative" had "no apparently authority" to file the complaint because to its knowledge there has been no vote by the union membership to even authorize the filing of the complaint. It did assert that it "knew," however, that the complaint was not properly authorized.

Complainant denied that it ever agreed to vote on the proposed settlement. It responded to the issue of approval to file the complaint that how the union approves the filing of a complaint is of no consequences to the merits of the complaint.

Respondent replied by moving to strike Complainant's response as untimely. It continued to allege that it "knew" that the union membership had not voted on authorizing the complaint. It asserted that if this was an action taken by union representatives on their own it was "problematic" for all of us.

DISCUSSION

Respondent's motion to strike Complainant's brief as untimely is denied because there is no showing of any prejudice ("no harm, no foul") and because the interests of justice are better served by considering it.[1]

Motion practice in prohibited practice complaints is very limited. The Commission's standard of review for motions to dismiss is set forth in Wis. Admin. Code §ERC 12.04(1)(f) which states:

> (f) *To dismiss*. Motions to dismiss shall state the basis for the requested dismissal. 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.

[1] CAMPBELLSPORT SCHOOL DISTRICT, WERC DEC. NO. 33168-B (WERC, 1/02)

Respondent's argument with respect to the settlement discussions does not support a motion to dismiss the complaint. Even assuming Respondents' factual assertions are true, it is undisputed that the parties did not reach a settlement of the merits, but, at most, agreed on a procedure to have a proposal considered.

The gravamen of Respondent's "lack of authorization" argument is that the Commission lacks jurisdiction over the complaint. Section 111.70(4), provides that the procedure for processing complaints under MERA shall be those specified in Sec. 111.07, Stats. Section 111.07(2), Stats, provides that the Commission has jurisdiction over a "party in interest." Section 111.07(2), Stats, provides in relevant part:[2]

> **(a)** Upon the filing with the commission by any party in interest of a complaint in writing, on a form provided by the commission, charging any person with having engaged in any specific unfair labor practice, it shall mail a copy of such complaint to all other parties in interest. Any other person claiming interest in the dispute or controversy, as an employer, an employee, or their representative, shall be made a party upon application. . . . .

The Commission has a long-standing policy of interpreting a "party in interest" as the concept applies to a labor organization to require that the labor organization must be (1) authorized by the employees involved to represent them for purposes of collective bargaining, or (2) said organization or 'person' claims to represent those employees for the purpose of collective bargaining, or (3) said labor organization or 'person' may be the 'representative" authorized by an employee or employees to seek legal redress with respect to an alleged unfair labor practice affecting such employees. See, GEROVAC WRECKING CO, INC., 8334 (WERC, 12/67), aff'd. sub nom. CHAUFFEURS, TEAMSTERS & HELPERS V. WERC, 51 Wis.2D 391, 402 (1971), SURFSIDE MANOR, WERC DEC. NO. 11809 (WERC, 5/73) p. 11, Aff'd. sub nom HOSPITAL AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150, AFL-CIO V. WERC, Case No. 410-309 (4/74).

Here the complaint alleges that Complainant is the certified representative of the bargaining unit involved and claims that it is acting on behalf of a majority of the employees in the bargaining unit. If Complainant is the certified representative of the employees involved, it is a party in interest irrespective of whether unit employees have authorized the filing of this

[2] See, Wis. Admin. Code, Sec. ERC 12.02(1)

complaint. If these facts are disputed, Complainant is entitled to a hearing to establish that it is a "party in interest" within the meaning of Sec. 111.07(2), Stats. Respondent is free to renew its motion after hearing.

Dated at Madison, Wisconsin, this 24th day of January, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Examiner

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