STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOSEPH C. GITTENS,

Complainant,

vs.

ONALASKA SCHOOL DISTRICT,
ONALASKA EDUCATION ASSOCIATION,
COULEE REGION UNITED EDUCATORS, and
WISCONSIN EDUCATION ASSOCIATION
COUNCIL,

Respondents.

Case 22
No. 51781 MP-2956
Decision No. 28243-A

Appearances:

Mr. Joseph C. Gittens, 410 South 8th Street, La Crescent, Minnesota 55947-1501, appearing on his own behalf.

Mr. Peter L. Albrecht, Godfrey & Kahn, S.C., Attorneys at law, 131 West Wilson Street, P.O. Box 1110, Madison, Wisconsin 53701-1110, appearing on behalf of Respondent District.

Ms. Priscilla R. MacDougall, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of Respondent Labor Organizations.

EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant filed with the Wisconsin Employment Relations Commission (herein WERC) a complaint and amendments thereof, alleging, among other things, that the above-named Respondents have committed prohibited practices within the meaning of the Municipal Employment Relations Act, Sec. 111.70 et seq, Stats., (herein MERA). On November 23, 1994, the Commission issued an order appointing the undersigned Marshall L. Gratz as Examiner in the matter.

Pursuant to notice, the Examiner conducted a hearing concerning the amended complaint on Tuesday, January 24, 1995 at the Department of Motor Vehicle Office in Onalaska, Wisconsin. Complainant submitted arguments in support of his position in pleadings and correspondence submitted prior to the hearing, in a document that was received as a part of the record at the hearing

(Exhibit 1), and during the course of his testimony at the hearing. The parties also reserved the right to submit initial and reply briefs. After the hearing, Complainant submitted and (over Respondent District's objections) the Examiner received into the record an additional document, Exhibit 19. Respondent District and Respondent Labor Organizations both filed initial briefs. When Complainant filed no reply brief within the time period reserved for same, the Examiner declared that briefing was completed on April 18, 1995.

The Examiner has considered the record evidence and arguments submitted by the parties. On the basis of the record, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Joseph C. Gittens (herein Complainant or Complainant Gittens) is an individual who resides at 410 South 8th Street, La Crescent, Minnesota, 55947-1501.

2. Respondent Onalaska School District (herein Respondent District or the District) is a municipal employer with offices at 118 East Main Street, PO Box 429, Onalaska, Wisconsin 54650-0429.

3. Respondent Onalaska Education Association (herein OEA) is a labor organization with a mailing address of attn: Dan King, President, c/o Onalaska Middle School, 711 Quincy Street, Onalaska, Wisconsin 54650. Until the hearing, the OEA had been referred to in Complainant's pleadings and the Examiner's correspondence and rulings as the Onalaska Area Education Association (OAEA).

4. Respondent Coulee Region United Educators (herein CRUE) is a labor organization with offices at 2020 Caroline Street, La Crosse, Wisconsin 54603.

5. Respondent Wisconsin Education Association Council (herein WEAC) is a labor organization with offices at 33 Nob Hill Drive, PO Box 8033, Madison, Wisconsin 53708. Respondents OEA CRUE and WEAC are herein jointly referred to as Respondent Labor Organizations.

6. Respondent OEA is the voluntarily-recognized exclusive collective bargaining representative of a collective bargaining unit of District employes described in Recognition article of the July 1, 1993 - June 30, 1995 collective bargaining agreement between Respondents District and OEA (herein Agreement). That Agreement provides, in part, as follows:

> **ARTICLE 1 - RECOGNITION**
>
> A. The Board recognizes the Association as the official bargaining

agent on wages, hours and conditions of employment for all full-time and part-time Department of Public Instruction certificated teaching personnel including Chapter I teachers, IMC directors, librarians, guidance counselors, and school nurse, excluding summer school and substitute teachers.

. . .

C. It is also agreed and understood that teachers and nurse have the right to join or not to join any organization for their economic or professional improvement, and membership in any organization, shall not be required as a condition of employment.

. . .

ARTICLE 7 - VACANCY & TRANSFER

A. All assignments and transfers will be made only in the area of the teachers' certification.

B. Vacancy and Transfer

1. Notices of existing teaching vacancies will be posted on the official bulletin board in each school and sent to the Association as they occur or are created during the school term. During the summer vacation period, vacancy notices will be posted at the district office.

2. Such notices will contain the date of posting, a description of the position, name and location of the school, requirements of the position, name of the person to whom an application is to be returned. Postings shall be open for five (5) work days.

3. Upon posting of vacancy notice, a teacher wishing to transfer shall contact, in writing, the principals of the schools involved in the request for transfer. Upon written request from the new principal and written endorsement by the present principal, the superintendent may grant the transfer.

4. Transfer to another grade level within the district and/or school will be considered by the superintendent upon the recommendations of the principals.

5. In case of staffing a new school, a district employee desiring to fill a vacancy may apply, in writing, directly to the superintendent.

. . .

ARTICLE 21 - FAIR SHARE AGREEMENT

FAIR SHARE DUES DEDUCTION

All employees in the bargaining unit shall be required to pay, as provided in this Article, their fair share of the costs of representation by the Association. No employee shall be required to join the Association, but membership in the Association shall be available to all employees who apply, consistent with the Association's Constitution and Bylaws. . . .

A. Effective thirty (30) days after the date of the initial employment of an employee or thirty (30) days after the opening of school in the fall semester, the District shall deduct from the monthly earnings of all employees in the collective bargaining unit, except exempt employees, their fair share of the costs of representation by the Association, as provided in Section 111.70(1)(h), Wisconsin Statutes, and as certified to the District by the Association, and pay said amount to the treasurer of the Association on or before the end of the month following the month in which such deduction was made. The district will provide the Association with a list of employees from whom deductions are made with each monthly remittance to the Association.

1. For purposes of this Article, exempt employees are those employees who are members of the Association and whose dues are deducted and remitted to the Association by the District pursuant to . . . (Membership Dues Deduction), or paid to the Association in some other manner authorized by the Association. The Association shall notify the District of those employes who are exempt from the requirements of the Fair Share provision, and shall notify the District of any changes in its membership affecting the operation of the provisions of this Article. . . .

. . .

MEMBERSHIP DUES DEDUCTION

A. Upon receipt of a dues deduction authorization form signed and dated by the employee, the Board shall deduct from the employee's paycheck the amount of Association dues.

. . .

7. Each of the Respondent Labor Organizations receives an allocation from dues or fees collected on their behalf from employes in the teacher bargaining unit. Employes in the teacher bargaining unit who choose to become a member of any of the Respondent Labor Organizations thereby automatically become a member of all three.

8. On August 15, 1994, Complainant learned that the District was accepting applications for a middle school math teacher vacancy. Complainant saw a District announcement bearing a posting date of August 1, 1994, in the UW-LaCrosse placement office describing a "7th Grade Math Teacher" vacancy with an August 15, 1994 closing date for obtaining and returning application materials to the District. Complainant called the District and confirmed that applications were being accepted until 3:30 PM that day. Complainant then obtained application materials from the District office, personally obtained copies of necessary records from various locations, completed and submitted his application for employment as a math teacher prior to the District's 3:30 PM application deadline that afternoon.

9. Complainant was not offered employment by the District in response to that application. Respondent District had previously filled what had been a full-time eighth grade vacancy by granting a seventh grade teacher's request for internal transfer to that position. The District thereafter filled the resulting full-time seventh grade vacancy by granting the request for internal transfer of James Pahl who had previously been hired to begin work for the District that fall as a part-time high school math teacher after having worked for several years as a math teacher in another state. Thereafter the District filled the resulting part-time math vacancy at the High School by hiring Charles Gould, a June, 1994 math education graduate of UW-Milwaukee whose previous teaching experience consisted of student teaching at Riverside University High School in Milwaukee.

10. In accordance with Respondent District's procedures for processing bargaining unit teachers' requests for internal transfers, the above-noted internal transfer requests were reviewed and acted upon by various District agents including a screening committee consisting of the middle school principal and bargaining unit teachers selected without participation by Respondent Labor Organizations. Because the eighth and seventh grade math teacher vacancies, in turn, were filled by internal transfer, no consideration was given by Respondent District to any outside applicants in filling those vacancies.

11. There was no request for internal transfer to the half-time high school math teacher position that was vacated by Pahl's internal transfer to the seventh grade vacancy. Consistent with Respondent District's hiring procedures, the high school principal and middle school principal screened the ten applications received in response to announcement of the seventh grade math teacher vacancy and selected the three of those they rated highest on criteria of educational qualification, experience, responses to written questions, and credentials/references. Those three applicants were then personally personal interviewed by the two principals, and Gould was ultimately selected for the half-time high school math teacher vacancy. Grievant was not among the three applicants interviewed for that vacancy.

12. At the time of his August 15, 1994 application for District employment, and all times

thereafter material to this case, Complainant was neither a member of the teachers bargaining unit nor a member of any of the Respondent Labor Organizations, nor employed by a municipal employer.

13. At the time Pahl was granted the internal transfer to fill the seventh grade math vacancy noted above, Pahl was not a member of any of the Respondent Labor Organizations, but he was a member of the teacher bargaining unit with Agreement Art. 7 rights to be considered for internal transfer under the Agreement.

14. At the time Gould was hired to fill the half-time high school math vacancy noted above, he was neither a member of any of the Respondent Labor Organizations nor a member of the teacher bargaining unit.

15. Respondent District's decisions to grant the two internal transfers noted above and to hire Gould were made without knowledge about and without regard to whether the bargaining unit teachers seeking the transfers and the external applicants seeking initial hire were or were not members of Respondent Labor Organizations.

16. The District and its agents did not refuse to hire Complainant to fill the above vacancies, in whole or in part, because Complainant was not a member of any of the Respondent Labor Organizations.

17. Respondent Labor Organizations had no role in the hiring of Gould.

18. Respondent Labor Organizations had no role in the granting of the two internal transfers noted in Finding of Fact 10, above, other than OEA's role in negotiating the Agreement.

19. Article 7 of the Agreement on its face and as applied by Respondent District with regard to the internal transfers noted in Finding of Fact 10, above:

> a. did not constitute a closed shop arrangement, i.e., did not constitute an arrangement whereby the District was to fill or in fact filled vacancies only by selecting individuals who were members of Respondent Labor Organizations at the time they were being considered for selection;
>
> b. did not constitute an arrangement whereby the District was to give or in fact gave preference in selection of individuals to fill teacher bargaining unit vacancies to members of Respondent Labor Organizations over non-members of Respondent Labor Organizations; and
>
> c. did constitute an arrangement whereby preference in selection for teacher bargaining unit vacancies was to be given and was in fact given to

applicants for internal transfer who were in the District's employ in the teacher bargaining unit at the time the vacancy was being filled.

20. Neither by their negotiation of the above-noted vacancy and transfer provision nor in any other way did Respondent Labor Organizations or their agents cause the District to give preference in hiring for the above-noted teacher vacancies to members of Respondent Labor Organizations over non-members of Respondent Labor Organizations including Complainant.

21. In light of the Findings of Fact, above, the Examiner does not find it necessary to the disposition of the amended complaint to resolve the parties disputes with respect the following issues: whether Complainant met the minimum qualifications for any or all of the above-noted vacancies; and whether the District's non-selection of Grievant for any or all of the vacancies referred to in Finding of Fact 10, above, violated any rights Complainant had to freedom from age discrimination under Sec. 111.31 et seq., Stats., and with regard to teacher hiring procedures under Sec. 118.21 and 22, Stats.

22. In his amended complaint in this case, Complainant asserted that the Respondents had violated various federal and state laws. After requesting and receiving from Complainant various clarifications of various aspects of the claims asserted in the amended complaint, the Examiner advised the parties in writing that he intended to dismiss as outside the WERC's jurisdiction all but the allegations set forth in an Appendix (herein Notice Appendix) to the December 30, 1994 Notice of Hearing.

CONCLUSIONS OF LAW

1. Except for the Complainant's claims set forth in the Examiner's December 30, 1994 Notice Appendix, WERC lacks subject matter jurisdiction under MERA to decide the Complainant's claims set forth in the complaint as amended.

2. Complaint was not owed a duty of fair representation under MERA by the OEA (or by any of the Respondent Labor Organizations) as regards his August 15, 1994 application for employment by Respondent District in a teacher bargaining unit position because Complainant was not employed by the District in the teacher bargaining unit for which OEA is the exclusive representative.

3. Complainant was not at any time material to this case a "municipal employe" within the meaning of the Sec. 111.70(1)(i), Stats., definition of that term, because he was not "employed by a municipal employer" within the meaning of that definition.

4. Accordingly, Complainant, as an applicant for employment by the District in a teacher bargaining unit position was not entitled to the protections accorded to "municipal employes" and to "employes" of municipal employers in Secs. 111.70(3)(a)1 and (3)(b)2, Stats.

5. Nevertheless, under Sec. 111.70(3)(a)3, Stats., as an applicant for employment by the

District in a teacher bargaining unit position who was not then employed by the District, Complainant was protected by MERA against discrimination on account of his non-membership in the Respondent Labor Organizations, with regard to hiring for vacant teacher bargaining unit positions.

6. Under Secs. 111.70(4)(a) and 111.07(2)(a), Stats., Complainant is a "party in interest" with standing to file a complaint alleging violations of the MERA protection noted in Conclusion of Law 5, above, and the WERC has jurisdiction to adjudicate that complaint.

7. Neither the Agreement internal transfer provision nor its application in this case constituted a closed shop or other arrangement violative of Sec. 111.70(3)(a)3, Stats. or of any other provision of MERA.

8. By the acts and occurrences noted in the Findings of Fact, above, neither Respondent District nor its agents has committed any prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats., or any other provision of MERA.

9. By the acts and occurrences noted in the Findings of Fact, above, neither any of the Respondent Labor Organizations nor any of their agents has committed any prohibited practice within the meaning of Sec. 111.70(3)(b)2, Stats., or any other provision of MERA.

ORDER 1/

1. The Complainant's claims asserted in the amended complaint that were not set forth in the Examiner's December 30, 1994 Notice Appendix are hereby dismissed in all respects.

2. The Complainant's claims set forth in the Examiner's December 30, 1994 Notice Appendix are hereby dismissed in all respects.

3. Respondent Labor Organizations' request for an order requiring Complainant to pay its costs and attorney's fees in this matter is denied.

Dated at Shorewood, Wisconsin, this 30th day of June, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz /s/
Marshall L. Gratz, 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

(Continued on page 9)

1/ (Continued)

> 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. 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).

ONALASKA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING EXAMINER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PLEADINGS

The initial complaint in this matter was filed on November 2, 1994. In it, Complainant alleged that Respondents District and OEA had violated numerous federal and state laws in connection with Complainant's August, 1994 application for employment by the District as a math teacher.

Complainant amended the complaint in various respects thereafter, and provided certain clarifications of the complaint in response to requests for same from the Examiner. During the course of that correspondence, the Examiner made several rulings by letter concerning the pleadings. The Examiner granted Complainant's requests to add Respondents CRUE and WEAC but denied his requests to add an unrelated claim and parties concerning Complainant's application for employment in a different school district. The Examiner also denied Complainant's request to bifurcate the proceedings against Respondent District from those against Respondent Labor Organizations.

Based on the Complainant's pleadings and clarifications in response to the Examiner's requests, the Examiner issued the following rulings by letter dated December 30, 1994, and at the same time issued the formal Notice of Hearing with an appendix relating to the pleadings in the case. The Examiner's rulings in that case related to pleadings read as follows:

> Ruling on Request to Add Godfrey & Kahn, S.C. as Party Respondent
>
> Mr. Gittens has requested that Godfrey & Kahn, S.C. of Madison, Wisconsin be added as a party respondent.
>
> Read in the light most favorable to him, Mr. Gittens' allegations concerning Godfrey & Kahn, S.C., assert that Attorney Kirk Strang of that firm caused Onalaska District Assistant Superintendent to place a telephone call to Mr. Gittens on the afternoon of August 24, 1994, during which conversation ensued, "solely to harass" Mr. Gittens within the meaning of 47 U.S.C. Sec. 223, in response to and in retaliation for Gittens' August 23, 1994 letter to the District complaining of age discrimination. Mr. Gittens alleges that during that phone conversation on August 24, 1994, Burnet advised Mr. Gittens that Mr. Gittens' age discrimination complaint letter had been referred to Strang; and that on Strang's advice the District would hold and not release

to Mr. Gittens materials Gittens had left for consideration by the District regarding his candidacy for employment, notwithstanding Mr. Gittens' previously-communicated intent to collect that information from the District later in the week.

Mr. Gittens asserts that Sec. 111.06(1)(l), Wis. Stats., was thereby violated. That provision of the Wisconsin Employment Peace Act makes it an unfair labor practice for a private sector employer or its agents "to commit a crime or misdemeanor in connection with any controversy as to employment relations." Mr. Gittens alleges no facts which could arguably support a finding that either the Onalaska District or Godfrey & Kahn, S.C. is an "employer" with respect to Mr. Gittens within the meaning of the Wisconsin Employment Peace Act definition set forth in Sec. 111.03(7), Wis. Stats.

MERA contains no language paralleling that in Sec. 111.06(1)(l). Mr. Gittens' statutory protections against the alleged retaliation by the District or its agents on account of Mr. Gittens' letter complaining about age discrimination are not found in Sec. 111.70(3)(a)1 or anywhere else in MERA.

For those reasons, Mr. Gittens' pleadings, when read in the light most favorable to him, do not state a claim against Godfrey & Kahn, S.C. of Madison, Wisconsin, that is within the jurisdiction of the WERC to hear and decide. Accordingly, Mr. Gittens' request to add that firm as a party respondent in this matter is denied.

Specification of Matters Asserted that are within the WERC's Jurisdiction

Section 227.44, Wis. Stats., requires that the notice of hearing in an administrative agency adjudication of this kind state both "the legal authority and jurisdiction under which the hearing is to be held" and "a short and plain statement of the matters asserted."

The legal authority and jurisdiction under which the MERA prohibited practice proceedings are held is Sec. 111.70(3) which substantively defines prohibited practices and Sec. 111.70(4)(a) which defines the procedure in such cases as that set forth in Sec. 111.07, Wis. Stats.

The Sec. 111.70(3) violations alleged in Mr. Gittens' pleadings are violations of Secs. 111.70(3)(a)1 and (3)(b)1.

Mr. Gittens' pleadings also refer to or allege violations of various federal labor relations laws, various federal and state laws proscribing age

discrimination, and portions of ch. 118 dealing with individual teacher contracts of employment. The federal labor relations statutes and cases to which Mr. Gittens refers simply do not apply to the public sector employment setting at issue in this case, though they may be persuasive by analogy. Section 111.70(3)(a)1 protects municipal employes from municipal employer interference, restraint or coercion in the exercise of their rights guaranteed by Sec. 111.70(2) rights, but it does not protect municipal employes from municipal employer violations of the age discrimination provisions of the Wisconsin Fair Employment Act (WFEA) in Sec. 111.31 et. seq or from violations of the requirements of ch. 118 regarding individual teacher contracts. The Commission has long held that the "employe's legal rights" from which Section 111.70(3)(b)1 protects municipal employes from concerted municipal employe (e.g., labor organization) coercion or intimidation does not include

> the exercise of legal rights other than those specifically set out in the rights section of [MERA] unless it can be said that the legal rights sought to be protected are rights established by other provisions of the statute or the employe or employes who are allegedly interfering with the employe's other legal rights (such as the right of free speech) are motivated by the employe's exercise of his rights under the statute.

E.g., Monona Grove School District, Dec. No. 20700-G (WERC, 1986); Racine Unified School District, Dec. No. 20736-A (Shaw, 7/84), aff'd by operation of law, Dec. No. 20736 (WERC, 10/84). Racine Policemen's Professional and Benevolent Corporation, Dec. No. 12637 (Fleischli, 4/74), aff'd by operation of law, Dec. No. 12637-A (WERC, 5/74). Therefore, alleged WFEA age discrimination or alleged violations of ch. 118 are matters conceivably within the WERC's jurisdiction with regard to Mr. Gittens claims against the Respondent labor organizations only to the extent that he asserts that the Respondent labor organizations have restrained or coerced Mr. Gittens in the enjoyment of those rights and that they were motivated to do so by Mr. Gittens exercise of his rights under MERA.

The requisite short and plain statement of the matters asserted would not be provided by incorporating by reference the lengthy and complex pleadings filed to date in this matter by Mr. Gittens. Moreover, for reasons noted above, Mr. Gittens' pleadings assert a number of claims which are beyond the "legal authority and jurisdiction" of the WERC to hear and decide. Accordingly, the Examiner has set forth in the enclosed Notice of Hearing a short and plain statement of the matters asserted in Mr. Gittens' pleadings that

appear to be arguably within the legal authority and jurisdiction of the WERC. It is those matters that the Respondents are called upon to answer. Except as otherwise may be determined on the motion of a party or by notice and/or order of the hearing examiner or the Commission, it is the Examiner's intent to dismiss the balance of the matters asserted in Mr. Gittens pleadings as outside the legal authority and jurisdiction of the WERC to hear and decide.

The Notice Appendix that the Examiner attached to the December 30, 1994 Notice of Hearing read as follows:

Appendix to Notice of Hearing

Statement of Matters Asserted in Amended Complaint
that are Arguably Within the Jurisdiction of the WERC

1. Complainant Joseph C. Gittens is an individual who resides at 410 South 8th Street, La Crescent, Minnesota, 55947-1501.

2. Respondent Onalaska School District (herein the District) is a municipal employer with offices at 118 East Main Street, PO Box 429, Onalaska, WI 54650-0429.

3. Respondent Onalaska Area Education Association (herein OAEA) is a labor organization with a mailing address of attn: Dan King, President, c/o Onalaska Middle School, 711 Quincy Street, Onalaska, WI 54650.

4. Respondent Coulee Region United Educators (herein CRUE) is a labor organization with offices at 2020 Caroline Street, La Crosse, WI 54603.

5. Respondent Wisconsin Education Association Council (herein WEAC) is a labor organization with offices at 33 Nob Hill Drive, PO Box 8033, Madison, WI 53708.

6. Respondents OAEA, CRUE and WEAC (herein jointly referred to as Respondent labor organizations) are the exclusive representative of a collective bargaining unit of District employes including teachers (herein referred to as the teacher bargaining unit).

7. Each of the Respondent labor organizations receives an allocation from dues or fees collected on their behalf from employes in the teacher bargaining unit.

8. On or about August 15, 1994, the District had a 7th grade math

instructor vacancy. That position is within the teachers bargaining unit.

9. Complainant learned of that vacancy from information he obtained at the University of Wisconsin-La Crosse placement service.

10. On August 15, 1994, Complainant drove to the District's office in Onalaska for a copy of application materials. Complainant was advised by a District employe that the deadline for all application materials was 3:30 PM that day. Complainant then drove to Winona State University

where he obtained a set of undergraduate credentials to submit as part of his application. Complainant then drove to his residence, completed the application materials, drove to the District and turned in those materials to a District employe at about 3:00 PM that day.

11. As an applicant for a teacher bargaining unit position, Complainant was a municipal employe with respect to the District.

12. As an applicant for a teacher bargaining unit position, Complaint was owed a duty of fair representation under MERA by Respondent labor organizations.

13. On Monday morning, August 22, 1994, Complainant was advised by a District employe that: the 7th grade position was taken by an 8th grade math teacher; the resulting eighth grade vacancy was taken by a part-time math instructor at the District's High School; and the resulting part-time math vacancy at the High School and was being interviewed for that afternoon.

14. Complainant met the minimum qualifications for each of the above-noted vacancies.

15. Complainant was not hired by the District and its agents for any of those vacancies.

16. The individuals selected by the District to fill the above vacancies were all members of the teacher bargaining unit and members of Respondent labor organizations.

17. Complainant was and is neither a member of the teachers bargaining unit nor a member of any of the Respondent labor organizations.

18. The District and its agents refused to hire Complainant to fill the above vacancies, at least in part, because Complainant was not a member of any of the Respondent labor organizations.

19. At the time the District made the selections for the vacancies noted above, the District and Respondent labor organizations were parties to a closed shop agreement or closed shop arrangement whereby the District gives preference in hiring for teacher vacancies to members of Respondent labor organizations over non-members of Respondent labor organizations.

20. By means of the above-noted closed shop agreement or closed

shop arrangement or by other means not known to Complainant, Respondent labor organizations and their agents caused the District to give preference in hiring for the above-noted teacher vacancies to members of Respondent labor organizations over non-members of Respondent labor organizations including Complainant.

21. By means of the above-noted closed shop agreement or closed shop arrangement or by other means not known to Complainant, Respondent labor organizations and their agents caused the District to violate Complainant's Sec. 111.31 et seq. rights to freedom from age discrimination and Complainant's Sec. 118.21 and 22 rights regarding teacher hiring procedures. Respondent labor organizations and their agents were motivated to do so, at least in part, by Complainant's exercise of Sec. 111.70(2) rights including his right to refrain from membership in Respondent labor organizations.

22. By the acts and occurrences noted above and particularly by those noted in 15, 16, 18 and 19, above, the District and its agents have interfered with, restrained and coerced Complainant in the exercise of his Sec. 111.70(2) rights and have therefore committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, Wis. Stats.

23. By the acts and occurrences noted above and particularly by those noted in 20 and 21, above, each of the Respondent labor organizations and their agents have violated their MERA duty to fairly represent Complainant and have otherwise restrained or coerced Complainant in the enjoyment of his legal rights within the meaning of Sec. 111.70(3)(b)1, Wis. Stats., and have therefore committed prohibited practices within the meaning of that Section.

24. By way of remedy for the prohibited practices noted above, Complainant requests an order requiring Respondent District and each of the Respondent labor organizations to immediately: make Complainant whole for all pay (including back pay, front pay and fringe benefits) Complainant lost by reason of the above-noted prohibited practices committed by the Respondents; pay Complainant additional exemplary damages; pay Complainant's attorney's/representative's fees and Complainant's costs associated with the filing and processing of the complaint in this matter. Complainant requests that the liability of each Respondent be apportioned according to the damage caused Complainant by each of them.

In its answer, Respondent District denied the existence of a "closed shop agreement or closed

shop arrangement," denied "that it engaged in any discriminatory conduct towards Complainant whatsoever," denied that it had committed the prohibited practices alleged in the Notice Appendix and denied that Complainant is entitled to any relief whatsoever in this proceeding. Respondent District asserted, as affirmative defenses, that Complainant's allegations fail to state a claim upon which relief can be granted and are not within the WERC's jurisdiction.

In their answer, Respondent Labor Organizations denied several of the Notice Appendix allegations and denied committing the prohibited practices alleged therein. By way of affirmative defenses, Respondent Labor Organizations asserted: that they owe Complainant no duty to fairly represent because he is neither a member of the teachers bargaining unit at Onalaska School District, nor a member of any of the Respondent Labor Organizations; that the Agreement providing that vacancies are first offered to existing members of the collective bargaining unit was lawfully negotiated by Respondents OEA and District and is a legal collective bargaining agreement pursuant to Wisconsin law; and that the amended complaint is frivolous with no merit and thus entitles Respondents to an order that Complainant pay their attorney's fees and costs and provide them any and all other appropriate relief as ordered by the WERC. Respondent Labor Organizations filed with their answer a motion to dismiss the amended complaint in its entirety on the grounds that WERC has no jurisdiction over a non-municipal employe who is not a member of the bargaining unit and that Respondents do not have a duty to fairly represent Complainant because he is neither in the bargaining unit nor a member of any of the Respondent Labor Organizations.

Thereafter, the Examiner issued another letter ruling bearing on the pleadings, as follows:

> Ruling on Request to Add
> Wisconsin Association of School Boards as a Party Respondent
>
> Mr. Gittens has requested that Wisconsin Association of School Boards of Madison, Wisconsin (WASB) be added as a party respondent.
>
> In support of that request, Mr. Gittens' letter (with underlining and brackets as in the original) states,
>
> > The School District per se as defined in Subchapter IV Municipal Employment Relations 111.70 Municipal Employment (d) ". . . one or more individuals labor organizations, associations, corporations or legal representatives", Respondent labor organizations and their agents [WASB, WEAC, CRUE, OAEA] were motivated to do so, at least in part, by complainant's exercise of Sec. 111.70(2) rights including his right to refrain from membership in, at least some of, the Respondent labor organizations."

> Read in the light most favorable to Mr. Gittens, the foregoing contentions taken together with the other pleadings filed by Mr. Gittens in this case do not allege how, if at all, Wisconsin Association of School Boards had anything to do with Mr. Gittens' nonselection for the Onalaska teacher vacancies that is the focus of the Case 22 complaint. Therefore, the Examiner concludes that WASB is not a necessary party for the proper adjudication of Mr. Gittens' Case 22 complaint. For that reason, and because adding WASB as a party now would necessitate rescheduling next week's hearing in order to comply with the 10-day notice requirements in Sec. 111.07(2)(a), Wis. Stats, Mr. Gittens' request to add WASB as a party respondent in this case is denied.

At the outset of the hearing, all Respondents moved for dismissal on the bases previously set forth in their above-noted responses to the Complainants' allegations as set forth in the Notice Appendix. Respondent Labor Organizations submitted a memorandum in support of its motion. The Examiner took the motions under advisement until he had the benefit of hearing the parties' evidence and closing arguments in the matter.

Also at the hearing, Complainant supplemented his testimony by presenting a document titled "Evidence file" in which, among other things, he expressly asserted that the conduct alleged in the Notice Appendix also constituted a violation of Sec. 111.70(3)(a)3, Stats. (Exh. 1 at 8). That section of MERA was not specified in the Notice Appendix because Complainant did not list it in his response to the Examiner's correspondence asking which sections of MERA Complainant was claiming had been violated. Nevertheless, the substantive allegations in the Appendix put the Respondents on fair notice that discrimination within the meaning of Sec. 111.70(3)(a)3, Stats., was and is at issue in this case. The discussion of discrimination at the hearing (tr. 14 and 45) also makes it clear that Respondents were fairly on notice that Sec. 111.70(3)(a)3, Stats. is at issue in this case.

Also at the hearing, the Complainant requested that the relief request in the Appendix be amended to include an order that the District make Complainant whole for other employment opportunities he allegedly lost on account of the District's refusal upon Complainant's request to return to him the documents he had submitted to Respondent District as his application packet. The Examiner sustained Respondents' objections to that amendment based on lack of notice of an assertion of loss of employment opportunity on account of a failure to return the documents. While the failure to return the documents was a matter addressed in the pleadings submitted by Complainant in this case, it appeared only to be a claim that was evidence of the District's posture toward the complainant as it related to the District's refusal to employ him in the Onalaska District vacancies. Therefore, the Examiner concluded, "It really did not come through to me in the documents that were earlier submitted that there was a claim for consequent harm arising out of that, that's unrelated to the Onalaska District vacancies." (tr. 7-8.)

In addition to the rulings noted above concerning the nature and scope of the pleadings, there were several other procedural issues on which rulings were made prior to, during and after the hearing. No attempt is made to summarize all of those additional rulings. However, because one of those rulings is noted in the Preface to this decision -- to wit, the Examiner's receipt into the record of Complainant's Exhibit 19 over Respondent District's objections -- the Examiner's reasons for granting that request are set forth below:

Ruling on Complainant's Request
to Make DPI Document Part of the Record

. . .

In effect, Mr. Gittens is requesting that the record be reopened to permit receipt into evidence of the enclosed one-page document which I will mark for identification as Exhibit 19. The District, by Mr. Albrecht's February 7, 1995 letter, opposes and objects to the introduction of that document into evidence on the grounds that the record has been closed such that the introduction of further evidence is untimely. The controlling provision of the Commission's rules is Ch. ERC 10.19, WIS. ADM. CODE, which provides in pertinent part that "The hearing may be reopened on good cause shown."

The Complainant's request to reopen the record for receipt of the document into evidence is granted for the following reasons.

Uncontroverted evidence adduced at the January 24, 1995 hearing established that as of that date Mr. Gittens had applied for DPI renewal of his expired teaching license but had not yet received it from DPI. [tr.83-84, 107-8]. Mr. Gittens therefore could not have presented the document at the hearing.

He could have formally requested during the hearing that the record be held open for receipt of the document when he received it from DPI. However, in the Examiner's opinion, it is not appropriate to hold a non-lawyer to that high a standard of hearing practice diligence. Compare, Cudahy Public Library, Dec. No. 26931-A (Gratz, 11/91) (Complainant's motion to reopen record denied because Complainant's attorney had opportunities but failed either to present relevant evidence at hearing or to request that hearing record be held open to permit Complainants to discover additional evidence).

Accordingly, the Examiner concludes that good cause has been shown for reopening the record to permit Mr. Gittens to offer the document into evidence.

> Because the document is arguably relevant to the allegation that Mr. Gittens met the minimum qualifications for each of the District teaching vacancies at issue, and because there is no objection to its authenticity, the Examiner finds it appropriate to receive the enclosed Exhibit 19 into evidence as a part of the record in this case.
>
> If any party-Respondent intends to request an opportunity to reopen the record to offer additional evidence on account of this ruling, it should do so promptly.

POSITIONS OF THE PARTIES

Complainant's Position

At the hearing, Complainant asserted that the Respondents had committed the MERA prohibited practices as set forth in the Examiner's December 30, 1994 Notice Appendix. In Exhibit 1 and his related testimony submitted at the hearing (tr.45), Complainant cited Sec. 111.70(3)(a)3, Stats., in further support of his position, noting that it makes it a prohibited practice for a municipal employer "[t]o encourage or discourage membership in any labor organization by discrimination in regard to hiring. . .".

Complainant asserts that as an applicant for employment in the teacher bargaining unit of employes of a municipal employer, Complainant is protected from discrimination by the Respondents with regard to hire by the District. Complainant also asserts that as an applicant for such employment, Respondent Labor Organizations owe Complainant the same MERA duty of fair representation as they owed to the employes in the teacher bargaining unit.

Complainant asserts that by negotiating and applying the Agreement in a manner that granted existing bargaining unit employes a preference for vacant positions over outside applicants for bargaining unit positions, the Respondents have all discriminated in favor of members of Respondent Labor Organizations and against Complainant (who was not a member of Respondent Labor Organizations) as regards hiring for the positions described in Finding of Fact 10. Complainant also asserts that Respondent Labor Organizations have thereby violated their duty to fairly represent Complainant.

At the hearing Complainant requested the relief described in the Notice Appendix. He also stated that, in addition, the District should be ordered to offer the Complainant a teaching position equivalent to those that it unlawfully failed to offer him in August of 1994, with Complainant's back pay in the matter not contingent on his acceptance of the offer of employment.

Complainant has cited numerous other legal authorities, state and federal, in support of his

position, including Phelps Dodge v. NLRB, 313 U.S. 177, 8 LRRM 439 (1941) regarding discrimination with regard to hire, and Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967) and City of Madison Joint School District No. 8 v. WERC, 69 Wis 2d. 200 (1975) with regard to the duty of fair representation. At the hearing Complainant argued that the District's reliance on Milwaukee Board of School Directors, Dec. No. 25608-A (Jones, 8/88) was misplaced because, unlike Complainant, the job applicant in that case had been employed by the Milwaukee district as a principal before he applied for employment in that district as a teacher.

Respondent District's Position

Respondent District renews its motion for dismissal on the grounds that WERC lacks jurisdiction of the subject matter of the amended complaint and that Respondent Labor Organizations owe Complainant no duty of fair representation under MERA. They contend that because as a job applicant, Complainant was not a "municipal employe" under the Sec. 111.70(i), Stats., definition, and hence did not enjoy either the rights of municipal employes defined in Sec. 111.70(2) MERA or MERA protection from prohibited practices defined in Sec. 111.70(3), Stats. The District argues that in Milwaukee Board of School Directors, above, the examiner dismissed a complaint of prohibited practices for lack of jurisdiction on the grounds that, as an applicant for a vacant teaching position, the complainant (who also had been a former principal in the Milwaukee District), was not a "municipal employe" protected by Sec. 111.70(3)(a)1, 2 and 3, Stats.

In the alternative, Respondent District asserts that the amended complaint should be dismissed for lack of merit. Complainant has not proven, as was his burden, that Respondent District refused him employment in whole or in part because he was not a member of the Respondent Labor Organizations. On the contrary, the District has proven that it filled the vacancies in question without knowledge or consideration of whether an employer "[t]o encourage or discourage membership in any labor organization by discrimination in regard yone involved was or was not a member of the Respondent Labor Organizations. The Agreement and the District's application of it in this case gave a preference only to individuals already employed by the District, without regard to whether they are or are not a member of the OEA or any other labor organization, and the Agreement fair share language expressly provides that no employe shall be required to join the OEA as a condition of employment. The evidence shows that neither Pahl nor Gould had applied for membership in any of the Respondent Labor Organizations when they were respectively selected by the District for the full-time seventh grade and half-time high school math vacancies involved in this case. The evidence shows that the District had legitimate, non-discriminatory reasons for not hiring Complainant. Finally, Respondent District asserts that the merits of Complainant's assertions that the District has acted unlawfully should also be assessed in the context that, on cross-examination, Complainant testified that it is his "normal" procedure when he is denied employment to initiate legal proceedings against the employer involved and that he has filed in excess of ten such proceedings in various forums.

Respondent Labor Organizations' Position

Respondent Labor Organizations reassert their motion to dismiss on the grounds that WERC lacks jurisdiction of the subject matter of the amended complaint and that MERA imposes no duty

of fair representation upon them with respect to Complainant. They argue, that, as an applicant for a teaching position in the District, Complainant was not a "municipal employe" within the meaning of MERA, citing, Milwaukee Board of School Directors, above, and that Complainant therefore lacks standing to bring a prohibited practices complaint under Sec. 111.70, Stats. Respondent Labor Organizations argue that the MERA duty of fair representation does not extend to Complainant because he was neither an employe of the District in the teacher bargaining unit nor a member of any of the Respondent Labor Organizations at the time he applied for District employment in August of 1994, citing, Vaca v. Sipes, above, and Mahnke v. WERC, 66 Wis.2d 524 (1974).

In the alternative, Respondent Labor Organizations assert that the amended complaint should be dismissed for lack of merit. In that regard they argue that the record establishes that none of the Respondent Labor Organizations played any role in the filling of the vacancies in question in this case, so that they could not have unlawfully affected whom the District selected to fill those vacancies. They also argue that Complainant has not shown that Respondent Labor Organizations engaged in arbitrary, discriminatory or bad faith conduct in connection with Complainant's application for District employment. Indeed, the evidence shows that Respondent Labor Organizations had no knowledge of Complainant's application before the District filled the vacancies in question and that Complainant did not ask any of the Respondent Labor Organizations for any kind of representation or assistance in connection with his application for District employment. They argue that there is therefore no basis in the record for finding that Respondent Labor Organizations committed any of the prohibited practices alleged by Complainant in this case.

DISCUSSION

I. Complainant's Claims Other Than Those Set Forth In The Notice Appendix

The Examiner's bases for dismissing Complainant's claims other than those set forth in the Examiner's December 30, 1994 Notice Appendix are adequately set forth in the December 30, 1994 letter ruling quoted above and need not be repeated or supplemented here.

II. Complainant's Claims Set Forth in the Notice Appendix

Simply stated, there is no factual basis in the record on which to conclude that any of the Respondents committed any prohibited practices within the meaning of MERA by agreeing to and applying Agreement Art. 7 or by the other acts and occurrences described in the Notice Appendix. Under Secs. 111.70(4)(a) and 111.07(3), Stats., Complainant bears the initial burden of proof of facts constituting a prohibited practice "by a clear and satisfactory preponderance of the evidence." He has not sustained that burden in any respect in this case.

Complainant has proven only that, in accordance with the agreement negotiated between Respondents District and OEA, the District gave first and preferential consideration in filling teacher bargaining unit vacancies to individuals who had already been hired and were in the employ of the District in teacher bargaining unit positions. Such provisions are not unlawful under MERA. E.g., Milwaukee County, Dec. Nos. 26247 and 26248 (WERC, 11/89). On the contrary, they have

been held to be a mandatory subject of bargaining between municipal employers and exclusive representatives under MERA. E.g., Id.; Sheboygan County Handicapped Children's Education Board, Dec. No. 16843 (WERC 2/79); and Milwaukee Board of School Directors, Dec. No. 20093-B (WERC, 8/83) The language of the instant Agreement, on its face, and as applied, gives no preference to members of Complainant Labor Organizations over non-members of those organizations. The Agreement Recognition and Fair Share provisions expressly acknowledge the rights of bargaining unit teachers to choose whether to join or not join organizations such as Respondent Labor Organizations without affecting their employment status with the District. Even if Complainant had proven that a substantial majority of the teacher bargaining unit are members of the Respondent Organizations, that additional fact would not be sufficient to render the instant provisions unlawful under MERA. The Commission has previously stated that determinations whether agreements providing seniority-based preferences are lawful under MERA are to be based on a reading of the language of the provisions involved, not on an assessment of whether their application is likely to more often benefit organization members or non-members. See, Racine Unified School District, Dec. No. 23380-A (WERC, 11/86) at 30-31 and Grafton School District, Dec. No. 27935 (WERC, 2/94) at Note 3 and accompanying text ("The language on its face does not create differing rights depending upon the support an individual provides to the Association Further, in our view, the question of whether the Association's supporters would in fact be the proposal's primary beneficiaries is irrelevant to a determination of whether the proposal is a mandatory subject of bargaining."). The record establishes that the District's transfer and hiring procedures gave no consideration to whether applicants for transfer or hire were or were not members of Respondent Labor Organizations. Respondent Labor Organizations played no role in either of those procedures and had no knowledge about Complainant's application for District employment until after it had been acted upon by the District.

Thus, Complainant has failed to show that Respondent District discriminated against him in regard to hiring based on his non-membership in Respondent Labor Organizations or in any other way committed a prohibited practice within the meaning of MERA by not hiring Complainant as a math teacher in August of 1994. It follows that Respondents Labor Organizations have not been shown to have caused Complainant to unlawfully so discriminate against Complainant, either by the OEA's negotiation of the Agreement or in any other way.

Because Respondent Labor Organizations affected the District's teacher transfer and hiring processes only by negotiating the lawful preferential consideration for bargaining unit applicants contained in Agreement Art. 7, there is no basis in the record for concluding that Respondent Labor Organizations coerced or intimidated Complainant in the enjoyment of any legal rights. Hence, the Examiner has found it unnecessary to make findings and conclusions regarding whether the District violated any rights Complainant had under the age discrimination provisions of Sec. 111.31 et seq., Stats., or under the teacher hiring procedures in Secs. 118.21 and 22, Stats.

There is also no factual basis in the record to support a conclusion that any of the Respondent Labor Organizations engaged in arbitrary, discriminatory or bad faith conduct with regard to

Complainant, even if it were assumed that they had some duty to fairly represent him. Respondent Labor Organizations did not know of Complainant's application until after it had been acted upon, and Complainant did not ask any of them for representation or assistance.

For those reasons, the Examiner finds no merit in Complainant's contentions that any of the Respondents has been shown to have committed any violation of any provision of MERA in this case.

The Examiner finds less persuasive some aspects of Respondents' contentions that Complainant has no standing to file, and the WERC has no jurisdiction to adjudicate any aspect of the instant complaint.

A. Applicability of Duty of Fair Representation to Job Applicant

Respondent Labor Organizations are on firm ground when they assert that none of them owed Complainant a duty of fair representation under MERA. In Mahnke v. WERC, the Wisconsin Supreme Court, described the duty of fair representation as follows:

> "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith."

66 Wis.2d 524, 531 (1975), citing, Vaca v. Sipes, above, 386 U.S. 171 at 190. Those same standards are applicable to fair representation analysis in the Wisconsin municipal sector, e.g., City of Greenfield, Dec. No 24776-C (WERC, 2/89) at 6 (Commissioner Hempe dissenting on other grounds). The federal courts have more recently restated the conclusion in Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364, 376, 115 LRRM 3641 at n.22 (1984) ("A union's statutory duty of fair representation traditionally runs only to members of its collective-bargaining unit and is co-extensive with its statutory authority to act as the exclusive representative for all the employees in the unit." None of the authorities cited by Complainant supports his contention that the statutory duty of fair representation extends to job applicants such as himself. On the contrary, where that issue has arisen previously, the contrary has been the result, see, e.g., Karo v. San Diego Symphony Orchestra Association, 762 F.2d 819, 821, 119 LRRM 2951 (CA 9, 1985) and Gray v. International Association of Heat & Frost Insulators Local 51, 416 F.2d 313, 316, 72 LRRM 2383 (CA 6, 1969).

Accordingly, the Examiner concludes that neither the OEA as exclusive representative nor any of the other Respondent Labor Organizations owed Complainant a duty of fair representation with regard to his application for District employment or for any other purpose.

B. Job Applicant as "Municipal Employe" under Sec. 111.70(1)(i)

As noted above, the Notice Appendix claims are deemed to include Complainant's assertion at the hearing in Exhibit 1 that the facts alleged in the Notice Appendix amount to a District violation of Sec. 111.70(3)(a)3 as well as of Sec. 111.70(3)(a)1, Stats. Respondents, in their Motions and

Answers, assert, essentially, that as an applicant for employment Complainant is not protected from conduct of the sort alleged in the Appendix Notice.

Respondents argue that as an applicant for employment, Complainant did not fall within the MERA definition of a "municipal employe" within the Sec. 111.70(1)(i) Stats. definition of that term:

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

They reason that because Complainant was not employed by the District he was not "employed by a municipal employer" within the meaning of that definition. Respondents further note that Sec. 111.70(3)(a)1, Stats. makes it a prohibited practice for a municipal employer . . . to interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." and that Sec. 111.70(2), Stats., in turn, reads, in part, as follows:

> RIGHTS OF MUNICIPAL EMPLOYES. Municipal 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 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. . . .

Respondents reason that because Complainant was not employed by the District he was not a municipal employe and hence did not have Sec. 111.70(2) rights. Respondents' reasoning to that point appears unassailable. The Examiner shares their conclusion that that Complainant was not a municipal employe within the meaning of MERA because he was not "employed by a municipal employer" within the meaning of Sec. 111.70(1)(i), Stats.

Complainant relies on National Labor Relations Act case law to the effect that job applicants are "employees" within the meaning of the NLRA Sec. 2(3) definition, e.g., John Hancock Mutual Life Ins. Co. v. NLRB, 191 F.2d 483 (CADC, 1951) (job applicants held within NLRA "employee" definition which "includes not only the existing employees of an employer but also in a generic sense, members of the working class." Id. at 485 N.6). That case law is not entirely persuasive as a basis on which to interpret MERA because because the NLRA "employee" definition is different and arguably broader than that in MERA. In pertinent part, the NLRA defines an employee ". . . as any employee, and shall not be limited to the employees of a particular employer, unless this subchapter specifically so states. . . ." Id. at 485, citing 29 U.S.C. Sec. 152(3). Nevertheless, the seminal NLRA case on this point Phelps Dodge Corp. v. NLRB, above, 313 U.S. 177, esp. at

191-192, 8 LRRM 439 (1941) (job applicants are protected from discrimination under the NLRA because to do otherwise would render the word "hire" meaningless in the discrimination prohibition and would be inconsistent with the underlying purposes of the Act) provides at least some persuasive guidance in terms both of labor relations policy and statutory interpretation.

C. Applicability of Sec. 111.70(3)(a)3 to Job Applicant

Respondents argue that because he was not a municipal employe, Complainant was not protected by MERA in any respect. That reasoning is persuasive with respect to Secs. 111.70(3)(a)1 and (3)(b)2, Stats., both of which expressly refer to "municipal employes" or "employes." However, that reasoning is not persuasive with regard to Sec. 111.70(3)(a)3, Stats., because that provision makes no express reference to "municipal employes" or to "employes." The provisions in question read as follows:

> Section 111.70 . . . (3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:
>
> 1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).
>
> . . .
>
> 3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement.
>
> . . .
>
> (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 the employe's legal rights, including those guaranteed in sub. (2).
>
> (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 the officer or agent on the officer's or agent's own initiative.

Respondents cite Examiner Raleigh Jones' decision in Milwaukee Board of School Directors, above, not only for the proposition that Complainant is not a municipal employe, but also for the proposition that Complainant is therefore not protected by MERA from Sec. (3)(a)3 discrimination

with regard to hiring.

Examiner Jones summarized the background of that case as follows:

> At all times pertinent to the instant matter, Complainant Munson served as the principal of an elementary school in the Milwaukee Public School district. School principals are vested with general supervision and custodianship of the school premises over which they preside. Munson resigned his employment with the District on February 27, 1987.
>
> During his employment with the District, Munson served as president of the Administrators' and supervisors' Council (ASC), an organization representing District administrators and supervisors.
>
> In his complaint initiating these procedures, the Complainant alleged that Respondent committed prohibited practices [within the meaning of Sec. 111.70(3)(a)1, 2 and 3, Stats.] by its surveillance of Complainant and coercing his resignation which interfered with the administration of the Administrators' and Supervisors' Council (ASC), but discriminating against him due to his membership in ASC and by refusing to re-employ him in a teaching or any other position due to his membership in ASC. Respondent moved the Commission to dismiss the complaint on the grounds that the Commission lacks jurisdiction over the person of Munson as complainant and ASC as an entity and also lacks jurisdiction over the subject matter of this complaint under MERA or any other portion of Chapter 111, Stats.

Dec. No. 25608-A at 3. Examiner Jones granted the motion to dismiss on the grounds that the complainant therein "is not within the coverage of the Municipal Employment Relations Act. More specifically, he concluded that because ". . . Munson is not a 'municipal employe" under MERA and [because] . . . ASC is not a 'labor organization' within the meaning of MERA, it follows that Complainant is not within the coverage of MERA . . . [and] not entitled to the protection of MERA, specifically Secs. 111.70(3)(a)1, 2 or 3, Stats." Id. at 6.

Examiner Jones' rationale for reaching those conclusions included the following:

> Complainant acknowledges that as a school principal, Munson was not a "municipal employe" within the meaning of the above provision because of his supervisory responsibilities. Complainant contends though that as a teacher and an applicant for a teaching position, he was a "municipal employe" within the meaning of MERA. The undersigned disagrees. Inasmuch as the instant complaint pertains to activities purportedly engaged in by Munson while serving as a principal, that is the only employment

> history pertinent herein. The fact that Munson may have been a teacher (and therefore a "municipal employe" under MERA) at one time does not mean he somehow became vested as a lifelong "municipal employe" under MERA. Instead, he remained a "Municipal employe" under MERA only so long as he met the definition set forth above. Likewise, the fact that Munson may now be an "applicant for a teaching position" with the MBSD is insufficient to convert him into a "municipal employe." At present, there is no employment relationship whatsoever between Munson and the MBSD; Munson severed that relationship when he resigned his position of principal in February, 1987. It is axiomatic that any employment relationship, including that governed by MERA, does not begin until a person is hired or becomes employed. Until that happens, Munson, as an applicant for a teaching position with the MBSD, stands in the same position as would any other member of the public seeking employment as a teacher with MBSD. Assuming arguendo that under certain circumstances a job applicant could be considered a "municipal employe" under MERA, such is certainly not the case here because, as previously noted, the instant complaint pertains only to activities purportedly engaged in by Munson while serving as a principal. It is therefore concluded that Munson is not a "municipal employe" within the meaning of MERA nor was he during the period of time relative to the complaint.

Id. at 5.

The Examiner finds that the holding in Milwaukee Board of School Directors, above, is not as broad as the Respondents' assert. In essence, Examiner Jones decided only that the Munson's activities as a supervisor on behalf of ASC prior to his resignation were not rendered protected by Sec. 111.70(3)(a)1, 2 or 3 of MERA just because Munson applied for District employment as a teacher. Examiner Jones expressly did not decide whether "under certain circumstances" a job applicant could be a "municipal employe" under MERA. Thus he did not determine whether in other circumstances than those before him a job applicant could be protected by Sec. 111.70(3)(a)1, 2 and/or 3, Stats. Complainant Gittens' circumstances are materially different from Munson's. Complainant Gittens claims to have been discriminated against on account of his (non)relationship to the Respondent Labor Organizations which are unquestionably "labor organizations" within the meaning of Sec. 111.70(3)(a)3, Stats, and MERA generally. In contrast, Munson claimed to have been discriminated against on account of his relationship to an organization that Examiner Jones specifically found was not a labor organization within the meaning of MERA.

More to the point in this case is the following issued by the Commission in its order denying rehearing in City of Milwaukee, Dec. No. 27975-C (WERC, 8/94):

> We have reviewed the matter and concluded that Complainant has not

> established a material error of law or fact or the existence of new evidence sufficiently strong to reverse or modify the order which could not have been previously discovered by due diligence. Thus, we have denied the petition. In doing so, we wish to emphasize that dismissal of the complaint only represents a conclusion that [individual Complainant] Benish's rights under the Municipal Employment Relations Act as a municipal employe and as an applicant for municipal employment were not violated by the conduct of Carpenter's Local 264 and the City of Milwaukee. 1/
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> ---
>
> 1/ For instance, as an applicant for employment with the City of Milwaukee, Benish was entitled to the protection of Sec. 111.70(3)(a)3, Stats., which prohibits discrimination in regard to hiring based upon a motive of encouraging or discouraging union membership. No such discrimination was established here.

In that case, Benish was an individual complainant who had alleged, among other things, that the City had violated unspecified portions of MERA by refusing to hire him on account of his having been terminated from a temporary City position less than one year before. Examiner Coleen Burns dismissed that portion of the complaint on the grounds that Complainant was not a "municipal employe" within the Sec. 111.70(1)(i), Stats., definition such that "the July 22, 1992 denial of his application for examination for Carpenter does not allege facts upon which relief can be granted under MERA." The balance of the complaint alleging unjust termination and union failure to pursue a grievance was dismissed as untimely filed under the applicable statute of limitations. Dec. No. 27975-A (Burns, 6/94).

Examiner Burns' decision was affirmed by operation of law when no petition for review was filed and no intervening order was issued within the 20-day period following issuance of her decision. Dec. No. 27975-B (WERC, 7/94)). Complainant then petitioned the Commission for rehearing which the Commission denied for the reasons quoted above.

The Commission's above-quoted passage unequivocally states that "as an applicant for employment, Benish was entitled to the protection of Sec. 111.70(3)(a)3, Stats., which prohibits discrimination in regard to hiring based upon a motive of encouraging or discouraging union membership." In the related text, the Commission emphasized that "dismissal of the complaint only represents a conclusion that Benish's rights under the Municipal Employment Relations Act as a municipal employe and as an applicant for municipal employment were not violated by the conduct of Carpenter's Local 264 and the City of Milwaukee." Taken together the footnote and text make it clear that the Commission concluded that as an applicant for municipal employment, Benish had rights under MERA -- which rights included the protection of Sec 111.70(3)(a)3, Stats., -- but that Benish's rights in those regards were not violated on the facts of the case. It is not clear what other MERA rights, if any, the Commission considered Benish to have as an applicant for

City employment. However, the Commission's reference to Benish's rights "as a municipal employe" appear to refer to the portion of his complaint concerning his termination from City employment rather than to his claim concerning the City's denial of his subsequent application for City employment.

Thus, the Commission appears clearly to have concluded in City of Milwaukee that a job applicant is protected by MERA from Sec. 111.70(3)(a)3, Stats. The language of Sec. 111.70(3)(a)3, Stats., supports the Commission's conclusion to that effect. Sec. 111.70(3)(a)3, unlike various other portions of MERA, makes no reference to "municipal employes" or to "employes." To hold that Sec. 111.70(3)(a)3 does not protect an applicant from such discrimination would render the word "hiring" in that provision meaningless, making that an interpretation to be avoided if possible. Such an interpretation also would render MERA ineffective in preventing municipal employers from favoring or disfavoring applicants in the hiring process because of their membership/non-membership in or attitudes about labor organizations. It would seem inconsistent with the underlying purposes of MERA, including the emphasis on employe choice embodied in the Sec. 111.70(6), Stats. "Declaration of Policy," (". . . it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice") to protect individuals once hired from such discrimination in relation to labor organizations but to permit unfettered discrimination of that kind by municipal employers in the process of hiring those individuals.

Thus, to conclude that MERA does not protect job applicants even from Sec. 111.70(3)(a)3, Stats., discrimination, would be contrary to the Commission's decision in City of Milwaukee, above, contrary to the language of the statute with its express reference to "hiring", and contrary to the underlying purposes of MERA. The Examiner therefore concludes, instead, that even though Complainant is not a "municipal employe," Sec. 111.70(3)(a)3, Stats., protects him as an applicant for District employment from discrimination regarding hiring based upon a motive of encouraging or discouraging union membership. Id. at 2. It follows that under Secs. 111.70(4)(a) and 111.07(2)(a), Stats., he is a "party in interest" with standing to complain that Respondent District's refusal to hire him violated Sec. 111.70(3)(a)3, Stats., and the WERC has jurisdiction to adjudicate that complaint and to grant Complainant relief if and as appropriate.

As noted above, however, the Examiner has found no factual support in the record for the Sec. 111.70(3)(a)3, Stats., discrimination aspects of the instant complaint. Moreover, even if Complainant was somehow deemed a municipal employe under MERA, he has failed to prove that any of the Respondents violated any of the rights and protections extended by MERA to municipal employes.

Accordingly, the amended Complaint has been dismissed in all respects.

III. Respondent Labor Organizations' Request for Costs and Attorney's Fees

As noted above, Respondent Labor Organizations requested in their answer that Complainant be ordered to pay their costs and attorneys fees because the complaint was frivolous.

The circumstances in which the WERC grants such requests are quite narrow. See, e.g., Wisconsin Dells, Dec. No. 25997-C (WERC, 8/90) and Madison Metropolitan School District, Dec. No. 16471-B (WERC, 5/81) (position taken must be "frivolous," not merely "debatable"). The Examiner is not persuaded that the instant complaint falls within that narrow range, all things considered.

The fact that Complainant represented himself in this matter is a factor that argues for giving him considerable leeway in this regard. On the other hand, Complainant's testimony that he has filed "[c]onceivably a lot more than ten" complaints in other forums against Respondent District and others (tr.78) and that threatening and initiating legal proceedings is his "normal procedure" when he questions the validity of his not being offered employment for which he applies (tr.77) are countervailing considerations in that regard. Nevertheless, especially because this appears to be the first WERC examiner decision of its kind issued with respect to Complainant, Complainant's litigious history does not render this case such an abuse of the WERC's complaint process as would warrant the requested order for him to pay Respondent Labor Organizations costs and attorneys fees.

Dated at Shorewood, Wisconsin, this 30th day of June, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz /s/
Marshall L. Gratz, Examiner