STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL W. HOPKINS, Complainant,

vs.

STEVE STANCZAK and CITY OF KENOSHA, Respondents.

Case 229
No. 70569
MP-4649

Decision No. 33271-A

Appearances:

Michael W. Hopkins, 33326 118th Street, Twin Lakes, Wisconsin 53181, appearing on his own behalf.

Daniel Vliet and **Sarrie Pozolinski**, Buelow Vetter Buikema Olson & Vliet, LLC, Attorneys at Law, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin 53186, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

On January 24, 2011, Michael W. Hopkins filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against his former employer, the City of Kenosha and Steve Stanczak. The allegations contained in the complaint will be identified in detail below. The complaint alleged that by its actions, the Respondents had violated Sections 111.31, 111.322 and 111.325, and Sections 111.70(3)(a)1, 2, 3 and 5, Stats. On February 11, 2011, the Respondents filed a motion to dismiss wherein it raised a number of defenses to the complaint. Attached to that motion was a 2003 settlement agreement signed by Hopkins, the Kenosha Firefighters Union and the City of Kenosha. On March 1, 2011, Commission Examiner Raleigh Jones directed Hopkins to make his complaint against the Respondents more definite and certain. On March 8, 2011, Hopkins filed his response. On March 17, 2011, the Commission formally appointed Raleigh Jones, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. On April 18, 2011, the Respondents filed a brief in support of its motion to dismiss the complaint along with various exhibits. On May 15, 2011, the

Complainant notified the Examiner via a phone message that he would not be filing a response to the Respondents' motion to dismiss. No evidentiary hearing has yet been conducted in this matter. Having considered the pleadings, as well as the arguments of the parties, I am satisfied that the Respondents' motion to dismiss should be granted. Accordingly, I hereby make and issue the following Findings of Fact, Conclusions of Law and Order Granting Respondents' Motion to Dismiss.

FINDINGS OF FACT

Since no evidentiary hearing has been conducted in this matter, the following facts are taken from the complaint and the documents submitted by the parties:

1. On January 24, 2011, Michael W. Hopkins filed a two page complaint with the Wisconsin Employment Relations Commission. The first page provided thus:

Michael W. Hopkins,

Complainant,

vs.

Steve Stanczak
City of Kenosha,

Respondent.

A. What is the name, address, phone number, e-mail address (if any) and fax number (if any) of the person/party making the complaint?

Michael Hopkins
33326 – 118 St.
Twin Lakes, WI 53181
xxx-xxx-xxxx

B. What is the name, address, phone number, e-mail address (if any) and fax number (if any) of the person/party against whom the complaint is being made?

Steve Stanczak
625 – 52 St.
Kenosha, WI 53140

City of Kenosha

C. What are the facts which constitute the alleged unfair labor or prohibited practices?

Attached

D. What part or parts of the applicable statute defining unfair labor or prohibited practices are alleged to have been violated?

Attached

E. What remedy do you seek? Reprimand & Damages

The second page provided thus:

C. What are the facts which constitute the alleged unfair labor or prohibited practices?

On January 19, 2010, Attorney for city of Kenosha acknowledged check/amount issued and testified to was in portion salary (really overtime) opposed to Stanczak's sworn testimony of "reimbursement only" resulting in reduced compensation.

Timely also on "when should have been known" with the City's prior conduct before Mrs. Mawhinney & Mr. Shaw of WERC – It could have never been known nor predicted that city would have told the truth with their track record nor should have been known.

D. What part or parts of the applicable statute defining unfair labor or prohibited practices are alleged to have been violated?

111.31 (1), (2)
111.322 (1), (2m)
Compensation
111.325
111.70(3)(A)
1.
2.
3.
5. Collective bargaining agreement.
All other minorities with greater years of service, Lianas and Gonzales, left city prior to retirement nor any promotion.

Pattern:

Having prior received probable cause ruling of discrimination by State of WI against city of Kenosha. Stanczak & city have track (> %) record against minorities. Known minorities prior attacks:

Myself
Lee Broadway
Hainey, Jonathan
Ken Jefferson
Theona Cox
Keith Watkins

2. On February 11, 2011, the Respondents' attorney, Daniel Vliet, filed the following letter with the Wisconsin Employment Relations Commission:

> Please be advised that we represent the City of Kenosha in the above-referenced matter. Please direct all future correspondence to regarding this matter to the undersigned.
>
> The City hereby requests that the Complainant be ordered to supply additional information necessary to make the complaint more definite and certain. Based on the Complainant's allegations as set forth in paragraph C and D of the complaint, it is simply impossible to determine his basis for alleging that the City somehow committed a prohibited practice.
>
> It also appears that the Complainant is alleging violations of Wis. Stats. §111.31(1) and (2), §111.322(1)(2m) and §111.325. None of these statutes are administered by the WERC; therefore, the City requests that these allegations be dismissed for failure to state a claim upon which relief can be granted.
>
> While it is difficult to determine the bases for this complaint, the City asserts that the Complainant waived any right he may have to pursue a prohibited practice complaint against the City by the terms of the settlement agreement dated April 3, 2003 and enclosed herein for reference. Specifically, at pages 4-5 of the settlement agreement, Complainant waived any claims he may have under Wis. Stats. §111.70, as well as any other real or potential claims he may have had as of the date the agreement was executed. As a result, the City requests that the complaint be dismissed based on the prior settlement.
>
> Finally, the City also asserts that the statute of limitations has run on any possible claim the Complainant could have under Wis. Stats. §111.70.
>
> Thank you for your assistance.

Attached to this letter was the settlement agreement dated April 3, 2003 referenced in the fourth paragraph.

3. On March 1, 2011, Commission Examiner Jones sent the following letter to Hopkins:

> I have been assigned as examiner on the complaint you filed against Steve Stanczak and the City of Kenosha.
>
> In a letter dated February 9, 2011, the City raised a number of defenses to your claim. I am not going to address those defenses at this time.
>
> However, I am going to address the following. In that letter, the City asked that you be ordered to supply additional information to make your complaint against the Respondents more definite and certain. I am granting that request. Here's why. I don't understand what you are saying in paragraphs C and D on page 2 of your complaint (copy enclosed). To address that, you need to explain in more detail (than what you did in paragraphs C and D of your original complaint) what facts form the basis for your complaint. Said another way, what are the facts that you think constitute a prohibited practice by the City?
>
> I have also enclosed a WERC complaint process booklet. On pages 5, 6 and 13 of that booklet it explains in more detail what you need to include in your complaint.
>
> You are to supply this information to me and the City's attorney, Daniel Vliet, by April 15, 2011.

Enclosed with this letter were the original complaint and a WERC complaint process booklet.

4. On March 8, 2011, the WERC received the following letter from Hopkins:

> Just recently received response in the matter from junior representative of Below Vetter law firm, delivered forwarded mail. Let me first address the settlement agreement fore which they seek dismissal based on.
>
> It is hard for me to ascertain whom city vs. scrupulous representative as to response logic. The city as I've experienced has claimed the settlement somehow gives them immunity of their future conduct/violations after dated agreement. The city since that date has had to be sued over **issues**, cancellation of insurance and before the Dept. of Employee Trust Fund one of which claiming I wasn't a paramedic. As one may guess upon hearing the name of the city of Kenosha – I'm currently receiving free insurance and paramedic benefits. Perhaps the city of Kenosha, if hadn't done, attempt to sell settlement agreement to Bernie Madoff of ponzi scheme or Kenneth Lay of Enron.

In addressing if response of scrupulous representative surely common knowledge would be to advise let alone put in writing that an agreement can't provide for additional separate unmentioned practice/conduct beyond that dated agreement. Though the theme is the same more discrimination and violation of statutes/codes vs. treatment of non-minorities governed by WERC. "City also asserts that the statute of limitations has run", in prior WERC case involving Arbitrator Karen MaWhinney the issue of dispute was representatives attempt of character assignation over an item that was over 10 years old, weeks after inspection [timely] and by third party not involved directly with inspection but with a history of reporting fire inspectors after violations found. The whole thing was to make me aware of public perception [only having 2 months on the job with first fire inspection] and was not in any form of neither verbal nor written warning.

As we know the Arbitrator ruled against the city – ruled the 10 year old **note** be removed from file and never mentioned again. As one may guess the city again used one month later violating Ms MaWhinney ruling. The representative was forced to write an apology but within the next 3 weeks he unscrupulously laid a defense before the EEOC that all of my "allegations have been unfounded" although having 3 weeks prior apologized.

In the case with Arbitrator David Shaw they didn't seek due settlement because it was going their way. In fact they broke Labor Agreement "EMS DUE PROCESS" [emergency medical services] and Laws of the State of Wisconsin Dept. of Health and Social Services license provider. Fore which by statute/code if a paramedic is accused of any patient wrong doing that individual must be reported to HSS and hearing scheduled. Well as one again may guess I reported myself to HSS of cities discriminatory accusations showing evidence of that of non-minorities of Kenosha fire dept. having been found negligent of patient care by the county EMS quality assurance board. Neither of which has even questioned my delivery of patient care.

Most recently this representative and/or city as made new statements before my attorney and Administrative Law Judge regarding statements of defense violating WERC practice and hope to present as a whole. I am prepared at a hearing to present my claim and if the Complainant is alleging any violations upon which relief can be granted let them as my right demand a hearing.

Thank you.

Michael Hopkins /s/
Michael Hopkins

5. On April 18, 2011, the City filed a brief in support of its motion to dismiss. At the same time, the City's Attorney, Daniel Vliet, filed an affidavit in support of Respondent's motion to dismiss. Attached to his affidavit were the following exhibits: 1) a document entitled "Waiver and Release of Claims" (i.e. the settlement agreement signed in April, 2003 by Hopkins, his attorney, the Kenosha Firefighters Union and the City of Kenosha); 2) a document entitled "Full and Final Compromise Agreement" signed by Hopkins in April, 2003 dealing with his worker's compensation claim; 3) a document entitled "Grievance Settlement Agreement" signed by Hopkins in April, 2003 dealing with two grievances; 4) the decision of the Wisconsin Retirement Board on Hopkins' appeal dated June 23, 2005; 5) the July 7, 2006 decision of the Circuit Court for Dane County affirming the Wisconsin Retirement Board's decision against Hopkins; 6) a letter to Hopkins from DETF dated March 23, 2010 denying Hopkins' request for a rehearing; 7) a decision by the (State of Wisconsin) Division of Hearings and Appeals dated February 3, 2011 concerning Hopkins' appeal; 8) an affidavit which Hopkins submitted in connection with the appeal referenced in (7); and 9) the letter which Hopkins filed with the WERC dated March 2, 2011.

6. The subject matter referenced in paragraph C of the instant complaint (i.e. whether a certain "check/amount issued" was reimbursement or overtime) has already been fully litigated and adjudicated by DETF, the Wisconsin Retirement Board, a Dane County Circuit Court and the (State of Wisconsin) Division of Hearings and Appeals.

7. None of the allegations contained in paragraphs C and D of the instant complaint can be read to allege acts that constitute prohibited practices which fall within the one-year period prior to the filing of the complaint.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. For the purpose of determining if Complainant states claims that can be heard by the Commission, Complainant was a "Municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

2. For the purpose of determining if Complainant states claims that can be heard by the Commission, the City of Kenosha is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. To the extent that Steve Stanczak took actions in this case, it was in his capacity as an employee of the City and not in his individual capacity. The claim against Stanczak individually is therefore dismissed.

4. Since the subject matter referenced in Paragraph C of the complaint (i.e. whether a certain "check/amount issued" was reimbursement or overtime) has already been fully litigated and adjudicated by DETF, the Wisconsin Retirement Board, a Dane County Circuit Court and

the (State of Wisconsin) Division of Hearings and Appeals, the doctrine of *res judicata* precludes the WERC from deciding that issue again.

5. The Commission lacks jurisdiction to determine those allegations contained in the complaint that cite law outside of Subchapter IV of Chapter 111, Stats.

6. Complainant's right to proceed under MERA, concerning those allegations of the complaint falling within Subchapter IV of Chapter 111, Stats., is barred by Sec. 111.07(14) and Sec. 111.70(4)(a), Stats.

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The Respondents' Motion to Dismiss is granted. The complaint is hereby dismissed with prejudice.

Dated at Madison, Wisconsin, this 11th day of July, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

CITY OF KENOSHA

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

As noted in this decision's prefatory paragraph, the Respondents filed a motion to dismiss the complaint.

A. The Legal Standards Applicable to a Motion to Dismiss

The Respondents' motion to dismiss is governed by Chapters 227 and 111 of the Wisconsin Statutes. Chapter 227 establishes the general framework for administrative agency proceedings. Chapter 111.70 provides the basis for prohibited practices under the Municipal Employment Relations Act (MERA).

A complainant does not have an automatic right to a hearing before the WERC on their complaint. Pre-hearing motions to dismiss are used to ferret out allegations that on their face fall outside the Commission's jurisdiction, are untimely, or are so vague that the respondent cannot prepare for hearing. PROFESSIONAL TECHNICAL COUNCIL, WEAC AND BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 30023-D (WERC, 10/03). Thus, an examiner can dismiss a complaint without a hearing when the WERC lacks jurisdiction over the allegations, or the complaint is untimely, or the complaint fails to state a claim. See, for example, COUNTY OF WAUKESHA, DEC. NO. 24110-A (Honeyman, 10/87), aff'd DEC. NO. 24110-B (WERC, 3/88); MORAINE PARK TECHNICAL COLLEGE ET AL., DEC. NO. 25747-C (McLaughlin, 9/89), aff'd DEC. NO. 25747-D (WERC, 1/90); CITY OF MILWAUKEE (POLICE), DEC. NO. 29485-A (Jones, 2/99); and CITY OF MADISON (TRANSIT), DEC. NO. 30288-A (Jones, 3/02), aff'd DEC. NO. 30288-B (WERC, 1/03).

Timeliness issues are governed by Sec. 111.07(14), Stats. That section, which is applicable to MERA under Sec. 111.70(4)(a), Stats., states: "The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged." In this case, the Complainant filed his complaint on January 24, 2011. To be timely filed, the complaint must allege that a prohibited practice occurred within the one-year period preceding that date.

Commission examiners have long cited the following standard when ruling on the merits of a pre-hearing motion to dismiss:

> Because the dramatic 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. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (Hoornstra

with final authority for WERC, 12/77), at 3; RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27982-B (WERC, 6/94).

That standard will be applied here as well.

B. Application of Those Legal Standards to the Complaint

For the purpose of this decision, it is assumed that the facts which the Complainant pled are true. The facts which the complaint allege constitute a prohibited practice are contained on page 2 of the complaint, paragraphs C and D (See Finding 1). In most cases, the facts alleged in a complaint case can be easily understood. That's not the case here. While the facts contained in paragraphs C and D are not long, I nonetheless consider them convoluted – particularly paragraph C. That's why, in my letter to the Complainant dated March 1, 2011, I said: "I don't understand what you are saying in paragraphs C and D on page 2 of your complaint." I then directed the Complainant "to explain in more detail (than what you did in paragraphs C and D of your original complaint) what facts form the basis for your complaint." The Complainant's response to my directive is contained in Finding 4. In my view, that response didn't clarify the facts. Be that as it may, the facts are the starting point for my analysis, so I've edited them (i.e. the factual allegations) down to the following:

1. On January 19, 2010, the Attorney for the City of Kenosha, acknowledged check/amount issued and testified to was in portion salary (really overtime) opposed to Stanczak's sworn testimony of "reimbursement only" resulting in reduced compensation.

2. Having prior received probable cause ruling of discrimination by State of Wisconsin against City of Kenosha. Stanczak and City have track record against minorities. Known minorities prior attacks: Complainant, Lee Broadway, Jonathan Hainey, Ken Jefferson, Theona Cox, Keith Watkins. All other minorities with greater years of service, Lianans and Gonzales, left City prior to retirement nor any promotion.

The first allegation above is almost verbatim from the first paragraph of paragraph C in the complaint. The second allegation above is almost verbatim from the first full paragraph of paragraph D in the complaint. The complaint goes on to allege that by engaging in that conduct, the City of Kenosha and Steve Stanczak violated the following statutes: Sections 111.31(1) and (2); 111.322(1) and (2m); 111.325; and Sections 111.70(3)(a)1, 2, 3 and 5, Stats.

. . .

The Examiner finds that even if all of the facts in the complaint are construed in the Complainant's favor, he has failed to state a cause of action against either Stanczak or the City of Kenosha. My rationale for these conclusions follow.

My discussion is structured as follows. In Section I, I'll address whether the complaint states a claim against Stanczak as an individual. In Section II, I'll address whether the complaint states a claim in what I earlier described as the first allegation (i.e. whether a certain "check/amount issued" was reimbursement or overtime). In Section III, I'll address whether the complaint states a claim in what I earlier described as the second allegation (i.e. the alleged discriminatory treatment of minorities by the City).

I.

The complaint names Steve Stanczak as a Respondent in this case, but never identifies who he is. Notwithstanding that fact, it can be surmised from the record that Stanczak is the City's Human Resources Director. While Sec. 111.70(3)(c), Stats., recognizes that prohibited practices can be committed by an individual, the Complainant did not allege – in either his complaint or his subsequent letter of clarification – that Stanczak acted independently in this matter or allege a violation of that section. Thus, to the extent that Stanczak took actions in this case, it was in his capacity as an employee of the City (specifically, his capacity as the City's Human Resources Director). That being so, it is held that the proper Respondent in this case is the City of Kenosha – not Stanczak as an individual. Hence, the claim against Stanczak individually is dismissed.

II.

The focus now turns to the claims against the City of Kenosha.

The following background information is relevant to what I earlier described as the first and second allegations. This information has been extrapolated from the documents submitted in this matter.

Hopkins was hired by the City of Kenosha as a firefighter and paramedic in 1985. In 2000, he was placed on administrative leave with pay and removed from the paramedic program. He grieved this action through his Union, the Kenosha Firefighters Union, IAFF, Local 414. He also filed a complaint with the Wisconsin Employment Relations Commission (WERC) alleging a violation of the Municipal Employment Relations Act (MERA) and a discrimination complaint and a wage claim with the Equal Rights Division of the Department of Workforce Development. On September 17, 2001, his grievance was settled. On April 19, 2002, the City terminated Hopkins. Hopkins' termination generated more grievance proceedings, administrative complaints and/or proceedings, a state court lawsuit and a federal lawsuit. In early 2003, the parties settled the federal lawsuit and the other claims/complaints just referenced. The settlement was memorialized in a lengthy settlement agreement document which was captioned "Waiver and Release of Claims". Subparagraph (a) of that settlement agreement provided thus:

(a) Plaintiff states that he can no longer work as a Paramedic or as a firefighter or be employed in any other capacity with the Defendant due to his permanent medical disability; that as a result of his permanent disability, he voluntarily terminates his employment effective April 24, 2002 with the Defendant. The City hereby rescinds his termination and accepts the Plaintiff's resignation effective April 24, 2002.

About the same time, Hopkins and the City entered into a "Full and Final Compromise Agreement" concerning whether Hopkins had sustained a compensable injury in the course of his employment. As a result of that compromise agreement, Hopkins was awarded worker's compensation benefits by an administrative law judge. About the same time, Hopkins submitted an application to the Department of Employee Trust Funds (DETF) for duty disability benefits. Before DETF determined his duty disability benefits, it informed him that his worker's compensation award, earnings received after his effective date, and a future offset from a possible partial permanent disability which had not yet been determined would offset his duty disability benefits. After DETF offset these amounts and determined Hopkins' duty disability benefits, Hopkins challenged the "salary" figure which had been used as the basis for calculating his duty disability benefits. In 2005, an ETF hearing examiner issued a proposed decision. One of the issues in that decision was "Whether overtime should have been included in the calculation of Mr. Hopkins' gross monthly base salary for purposes of determining the amount of his duty disability benefit." The hearing examiner held, in pertinent part, that overtime was not to be included in calculating Hopkins' duty disability benefits. Hopkins appealed that decision to the Wisconsin Retirement Board. On June 23, 2005, the Wisconsin Retirement Board affirmed the examiner's proposed decision on that matter. With regard to the overtime matter just noted, the Board made the following Conclusions of Law:

22. The parties agree that April 24, 2002, constituted the qualifying date for Hopkins' duty disability benefit. See Wis. Admin. Code § ETF 52.08(1). Hopkins' claim that he received overtime in each of the five years preceding calendar year 2002 is based on his attending the paramedic recertification course pursuant to his September 17, 2001 grievance settlement with the City. (Ex. 103 (attached Ex. C)) According to Hopkins, he received time and a half while attending the course pursuant to his union's collective bargaining agreement. Hopkins assumes, without explanation, that a premium payment necessarily constitutes "overtime"; however, that is not the case, particularly when it is for a period of time that he was not working, but was on sick leave. In addition, by his own testimony, he did not attend the course in 2001. He has not identified any other overtime earned in 2001.

23. Hopkins argues that the City delayed paying him overtime and that pursuant to Wis. Stat. §40.02(22)(a), the amount paid to him in 2002 should be treated as earned in 2001, since this is when he would have taken the recertification course, had the City acted in good faith. Hopkins' reliance on Wis. Stat. §40.02(22)(a)'s definition of "earnings" in Wis. Stat. §40.02(22)(a)

> is misplaced. "Monthly salary," which provides the basis for determining a disability benefit, is composed of "regular monthly earnings, prorated cash payments, and regular and dependable overtime pay." Wis. Admin. Code §52.12 (1). The definition of "earnings" may apply to "regular monthly earnings" (though this decision need not and does not address that issue), but does not apply to "regular and dependable overtime pay." In addition, Wis. Admin. Code §52.12 (1)(c)1. refers to regularly and dependably *received* overtime pay, which is different than pay that *should* be received on a regular and dependable basis.

Hopkins then appealed the Board's decision to circuit court. On July 6, 2006, the circuit court upheld the Board's decision. The portion of that decision dealing with overtime provided thus:

> Mr. Hopkins urges the Court to find that the Board erred in not finding that he worked overtime in 2001. (Id. at 10). He argues that his attendance at a course in 2002 should be counted as overtime in 2001, since the City should have sent him to the course in 2001. (Id. at 11). The Board's decision not to assign attendance in a class in 2002 as overtime in 2001 in order to entitle Mr. Hopkins to overtime pay in his benefits under Wis. Adm. Code §52.12 (1)(c)1 was a reasonable finding. Since Mr. Hopkins did not attend the class in 2001, he was not credited for overtime in 2001.
>
> (p.6)

In 2009, Hopkins asked the City to review how its representatives had determined the "salary" that had been used as the basis for calculating his duty disability benefits. The City reviewed the matter, and in January, 2010, the City Administrator informed Hopkins, via e-mail, that an error had been made. In a letter dated January 19, 2010, the City Attorney confirmed that an error had been made concerning whether a check to Hopkins for $1,093 was for reimbursement of paramedic recertification expenses or for overtime related to his attendance at paramedic training classes in the latter months of 2001. In February, 2010, Hopkins wrote the Department of Employee Trust Funds (DETF) and requested a hearing based on newly-discovered evidence relating to overtime which was not included when the amount of his duty disability benefits was calculated. The newly-discovered evidence was the City's admission, in the City Attorney's letter dated January 19, 2010, that the City made an error years before in its determination of whether one of Hopkins' checks was reimbursement or overtime compensation. On March 23, 2010, the DETF denied Hopkins' request for hearing on this newly-discovered evidence (and reconsideration of its earlier overtime pay calculation). It did so on the grounds that the time for Hopkins to petition for a rehearing of the 2005 Wisconsin Retirement Board decision was long past and the overtime issue had been litigated previously in connection with the appeal to the Circuit Court of Dane County. Hopkins then appealed this decision by the DETF to the Division of Hearings and Appeals. On February 3, 2011, an administrative law judge granted the City's motion to dismiss the appeal of "the issue relating to the calculation of overtime pay as it relates to the duty disability

award." In his decision, the administrative law judge reviewed both the decisions of the Wisconsin Retirement Board and the circuit court and, after doing so, concluded that the overtime issue had been previously fully litigated in those forums. With regard to Hopkins' contention that new evidence warranted a rehearing on the overtime issue, the administrative law judge held that the time to petition for a rehearing on the overtime pay issue had long since passed.

. . .

It can be inferred from the factual history noted above that Hopkins has been fighting for a long time over whether a payment made to him in 2003 as part of a grievance settlement constituted reimbursement or overtime compensation. That issue has been part of four separate cases which he's litigated. I'm referring to the following: 1) the original complaint in 2005 where the Wisconsin Retirement Board upheld DETF's decision concerning Hopkins' duty disability benefits; 2) the appeal of the Wisconsin Retirement Board's decision to circuit court in 2006; 3) the dispute over whether the newly-discovered evidence from January, 2010 allowed the overtime issue to be reconsidered; and 4) the appeal and decision on that matter by the Division of Hearings and Appeals in 2011. Given that litigation, the matter referenced in the first sentence of this paragraph has been fully adjudicated.

The issue which Hopkins is asking the WERC to rule on in his first allegation (i.e. whether a certain "check/amount issued" was reimbursement or overtime) is the same issue that has already been litigated and adjudicated by the DETF, the Wisconsin Retirement Board, a circuit court and the Division of Hearings and Appeals. In WAUKESHA COUNTY, DEC. NO. 24110-B (WERC, 3/88), the Commission affirmed an Examiner's conclusion that where a circuit court had decided the issues pending before him, the doctrine of *res judicata* precluded him from proceeding to resolve those same issues. Consistent with that decision, the Examiner concludes that since the first allegation raised in the complaint (i.e. whether a certain "check/amount issued" was reimbursement or overtime) has already been litigated and adjudicated in the previously identified forums, the doctrine of *res judicata* precludes the WERC from deciding that issue again.

Aside from the fact that those agencies (and a circuit court) have already fully adjudicated that issue, there's a jurisdictional problem for Hopkins. It's this. The WERC does not make duty disability benefit determinations, nor do we have jurisdiction over disputes arising out of Chapter 40, Stats., relating to the Public Employee Trust Fund. Instead, the WERC administers the Municipal Employment Relations Act (MERA) and has jurisdiction to resolve claims arising thereunder. In the Examiner's view, the claim which Hopkins raises in paragraph C of his complaint (i.e. whether a check he received from the City long ago was reimbursement or overtime), and alleges is a MERA violation, is inextricably linked to Hopkins' duty disability benefit determination. As previously noted, the WERC does not have jurisdiction over duty disability benefit determinations, so Hopkins' attempt to shoehorn the overtime matter into a MERA claim is not successful.

Assuming for the sake of discussion that the WERC does have jurisdiction over the first allegation (i.e. whether a certain "check/amount issued" was reimbursement or overtime), that claim is time barred pursuant to Sec. 111.07(14), Stats. Here's why. That section of the statute says "[t]he right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged." In paragraph C of Hopkins' complaint, he states that the alleged prohibited practice occurred on January 19, 2010. For his complaint to be timely, it had to be filed within one year of that alleged event. Thus, it had to be filed by January 19, 2011. That did not happen. Since he filed his complaint on January 24, 2011, the complaint was untimely filed. In so finding, I have considered Hopkins' contention that his claim is not time barred because the key date to trigger the statute of limitations is "when should have been known." However, even using the timeliness rule of "when did the employee know or should have known" of the (alleged) violation, Hopkins knew of the (alleged) violation by January 19, 2010 because that's what he asserted in paragraph C of his complaint. Thus, even if the Complainant did not know he had a claim in 2003 when the check in question was issued, he certainly knew it on January 19, 2010 (i.e. the date that the City Attorney confirmed that an error had been made concerning whether the 2003 check was for reimbursement or for overtime). Thus, this claim is time barred.

III.

The focus now turns to what I earlier described as the second allegation. It alleges discriminatory treatment of minorities by the City of Kenosha. The Complainant's complaint does not state the basis for the alleged prohibited practice violation based on the Respondent's "track record against minorities". Nor does Complainant's clarification letter provide any assistance, as it does not further describe the prohibited practice, the time or place of occurrence of these alleged acts. All of the foregoing are required to state a viable complaint under 111.70(3), Stats. and Wis. Adm. Code ERC §12.02(2). That means that all the Examiner has to work with here are the minimal statements Complainant made regarding the employment of minorities while he was an employee of the City of Kenosha and the citations to Wisconsin statutes that address discrimination under the Wisconsin Fair Employment Act (WFEA). That is not sufficient to plead a claim.

Assuming for the sake of discussion that it is sufficient to plead a claim, it (i.e. the claim) must be dismissed for the following reasons.

First, before the WERC can hold a hearing on a complaint or address the merits of a complaint, it has to have subject matter jurisdiction to do so. In his complaint, Hopkins alleged that the City violated Secs. 111.31(1) and (2); 111.322(1) and (2m); and 111.325 by its actions. Those are subsections of the Wisconsin Fair Employment Act. The WERC does not have jurisdiction over that statute. Instead, another state agency does, namely the Equal Rights Division of the Department of Workforce Development. As noted in Section II, the WERC administers the Municipal Employment Relations Act (Sec. 111.70). MERA applies to municipal employees and former municipal employees. Complainant's rights under MERA

flow from his employment as a former municipal employee. In EAU CLAIRE ASSOCIATION OF EDUCATORS, DEC. NO. 29689-C, 29690-C, 29691-C (WERC, 1/00) it was held that "under no view of the governing law can the Commission assert jurisdiction over state or federal statutes beyond MERA." While conduct that can violate non-MERA statutes can also violate MERA, there still must exist facts that can support a MERA violation. Thus, sections of a complaint that allege "violations of non-MERA statutes, but [fail] to allege specific facts pointing to a MERA violation, must be dismissed on that basis alone." *Id.* Similar to EAU CLAIRE ASSOCIATION OF EDUCATORS, in this case Complainant does not allege any facts that would support a MERA claim and thus, his discrimination prohibited practice claim is dismissed for lack of jurisdiction.

Second, assuming for the sake of discussion that the WERC does have jurisdiction over the discrimination claim referenced in paragraph D of the complaint, that claim is time barred pursuant to Sec. 111.07(14), Stats. As addressed above, the statute of limitations for prohibited practice complaints is one year. Neither the complaint nor his letter supplementing the complaint list a date when the discrimination allegedly occurred. That's problematic, because the Respondent does not have to guess or supply a date. While the complaint does list a date in paragraph C (namely, January 19, 2010), that date applies only to what I earlier described as the first allegation (i.e. whether a certain "check/amount issued" was reimbursement or overtime). That date does not apply to the second allegation (i.e. the discrimination claim) which is referenced in paragraph D of the complaint. If the complaint is read to allege that the discrimination occurred during his employment (i.e. prior to April 24, 2002), such claim is clearly time barred.

If the complaint is read to allege that the discrimination occurred up to a year after his employment ended, the discrimination claim is barred by the "Waiver and Release of Claims" document (i.e. the settlement agreement) which was entered into by the City of Kenosha and Complainant. The following shows why. Hopkins signed the settlement agreement on April 11, 2003. When he signed it, he had not worked for the City for about one year. As part of the settlement agreement, Complainant acknowledged that he:

> reached this compromise of claims and **disputes arising from allegations of racial and national origin discrimination and retaliation** by [Complainant] against the Defendant City as well as all other pending claims involving the City and the Union. Such claims include allegations the Defendant violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et. seq.*, 42 U.S.C. §1983, *et. seq.*, the Wisconsin Fair Employment Act, §111.33 *et. seq.*, Wis. Stats., and **the Wisconsin Municipal Employment Relations Act, §111.70, *et. seq.*, Wis. Stats.,** as well as various provisions of the applicable collective bargaining agreement between the City and Union.
>
> *Id.* (emphasis added).

In addition, in the release paragraph of the settlement agreement, the Complainant specifically:

> fully release[d] and forever discharge[d] the Defendant [City] and its affiliates, insurers, successors or assigns, and its present and former employees, present and former elected officials, officers, and agents, of any and all claims, demands, actions, rights, obligations, grievances, damages, costs, liabilities, or causes of action, arising out of or relating in any way to events occurring prior to and including the date of execution of this Agreement of whatsoever kind or nature which they have in law or in equity against each other, on account of, or growing out of, **or related in any way to any and all known and unknown, forseen and unforseen,** act, omission, event, transaction, matter or thing involved, alleged or referred to, or appearing directly or indirectly regarding the dispute, except for the rights and liabilities created by this Agreement.

Id. (emphasis added).

In CITY OF MILWAUKEE (POLICE), DEC. NO. 29485-A (Jones, 2/99), the undersigned held that when a settlement agreement covers the subject matter of a later prohibited practice complaint, the complaint was foreclosed by the settlement agreement. In that case, I evaluated the motion to dismiss by determining whether the settlement agreement applied to the complaint at issue. In determining that the settlement agreement applied to the pending complaint regarding the denial of the employee's promotion, I relied on the plain language of the settlement agreement. Specifically, I found that the settlement agreement included a statement that it was intended as a final settlement for any complaints or claims of any kind arising out of the denial of the employee's promotion.

Just like CITY OF MILWAUKEE (POLICE), the settlement agreement in this case addresses the basis of Complainant's prohibited practice complaint on the discrimination matter. The first paragraph of the settlement agreement specifically states that it is a full compromise of claims and disputes of "racial and national origin discrimination and retaliation" and any claims of violations of MERA. Thus, the settlement agreement clearly covered any of Complainant's existing claims of discrimination or MERA violations. In addition, in the release paragraph, Complainant specifically released all claims, known and unknown, forseen and unforseen, relating to any events that occurred prior to the execution of the agreement. Thus, the settlement agreement covered all claims, known and unknown as of April 11, 2003.

Finally, the complaint cannot be read to allege that the discrimination occurred after the 2003 settlement agreement was signed. In order to read the complaint that way, the Complainant needed to specify such a date in paragraph D of his complaint. As previously noted, he did not do so. Nor did he specify a date in his letter supplementing his complaint. That being so, the discrimination claim is dismissed as untimely.

. . .

In sum, a portion of the complaint challenges conduct falling outside the scope of MERA. Those portions must be dismissed because the Commission has no jurisdiction to hear

them. To the extent the complaint challenges conduct within the scope of MERA, Commission consideration of that conduct is time barred, has previously been fully adjudicated, and/or is foreclosed by the 2003 settlement agreement Hopkins signed. Accordingly, Hopkins' complaint has been dismissed with prejudice.

Dated at Madison, Wisconsin, this 11th day of July, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

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