

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE COUNTY, :
 :
 Complainant, :
 :
 vs. : Case LXIII
 : No. 17694 MP-339
 MILWAUKEE DISTRICT COUNCIL 48, : Decision No. 12534-B
 AFSCME, AFL-CIO, and MICHAEL COLLOTON, :
 LAWRENCE KWINCINSKI, FRED BROWN, :
 ROBERT LUZINSKI, KATHRYN DOCKINS, :
 BERTHA CARDWELL, LORRAINE DETTMANN, :
 DOROTHY PETERSON, OTTO LOWENGART and :
 RUSSELL LAMB, :
 Respondents. :
 :

Appearances:

Mr. Patrick J. Foster, Assistant Corporation Counsel, appearing on behalf of Complainant.
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S. Williamson, Jr., appearing on behalf of Respondent Milwaukee District Council 48, AFSCME, AFL-CIO and Respondent Luzinski.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainant having filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondents and others committed prohibited practices within the meaning of Sec. 111.70 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Marshall L. Gratz, a member of its staff, to act as Examiner and to make and issue findings of fact, conclusions of law and orders in the matter as provided in Sec. 111.07(5) of the Wisconsin Employment Peace Act as made applicable to municipal employment by Sec. 111.70(4)(b) of MERA; and hearing in the matter having been conducted at Milwaukee, Wisconsin, on May 9, 1974; and upon motion of the Complainant--concurred in by all parties appearing--the instant complaint having been dismissed without prejudice, with respect to a number of individual Respondents; and the Examiner having considered the evidence and the arguments and briefs of Counsel and being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Milwaukee County, referred to herein as Complainant, is a municipal employer with its principal office at 901 North 9th Street, Milwaukee, Wisconsin.

2. That Milwaukee District Council 48, AFSCME, AFL-CIO, referred to herein as Respondent Union, is a labor organization with its principal office located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin.

3. That all parties appearing at the hearing herein have stipulated that for the purposes of this proceeding the above-named Respondents (other than Respondent Union) are individuals occupying positions in the classified service of Complainant which positions are supervisory; and that for the purposes of this proceeding, therefore, said individual Respondents are supervisors.

4. That at all times material hereto, Respondent Union has been the duly certified collective bargaining representative for certain employes in the employ of the Complainant, including subordinates of each of the individual Respondents.

5. That all parties appearing at the hearing herein have stipulated that none of the above-named Respondents are municipal employers within the meaning of Sec. 111.70 of MERA; that therefore, for the purposes of this proceeding, none of said Respondents is a municipal employer.

6. That subsequent to January 1, 1974 each of the above-named individual Respondents was instructed by Complainant, in writing, to terminate his or her membership in Respondent Union, but each has failed to do so and each continues to be a member of Respondent Union.

On the basis of the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

That since Sec. 111.70(3)(a)2 regulates only the conduct of municipal employers and since it has been stipulated herein that for the purposes of the instant proceeding none of the Respondents are municipal employers, it is not and cannot be concluded in this proceeding that the continued membership of the above-named individual Respondents in

Respondent Union constitutes a prohibited practice in violation of Sec. 111.70(3)(a)2 of MERA.

On the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that the complaint of prohibited practices filed herein be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 17th day of December, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Marshall L. Gratz

Marshall L. Gratz, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

BACKGROUND

Complainant, in its complaint, alleged narrowly and specifically ~~alleged~~ that the Respondent Union and the individual Respondents and other supervisors had committed and were committing a prohibited practice within the meaning of Sec. 111.70(3)(a)2 by reason of the continued membership of such supervisors in Respondent Union, the representative of their subordinates. By way of relief, Complainant requested at the hearing that the Commission order Respondent Union to remove the individual Respondents from its membership rolls and that the Commission order the individual Respondents to terminate their membership in Respondent Union.

In its Answer, 1/ Respondent Union initially raised two defenses: the first, which was withdrawn following the below-noted dismissal as to some Respondents, was that the supervisory status of the positions held by certain of the individual Respondents was presently at issue in a unit clarification proceeding presently pending before the Commission; 2/ the second was that "[T]he Complaint fails to state a cause of action against District Council 48 or any other individual respondents because they are not municipal employers within the meaning of Section 111.70 (3)(a)."

At the hearing, Complainant, without objection from any Respondent appearing, moved to withdraw without prejudice its complaint as to the following individual Respondents:

1/ Respondent Robert J. Luzinski filed a letter with the Examiner on April 30, 1974 responding to the complaint by asserting that he had been removed from the active rolls of the Respondent labor organization. During an informal pre-hearing discussion, it appeared that Mr. Luzinski probably remained a member of Respondent labor organization. Thereupon, Mr. Luzinski indicated that he authorized Attorney Williamson to represent him in the instant matter, and the Examiner concludes that the Answer filed by Attorney Williamson on behalf of Respondent Union should be considered to be the exclusive answer filed herein.

2/ Case XLIX, No. 15689, ME-799.

Michael Colloton
Lawrence Kwiecinski
Fred Brown
Robert Luzinski
Kathryn Dockins
Bertha Cardwell
Lorraine Dettmann
Dorothy Peterson
Otto Lowengart
Russell Lamb 3/

The Examiner granted said motion and issued an Order dismissing without prejudice the complaint against the above-listed individual Respondents.

Thereupon, it was stipulated by all parties appearing that none of the Respondents remaining in the case were "municipal employers" within the meaning of Sec. 111.70 of the Wisconsin Statutes. Respondent Union stipulated that for the purposes of the instant proceeding, it did not challenge the alleged supervisory status of the individual Respondents remaining in the case. Both Complainant and Respondent Union filed briefs, the last of which was received by the Examiner on November 11, 1974.

POSITIONS OF THE PARTIES

The Complainant argues that to preclude the Respondents from enforcing the last two sentences of Sec. 111.70(3)(a)2 of MERA would yield an absurd result which the Legislature must not have intended since such an interpretation would leave no proper complainant interested in the enforcement of those sentences and would entail absurd remedial orders by the Commission that the municipal employer either order the union to cancel the supervisor's membership or order the discharge of supervisors retaining membership in the union; that the Commission's recent Declaratory Ruling in City of Milwaukee 4/ is clearly controlling herein; and that the Examiner should impose against the Respondents any of the remedies noted in that case as appropriate to circumstances such as are here present.

3/ The Complainant's stated basis for the above-mentioned Motion to Dismiss was that the above-listed Respondents had either severed their relationships with Respondent Union to Complainant's satisfaction or occupied positions the supervisory nature of which was pending WERC determination in a unit clarification proceeding, Case XLIX.

4/ Dec. No. 12448-A (10/74).

The Respondents argue that the provisions of Sec. 111.70(3)(a)2 allegedly violated herein are clearly and unambiguously addressed only to the conduct of municipal employers; that the Commission is without the authority to expand the coverage of such provisions to non-municipal employers such as the Respondents have been stipulated herein to be for the purposes of this proceeding; that the City of Milwaukee Declaratory Ruling cited by Complainant ". . . does not address itself to, much less answer the central issue in this case, to wit, whether non-municipal employers may be found to have violated Sec. 111.70(3)(a)2"; that the reference in that decision to remedies as against supervisors and unions must be construed only as a discussion of remedies for municipal employer violations of Sec. 111.70(3)(a)2 which remedies would apply beyond the municipal employer; that the question of whether the remedies so discussed are appropriate cannot arise until a violation of Sec. 111.70(3)(a)2 is found; but that for the foregoing reasons, Respondents cannot be found to have committed such a violation; therefore, the complaint must be dismissed.

DISCUSSION

The complaint alleges, quite specifically, only a violation of Sec. 111.70(3)(a)2. That subsection reads as follows:

"(3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:

. . .

2. To initiate, create, dominate or interfere with the formation or administration of any labor or employe organization or contribute financial support to it, but the employer shall not be prohibited from reimbursing its employes at their prevailing wage rate for the time spent conferring with the employes, officers or agents. Supervisors may remain members of the same labor organization of which their subordinates are members, but such supervisor shall not participate in determinations of the collective bargaining policies of such labor organization or resolution of grievances of employes. After January 1, 1974, said supervisors shall not remain members of such organizations."

The Examiner adopts the view, contrary to that of the Complainant, that (3)(a)2 is addressed to municipal employers alone and that it does not prohibit or govern conduct of entities or persons other than "municipal employers" as defined in Sec. 111.70(1)(a). ^{5/}

^{5/} That section defines "municipal employer" as follows:

". . . any city, county, village, town, metropolitan sewerage district, school district, or any other political subdivision of the state which engages the services of an employe and includes any person acting on behalf of a municipal employer within the scope of his authority, express or implied."

While the last two sentences of (3)(a)2 speak directly to the question of supervisors' eligibility for union membership rather than to municipal employer responsibilities in that regard, the Examiner finds that the placement of those sentences in the municipal employer prohibited practices section of MERA compellingly indicates that (3)(a)2 was intended to be enforceable only as against municipal employers.

The stipulation herein that the individual Respondents are not "municipal employers" for the purposes of this proceeding 6/ and the narrow issue joined by the pleadings may make this case exceptional. As a result of that stipulation and those pleadings, the instant case does not present any of the following questions for determination herein:

- 1) Are the individual Respondents themselves "municipal employers" so as to be subject to (3)(a)2?
- 2) Does Respondent Union's continuation of its members' supervisors on its membership lists constitute restraint or coercion of its municipal employe members in violation of Sec. (3)(b)1 of MERA? 7/
- 3) Are either Respondent Union or the individual Respondents, by failing to terminate their membership relationships with one another, causing a prohibited practice to be done on behalf of or in the interest of Complainant (to wit, permitting supervisors to continue membership in their subordinates' labor organization) so as to

6/ Such stipulation, though it is as to the potential subject of a conclusion of law, has been honored by the Examiner since it appears clear that the parties herein seek a determination of a narrow question of interpretation under Subsec. (3)(a)2 in order to provide them with guidance in resolving their dispute concerning supervisors' union membership. The underlying purposes of MERA would surely support providing the parties with a determination on such narrow issue in order to provide such guidance.

7/ Section 111.70(3)(b)1 of MERA reads as follows:

"(3) PROHIBITED PRACTICES AND THEIR PREVENTION. . . .

(b) It is a prohibited practice for a municipal employe, individually or in concert with others:

1. To coerce or intimidate a municipal employe in the enjoyment of his legal rights, including those guaranteed in sub. (2).

violate Sec. 111.70(3)(c) of MERA? 8/

- 4) If the answer to any of the above is "yes, is Complainant a proper party to bring a complaint against the Respondents or any of them on such theory? 9/

No matter what answer is given to the above-noted questions, the Complainant has failed to demonstrate herein why it would not be free, on its own, to threaten and, if necessary, impose discipline (including discharge if necessary) upon a person authoritatively determined to be a "supervisor" 10/ who failed to comply with a written directive to terminate membership in his or her subordinates' labor organization. If municipal employers such as Complainant have such effective self-help remedies available to them, it would not be attributing irrationality or absurdity to the Legislature to conclude that it intentionally limited the class of respondents governed by Sec. 111.70(3)(a)2 solely to municipal employers.

Moreover, especially with the above-noted questions unanswered, it cannot be stated with assurance that the language in the City of

8/ Section 111.70(3)(c) of MERA reads as follows:

"(c) It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b)."

9/ The principles of fair play preclude the Examiner from determining such matters since Respondents cannot reasonably be said to be aware that such matters are at issue herein. See, General Electric Co. v. WERB, 3 Wis. 2d. 227 (1958).

10/ "Supervisor" is defined in Sec. 111.70(1)(o) of MERA. In addition, supervisors are expressly excluded from the Sec. 111.70(1)(b) definition of "municipal employees".

Milwaukee Declaratory Ruling 11/ cited by Complainant conclusively implies that the Commission adopts the Complainant's expansionary interpretation of (3)(a)2.

For the foregoing reasons, the complaint has been dismissed.

Dated at Milwaukee, Wisconsin, this 17th day of December, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

11/ Decision No. 12448-A (10/74). In that case, the Commission declared, inter alia, as follows:

"That should . . . any . . . supervisory law officer in the employ of the Police Department of the City of Milwaukee, be a member of the Professional Policemen's Protective Association of Milwaukee, or hold any office therein, including membership in its Board of Trustees, such membership and participation would constitute a prohibited practice within the meaning of Section 111.70(3)(a)2 of the Municipal Employment Relations Act; and should any complaint be filed with the Wisconsin Employment Relations Commission, wherein it would be alleged that membership in, and participation by, supervisory law enforcement personnel in the Professional Policemen's Protective Association of Milwaukee constituted a prohibited practice within the meaning of the aforementioned statutory provision, the Commission would conduct hearing therein, and if the evidence at said hearing established the facts as alleged, the Commission would issue a decision finding that such membership and participation constituted a prohibited practice within the meaning of said statutory provision, and would, at the same time, issue an appropriate remedial order."

In its Memorandum Accompanying said Declaratory Ruling, the Commission added that

". . . the Commission finds that Section 111.70(3)(a)2 precludes . . . any . . . supervisor, from participating in the affairs of either the Association or its Board of Trustees.

Accordingly, if the Commission were to be presented with a factual situation in a prohibited practice case which showed prohibited supervisory participation in the affairs of such a labor organization, the Commission in that case would be required to issue an appropriate remedy to rectify that prohibited practice. In fashioning such a remedy, the Commission would have the power to consider a variety of effective remedies, including ordering supervisory law enforcement personnel to cease their membership in, and activity on behalf of, the Association. Failure to comply with such an order could affect the representative status of the Association."