STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RAY AHERN,

Complainant,

vs.

KENOSHA EDUCATION ASSOCIATION AND ITS PRESIDENT WILLIAM KLENKE AND PRESIDENT-ELECT ROBERT BAETZ,

Respondents.

Case I No. 13127 MP-73 Decision No. 9239-A

Appearances:

Lepp & Lepp, by Mr. Burton Lepp, Attorney, appearing on behalf of Complainant.

Lawton & Cates, by Mr. George E. Aumock, Attorney, appearing

Lawton & Cates, by Mr. George E. Aumock, Attorney, appearing on behalf of Respondents.

ORDER DENYING MOTION TO DISMISS THE COMPLAINT

Ray Ahern, Kenosha, Wisconsin, having filed a complaint with the Wisconsin Employment Relations Commission alleging that the abovenamed Respondents had committed prohibited practices contrary to the provisions of Chapter 111 of the Wisconsin Statutes; and the Commission having authorized Robert B. Moberly, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter, as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and the matter having been brought on for hearing on October 24, 1969, in Kenosha, Wisconsin, at which time counsel for Respondents moved for a dismissal of the complaint; and the Examiner having considered the arguments and briefs of counsel and being fully advised in the premises, makes and files the following

ORDER

IT IS ORDERED that the motion of Respondents to dismiss the complaint in the instant matter be, and the same hereby is, denied.

IT IS FURTHER ORDERED that the hearing on the matter be continued on Thursday, December 11, 1969 at 10:30 a.m. in the Kenosha County Courthouse, Kenosha, Wisconsin.

Dated at Milwaukee, Wisconsin, this 2nd day of December, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Robert B. Moberly, Examiner

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MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS THE COMPLAINT

The Complaint alleges that Respondents have engaged in prohibited practices in violation of Chapter III, Wisconsin Statutes, in the following respects:

"My rights as a municipal employee in the public schools of Kenosha, Wisconsin have been violated on March 21, 1969 and again on March 25, 1969. At 4:30 PM on March 21, 1969, I went to the Kenosha Education Building at 2525 - 63rd Street, Kenosha, Wisconsin to see William Klenke, President of K.E.A. to ask him for K.E.A. representation on a grievance on hours and working conditions at McKinley Jr. High School, 5710 - 32nd Ave. Kenosha, Wisconsin. I asked Mr. Klenke for this support and he walked away and didn't return. At 8:00 PM on March 21, 1969, I phoned Mr. Klenke at his home. I asked him to have the K.E.A. represent me in the grievance and he said, "Mr. Ahern, we cannot represent you because you are not a member of K.E.A." On Tuesday evening, March 25, 1969, I called by phone Robert Baetz, President Elect of K.E.A., and asked him if he would have the K.E.A. represent me on the grievance of hours and working conditions at McKinley Jr. High School, 5710 - 32nd Ave. Kenosha, Wisconsin. Mr. Baetz said, 'We cannot represent you because you are not a K.E.A. member.'

"My legal rights as a municipal employee have been interfered and restrained by the Kenosha Education Association, through the above named officers, when they refused me my legal right to be represented."

In its answer, Respondents "admit that Ray Ahern discussed with them his complaint involving the termination of his employment by the Employer, but deny that the respondents or any of them refused to process, handle or attempt to adjust such grievance with said Employer or refused to represent him in his grievance because he was not a member of the K.E.A. or for any other reason." The answer also denies that Respondents refused or failed to fairly represent Ray Ahern in the pursuance of his grievance. The answer further stated as an affirmative defense that Respondents "acted in good faith in considering the merits of Ahern's grievance and did fairly represent Ahern as a member of the bargaining unit in processing, handling and attempting to adjust such grievance."

At the outset of the hearing the Respondents moved to dismiss the complaint and the motion was taken under advisement. Respondent argues in its brief that the complaint should be dismissed because (1) it does not state a cause of action, and (2) the Commission lacks jurisdiction over the subject matter set forth in the complaint.

SUFFICIENCY OF THE COMPLAINT

Section 111.70(3)(b) and (c), Wisconsin Statutes, provide, interalia, that municipal employes individually or in concert are prohibited from coercing, intimidating or interfering with municipal employes in the enjoyment of their legal rights, including the right to refrain from affiliating with any labor organization, and that it is also a prohibited practice for any person to do on behalf of any municipal employer or employe any act prohibited by paragraphs (a) and (b).

These statutory provisions clearly prohibit interfering with a municipal employe in the enjoyment of his right to refrain from affiliating with a labor organization. The complaint alleges that when Complainant requested representation on his grievance, the President and President-Elect of the Kenosha Education Association, respectively, told him that "We cannot represent you because you are not a member of K.E.A." and "We cannot represent you because you are not a K.E.A. member." It is to be noted that these allegations are denied in the answer. However, the question here is the sufficiency of the complaint, and in the opinion of the Examiner a cause of action exists if Respondents, as alleged in the complaint, refused to represent Complainant in his grievance because he was not a member of the Kenosha Education Association. Such a refusal would constitute discrimination against Complainant because of his nonaffiliation with the Kenosha Education Association, and would thereby interfere with Complainant's right to refrain from affiliation with a labor organization.

JURISDICTION

The Respondents contend that the Wisconsin Employment Relations Commission lacks jurisdiction over the subject matter because it is unable to grant relief to the aggrieved party. Although it may be true that the Commission under the circumstances here could not order reinstatement of the employe, the Commission is not without other remedies to ensure protection of an employe's statutory right to refrain from affiliation with a labor organization. Without precluding the possibility of other remedies, the Commission could, for example, attempt to remedy any such violation by the issuance of an appropriate cease-and-desist order and an order to provide an appropriate notice to members of the collective bargaining unit.

In its brief Complainant argues that Respondents, by filing an answer which does not object to the jurisdiction of the Commission to consider the complaint, have waived their right to object to the Commission's jurisdiction and to the sufficiency of the complaint. However, a determination of this issue is unnecessary in view of the conclusions of the Examiner that the complaint states a cause of action and that the Commission has jurisdiction over the subject matter.

In accordance with the above, the Examiner is today issuing an order denying the motion to dismiss the complaint and directing that the matter be brought on for further hearing.

Dated at Milwaukee, Wisconsin, this 2nd day of December, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Robert B. Moberly, Exami