STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ARTHUR BURDICK, Complainant, vs. DONALD BEATTY, WILLIAM KNUDSEN, CARMELLA MICHALSKI, LUCIAN BROWN, JR., and LOCAL 150, SERVICE EMPLOYEES INTERNATIONAL UNION, Respondents.	:	Case II No. 22788 MP-839 Decision No. 16277-C

Appearances:

Mr. Arthur Heitzer, Attorney at Law, 536 West Wisconsin Avenue, Suite 300, Milwaukee, Wisconsin 53203, on behalf of Complainant.

Goldberg, Previant, Uelmen, Gratz, Miller, Levy & Brueggeman, S.C., by Mr. Gerry M. Miller, Attorney at Law, P.O. Box 92099, Milwaukee, Wisconsin 53202, on behalf of Respondents. Mr. Matthew R. Robbins, Attorney at Law, joined him on briefs.

CONCLUSIONS OF LAW AND ORDER

Complainant filed a complaint on March 14, 1978 with the Wisconsin Employment Relations Commission, which was later amended both in writing and verbally at hearing. Complainant alleges that Respondents have committed prohibited practices within the meaning of the Municipal Employment Relations Act and/or unfair labor practices within the meaning of the Wisconsin Employment Peace Act. The Commission appointed Ellen J. Henningsen, a member of its staff, to act as Examiner and to issue Findings of Fact, Conclusions of Law and Order as provided for in sections 111.70(4) and 111.07, Wis. Stats. The hearing on August 7, 1978 was adjourned by the Examiner when three individuals, two of whom are named as Respondents, refused to comply with subpoenas duces tecum previously issued by the Examiner upon the request of Complainant and when Complainant requested the Commission to enforce the subpoenas prior to taking any evidence on the merits. The Commission, on August 17, 1978, notified the Examiner in writing that it would not determine at that time whether to seek enforcement of the subpoenas and requested the Examiner to first rule on Respondents' previously raised claims that the Commission lacked subject matter jurisdiction over the complaint, as amended, and that the complaint, as amended, failed to state a claim upon which relief could be granted. Based on the Commission's request, the Examiner notified the parties that she would rule on Respondents' claim prior to proceeding to an evidentiary hearing on the merits of the complaint, as amended. In addition, the Examiner directed the parties to brief two issues not previously raised by Respondents. Briefs, additional arguments and documents were received until January 30, 1979. The Examiner, having considered the evidence and arguments of the parties and having assumed, for the purposes of this decision, that the facts alleged by Complainant are true, issues the following Conclusions of Law and Order.

CONCLUSIONS OF LAW

1. The complaint, as amended, is not subject to the rule of mootness.

2. The Commission has jurisdiction to determine the allegations concerning Complainant's eligibility to run for elected office of Respondent Local 150.

3. The Commission's jurisdiction over the allegations concerning a violation of the Wisconsin Employment Peace Act is not pre-empted by the National Labor Relations Act.

4. The complaint, as amended, does not fail to state a claim upon which relief can be granted even though Complainant did not exhaust his internal union remedies prior to bringing this action.

5. The complaint, as amended, fails to state a claim upon which relief can be granted under either section 111.06(2)(a) or section 111.06(3) of the Wisconsin Employment Peace Act.

6. The complaint, as amended, fails to state a claim upon which relief can be granted under either section 111.70(3)(b)1 or section 111.70(3)(c) of the Municipal Employment Relations Act.

Based on the above Conclusions of Law, the Examiner makes and issues the following

ORDER

The complaint, as amended, is dismissed in its entirety.

Dated at Madison, Wisconsin this 22nd day of October, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Ellen J. Henningsen
Ellen J. Henningsen, Examiner

MEMORANDUM ACCOMPANYING CONCLUSIONS OF LAW AND ORDER

PROCEDURAL ASPECTS OF THE CASE

Complainant filed a complaint on March 14, 1978 with the Wisconsin Employment Relations Commission, which was amended in writing on June 15, 1978, and thereafter further amended verbally at hearing on June 28, 1978. Hereafter, the term "complaint" includes the amendments to the complaint. Complainant alleges that Respondents have committed prohibited practices within the meaning of sections 111.70 (3)(b) 1 1/ and/or 111.70(3)(c) 2/ of the Municipal Employment Relations Act (MERA) and/or unfair labor practices within the meaning

---

1/ Section 111.70(3)(b) 1 of MERA states:

> (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).

Section 111.70(2) of MERA provides, in pertinent part:

> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right to self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement.

2/ Section 111.70(3)(c) of MERA states:

> (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 employes, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b).

of sections 111.06(2)(a) 3/ and/or 111.06(3) 4/of the Wisconsin Employment Peace Act (WEPA), by allegedly impairing his membership rights in Respondent Local 150 of Service Employees International Union, (Respondent Local 150) because of his membership in Local 310 of American Federation of State, County and Municipal Employees (AFSCME Local 310). Complainant alleges that his membership in, and active participation in the affairs of, AFSCME Local 310 are rights protected by section 111.70(2) of MERA. Specifically, Complainant alleges that, due to his membership in AFSCME Local 310, and/or his protests against his electoral disqualification, (1) he was disqualified as a candidate for president of Respondent Local 150 in its 1977 election; (2) his appeal of the election committee's action to disqualify him was denied by Respondent Local 150; (3) Respondents relied upon and hold forth a constitution and by-laws never validly enacted which bars members of rival unions from candidacy for office in Respondent Local 150; (4) he was expelled from membership in Respondent Local 150 without a hearing or the bringing of specific charges; (5) his tender of dues was rejected; (6) his membership in Respondent Local 150 was involuntary withdrawn; and (7) his name was removed from the membership mailing list. As a result of these various actions against him, Complainant's rights to join or assist labor organizations, protected by section 111.70(2) of MERA, have been chilled.

3/ Section 11.06 (2)(a) of WEPA states:

> (2) It shall be an unfair labor practice for an employe individually or in concert with others:
>
> (a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employe or his family.

Section 111.04 of WEPA states:

> 111.04 RIGHTS OF EMPLOYES. Employes shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employes shall also have the right to refrain from any or all of such activities.

4/ Section 111.06(3) of WEPA states:

> (3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section.

This case is presently before the Examiner for a decision on what can be considered, in effect, a motion to dismiss the complaint. After the complaint was filed, the Examiner scheduled the hearing for June 28 and 29, 1978. On June 5, 1978, Respondents filed their answer to the complaint, later amended in response to the amendments to the complaint, raising several affirmative defenses. These defenses may be summarized as claims that the Commission lacks subject matter jurisdiction over the complaint and that the complaint fails to state a claim upon which relief can be granted. On the same day, Respondents filed a Motion to Dismiss or Stay Proceedings based solely on the grounds that Complainant was required to exhaust internal remedies within Respondent Local 150 and that he had failed to do so or to plead such exhaustion. On June 26, 1978 the Examiner issued her Order Denying Motion to Stay Proceedings and Reserving Ruling on Motion to Dismiss. 5/ No ruling was made on the affirmative defenses raised by Respondents in the answer. The matter proceeded to hearing as previously scheduled. At the hearing, Respondents moved to quash subpoenas duces tecum which the Examiner had previously issued upon the request of Complainant. The basis of the motion to quash was, among other things, that the Commission lacked subject matter jurisdiction over the complaint as argued previously in the answer and motion to dismiss or stay and that therefore the subpoenas were a nullity. The Examiner took the motion under advisement and adjourned the hearing until August 7, 8 and 9, 1978. On July 17, 1978, the Examiner issued her Order Granting, In Part, and Denying, In Part, Motion to Quash Subpoenas. 6/ The Examiner stated, in pertinent part, that:

> Respondents have also moved to quash the subpoenas duces tecum because they argue that the Commission is without jurisdiction in this matter, thus causing the subpoenas to be a nullity. Respondents are, in effect, requesting the Examiner to rule on its affirmative defenses and motion to dismiss prior to an evidentiary hearing on the merits of Complainant's claim. The Examiner will not quash the subpoenas on jurisdictional grounds nor rule on the affirmative defenses and motion to dismiss at this time because a decision on the defenses and motion can best be made after hearing all the evidence and arguments in this case.

The matter proceeded to hearing, as previously scheduled. At the hearing, the subpoenaed individuals refused and failed to comply with the subpoenas duces tecum, as modified by the Examiner's July 17, 1978 order. Complainant chose to have the subpoenas enforced prior to taking any evidence on the merits and, therefore, the Examiner adjourned the hearing. On August 11, 1978 Complainant moved the Commission to enforce the subpoenas duces tecum. Commission, by its General Counsel, responded to the Examiner on August 17, 1978, in pertinent part, as follows:

> The Commission . . . [has] decided not to take formal action on the motion, but to advise [the Examiner] that it will not request the Attorney General to seek enforcement of the subpoenas at

---

5/ 16277-A.

6/ 16277-B.

this time.

> The Commission notes that [the Examiner] has declined to rule on certain affirmative defenses and a motion to dismiss prior to an evidentiary hearing on the merits. While this is ordinarily the preferred approach in administrative proceedings, since it presents a complete record for Commission and subsequent judicial review and avoids the possible need to remand the proceeding for the taking of further evidence, the Commission is concerned that an action to enforce the subpoenas might result in premature court review of issues which [the Examiner] and the Commission have had no opportunity to determine. In particular we note the Respondents' claims that the Commission lacks jurisdiction and that the complaint does not state a cause of action. We, therefore, ask that [the Examiner] conduct any hearing necessary . . . to rule on those matters, before the Commission determines whether to seek court enforcement of the subpoenas.

Based on the above request, the Examiner will rule on the several issues raised by Respondents as affirmative defenses in their answer and in their June 5, 1978 Motion to Dismiss. In addition, the Examiner will rule on two issues not raised by Respondents; the parties were notified of the Examiner's intent to rule on said issues and both parties briefed these additional issues. This ruling is being issued prior to an evidentiary hearing on the merits of the complaint. For purposes of this ruling, the Examiner assumes the facts alleged by Complainant to be true. Also for purposes of this ruling, the Examiner assumes the facts concerning internal union remedies and the Department of Labor complaint which were alleged by Respondents -- and which Complainant did not dispute -- to be true. In addition, the Examiner considers all documents sent the Examiner as properly before the Examiner for the purposes of this decision.

FACTUAL ALLEGATIONS

The factual allegations made by Complainant are deemed to be accurate solely for the purpose of the issuance of the attached Conclusions of Law and Order. These allegations are either express allegations contained in the complaint or are inferences drawn by the Examiner from the pleadings and briefs of the parties.

Complainant, Arthur Burdick, is a municipal employe within the meaning of section 111.70(1)(b) of MERA 7/ who has been employed since at least 1974 to the present by Racine County, Wisconsin, a municipal

---

7/ "'Municipal employe' means any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employe."

employer within the meaning of section 111.70(1)(a) of MERA. 8/ Complainant is represented for collective bargaining purposes in that employment by Local 310 of American Federation of State, County and Municipal Employees (AFSCME Local 310), a labor organization within the meaning of section 111.70(1)(j) of MERA. 9/ No wrongdoing of any kind on the part of Racine County or AFSCME Local 310 has been alleged. Complainant has been a member of AFSCME Local 310 from sometime in 1974 until sometime after the filing of the instant complaint, as amended, when he resigned his membership in order to restore, retain and/or protect his rights in Respondent Local 150.

From sometime in 1974 until his discharge on June 29, 1976, Complainant was also employed by St. Luke's Memorial Hospital, Inc., a private sector employer located in Racine, Wisconsin. Complainant is an employe within the meaning of section 111.02(3) of WEPA. 10/ St. Luke's Memorial Hospital, Inc. is an employer within the meaning of section 111.02(2) of WEPA 11/ and section 2(2) of the National Labor Relations Act (NLRA), 29 U.S.C. section 152(2). 12/ Complainant was represented for collective bargaining purposes during his employment and, as an unfair labor practice discharge, continues to be represented for such purposes by Respondent Local 150. Respondent Local 150 represents for collective bargaining purposes both public and private sector employes and is a labor organization within the meaning of section 111.70

8/ "'Municipal employer' means 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."

9/ "'Labor organization' means any employe organization in which employes participate and which exists for the purpose, in whole or in part, of engaging in collective bargaining with municipal employers concerning grievances, labor disputes, wages, hours or conditions of employment."

10/ "The term 'employe' shall include any person, other than an independent contractor, working for another for hire in the state of Wisconsin in a nonexecutive or nonsupervisory capacity, and shall not be limited to the employes of a particular employer unless the context clearly indicates otherwise; and shall include any individual whose work has ceased solely as a consequence of or in connection with any current labor dispute or because of any unfair labor practice on the part of an employer . . . ."

11/ "The term 'employer' means a person who engages the services of an employe, and include any person acting on behalf of an employer within the scope of his authority, express or implied, but shall not include the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact."

12/ "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

(1)(j) of MERA, 13/ section 2(5) of the NLRA, 29 U.S.C. sec. 152(5), 14/ and section 3(i) of the Labor-Management Reporting and Disclosure Act (LMRDA, a/k/a the Landrum-Griffin Act) 29 U.S.C. section 402(i). 15/ Complainant contested his discharge under the appropriate provisions of NLRA. On September 11, 1978, an Administrative Law Judge of the National Labor Relations Board issued his decision in the matter, holding that St. Luke's Memorial Hospital, Inc. had violated section 8(a)(1) and 8(a)(3) of the NLRA by discharging Complainant and ordering the hospital to reinstate Complainant and make him whole for loss of pay. 16/

Respondent Local 150 is a labor organization representing persons throughout Wisconsin for collective bargaining purposes who are employed by municipal employers and by private sector employers, including St. Luke's Memorial Hospital, Inc.

Respondent Donald Beatty has at all times relevant herein served as president of Respondent Local 150 and on the executive board. As president, he appointed in 1977 the members of the election committee of Respondent Local 150. Respondent William Knudsen has at all times relevant herein been the business agent of Respondent Local 150 and served as the chair of the 1977 election committee. Respondent Carmella Michalski has at all times relevant herein been a member of Respondent Local 150 and has, at least sinch March 15, 1977 and until the present, served as a member of the election committee. Respondent Lucian Brown, Jr., has at all times relevant herein been a member of Respondent Local 150 and has, at least since March 15, 1977 until the present, served as a member of the election committee.

13/ See footnote 9.

14/ "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

15/ "'Labor organization' means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body."

16/ Wrongdoing on the part of St. Luke's Memorial Hospital, Inc. was alleged solely to provide a factual background for the complaint and not for the purpose of seeking a legal determination by the Examiner on that allegation.

On March 15, 1977 Respondents Knudsen, Michalski and Brown, in their respective capacities as chair and members of the election committee, sent a letter to Complainant notifying him that he was ineligible to run for office of Respondent Local 150 "because of Dual-Unionism." Thereafter, Complainant's name was excluded from the ballot for president of Respondent Local 150, a position for which he had previously been nominated.

On or about April 25, 1977, Respondent Local 150, by its executive committee, denied Complainant's appeal of the executive committee's above-described actions. On or about March 10, 1978, Respondent Local 150, by its executive committee, denied an appeal filed by other individuals which in part incorporated Complainant's appeal.

One or more Respondents have relied upon and hold forth as valid a constitution and by-laws, effective October 27, 1976, which was never validly enacted and which contains for the first time a requirement that candidates for offices of Respondent Local 150 cannot be members of "rival unions." Respondent Beatty suggested that Complainant be ruled ineligible for office due to Complainant's membership in AFSCME Local 310, although Respondent Beatty is also a member of another union.

One or more of Respondents have repeatedly refused to accept payment of dues tendered by Complainant and, on October 7, 1977 without benefit of hearing on specific charges, expelled Complainant. Thereafter on March 10, 1978, one or more of Respondents sent to Complainant an unrequested "withdrawal card" signed or stamped with the name of Respondent Beatty and the secretary of Respondent Local 150. Further, one or more of Respondents removed Complainant's name from mailing lists and from the rolls listing members in good standing.

All of the above actions were motivated by Complainant's membership and participation in AFSCME Local 310 and/or his protests against his electoral disqualification, thus restricting Complainant's exercise of the rights protected by section 111.70(2) of MERA.

Complainant pursued the remedy available to him under Title IV of the Labor-Management Reporting and Disclosure Act (LMRDA, a/k/a the Landrum-Griffin Act), 29 U.S.C. section 403, to contest the conduct of the election for officers. Two decisions involving his eligibility were issued on December 9, 1977 and June 6, 1978 by the Department of Labor; both found no probable cause to believe that a violation of Complainant's Title IV rights had occurred.

Prior to filing the instant complaint, Complainant filed charges pursuant to the mechanism available to him under the constitution and by-laws of Respondent Local 150 to overturn the rejection of his dues payment, the expulsion from membership and the involuntary withdrawal of his membership. The process had not reached its conclusion prior to the filing of the complaint. During the processing of Complainant's charges, Respondent Local 150 unilaterally overturned those actions. The hearing officer appointed by the International Union to review these charges, among others, issued his report on December 12, 1978 and recommended that Complainant's charges be dismissed. The International President accepted these recommendations on January 16, 1979.

POSITION OF RESPONDENTS

Respondents claim, in general, that the Commission and the Examiner lack subject-matter jurisdiction over the complaint and that the complaint fails to state a claim upon which relief can be granted. Respondents further claim that except for the election eligibility question, all the issues raised by Complainant are moot.

The United States Secretary of Labor, pursuant to LMRDA, 29 U.S.C. section 401 et seq., has exclusive jurisdiction over the election eligibility questions raised by Complainant, whether made before or after the election in question and whether or not the complaining party seeks to overturn the election in question, and therefore the Commission lacks jurisdiction to resolve those issues. In Driscoll v. IUOE, Local 139, 484 F. 2d 682, 84 LRRM 2255 (7th Cir., 1973), plaintiff brought an action in federal court to void a union requirement that all candidates for union office sign a non-communist affidavit so that he could not be excluded from candidacy in future elections. There, as here, the Secretary of Labor had already investigated a post-election complaint and refused to commence a lawsuit against the local union to upset the election. The Seventh Circuit held that the district court lacked subject matter jurisdiction over such an action. The court stated:

> [W]e are . . . bound by the maxim . . . that ". . . disputes . . . basically relating as they do to eligibility of candidates for office, fall squarely within Title IV of the Act and are to be resolved by the administrative and judicial procedures set out in that Title." Since Driscoll's allegations "basically relate" to eligibility and charge "in substance" that he has been denied the right to run for office in his union, he is therefore stating a cause of action which can be enforced only under the provisions of Title IV calling for complaint to and suit by the Secretary of Labor as the exclusive remedy. (Emphasis added) (citations omitted) 484 F.2d at 686, 84 LRRM 2255 at 2258.

So long as the gravamen of the complaint is the validity, reasonableness or uneven imposition of election eligibility rules, the Secretary of Labor has exclusive jurisdiction. The Complainant's contentions have already been investigated and ruled upon by the Secretary of Labor who found those contentions to lack merit. The decisions are res judicata as to the issues raised.

The Commission lacks jurisdiction over Complainant's WEPA complaint. Conduct arguably either related to and protected by section 7, or related to and prohibited by section 8, of the National Labor Relations Act is preempted by the exclusive jurisdiction of the National Labor Relations Board where, as here, the private sector employer is engaged in an industry affecting commerce within the agency's jurisdictional standards. 17/ Section 111.06(2)(a), and derivatively section 111.06(3) of WEPA, prohibit coercion and intimidation with regard to those private sector employes specified in section 111.04. However, section 111.04 essentially repeats the employe's rights provided for in section 7 of the NLRA. Section 8(b)(1)(A) of the NLRA prohibits unions from coercing employes in the exercise of their right to join or assist labor unions. Since Respondent Local 150 is a labor organization under the NLRA, Complainant's allegations that Respondents have coerced him in the exercise of his WEPA section 111.04 rights is preempted by the exclusive jurisdiction of the NLRB.

17/ Amalgamated Transit Union v. Lockridge, 403 U.S. 274 (1971).

Complainant has failed to state a claim upon which relief can be granted under sections 111.70(3)(b)1 and (3)(c) of MERA as well as under sections 111.06(2)(a) and (3) of WEPA. Section 111.70(3)(b) 1 of MERA prohibits certain action by a municipal employe, individually or in concert with others, against a municipal employe. The instant complaint is clearly insufficient with regard to individual Respondents in that it does not allege that they are municipal employes. And Respondent Local 150 does not constitute a municipal employe either because its only connection with Complainant is as his bargaining representative in the private, not public, sector. Furthermore, section 111.70(3)(b)1 focuses on employment relationships, not internal union matters, and thus cannot be construed to authorize the Commission to intrude into internal union affairs. Federal precedent suggests that the imposition of internal union sanctions for "dual unionism" or membership in a rival labor organization does not restrain or coerce an employe in the exercise of his or her statutory right to belong to another union unless it adversly impacts upon an employment relationship. Complainant has alleged conduct which relates solely to the internal affairs of Respondent Local 150 and none of the conduct alleged pertains to the relationship between him and his municipal employer. Therefore, Complainant has failed to state a cause of action under section 111.70(3)(b)1 of MERA.

Section 111.70(3)(c) is a derivative provision which prohibits any person from doing acts prohibited by section 111.70(3)(b). Since Complainant has failed to allege conduct violative of section 111.70 (3)(b), it follows that he has failed to allege a violation of section 111.70(3)(c). In addition, Complainant fails to state a claim upon which relief can be granted under section 111.70(3)(b) because that section requires that the alleged conduct be done on behalf of municipal employers or employes or to influence a controversy in municipal employe relations and Complainant alleges conduct which relates solely to the internal affairs of Respondent Local 150.

Complainant has failed to state a claim upon which relief can be granted under sections 111.06(2)(a) and (3) of WEPA as well. Like MERA, WEPA has never been construed as authorizing the Commission's intrusion into internal union affairs. Because Complainant's allegations assert no impact on the employer-employe relationship governed by WEPA, no claim upon which relief can be granted has been asserted.

Complainant has also failed to state a claim upon which relief can be granted as he did not exhaust his internal union remedies prior to bringing the instant complaint. 18/ The exhaustion requirement would conserve the scare resources of the Commission, permit union tribunals to remedy internal union problems, provide the Commission with the benefit of the expert judgment of a union's specialized tribunal and preserve the autonomy of unions as essentially private institutions.

Finally, Respondents argue that Complainant's allegations that do not relate to his election eligibility are moot. Complainant has acknowledged, Respondents assert, that the "expulsion of [Complainant] without any hearing or specific charges in October, 1977, followed by its involuntary 'withdrawal' of him and successive rejections of his tendered dues payments" have "all . . . apparently been rescinded or

---

18/ UAW Local 283 v. Scofield, 50 Wis. 2d 117, 137 (1971); Kopke v. Ranney, 16 Wis. 2d 369 (1962); Fray v. Amalgamated Meat Cutters, 9 Wis. 2d 631 (1966). See generally Browne v. Milwaukee Bd. of School Directors, 69 Wis. 2d 169, 179-180 (1975).

resolved at the present." [i.e., as of October 6, 1978]. As these matters are resolved, there is nothing else to litigate.

POSITION OF COMPLAINT

Complainant argues that the Commission has subject-matter jurisdiction over the complaint, as amended, and further that the Commission's jurisdiction has not been preempted by the NLRA or the LMRDA. The complaint is based on Complainant's right to engage in protected concerted activity under section 111.70 of MERA and is not based on any right arising under federal law. Moreover, Complainant's case reaches beyond an objection to an election eligibility rule and even that objection is beyond the alleged exclusiveness of the U.S. Department of Labor. Complainant notes that it is not seeking to overturn the 1977 election; Complainant characterises his complaint as a pre-election complaint.

As to the elements of the complaint other than the ineligibility ruling, there is no doubt that the Commission has subject-matter jurisdiction. The allegations of expulsion and dues rejection raise issues governed by Title I of the LMRDA but Title I clearly provides that "nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal . . ." 29 U.S. C. section 413.

As to Complainant's claim relating to the election ineligibility ruling, it is well established that where an eligibility rule is used in a discriminatory fashion and to squelch dissent the alleged exclusivity of the Department of Labor does not apply. Here, the ineligibility ruling was applied in a highly discriminatory manner in that Complainant's ineligibility was declared at the suggestion of his opponent, Respondent Beatty, who appointed and controlled the election committee and who was also a member of another labor organization. Further, the written eligibility rule was first produced for use against Complainant in a new constitution and by-laws which were never validly enacted. Even in Driscoll, cited above, the case relied upon by Respondents, the court denied jurisdiction because no such discrimination was alleged. In Schonfeld v. Rafferty, 335 F. Supp. 846, 79 LRRM 3013 (S.D.N.Y. 1971) the district court noted the difference between Title I rights for which there explicitly is no preemption and Title IV rights by stating that "distinct from the guarantee of an equal right under section 101, Title IV of the LMRDA, 29 U.S.C. sections 481-483, governs the actual conduct of union elections." Complainant is not objecting to the actual conduct of any election. Furthermore, in Beckman v. Local 46, International Association of Bridge Workers, 314 F. 2d 848, 52 LRRM 2648 (7th Cir., 1963), the 7th circuit upheld direct court jurisdiction on a post-election challenge to the conduct of an election on the theory that equal voting rights would be infringed, and declined in Driscoll to overrule that holding.

In Calhoon v. Harvey, 379 U.S. 134, 57 LRRM 2561 (1964), the Supreme Court makes it clear that state jurisdiction exists in actions brought prior to an election. And in Driscoll, above, the 7th Circuit expressly recognized that other remedies with a jurisdictional basis outside the LMRDA continue to exist even to protect rights enumerated in Title IV. Thus, the asserted exclusivity of the Department of Labor cannot extend to the complaint which does not seek to overturn the actual results of the last election.

Complainant argues that a claim upon which relief can be granted has been stated under section 111.70(3)(b)1 of MERA. Section 111.70 (3)(b) prohibits "municipal employees, individually or in concert with others" from taking certain action. Respondent SEIU Local 150, at

least, has been pleaded as labor organization representing both municipal and private sector employes. The definition of "labor organization" found in section 111.70(1)(j) of MERA 19/ requires that said organization represent and include municipal employes among its members. Thus a claim upon which relief can be granted under section 111.70(3)(b) has been stated against Respondent Local 150 because it is, as a labor organization, an employe organization in which municipal employes participate and therefore must be seen as the equivalent of "municipal employe[s], individually or in concert with others."

Complainant points out that in Racine Unified School District (14308-D, 14309-D, 14390-D) 6/77; aff'd Dane Co. Cir. Ct., Case No. 158-408, 5/78, the Commission held that a labor organization representing municipal employes had committed prohibited practices within the meaning of section 111.70(3)(b) of MERA and dismissed the complaint as to individually named municipal employes who were explicitly plead as such employes and who were, at least in part, responsible for the conduct which was found to be unlawful. Clearly, a labor organization can be found liable under section 111.70(3)(b) without specifically asserting that it constitutes "municipal employes" and charges specifically pleaded against such employes can be subordinated to those against their labor organization.

Complainant also argues that a claim upon which relief can be granted has been stated against each Respondent under section 111.70 (3)(c) of MERA. Under that section certain acts by "any person" are prohibited if one or more of the following conditions are met: (1) if the act was done on behalf of municipal employes, (2) if the act was done in the interest of municipal employes, (3) if the act was done in connection with any controversy as to employment relations, or (4) if the act was done to influence the outcome of any controversy as to employment relations.

Respondent Local 150 is pleaded to have been acting "on behalf of" municipal employes by the fact that, as a labor organization, it represents, and therefore acts "on behalf of," municipal employes. It is also obvious that such an organization must be deemed to be "acting in the interest of" the employes it represents. Further, since it is clear that Respondent Local 150 is a labor organization including and representing municipal employes, it follows that any individual, such as the individually named Respondents, acting on behalf of or in the interest of Respondent Local 150 is covered under subsection (3)(c).

Similarly, the actions of such persons would be covered if their actions were done either "in connection with or to influence any controversy as to employment relations" [emphasis added]. The statute uses the all inclusive term "any" to modify the already broad and unlimited phrase "controversy as to employment relations." Whether Complainant is allowed to be a member, steward or officer of AFSCME Local 310 is a controversy as to employment relations. Had Complainant's municipal employer threatened him with any reprisals for maintaining his membership in or becoming active in AFSCME Local 310, a violation of 111.70 would have occurred.

Alternatively, Respondent Beatty may have used Complainant's membership in AFSCME Local 310 as a pretext to remove Complainant due to controversies within Local 150. That too would be a controversy as to employment relations.

19/ See footnote 9.

Complainant also argues that claims upon which relief can be granted have been stated under sections 111.06(2) and (3) of WEPA, for similar reasons as noted above. Here there is no question but that Respondent Local 150 as an entity constitutes concerted activity of employes covered under section 111.06.

Complainant notes that the definition of "employe" at 111.02(3) explicitly states that it "shall not be limited to the employes of a particular employer . . ." and that "employe" includes "any individual whose work has ceased solely . . . because of any unfair labor practice on the part of an employer. . . ." Further, municipal employes are not excluded from the definition. Similarly, the rights of employes set forth in section 111.04 20/ are all inclusive, without excluding the right of municipal employes to engage in protected concerted activities, while section 111.06(2)(a) 21/ also uses inclusive rather than exclusionary language in setting forth the rights which are protected against conduct such as that of Respondents. Thus, Respondents are prohibited under section 111.06 from interfering with Complainant's legal rights, which include his rights as a municipal employe to engage in protected concerted activity.

Should the Examiner not agree with this construction, Respondents' actions would still be prohibited under WEPA as Complainant has alleged that those actions were based in whole or in part upon Complainant's protest against the actions taken against him. The Commission should exercise its jurisdiction to protect Complainant's right to protest the violation of his section 111.70 rights.

Complainant also asserts that the Commission has the statutory authority to, as Respondents describe it, "intrude into the internal affairs of a labor organization" where, as here, conduct on the part of the labor organization infringes on a member's statutory rights. 22/

Complainant further alleges that the Commission has never adopted a requirement that a municipal employe must exhaust whatever internal union remedies might exist prior to filing a complaint of interference with Complainant's statutorily protected rights. The Commission should not adopt such a rule, particularly in light of the fact that while Complainant has attempted in good faith to utilize such remedies, the behavior of Respondents has made such resort highly uncertain, indefinite and extremely delayed, if not futile.

Regarding Respondents' mootness argument, Complainant argues against dismissal. Respondents' unlawful conduct has continued after the qualified comments concerning resolution of certain issues. 23/ Respondents' conduct necessitates a clear finding of statutory violation and a legally binding order to remedy all aspects of Respondents' conduct.

DISCUSSION

Mootness

The threshhold issue is whether the allegations relating to re-

---

20/ See footnote 3, above.

21/ See footnote 3, above.

22/ AFSCME (Dist. Council 40, Local 990) (14608-B) 11/76; International Association of Fire Fighters, Local 1793 (13603-A) 9/76.

23/ See page 11.

jection of dues payments, expulsion from membership, and involuntary withdrawal of membership should not be decided because they are moot. Respondents do not raise the mootness argument regarding the issue of Complainant's eligibility to run for office of Respondent Local 150.

The Wisconsin Supreme Court has defined a moot case as:

> . . . one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretended controversy when in reality there is none, or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy. 24/

The definition which arguably applies to the instant case is the claim that a judgment would not have any practical legal effect upon the existing controversy. In Watkins v. ILHR Department, 69 W. 2d 782, 233 N.W. 2d 360 (1975), the Wisconsin Supreme Court rejected the application of that definition to an employment discrimination case even though the alleged discrimination had ended prior to the administrative hearing. The Department of Industry, Labor and Human Relations had dismissed Complainant's case as moot without reaching the merits; the Circuit Court reversed and remanded the case to the department and the Supreme Court affirmed the Circuit Court. Complainant in Watkins alleged that she had been illegally denied a transfer to another job because of her race and further that her collective bargaining representative had unlawfully refused to process her grievance because of her race. Prior to the hearing, she received the transfer. Even though she would not have been entitled to backpay (there was no difference in pay between her former position and the position she sought), or to an affirmative order against her employer requiring immediate transfer (she had already been transferred), the Supreme Court determined that the case was not moot.

> . . . The department can, if discrimination is found, enter an order which would have the practical, legal effect of requiring that Watkins be considered for all future transfers on the basis of her qualifications and ability, and without regard to race. The department can also, if discrimination is found, enter an order requiring that Watkins be treated fairly and equally in the processing of future grievances. Moreover, it is harsh to suggest that a finding on discrimination would serve no purpose. For more than two years Watkins was denied the kind of job she desired and for which she deemed herself qualified. . . . She is entitled to know whether or not this was due to racial discrimination or to some other cause. It would be inequitable to hold that a person who must have suffered deep personal frustration over an extended period of time is not entitled to a determination of the cause of that frustration, while a person who

---

24/ WERB v. Allis-Chalmers Workers Union, Local 248, USWA, CIO, 252 Wis. 436, 32 N.W. 2d 190 (1948).

> failed to receive a minor pay differential because he or she was not transferred is in all cases entitled to a full legal determination. (Citations omitted) at 793-4.
>
> . . .
>
> Watkins is still employed by the same employer that had allegedly discriminated against her on the basis of race, and she is also still a member of the same union. It cannot be said that, if discrimination is found, an order of DILHR would be useless. DILHR can order, as the hearing examiner recommended, that Watkins be considered for all future transfers on the basis of her qualifications and ability, and without regard to race. A similar order can be made requiring the union to process Watkins' grievances without regard to her race, if it is found that the union has discriminated. . . . Such orders would have a practical, legal effect upon the relation of the parties to this case. at 796.

In the opinion of this Examiner, the remedy available in Watkins was no more than an order requiring the employer and the union to abide by a law in the future that they were required to abide by without an order to do so. Yet the Court determined that the remedy would have a practical legal effect.

Complainant in the case before this Examiner has alleged that the exercise of his WEPA and MERA rights were restricted due to and during the lengthy uncertainty of his status Respondent SEIU Local 150. As in Watkins, Complainant is entitled to know whether the action taken against him was unlawful, assuming of course that the Commission has subject-matter jurisdiction over these matters and that Complainant has stated a claim upon which relief can be granted. Complainant has the legal right to ask that Respondents be directed to cease engaging in any unlawful conduct and to take such affirmative action as might be appropriate to insure against its recurrence. Assuming that the other issues raised by Respondents are decided in Complainant's favor and assuming that the facts asserted are true, a decision in this case would have a practical legal effect. Therefore, this case is not subject to the rule of mootness.

Another reason exists for holding that this case is not subject to the rule of mootness. This case involves legal questions of first impression and of public interest and importance. Furthermore, the facts asserted are such that they may immediately recur. Thus, the case should be decided. 25/

25/ Jt. School Dist. No. 8 v. WERB, 37 Wis. 2d 483 (1967); WERB v. Allis Chalmers Workers Union, Local 248, UAWA, CIO, 252 Wis. 436 (1948); Unified School Dist. No. 1 of Racine County (11315-D), 4/74.

Jurisdiction over Complainant's allegations concerning his eligibility to run for office.

Complainant is seeking from the Commission a determination regarding the lawfulness under MERA and WEPA of Respondents' actions of disqualifying Complainant from running for office. Complainant is not challenging the 1977 election itself--that is, he is not seeking an order requiring the contested election to be rerun--but is seeking an order requiring Respondents to cease and desist from denying or limiting Complainant's rights, including the right to run for office, in the future. Complainant characterizes his contention in this matter as a pre-election challenge. Respondents contend that this allegation can be heard only by the Department of Labor, pursuant to the LMRDA, 29 U.S.C. section 401 et seq.

The LMRDA applies, in general, to labor organizations and their members where the labor organization represents employes whose employer is engaged in an industry affecting commerce. Respondent Local 150 is such a labor organization. Title IV of the LMRDA governs the elections of officers of covered labor organizations. Section 401 (e) states ". . . every member in good standing shall be eligible to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed). . . ." Section 402 sets forth an administrative procedure for enforcing the above right, among other rights. Upon the complaint from a member, the Secretary of Labor must investigate the complaint and, if the Secretary finds probable cause to believe that a violation has occurred, the Secretary must file a suit in federal court seeking to overturn the invalid election and to direct a new election. Section 403 states, in part, that "[t]he remedy provided by this title for challenging an election already conducted shall be exclusive." (Emphasis added).

Complainant did pursue the remedy available to him under Title IV. Two decisions involving his eligibility were issued by the Department of Labor; both found no probable cause to believe that a violation of Complainant's Title IV rights had occurred.

Complainant is seeking a determination that will affect his right to run for office in the future and thus his challenge is properly characterized as a pre-election challenge. Section 403 of Title IV would appear to permit Complainant's action concerning his election eligibility to be heard by the Commission. Section 403 specifically restricts only the availability of forums for post-election challenges and thus by implication does not restrict the availability of forums for pre-election challenges.

Describing Complainant's challenge in this manner is not sufficient to necessarily avoid the exclusive jurisdiction of the Department of Labor, however. In Calhoon v. Harvey, 379 U.S. 134, 57 LRRM 2561 (1964), plaintiffs brought a pre-election suit in federal court against their labor organization, alleging violations of their rights under Title I, specifically section 101, of the LMRDA, 29 U.S.C. section 401, to nominate candidates for office. 26/ Title I, unlike Title IV,

---

26/ Section 101 guarantees that:

> Every member of a labor organization shall have equal rights and privileges within such labor organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

provides:

> Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization. 27/

Although plead in terms of a violation of Title I, and thus not subject to the exclusive jurisdiction of the Department of Labor, the Supreme Court determined that the issues "basically related . . . to eligibility of candidates for office" and thus fell "squarely within Title IV of the Act." Therefore the issue was to be resolved by the administrative and judicial procedures set forth in Title IV. Though plaintiffs were contesting an action by a labor organization taken before an election was conducted, the Court nevertheless held that exclusive jurisdiction lay with the Department of Labor. Thus it would appear that Calhoon prohibits challenges to eligibility requirements prior to the conduct of the election; any challenges following the election are subject to the exclusive jurisdiction of the Department of Labor. Therefore it would appear that the Commission does not have jurisdiction to hear Complainant's election eligibility case.

Interestingly, however, the Supreme Court, post-Calhoon, stated in Trbovich v. United Mine Workers, 404 U.S. 528, 531, 79 LRRM 2193, 2194 (1972), that "with respect to elections not yet conducted, the statute provides that existing rights and remedies apart from the statute are not affected." (Emphasis added). Reading Calhoon and Trbovich together, the Examiner concludes, as did the court in Driscoll v. IUOE, 484 F. 2d 682, 84 LRRM 2255, 2259 (7th cir., 1973), that "the only pre-election remedies to protect rights enumerated in Title IV are those existing outside the LMRDA." 28/

Therefore, the Commission has jurisdiction to hear Complainant's allegations concerning his election eligibility, as he is alleging that a right arising outside the LMRDA has been violated.

An additional reason exists for determining that jurisdiction exists despite Calhoon's apparent broad sweep. Complainant alleges that "on information and belief, respondent Beatty suggested Complainant be ruled ineligible based on his membership in Local 310, although Beatty also was a member of another union." This amounts to a claim that Respondent Local 150's eligibility requirements are being administered in a discriminatory manner; one could even go so far as to say that this is a claim that the discrimination was designed to perpetuate a certain individual in office. Courts have asserted jurisdiction over pre-election cases otherwise subject to Calhoon's restriction where

---

27/ Section 103, 29 U.S.C. 413.

28/ Respondents rely on Driscoll, above, to support their argument that the Commission does not have jurisdiction. Driscoll, citing Calhoon, above, held that the pre-election court challenge of plaintiff was barred by the Department of Labor's exclusive jurisdiction. Driscoll, however, unlike the case before the Examiner, did not involve rights arising outside the LMRDA.

arbitrary discrimination has been asserted. 29/ Therefore, the Commission has jurisdiction for this reason as well.

Jurisdiction over Complainant's WEPA allegations.

As noted earlier in this memorandum, Respondents argue that the Commission's jurisdiction over Complainant's WEPA allegations has been pre-empted by the NLRA. Complainant did not respond to this argument. Complainant's WEPA allegations center on the assertion that violations of rights arising under MERA, including protests against said violations, can be redressed under WEPA. 30/

In San Diego Building Trades Council v. Garmon, 359 U.S. 236, 43 LRRM 2838 (1959), the U.S. Supreme Cort held that:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by [section] 7 of the National Labor Relations Act, or constitute an unfair labor practice under [section] 8, due regard for the federal enactment requires that state jurisdiction must yield.
>
> . . . [And] [w]hen an activity is arguably subject to [section] 7 or [section] 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of State interference with national policy is to be averted.

The activity sought to be regulated pursuant to the complaint is not clearly or even arguably protected by section 7 of the NLRA or clearly or arguably prohibited by section 9 of the NLRA. Although section 7 contains language nearly identical to the language in section 111.04 of WEPA and although section 8(b)(1)(A) contains a prohibition nearly identical to the prohibition contained in section 111.04 of WEPA, the Commission's jurisdiction is nevertheless not pre-empted. The rights under section 7 of the NLRA do not accrue to municipal employes for the NLRA addresses private, not public, employment relations. Since section 7 of the NLRA does not protect rights of municipal employes, section 8(b)(1)(A) does not prohibit restraint of or coercion regarding those rights. Therefore, the complained of activity is not subject to the provisions of the NLRA and the Commission's jurisdiction is not pre-empted.

29/ DePew v. Edmiston, 386 F. 2d 710, 66 LRRM 2663 (3d Cir., 1967); Beckman v. Local 46, International Assoc. of Bridge Workers, 314 F. 2d 848, 52 LRRM 2648 (7th Cir., 1963); Schonfeld v. Raferty, 335 F.Supp 846, 79 LRRM 3013 (S.D.N.Y., 1971). Even Driscoll, above, implies that jurisdiction in that case would have been asserted had "it appeared that the eligibility requirement is a discriminatory, ad hoc device calculated to perpetuating certain individuals in office." at 2259.

30/ Contrary to the belief of Respondents as evidenced in one of their briefs, Complainant is not asserting that his LMRDA rights are incorporated into WEPA.

Exhaustion of internal remedies

The Examiner previously denied Respondents' motion to stay proceedings and reserved ruling on Respondents' motion to dismiss. 31/ No memorandum was issued in support of that order; this portion of the discussion, which reaffirms that order, should be considered that memorandum.

The Commission does not require a union member to first exhaust available internal union remedies prior to filing a complaint alleging that the member's statutory rights have been violated. 32/ Respondents cite several cases 33/ which have held that a union member must exhaust internal union remedies prior to bringing an action challenging certain activity of the union. These cases are not determinative of the case before the Examiner as none of them involved the assertion of any right arising outside of the contractual relationship between the union member and the union. Although Complainant in this case does allege that the constitution and bylaws of Respondent Local 150, which were allegedly relied upon to disqualify his candidacy, were never validly enacted, the essence of the allegations are not that Respondents have violated any contractual obligation owed Complainant but that they have violated his MERA and/or WEPA rights. Therefore, the cases relied upon by Respondents are not applicable.

Claim for relief under sections 111.06(2)(a) or 111.06(3) of the Wisconsin Employment Peace Act.

Complainant argues that the rights guaranteed under section 111.04 of WEPA and the protection against coercion and intimidation of an employe's " . . . legal rights, including those guaranteed in section 111.04 . . ." include rights arising under MERA. In essence, Complainant is attempting to extend the coverage of WEPA beyond the limits of the private sector into the public sector. However, section 111.02(2) clearly excludes municipal employers from coverage under WEPA. 34/ The definition of "employe" found in section 111.02 (3) of WEPA does not specifically exclude municipal employes but this does not indicate that municipal employes were to be afforded any protection pursuant to WEPA. The statute was intended to regulate private employment relations. 35/ Thus, the rights guaranteed by section 111.04 of WEPA are the rights of private sector employes in their private sector employment. To argue, as Complainant does, that section 111.04 rights include the rights of municipal employes, ignores this principal entirely.

31/ (16277-A) 6/78.

32/ City of Appleton (17541) 1/80, aff'd by Commission (17541-A) 1/80; American Federation of Teachers (12707-A, 12708-A) 2/75, aff'd by Commission (12707-B, 12708-B) 1/76.

33/ See footnote 18.

34/ " . . . employer . . . shall not include the state or any political subdivision thereof. . . ."

35/ Unified School District No. 1 of Racine Co. v. WERC, 81 Wis. 2d 89, 93, 94 (1977).

Complainant argues that section 111.06(2)(a) prohibits infringement of an employe's "legal rights." The implication of this argument is that even if 111.04 does not protect Complainant in the exercise of his MERA rights, MERA rights are nevertheless included with the term "legal rights" and thus protected from infringement. The Examiner does not agree. The Commission has never construed the language in question, or the similar sections of MERA or the State Employment Labor Relations Act (SELRA), in the way suggested by Complainant. To the contrary, in Racine Policemen's Professional and Benevolent Corporation (12637, 12637-A) 5/74, the Commission held that the legislature did not intend WEPA, MERA or SELRA to protect the exercise of legal rights other than the rights specified in the rights section 36/ of the respective statute or the rights established by other provisions of the respective statute, unless the persons allegedly interfering with the employe's rights outside the pertinent statute are motivated by the employe's exercise of his rights under the pertinent statute. In other words, WEPA was not intended to protect the exercise of legal rights other than the rights specified in section 111.04 (which, as noted above, do not include any MERA rights) or rights established by other provisions of WEPA, unless the persons allegedly interfering with the employe's rights outside of WEPA are motivated by the employe's exercise of his rights under WEPA. Since none of those circumstances are alleged by Complainant, Complainant's contention under section 111.06(2)(a) must fail. Accordingly, that portion of the complaint is dismissed.

No claim upon which relief can be granted has been stated under section 111.06(3) of WEPA. Section 111.06(3) makes ". . . any act prohibited by subsections (1) and (2) of this section" an unfair labor practice if committed by a "person" as defined in section 111.02(1) and if said act meets one of four criteria. As noted above Complainant's case under WEPA is based on the contention that MERA rights are, in effect, incorporated into WEPA. The Examiner has already rejected that contention. Therefore, the acts complained of are not prohibited under WEPA and thus they do not fall within the protection of section 111.0(3). Accordingly, that portion of the complaint is dismissed.

Claim for relief under section 111.70(3)(b)1 of the Municipal Employment Relations Act

Section 111.70(3)(b) of MERA prohibits certain activities by a "municipal employe, individually or in concert with others . . ." "Municipal employe" is defined in section 111.70(1)(b) as "any individual employed by a municipal employer other than an individual contractor, supervisor, or confidential, managerial or executive employe." None of the individually named Respondents are "municipal employes" within the meaning of section 111.70(1)(b) and therefore no claim upon which relief can be granted has been stated against them under section 111.70 (3)(b)(1). Accordingly, that portion of the complaint which pertains to that allegation has been dismissed.

Despite the fact that the definition of municipal employe does not include the term labor organization, section 111.70(3)(b) has repeatedly been interpreted as applying to labor organizations. 37/ The organizations to which section 111.70(3)(b)1 specifically has been

---

36/ Section 111.04 of WEPA, section 111.70(2) of MERA and section 111.82 of SELRA.

37/ Racine Unified School District, 14308-D, 14389-D, 14390-D (6177); aff'd. Dane Co. Cir. Ct., Cast No. 158-408, 5/78.

applied have all represented the respective complainants as municipal employes for collective bargaining purposes. Here Respondent Local 150 is a labor organization representing both public employes in Wisconsin and private sector employes in Wisconsin. Its connection with Complainant is as a labor organization representing him in his private sector employment. Although the labor organizations to which section 111.70(3)(b)1 has been applied represented the complaining municipal employe as such, unlike the instant case, the Commission and its Examiners have never determined whether or not a labor organization, which represents both public and private employes but which does not represent a complainant in her/his public sector employment, is covered by section 111.70(3)(b)1.

Section 111.70(1)(j) defines a labor organization to mean "any employe organization . . . which exists for the purpose, in whole or in part, of engaging in collective bargaining with municipal employers. . . ." (Emphasis added). Respondent Local 150 falls within this definition. But before the Examiner can determine whether Complainant has stated a claim upon which relief can be granted against Respondent Local 150, it is necessary to decide what connection, if any, the dispute between Complainant and Respondent Local 150 must bear to Complainant's municipal employment.

Respondents suggest that the instant dispute relates only to internal union matters, not to Complainant's municipal employment, and that therefore no claim upon which relief can be granted has been stated. The Examiner concludes that the conduct complained of does not relate to Complainant's relationship with his municipal employer. Not being a member of one's collective bargaining representative or active in its activities does not, standing alone, bear any relationship to one's employment. The conduct complained of relates to Complainant's relationship with his municipal collective bargaining representative but not to his relationship with his municipal employer. This is not dispositive of the issue raised by Respondents, however.

It is generally true that the Commission will not interfere with a labor organization's right to prescribe rules with respect to the acquisition and retention of membership. 38/ However, the Commission has held that it will pass judgment on what might otherwise be viewed solely as an internal union matter, even though no impact on the relationship between a municipal employe and her/his municipal employer is demonstrated, where the labor organization's actions resulted from the refusal of members to engage in strike prohibited by MERA. Thus, in AFSCME, Local 990 (14608-A) 11/76, aff'd by Commission (14608-B) 11/76 and AFT, Local 1714, above, labor organizations were ordered to reinstate the membership of complainants who had been expelled from membership for refusing to pay a fine imposed due to their refusal to either picket or strike.

The instant case does not fall within this exception as the action taken against Complainant was not motivated by his refusal to participate in an unlawful strike. No other exception to the Commission's policy of refraining from passing judgment on membership rules has been created but the Commission has not been presented with a case requiring the creation of another exception. In order to determine whether the lack of any impact on Complainant's municipal employment

---

38/ AFT, Local 1714 (12707-A, 12708-A) 2/75, aff'd by Commission (12707-B, 12708-B) 1/76.

is fatal to his claim under section 111.70(3)(b)(1), the Examiner will look to the legislature's intent as manifested in MERA as a whole.

MERA is quite clearly directed toward regulating the conduct of municipal employers, municipal employes and labor organizations representing municipal employes in the context of municipal employes' employment by municipal employers. Nothing contained in the statute indicates to the Examiner a contrary intent. Therefore, because the instant dispute has no impact on Complainant's employment with his municipal employer, the Examiner concludes that Complainant has failed to state a claim upon which relief can be granted against Respondent SEIU Local 150 under section 111.70(3)(b)(1) of MERA. Accordingly, that portion of the complaint is dismissed.

Claim for relief under section 111.70(3)(c) of the Municipal Employment Relations Act.

Section 11.70(3)(c) of MERA states that:

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

The Complainant has made no allegations against a municipal employer so the Examiner will delete references to a municipal employer where appropriate in this discussion. There are three requirements necessary in order to state a claim under section 111.70(3)(c). First, the act complained of must have been done or caused to have been done by a "person", as defined in section 111.70(1)(k) of MERA. 39/ Second, the act complained of must be prohibited by section 111.70(3)(b) of MERA which concerns prohibited practices of "municipal employes, individually or acting in concert." Third, any one of the following criteria must be met: a) the act was done or caused to have been done on behalf of municipal employes; b) the act was done or caused to have been done in the interest of municipal employes; c) the act was done or caused to have been done in connection with any controversy as to employment relations; or d) the act was done or caused to have been done to influence the outcome of any controversy as to employment relations.

All Respondents fall within the definition of "persons" as Respondents are either a labor organization or individuals. Thus the first requirement has been met. The second requirement has not been met, however, and thus the Examiner must dismiss this allegation of the complaint. As noted above, the act complained of is not a violation

---

39/ "'Person' means one or more individuals, labor organizations, associations, corporations or legal representatives."

of section 111.70(3)(b)1 of MERA. In addition, the act complained of is not prohibited by any other section of 111.70(3)(b) of MERA. 40/

Dated at Madison, Wisconsin this 22nd day of October, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Ellen J. Henningsen
Ellen J. Henningsen, Examiner

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

. . .

2. To coerce, intimidate or induce any officer or agent of a municipal employer to interfere with any of its employes in the enjoyment of their legal rights, including those guaranteed in sub. (2), or to engage in any practice with regard to its employes which would constitute a prohibited practice if undertaken by him on his own initiative.

3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer. . . .

4. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes. . . .

5. To coerce or intimidate an independent contractor, supervisor, confidential, managerial or executive employe, officer or agent of the municipal employer, to induce him to become a member of the labor organization of which employes are members.

6. To refuse or otherwise fail to implement an arbitration decision lawfully made under sub. (4)(cm).