

STATE OF WISCONSIN
SUPREME COURT

FILED

JAN 18 2002

Clerk of Supreme Court
Madison, WI

SCOTT R. JENSEN, personally and as
Speaker of the Wisconsin Assembly and
MARY E. PANZER, personally and as
Minority Leader of the Wisconsin Senate,

Petitioners,

v.

Case No. 02-0057-OA

WISCONSIN ELECTIONS BOARD, an
independent agency of the State of Wisconsin;
JERALYN WENDELBERGER, its chairman;
and each of its members in his or her official
capacity, DAVID HALBROOKS, R. J.
JOHNSON, JOHN P. SAVAGE, JOHN C.
SCHOBBER, STEVEN V. PONTO, BRENDA
LEWISON, CHRISTINE WISEMAN and
KEVIN J. KENNEDY, its executive director,

Respondents,

CHARLES J. CHVALA, personally and as
State Senate Majority Leader and SPENCER
BLACK, personally and as State Assembly
Minority Leader,

Intervening Respondents.

**PETITIONERS' RESPONSE TO WISCONSIN EDUCATION
ASSOCIATION COUNCIL'S MOTION TO INTERVENE**

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Petitioners, Scott R. Jensen, personally and in his capacity as the Speaker of the Wisconsin Assembly, and Mary E. Panzer, personally and in her capacity as the Minority Leader of the Wisconsin State Senate (hereafter "Petitioners"), by and through their attorneys, Michael Best & Friedrich LLP and Reinhart Boerner Van Deuren S.C., respectfully submit this response to the Motion to Intervene filed by Wisconsin Education Association Council, Stan Johnson, Tommie Lee Glenn, Paul Hambleton and Dianne Catlin Lang (collectively "WEAC"). For the reasons set forth below, the Court should not grant WEAC's Motion to Intervene at this time; rather, the Court should defer its decision on the motion until after the Petition for Leave to File an Original Action is granted, or deny the motion as failing to meet the statutory criteria at this time.

ARGUMENT

I. WEAC FAILS TO SATISFY THE REQUIREMENTS FOR INTERVENTION AT THIS TIME.

The relevant standards which govern a motion to intervene as of right under Wis. Stat. § 803.09(1) are not in dispute. The four requirements which must be satisfied by the moving party are:

- (1) that the motion to intervene must be made in a timely fashion;

- (2) that the movant claims an interest relating to the property or transaction which is the subject of the action;
- (3) that the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and
- (4) that the movant's interest is not adequately represented by the existing parties.

(Notice of Motion and Motion to Intervene, (hereafter "WEAC Motion"), ¶ 15, citing *Armada Broadcasting, Inc. v. Stirn*, 183 Wis.2d 463, 471, 516 N.W.2d 357, 360 (1994)); see, also, *Milwaukee Sewerage Commission v. DNR*, 104 Wis.2d 182, 186, 311 N.W.2d 677 (Ct. App. 1981) (burden is on moving party demonstrate grounds for intervention).

WEAC's Motion fails, at this time, to satisfy three of the four criteria.

A. The Sole Interest To Be Addressed By The Court, At This Time, Is The Grant Of Original Jurisdiction.

This matter is in a somewhat curious procedural posture. The Petition for Leave to Commence an Original Action Seeking Declaratory Judgment and Other Relief ("Petition") has not yet been granted, and as a result the defined "interest" of any potential intervenor at this time is limited to an interest in the Petitioners' request to proceed with an Original Action in this Court. The interest a potential intervenor may have in

redistricting quo redistricting will be the subject of the proceedings only after the Petition is granted.

This distinction is not an idle one. Redistricting matters must be addressed, in the absence of legislative action, by this Court in an orderly, efficient and timely manner. The premature consideration of motions to intervene could ultimately affect the administration of this critically important case even before the Court sets out a procedure and criteria for intervention. Different parties, WEAC included, may well be capable of providing assistance or asserting and protecting an interest in redistricting, but that interest is not yet before the Court. The only matter before the Court at this time is the propriety of allowing this action to proceed as a matter of original jurisdiction. On that matter, WEAC has not stated (or even attempted to state) a cognizable interest.

B. WEAC Has Asserted No Interest Relating To The Issue Of Whether This Court Should Grant The Petition For Original Jurisdiction.

WEAC's asserted basis for intervention in this matter concerns its interest in the proper redistricting of the currently malapportioned state Senate and Assembly districts:

. . . WEAC and its members are directly affected by the existing malapportionment of the state legislature and any violation of the

“one person/one vote” guarantee embodied in article IV, section 3 of the Wisconsin Constitution and in the 14th Amendment to the U.S. Constitution.

(WEAC Motion, ¶ 9B). That asserted interest relates solely to the substantive issues which this Court may address after the Petition is granted. However, the matter presently before this Court is whether to grant the Petition in the first instance, and nowhere in its Motion does WEAC claim a distinct interest in that issue.

Moreover, it is hard to imagine how WEAC could claim such an interest. WEAC is not a party to the *Arrington* matter, the only other redistricting matter now pending, and has never sought to intervene in that matter. *See Arrington v. Elections Board*, 173 F. Supp. 2d 856 (E.D. Wis. 2001). Indeed, its failure to seek intervention in the *Arrington* matter, a matter “pending now for almost a full year” (WEAC Motion, ¶ 12), raises obvious questions about its motives for bringing its Motion here. If WEAC has an interest in arguing for a different court to hear redistricting, surely that interest must be demonstrated, at a minimum, by its participation in that other jurisdiction. Yet, WEAC has chosen not to participate in the very matter (*Arrington*) about which it claims to be so concerned.

While it may ultimately be appropriate for WEAC to intervene in this action after the Court has accepted jurisdiction and proceeds to address the substantive matters raised by the Petition, for present purposes, WEAC has no interest supporting its intervention. The Motion fails to satisfy the second of the four criteria.

C. **WEAC's Asserted Interest In The Apportionment Of State Senate and Assembly Districts Will Not Be Impaired By The Granting Of The Petition.**

WEAC's asserted interest relates solely to the actual apportionment of the State's Senate and Assembly districts. The Motion fails to explain how an interest in redistricting is impaired by one court rather than another court taking jurisdiction. There is no conceivable set of circumstances in which redistricting, as WEAC may wish that redistricting to take place, is "impaired or impeded" by a grant of original jurisdiction. The Motion makes no attempt to explain how WEAC is affected differently if a judicial plan of apportionment is adopted by this Court, as opposed to a federal court or other state court. The Motion, in fact, asserts quite clearly, that WEAC's interests will only be affected by the substantive proceedings themselves, not the forum:

If this Court grants the Petition and ultimately redistricts the state's Senate and Assembly districts, *that action* will directly affect the

proposed intervening parties' rights as voters and citizens to determine who represents their interests in the state legislature.

(WEAC Motion, ¶ 16C) (emphasis added). This assertion forms no basis for WEAC's intervention at this stage of the proceedings.

Indeed, rather than demonstrating an impairment of any interest on the question of jurisdiction, WEAC's Motion explicitly acknowledges that WEAC will be able to protect its interests in the substantive issues of redistricting if this Court grants the Petition and accepts jurisdiction in this action. In reference to its involvement in *Prosser v. Elections Board*, 793 F.Supp. 859 (W.D. Wis. 1992), WEAC asserts that,

. . . WEAC's participation there, the most recent legislative redistricting case, will permit it to share that experience *with this Court*, including the submission of a proposed legislative redistricting plan for the Court's consideration should the Court accept original jurisdiction.

(WEAC Motion, ¶ 14) (emphasis added). WEAC unequivocally argues that it will be quite capable of protecting its interests in "this Court" should the Petition be granted. There is no attempt in the Motion to argue or show that WEAC's interests will be prejudiced by this action proceeding in this Court.

WEAC fails to demonstrate that its interest will be impaired or impeded by these proceedings. On the contrary, the Motion concedes that

WEAC will be able, once this Court grants the Petition, to then move to intervene or otherwise protect its interest. The Motion fails to satisfy the third criteria for intervention.¹

D. WEAC's Interest, To The Extent It Has An Interest In Original Jurisdiction, Is Adequately Represented By The Existing Parties.

WEAC has demonstrated no interest sufficient to allow intervention to address the question of this Court's jurisdiction. However, assuming it has such an interest, that interest is unquestionably represented by the existing parties to this action. The Court has already granted a Motion to Intervene filed by Senator Chvala and Representative Black ("Chvala Intervenors"). (Order, Jan. 16, 2002) The Chvala Intervenors have intervened, in part, for the purpose of opposing the grant of original jurisdiction. Indeed, the Court has directed the Chvala Intervenors address that issue immediately.

¹ WEAC also argues that it should be allowed to intervene under Wis. Stat. § 803.09(2), which governs "permissive intervention." However, on the question of this Court's jurisdiction, WEAC still fails to identify any basis for permissive intervention. Instead, WEAC again addresses the substantive proceedings stating that if the Court grants the petition, "WEAC's participation will help ensure that the Court has the benefit of diverse parties able to present a broad range of well-supported legal arguments and well-documented redistricting plans to the Court." (WEAC Motion, ¶ 18B) While this may support intervention as to the substantive proceedings, it does not support intervention on the question of jurisdiction.

This Court has held that when determining whether an existing party will adequately represent the interests of a proposed intervenor, the Court “look[s] to see if there is collusion between the representative and the opposing party; if the representative’s interest is adverse to that of the proposed intervenor; or if the representative fails in the fulfillment of that duty.” *Armada Broadcasting*, 183 Wis.2d at 476. Applying this test here, WEAC cannot claim that its interests, if any, on the question of this Court’s jurisdiction will be inadequately represented.

Certainly WEAC has raised no claim of “collusion” between Petitioners and the Chavala Intervenors. As to the question of jurisdiction, WEAC and the Chavala Intervenors are aligned on the basis of their filings with this Court. Finally, there is no reason to believe, and the Motion does not suggest, that the Chvala Intervenors will fail to adequately address those arguments against allowing the Petition.²

In any event, given that WEAC fails to specifically assert any interest in the denial of the Petition in the first instance (*see* § I, B and C,

² Petitioners are unaware of the position that the Respondents intend to take concerning original jurisdiction in this action. One might presume, however, that as agency of the State of Wisconsin, the Elections Board and its members would prefer to have disputes over the apportionment of State legislative districts resolved by a Wisconsin court.

above), it cannot possibly explain how any such interest would be inadequately represented by the existing parties. It may be that the teachers union has separate and distinct interests related to the substantive process of apportioning Wisconsin's legislative districts and that its participation in this action will be necessary to protect those interests after the Petition is granted, but that is not the issue before the Court.

The burden is on the moving party to demonstrate in its motion why others will not adequately address the only question before this Court – original jurisdiction. It has not done so and thus cannot satisfy the fourth criteria.

CONCLUSION

Given the present status of this case, the Motion to Intervene submitted by Wisconsin Education Association Council, Stan Johnson, Tommie Lee Glenn, Paul Hambleton and Dianne Catlin Lang should be denied. Such denial need not be with prejudice to the renewal of that motion after the Petition is granted. In the alternative, the Court may simply postpone any ruling on the WEAC Motion until after the Petition's request for original jurisdiction is addressed. There is no necessity that the

Court rule on WEAC's Motion at this time, and simply postponing a decision may be the most efficient solution.

Dated this 18th day of January, 2002.

Respectfully submitted,

SCOTT R. JENSEN and MARY E.
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