STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROBERT L. ALBRIGHT, CARL E. AUSTIN, LLOYD W. BRIGGS, MARVIN J. KAMMER, HAROLD P. KLEIN, ELLINGTON H. LANDSOWNE, KEITH F. LAWLER, RAYMOND A. MARTINSON, AND JAMES C. OLSON, Complainants, vs. CITY OF MADISON, LOCAL 311 OF THE INTERNATIONAL ASSOCIATION OF FIREFIGHTERS AFL-CIO, BOARD OF TRUSTEES OF THE FIRE PENSION FUND OF THE CITY OF MADISON, PAUL SOGLIN, HOWARD GALLAGHER, PAUL REILLY, ELDON MAGINNIS, PAUL G. McCALLUM, DARRELL FLEMING AND RICHARD HAACK, INDIVIDUALLY AND IN THEIR CAPACITY AS MEMBERS OF THE BOARD OF TRUSTEES OF THE FIRE PENSION FUND OF THE CITY OF MADISON, AND CHARLES R. MERKLE, INDIVIDUALLY AND AS PRESIDENT OF LOCAL 311 OF THE INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, Respondents.	Case XLVII No. 21058 MP-685 Decision No. 15079-C
OSCAR PETRY, Complainant, vs. CITY OF MADISON, and LOCAL 311 OF THE INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, Respondents.	Case XLIX No. 21185 MP-694 Decision No. 15171-B

ORDER DENYING MOTION TO STRIKE

Robert L. Albright, et. al., having filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on November 30, 1976; and the Commission having appointed Thomas L. Yaeger to act as Examiner therein; and Oscar Petry having filed a complaint of prohibited practices with the Commission on December 30, 1976; and the Commission also having appointed the undersigned to act as Examiner therein; and the Examiner having on January 31, 1977 ordered both matters consolidated for hearing; and prior to said consolidation the Examiner having held two days of hearing on said Albright, et. al. complaint; and at said hearing Respondent Pension Board having moved to strike testimony heretofore taken concerning the motivation of an individual Pension Board member in supporting a resolution adopted by said board as improper inquiry

into the motives of members of a legislative body in enacting legislation; and the Examiner having considered the motion, and being fully advised in the premises, is satisfied said motion should be denied;

NOW, THEREFORE, it is

ORDERED

That Respondent Pension Board's motion to strike in the above entitled matter be, and the same hereby is, denied. 1/

Dated at Madison, Wisconsin this 3rd day of February, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Thomas L. Yaeger, Examiner

1/ Respondent Pension Board requested the aforesaid Order be issued as soon as possible prior to reconvening the continued hearing on February 7, 1977. The Examiner, therefore, has issued the aforesaid Order without an accompanying memorandum in order to comply with counsel's request. Said memorandum will be issued in the very near future.

CITY OF MADISON (FIRE DEPT.), XLVII and XLIX, Decision Nos. 15079-C and 15171-B

MEMORANDUM ACCOMPANYING ORDER
DENYING MOTION TO STRIKE

The Respondent Pension Board moved to strike the testimony of a member of the Pension Board relating to what motivated his support for a resolution establishing a mandatory retirement at age 55 for those firemen over which said board had jurisdiction. Respondent avers it is a widely recognized principle that courts cannot inquire into the motives of the members of a legislative body in enacting legislation, that this principle applies as well to administrative bodies acting in a legislative capacity, that the Pension Board herein was acting in a legislative capacity when it adopted the resolution requiring firemen under its jurisdiction to retire at age 55; and, therefore, the Commission should exclude evidence as to the motivation of Pension Board members in adopting said resolution. Complainants, on the other hand, oppose said motion in the belief that inquiry into motivation is appropriate herein to determine whether the adoption of the resolution and subsequent actions taken to implement same constituted prohibited practices within the meaning of sec. 111.70(3), Stats.

The principle being relied upon by Respondents herein is one of long standing. In Fletcher v. Peck, 6 Cranch 87 (1810), wherein an action was brought to invalidate a legislative enactment because it was allegedly induced by promise of benefit, the Supreme Court stated even though the majority of the legislature be corrupted it doubted the authority of the judiciary to control legislative conduct. Again, approximately 100 years later in McCray v. United States, 195 U.S. 27 (1904), the Court addressed the question and said:

> "This [argument], when reduced to its last analysis, comes to this, that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.
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> "The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the constitution to uphold, and would thus be full of danger to the premanence of our institutions."

More recently, in United States v. O'Brien, 391 U.S. 367 (1967), in a suit challenging the constitutionality of a particular enactment, the Court reiterated this general proposition.

The undersigned is persuaded that this principle, at least in part, is founded in the doctrine of separation of powers. This conclusion is supported by the Court's discussion in McCray v. United States supra. Also, in Bullock v. Washington, 468 F. 26 1096 (1972), an action seeking to invalidate a statute, the Court therein said:

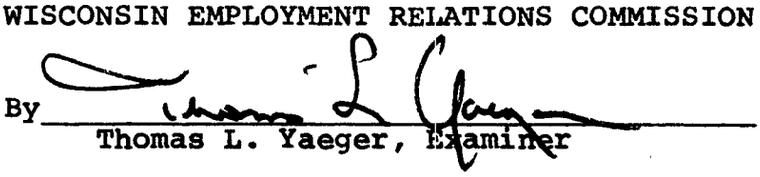
"The reason courts will not go behind the face of legislation to hold it constitutionally void on such grounds [invalid motives] rests on sound practical considerations regarding the nice balance between the judicial and legislative branches of government."

A careful reading of the cases, however, has led the Examiner to conclude that Respondent's reliance herein upon this long standing principle is misplaced. The cases wherein the principle evolved all dealt with challenges to the constitutional validity of legislative action. 2/ This is not an action challenging the constitutional validity of said resolution. Rather, this action necessarily assumes the validity of the resolution but, places in issue the violation of substantive provisions of sec. 111.70, Stats.

Further, the legislature by enactment of sec. 111.70, Stats. has confered jurisdiction in the Commission to inquire into motivation in determining whether certain provisions of said statutes have been violated; and, made it a matter of relevant inquiry in determining, for example, whether an employe's termination was discriminatorily motivated. 3/ While it may be in certain cases motivation can be established by objective criteria, in others this may only be established through direct inquiry into deliberation and intent. To apply the exclusionary principle advanced by Respondent Pension Board in a case where intent and motivation are relevant factors would seriously hamper the Commission in determining whether a statutory violation has occurred. Thus, in this limited situation, where the constitutional validity of the legislative act itself is not in question, the Examiner believes the Commission may consider evidence of deliberation and intent of individuals acting in a legislative capacity where the action complained of before the Commission was legislative in nature, and where motivation for said action is relevant to the determination of whether a violation of sec. 111.70, Stats., has occurred.

Dated at Madison, Wisconsin this 4th day of February, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Thomas L. Yaeger, Examiner

2/ The Examiner was unable to locate any case where the constitutional validity of a legislative enactment was not in issue and where the principle under review herein was applied.

3/ Muskego-Norway C.S.S.S.D. No. 9 v. WERB, 35 Wis. 2d 540 (1967).