

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MR. ROBERT M. BENISH,	:	
	:	
Complainant,	:	
	:	
vs.	:	Case 397
	:	No. 48219 MP-2652
	:	Decision No. 27975-A
CARPENTER'S LOCAL 264 and	:	
CITY OF MILWAUKEE	:	
City Service Commission,	:	
	:	
Respondents.	:	
	:	

Appearances:

Castellani, Sheedy & Associates, Attorneys at Law, 829 North Marshall Street, Milwaukee, Wisconsin 53202, by Mr. Michael T. Sheedy, appearing on behalf of the Complainant.

Grant F. Langley, City Attorney, by Mr. Thomas C. Goeldner, Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of the Respondent City of Milwaukee.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Renata Krawczyk, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Respondent Carpenter's Local 264.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 22, 1992, Complainant Robert M. Benish filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that the City of Milwaukee and Carpenter's Local 264 had committed prohibited practices in violation of State Statutes. On March 4, 1994, the Commission appointed Coleen A. Burns, a member of its staff as Examiner to conduct a hearing on the complaint and to make and issues Findings of Fact, Conclusions of Law and Order in the matter as provided in Secs. 111.70(4)(a) and 111.07, Stats. Hearing on the matter was held on April 18, 1994, in Milwaukee, Wisconsin. The record was closed on April 29, 1994, upon receipt of transcript.

Having considered the evidence and arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Carpenter's Local 264 has offices located at 3020 West Vliet Street, Milwaukee, Wisconsin 53208.
2. City of Milwaukee is a municipal employer with offices located at City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551.
3. At all times relevant hereto, the City of Milwaukee and Milwaukee Building and Construction Trades Council, AFL-CIO, were parties to a collective bargaining agreement which by its terms, was in full force and effect commencing at 12:01 a.m. on August 16, 1991, and terminating at 12:01 a.m. on August 16, 1994. This collective bargaining agreement contained the following provision:

ARTICLE 2

RECOGNITION

The City recognizes the Union as the exclusive collective bargaining agent on the subjects of wages, hours and conditions of employment for employees who have passed the City's probationary period and who are in classifications covered by the appropriate bargaining unit certification of the Wisconsin Employment Relations Commission as of August 16, 1985.

This provision is set forth merely to describe the bargaining representative and the bargaining unit covered by this collective bargaining agreement and is not to be interpreted for any other purpose.

4. On September 12, 1991, Gary Kulwicki, Structures Engineer for the City of Milwaukee and Don Hiller, a superintendent employed by the City of Milwaukee, issued the following termination notice to Robert M. Benish, who at that time was employed as a Temporary Carpenter in the City's Department of DPW/Bridges and Public Buildings:

On Wednesday evening, September 11, 1991, at 11:20 p.m., your immediate supervisor visited your assigned work area. You were not there. You left your work area without notification and authorization before the end of your shift which ends at 1:00 a.m.

Thereafter, Benish contacted Seaver Bigler, Business Representative for Milwaukee and Southern Wisconsin District Council of Carpenters and discussed the termination of his employment with the City of Milwaukee. Carpenter's Local 264 is a member of Milwaukee and Southern Wisconsin District Council of Carpenters, but it is Milwaukee and Southern Wisconsin District Council of Carpenters which is the bargaining representative of members of Carpenter's Local 264. Bigler contacted Archie Smith, Carpenter Supervisor for the City of Milwaukee to investigate the facts surrounding Benish's termination. Based upon this investigation, Bigler made a determination not to file a grievance on behalf of Benish because such a grievance would not be meritorious and, due to Benish's status as a temporary employe, he did not have access to the grievance procedure. Bigler told Benish that Bigler could not file a grievance because Benish was a temporary employe. Benish was advised of Bigler's decision not to file a grievance on his behalf on or about September 18, 1991.

5. Robert M. Benish, who currently resides in Cedarburg, Wisconsin, had a temporary appointment with the City of Milwaukee to work as a carpenter in the Bureau of Bridges and Buildings from August 30, 1988 to October 21, 1988; from July 23, 1990 to October 5, 1990 and from July 15, 1991 to September 12, 1991. During his first appointment he worked 52 days; during his second appointment he worked 74 days; and during his final appointment he worked 58 days. At the time that he received his appointment on July 15, 1991, Benish signed the following "Temporary or Provisional Appointees Statement of Understanding," which was witnessed by Gary Kulwicki:

I understand that if I am appointed as a Carpenter, on a ~~provisional or~~ temporary** basis, that I must meet the requirements for and compete in the next examination for this position. I also understand that I must not only pass the examination, but pass with a grade which shall place me among the

top three on the eligible list in order to be eligible for a regular appointment to this position. I understand that if I do not pass the examination, or if I do not pass it with a grade high enough to place among the top three eligible on the eligible list, that I will be replaced by someone appointed from the list, within two weeks after the list is approved.

I also understand that I will not be eligible for paid holidays, sick leave, vacation or other fringe benefits until I am appointed from an eligible list. (Note: This does not apply to City employees who are eligible for fringe benefits at the time they are given provisional or temporary appointments.)

In accordance with Civil Service Rule VIII, Section 12, concerning nepotism, I hereby certify that I am not related, either by blood or through marriage, to the appointing officer or to any member of the appointing board or body or to any direct superior or to any elective or appointive City official. (This includes relative of both whole and half blood, and extends to persons related as closely as first cousins when the relationship is by blood or more closely than first cousins when the relationship is through marriage, and includes the cases of husbands of sisters-in-law and wives of brothers-in-law.

<u>Gary T. Kukwicki /s/</u> WITNESS	<u>Robert M. Benish /s/</u> PROVISIONAL APPLICANT TEMPORARY APPLICANT
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- * Provisional Appointments covered by the 2/3/75 Court Order cannot exceed 180 days.
- ** A Rule IX, Section 2, temporary appointee who is on an eligible list may be considered for future regular appointment when the appointee ranks among the certifiable highest eligible on the list, or compete in a future examination. Individuals given temporary appointments to jobs covered by the 2/3/75 court order will not be given regular job rights (civil service status) despite their ranking on the eligible list and, because of this Federal court order, these temporary appointments cannot exceed sixty days.

In a notice dated July 22, 1992, Sally A. McAttee, Staffing Services Manager for the City of Milwaukee, Department of Employee Relations, notified Benish of the following:

We have carefully considered your application for the examination for Carpenter. We find that you do not show that you meet the qualifications (checked below) as outlined in our announcement sheet this time. Thank you for your interest in this position.

<u> </u> Experience Requirement	<u> </u> Filing Date Requirement
<u> </u> Education Requirement	<u> </u> License Requirement
<u> </u> Not City Employee	<u> x </u> Other: Discharge

qualification
If you have any questions, please call the Personnel
Analyst in charge of the examination, Dan Carson at
278-3360.

Sally A. McAttee
Staffing Services Manager

Upon receiving this notice, Benish contacted Bigler and told Bigler that he (Benish) was not being allowed to reapply for a Carpenter position with the City of Milwaukee. Bigler contacted the City of Milwaukee Civil Service Commission and Department of Labor Relations and was advised that the City of Milwaukee had a policy of not accepting applications of employes who were terminated until one year after the termination. Bigler relayed this information to Benish. Benish, did not ask Bigler to file a grievance in this matter.

6. The complaint in this matter, with the accompanying statutory filing fee of \$25.00, was filed with the Wisconsin Employment Relations Commission on October 22, 1992. A complaint received by the Wisconsin Employment Relations Commission on October 19, 1992, was returned to Complainant because it was not accompanied by the \$25 statutory filing fee. Complainant Robert M. Benish was not an employe of the City of Milwaukee at the time that the City denied his application for the examination of Carpenter. Complainant Robert M. Benish has never been a member of Carpenter's Local 264.

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

CONCLUSIONS OF LAW

1. The conduct of the City of Milwaukee in terminating the employment of Robert M. Benish on September 12, 1991 and the conduct of Business Representative Bigler in not pursuing a grievance on the September 12, 1991 termination of the employment of Robert M. Benish occurred outside of the one year statute of limitations provided for in Sec. 111.07(14), Stats., and, therefore, the Wisconsin Employment Relations Commission does not have any jurisdiction over any alleged prohibited practice arising out of such conduct.

2. Complainant Robert M. Benish is not a municipal employe within the meaning of Sec. 111.70(1)(i), Stats., and, therefore, the Complaint fails to allege facts upon which relief could be granted pursuant to the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

The Complaint filed on October 22, 1992 is dismissed in its entirety.

Dated at Madison, Wisconsin, this 28th day of June, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time.

(footnote continued on page 6)

1/ (footnote continued from page 5)

If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time

for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

CITY OF MILWAUKEE

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DISCUSSION

On October 22, 1992, Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondents "have engaged in and are engaging in prohibited practices including but not limited to Ch. 111 and 101, the meaning of Sections 111.36(1) and 111.84 Wis. Stats., . . ." In this Complaint, Complainant references an unjust termination from the Department of Bridges and Buildings and a letter stating that he was ineligible to be reinstated as a Carpenter. At hearing, Complainant specifically alleged that the Respondent Carpenter's Local 264 had violated its duty of fair representation.

Since the allegations raised in the Complaint concern an employment relationship and a lack of employment relationship with the City of Milwaukee, the Examiner is satisfied that the allegation that Respondents Carpenter's Local 264 and the City of Milwaukee "have engaged in and are engaging in prohibited practices" is an allegation that Respondents have violated the Municipal Employment Relations Act (MERA).

Sec. 111.07(14), Stats., is applicable to complaints alleging a violation of MERA by virtue of Sec. 111.70(4)(a), Stats. Sec. 111.07(14), Stats., provides:

The right of any person to proceed under this section shall not exceed beyond one year from the date of the specific act or unfair labor practice alleged.

The Complaint in this matter was filed on October 22, 1992. 1/ The conduct of Respondent City of Milwaukee in terminating the employment of Robert M. Benish and Business Representative Bigler's decision not to file a grievance over this termination of employment occurred more than one year prior to October 22, 1992. Accordingly, the Examiner does not have jurisdiction to determine whether or not this conduct involved a prohibited practice in violation of MERA.

The letter stating that Complainant was ineligible for reinstatement is the letter from Sally A. McAttee, dated July 22, 1992, informing the Complainant that the City of Milwaukee could not accept his application for examination for Carpenter. At that time, Complainant was not an employe of the City of Milwaukee. Nor was Complainant a municipal employe at the time that he contacted Business Representative Bigler regarding the City of Milwaukee's failure to accept his application for examination for Carpenter.

Since Complainant is not a municipal employe within the meaning of Sec. 111.70(1)(i), Stats., his complaint with respect to conduct involving the July 22, 1992 denial of his application for examination for Carpenter does not allege facts upon which relief can be granted under MERA. Accordingly, the Examiner has dismissed the complaint in its entirety.

1/ A complaint filed on October 19, 1992, was returned because it was not accompanied by the statutory filing fee of \$25.

Dated at Madison, Wisconsin, this 28th day of June, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner