STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOSEPH C. GITTENS, Complainant,

vs.

CITY OF LaCROSSE, SEIU LOCAL #180, AFL-CIO and LaCROSSE AFL-CIO COUNCIL, Respondents.

Case 293
No. 57396
MP-3501

Decision No. 29613-A

Appearances:

Mr. Joseph C. Gittens, 400 Gillette Street, Apartment 223, LaCrosse, WI 54603-4206, appearing on his own behalf.

Davis, Birnbaum, Marcou, Seymour & Colgan, by **Attorney James G. Birnbaum**, 300 North Second Street, Suite 300, P.O. Box 1297, LaCrosse, WI 54602-1297, appearing on behalf of SEIU Local #180, AFL-CIO.

Mr. Peter G. Kisken, Deputy City Attorney, City of LaCrosse, City Hall, 400 LaCrosse Street, LaCrosse, WI 54601-3396, appearing on behalf of the City of LaCrosse.

ORDER GRANTING MOTIONS TO DISMISS AND DENYING MOTIONS FOR SANCTIONS

On March 15, 1999, Joseph C. Gittens, hereinafter Gittens, filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging that Respondents City of LaCrosse, SEIU Local #180, AFL-CIO and LaCrosse AFL-CIO Council had committed prohibited practices in violation of Secs. 111.70(3)(a)1 and (3)(b)1, Stats. On April 21, 1999, Local 180, SEIU, AFL-CIO, hereinafter the Union, by Counsel, filed a Motion to Dismiss and a Motion for Sanctions. Gittens responded to said Motions on May 3, 1999. On May 7, 1999, the Commission appointed Lionel L. Crowley, a member of its staff,

to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. On May 12, 1999, the City of LaCrosse, hereinafter the City, by Counsel, also filed Motions to Dismiss and for Sanctions. On May 20, 1999, Gittens filed the same response to these Motions as he did to the Union's Motions. On May 13, 1999, Gittens filed a Motion to include as a Respondent, Mr. Phil Addis, Chairman of the City's Personnel and Finance Committee. The Examiner, having considered the complaint, the Motions and the responses thereto, issues the following

ORDER

The Union's and City's Motions to Dismiss are hereby granted, the Motions for Sanctions are denied and the complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 27th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

CITY OF LaCROSSE

**MEMORANDUM ACCOMPANYING
ORDER GRANTING MOTIONS TO DISMISS AND
DENYING MOTIONS FOR SANCTIONS**

In his complaint filed on March 15, 1999, Gittens alleged that he applied for the position of Transportation Planner in the City of LaCrosse. Gittens alleged that the deadline for applications was January 20, 1999, and as of the date of the complaint, he was not contacted by any representative of the City. Gittens named SEIU, Local 180 and the LaCrosse AFL-CIO, as well as the City of LaCrosse, as Respondents. Gittens alleged that the Respondent Unions owed him a duty of fair representation. He further alleged that the Respondent Unions and the City were parties to a closed shop arrangement whereby the City gives preference in hiring to members of the Respondent Unions. Gittens further alleged that by the closed shop arrangement or agreement or by means not known to him, the Respondent Unions caused the City to give preference in negotiating to members of the Respondent Unions and caused the City to violate his Sec. 111.31, Stats., right to freedom from age discrimination and harassment under the Municipal Employment Relations Act. He further claims that the Respondent Unions were motivated to do so by the exercise of his Sec. 111.70(2), Stats., rights including his right to refrain from membership in said Unions and they committed prohibited practices within the meaning of Sec. 111.70(3)(a)1, Stats, as well as their duty to fairly represent him in violation of Sec. 111.70(3)(b)1, Stats. Gittens also asserted that the City interfered with, restrained and coerced him in the exercise of his Sec. 111.70(2) rights, thereby committing prohibited practices within the meaning of Sec. 111.70(3)(a)1, Stats. On April 21, 1999, Local 180, SEIU filed Motions to Dismiss and for Sanctions. Gittens was given the opportunity to respond to said motions and filed a response on May 3, 1999, asserting among other things that the complaint was based on the National Labor Relations Act, that information supplied by Conciliator Houlihan violated Title 47 U.S.C. Sec. 223, that under Sec. 111.70(3)(a)3, Stats. MERA protected him as an applicant for employment and he was a "party in interest." He further asserted that the majority labor organization was the exclusive bargaining representative of applicants, i.e. party of interest. On May 12, 1999, the City of LaCrosse filed a Motion to Dismiss and for Sanctions. On May 20, 1999, Gittens filed a response, which was the same as his May 3, 1999 response to the Union's Motion.

The instant complaint appears to be similar in the allegations made and in theory to the case Complainant Gittens filed in GITTENS V. ONALASKA SCHOOL DISTRICT, ET AL., DEC. NO. 28243-A (GRATZ, 6/95), AFF'D BY OPERATION OF LAW, DEC. NO. 28243-B (WERC, 8/95). In that case, the Examiner explained the legal authority and jurisdiction of the Commission as follows at pages 11 and 12:

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 (sic) 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 (sic) pleadings as outside the legal authority and jurisdiction of the WERC to hear and decide.

Thus, the Commission lacks jurisdiction over federal labor relations laws including the National Labor Relations Act, the various federal and state laws proscribing age discrimination including those set forth in Sec. 111.31, et seq, Stats., and therefore these are dismissed as they are beyond the "legal authority and jurisdiction" of the Commission to decide.

As to the allegation that the Respondent Unions owed Gittens a duty of fair representation, in SCHOOL DISTRICT OF ONALASKA, SUPRA, it was held that none of the labor organizations owed Gittens a duty of fair representation under MERA. Examiner Gratz stated as follows:

> 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:
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> > "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."
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> 66 Wis.2d 524, 531 (1975), .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 2382 (CA 6, 1969).

In accordance with the above reasoning of Examiner Gratz and inasmuch as Gittens alleges he was a job applicant and nothing more, neither SEIU Local 180 and/or LaCrosse AFL-CIO Council owed Gittens a duty of fair representation with regard to his application for City employment or any other purposes. Thus, this allegation must be dismissed.

Gittens alleges in paragraphs 17 and 19 of his complaint that the Respondent Unions violated Secs. 111.70(3)(a)1 and (b)1, Stats. Again, these allegations were fully discussed by Examiner Gratz wherein he concluded that Gittens was not a "municipal employe" because he was not "employed by a municipal employer" within the meaning of Sec. 111.70(1)(i), Stats. Examiner Gratz continued:

> 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 (sic) 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).

Sec. 111.70(1)(i), Stats., defines a "municipal employe" as follows:

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

As Gittens was not employed by the City he did not meet the above statutory definition and it follows that a job applicant is not a "municipal employe." Sec. 111.70(3)(a)1, Stats., provides as follows:

> (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).

Section 111.70(3)(b)1 provides as follows:

> (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).

As Gittens did not meet the definition of a "municipal employe," the Respondent Unions did not violate Secs. 111.70(3)(a)1 or (3)(b)1, Stats., as a matter of law because these sections prohibit coercion or intimidation of a "municipal employe," and the mere application for employment does not make Gittens a "municipal employe" such that he can maintain a complaint involving a violation of Sec. 111.70(3)(a)1 and/or Sec. 111.70(3)(b)1, Stats.

Similarly, the allegation in paragraph 18 that the City has violated Sec. 111.70(3)(a)1, Stats., is not legally sound for the same reason that Gittens is not a "municipal employe."

Gittens alleged that under Sec. 111.70(3)(a)3, Stats., as an applicant for employment, he was protected under MERA against discrimination based on membership or non-membership in Respondent Labor Organizations, with regard to hiring by the City for vacant bargaining unit positions. He also asserted that he was a "party of interest" with standing to file a complaint alleging violations of Sec. 111.70(3)(a)3 of MERA. Gittens has correctly stated the law in this regard, however, Gittens' complaint does not allege a prohibited practice in violation of Sec. 111.70(3)(a)3, Stats.

In Gittens' response to the Motions to Dismiss, he includes a quote from MADISON JOINT SCHOOL DISTRICT NO. 8, ET AL., 69 WIS.2D 200, 231 N.W. 2D 206 (1975) but has added in parentheses certain words which change the meaning of the Court's statement. The Court stated the following:

> This court has held that the majority organization in a particular labor bargaining unit is, under the Municipal Employment Relations Act (MERA), sec. 111.70, Stats., not only the bargaining representative for the members of that majority organization, but is the exclusive bargaining representative of all the employees, members or nonmembers of the bargaining unit. BOARD OF SCHOOL DIRECTORS OF MILWAUKEE V. WERC, SUPRA, AT 645-647.

Gittens infers that applicants for employment are non-members as that term is used by the Court. This is not accurate as all the Court stated was that the exclusive bargaining representative represents all the employes, both members of the bargaining representative and non-members of the bargaining representative. It should be noted the important word here is "employees" which as noted above does not include applicants for employment. Incidentally, MADISON JOINT SCHOOL DISTRICT, NO. 8, SUPRA, involved a non-member of the Union appearing before the School Board during a public meeting. The Court held this to be a violation of MERA because allowing the non-member to speak to the Board constituted improper negotiating. This case was unanimously overruled by the U.S. Supreme Court in CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, ET AL., 429 U.S. 167, 50 L.ED. 2D. 376, 97 S.CT. 421 (1976). It must be concluded that the case cited by Gittens does not grant applicants for employment "municipal employee" status.

Gittens also referred to the general language of Sec. 111.01(2), Stats., which in essence is a declaration of policy. It has been held that jurisdiction of the Commission cannot be predicated upon policy provisions. CHAUFFEURS, TEAMSTERS & HELPERS, 51 WIS.2D. 391 AT 402-406 (1971).

Thus, the prohibited practices alleged in the complaint are not within the jurisdiction of the Commission and the complaint must be dismissed. This should come as no surprise to Mr. Gittens as these same allegations were dismissed for the same reasons in ONALASKA SCHOOL DISTRICT, SUPRA. Inasmuch as the complaint has been dismissed because the Commission lacks jurisdiction of the various allegations or because Gittens lacks standing under the law, the request to add Mr. Phil Addis as a Respondent is denied.

The Respondents SEIU Local 180 and the City have requested sanctions including attorneys' fees and costs. The Commission has held that it lacks the statutory authority to award attorney's fees and costs to responding parties in complaint proceedings. DEPT. OF EMPLOYMENT RELATIONS, ET AL., DEC. NO. 29093-B (WERC, 11/98). Thus, the request for

attorneys' fees and costs are denied and Respondents will have to seek such relief in courts of competent jurisdiction. Respondents have asked for further relief including suspension of Gittens' rights under Sec. 111.70, Stats., for the maximum time permitted by law. Perhaps such a remedy might be appropriate after a hearing, but the undersigned finds that such is not warranted where a Motion to Dismiss has been granted. Thus, the Motions for Sanctions are denied.

Dated at Madison, Wisconsin, this 27th day of May, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

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