

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOSEPH GITTENS,

Complainant,

vs.

JANESVILLE SCHOOL DISTRICT,

Respondent.

Case 47

No. 51895 MP-2969

Decision No. 28288-C

Appearances:

Mr. Joseph Gittens, 410 South Eighth Street, LaCrescent, Minnesota 55947-1501, for himself.

Nowlan & Mouat, Attorneys at Law, P.O. Box 8100, Janesville, Wisconsin 53545-8100, by Mr. Robert G. Krohn, for the District.

Lathrop & Clark, Attorneys at Law, 122 West Washington Avenue, Madison, Wisconsin 53701, by Ms. Malina R.P. Fischer and Mr. Michael J. Julka, for the Wisconsin Association of School Boards.

ORDER DENYING PRE-HEARING MOTION TO DISMISS

Joseph Gittens, (herein, "Complainant"), on December 5, 1994 filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission (herein, "Commission"), in which he alleged Janesville School District (herein, "District") had committed prohibited practices within the meaning of Chapter 111, Stats. On January 19, 1995, the Commission appointed Jane B. Buffett, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07(5), Stats. On February 1, 1995, the District filed a motion to dismiss with supporting affidavit. On February 6, 1995, Complainant moved to amend the complaint to add the Wisconsin Association of School Boards (herein "WASB") as Respondent. On February 8, 1995, said motion was served on WASB. On February 20, 1994, WASB filed a motion that Complainant be ordered to make the complaint more definite and certain. On February 22, 1995, the Examiner found WASB's motion untimely, and denied it. On March 1, 1995, WASB filed a motion for reconsideration of its motion. On March 2, 1995, the Examiner affirmed her earlier denial of WASB's motion. On March 17, 1995, WASB filed a motion to dismiss with supporting memorandum. On May 9, 1995, Complainant responded to WASB's motion.

No. 28288-C

The Examiner, having considered the arguments of the parties, and being fully advised in the premises, makes and issues the following Order.

ORDER

The pre-hearing motion to dismiss is denied.

Dated at Madison, Wisconsin this 18th day of May, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett /s/
Jane B. Buffett, Examiner

JANESVILLE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER DENYING
PRE-HEARING MOTION TO DISMISS

BACKGROUND

Complainant applied for a position with the District as Local Vocational Education Coordinator and was not awarded the position. He filed a complaint of prohibited practices with the Commission alleging that the District failed to hire him because he was not a member of a labor organization, because of his age, and in violation of school district hiring procedures regulated by Sec. 118.21 and 22, Stats. In an amended complaint, Complainant seeks to add the Wisconsin Association of School Boards as Respondent, and alleges that the District and WASB are labor organizations.

The District and WASB have filed pre-hearing motions to dismiss which are the subject of this Order and accompanying Memorandum.

POSITIONS OF THE PARTIES

A. COMPLAINANT

The Complainant argues that the term "labor organization" covers those Respondents in the complaint, thereby disputing WASB's argument that it cannot be added as a Respondent to this claim.

B. DISTRICT

The District asserts that the complaint does not state any violations of Sec. 111.70, Stats. It asserts Complainant is not now nor ever has been an employe of the District. It asserts the position for which Complainant applied was not a bargaining unit position, and Complainant did not have the license required for the position.

C. WASB

The Wisconsin Association of School Boards asserts the amended complaint should be dismissed as to itself because it is neither a municipal employe nor a labor organization. It further asserts the complaint must be dismissed because the Complainant is not a municipal employe, but only an applicant for a position. Finally, it argues the Commission lacks jurisdiction over the age discrimination claim and the claimed violation of Sec. 118.21 & 22, Stats.

DISCUSSION

A pre-hearing motion to dismiss can be granted only if the facts alleged in the complaint, assumed to be true, would fail to make out a violation of MERA. This standard has been stated:

... an examiner has the power to grant a motion to dismiss a complaint, and thereby deny a hearing to a Complainant, if the complainant fails to raise a genuine issue of fact or law. Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss, the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged, would the complainant be entitled to relief. 1/

The allegations of the complaint fall into three categories: one, allegations regarding the authority of the school board and the District administration pursuant to Sec. 118.21 & 22, Stats.; two, allegations of age discrimination pursuant to Sec. 111.31 et. seq. Stats, the Wisconsin Fair Employment Act (herein, WFEA), and, three, allegations of violations of the Municipal Employment Relations Act (herein, MERA). The proposed amendment states that the Respondents maintain a "closed shop" and violated MERA by failing to recommend him for the vacancy because of his exercise of his rights under MERA to refrain from membership in a labor organization.

A. Complainant's Employee Status

WASB's argument that Complainant lacks standing to bring this case must be rejected. WASB cites Milwaukee Board of School Directors 2/ for the proposition that an applicant is not a municipal employe within the meaning of MERA. Since the Examiner's decision in that case was not appealed, the Commission did not have opportunity to review the question of employe status. In a later case, City of Milwaukee, 3/ the Commission stated that an applicant is an employe within the meaning of MERA. The Commission did not elaborate its rationale, but the U.S. Supreme Court, in Phelps Dodge v. N.L.R.B. 4/ found that protection of the right to form and support labor organizations must include applicants if it is to have the desired effect on labor relations. It stated:

1/ Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 15915-B (Hornstra with final authority for WERC, 12/77)

2/ Dec. No. 25608-A (Jones, 8/88), aff'd by operation of law. Dec. No. 25608-B (WERC, 9/88).

3/ Dec. No. 27975-C, (WERC, 8/94).

4/ 313 US 177, 8 LRRM 439, (1941).

Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. 5/

Since Complainant had employe status pursuant to MERA by his being an applicant, the Complainant has legal standing and the motion to dismiss the complaint on grounds of legal standing must be denied.

B. Alleged Violation of Sec. 111.31 et. seq. and Sec. 118.21 & 22, Stats.

Complainant alleges that the District and WASB discriminated against him on the basis of age in violation of Sec. 111.31 et. seq., commonly referred to as the Wisconsin Fair Employment Act, and violated his rights pursuant to Sec. 118.21 & 22, Stats.

Section 111.31(3)(a)1, Stats., which governs the conduct of employers, 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)." Subsection (2) provides:

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. . .

These rights are the heart and soul of Chapter 111, Stats. The Commission must guard these rights, but it has no jurisdiction to determine violations by employers of statutes other than MERA. This jurisdictional limit was made clear by the Commission in Milwaukee Public Schools. 6/

. . . MERA was not enacted to grant the Commission an unlimited authority to generally oversee an employer's employment relations decisions. Rather, MERA grants the Commission a limited authority to review contested cases raising issues of employe exercise of "lawful, concerted activities for the purpose of collective bargaining

5/ Ibid. LRRM at 441, 442.

6/ Dec. No. 20005-B, (WERC, 2/84) at 8.

or other mutual aid or protection."

Therefore, if the complaint merely claims that the District as employer violated WFEA and Sec. 118.21 and 22, Stats., that part of the complaint would have to be dismissed.

The proposed amendment to the complaint refers to the District and WASB as labor organizations. WASB denies it is a labor organization and that is a fact to be determined by the evidence. If the Respondents were found to be labor organizations, their conduct would then be regulated by Sec. 111.70(3)(b) which provides:

(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). (emphasis added)

The term "legal rights" contrasts with the term used in Sec. 111.70 (3)(a)1 which only refers to "rights guaranteed in subs. (2)."

In analyzing the significance of this difference between the two subsections, the Examiner in Racine Policemen's Professional and Benevolent Corporation 7/, cited with approval by the Commission in a subsequent case 8/, reviewed the language and legislative history of this subsection of the statute. He concluded that Sec. 111.70(3)(b)1, Stats. was not intended to protect all legal rights of employes, but in addition to those enumerated in MERA itself, only those other legal rights that were violated by employes who were motivated by their hostility to the employe's exercise of MERA rights. Consequently, in addressing the conduct of employes and labor organizations, the Commission considers violation of statutes other than MERA, but it still lacks jurisdiction to review conduct violative of other statutes unless it arises out of hostility toward an employe's exercise of rights protected by MERA.

Applying this law to the instant case, this Examiner holds in abeyance the motion to dismiss those portions of the complaint that allege violation of Complainant's rights pursuant to the Wisconsin Fair Employment Act and Sec. 118.21 and 22, Stats. The Examiner will rule on that

7/ Dec. No. 12637 (Fleischli, 4/74) aff'd by operation of law, Dec. No. 12637-A (WERC, 5/74).

8/ Monona Grove School District, Dec. No. 20700-G (WERC, 10/86).

portion of the motion to dismiss after Complainant has had opportunity to present evidence to show that the District and/or WASB are labor organizations. If such a showing can be made, then evidence regarding violations of statutes other than MERA would be probative in conjunction with a showing that those violations resulted from Respondent's hostility to Complainants' conduct protected by MERA.

C. Alleged Violation of 111.70(3)(a)1 by Discrimination against Complainant for his Refraining from Joining a Labor Organization.

Complainant alleges that the District failed to hire Complainant for the position for which he applied because of his exercise of his right to refrain from membership in a labor organization. If proven, such an allegation would make out a violation of Sec. 111.70(3)(a)3, Stats. An evidentiary hearing is necessary to determine the factual basis of this claim. Therefore the motion to dismiss as to that allegation is denied in order to provide Complainant with opportunity to prove the facts he alleges.

CONCLUSION

In summary, the Examiner concludes that a hearing is necessary. At hearing, the parties will have opportunity to be heard on the proposed amendment to the complaint and the Examiner will rule on the amendment. The parties will then present evidence on the question of the labor organization status of the District and WASB and the Examiner will then rule on the motion to dismiss the complaint as to the allegations that the District and WASB violated Complainant's rights under the Wisconsin Fair Employment Act and Sec. 118.21 and 22, Stats. The Examiner will then take evidence on the Complainant's allegation that Respondents violated Complainant's right to refrain from joining or supporting a labor organization. If the portion of the complaint alleging a violation of Complainant's rights under the Wisconsin Fair Employment Act and Sec. 118.21 & 22, Stats., has survived the motion to dismiss, the evidence on that allegation will also be heard. Arrangements for a hearing date are in the cover letter accompanying this order.

Dated at Madison, Wisconsin this 18th day of May, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett /s/
Jane B. Buffett, Examiner