EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Regina R Rhyne
General Delivery
Madison WI 53714

Complainant

vs.

Madison Metropolitan School District
545 W Dayton St
Madison WI 53703

Respondent

HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS

CASE NO. 20092030

EEOC CASE NO. 26B200900026

BACKGROUND

This is a review on the Respondent's Motion to Dismiss the allegations of the complaint for a Lack of Subject Matter Jurisdiction. The Complainant is Regina Rhyne. On March 5, 2009, Rhyne filed a complaint with the Madison Department of Civil Rights, Equal Opportunities Division (EOD). The complaint charged that the Respondent, Madison Metropolitan School District (MMSD), discriminated against the Complainant by terminating her employment on the bases of color, race, age, political beliefs, and less than honorable discharge, and in retaliation for her exercise of a right protected by the ordinance in violation of Equal Opportunities Ordinance sec. 39.03(8) and (9), Mad. Gen Ord. The Respondent denies discriminating against the Complainant and asserts that it terminated her employment due to unsatisfactory past performance, including an altercation between the Complainant and a teacher.

In an Initial Determination issued on September 29, 2009, an Investigator/Conciliator found that there was no probable cause to believe that the Respondent discriminated against the Complainant on the bases of color, race, age, political beliefs, less than honorable discharge, or in retaliation for the exercise of a right protected by the ordinance. The Complainant timely appealed from the Initial Determination on October 9, 2009. On March 3, 2010, the Hearing Examiner issued a Decision and Order on Review of Initial Determination affirming the Investigator/Conciliator's findings of no probable cause, except the finding of no probable cause regarding retaliation. As a result, the Hearing Examiner transferred the Complainant's retaliation claim to conciliation. Subsequent to unsuccessful conciliation efforts, the parties attended a Pre-Hearing Conference on September 14, 2010. At that time, the Respondent raised the issue of whether the EOD has subject matter jurisdiction over the MMSD and of whether the EOD has the authority to order the MMSD to pay either punitive or compensatory damages.

The Respondent timely filed a motion to dismiss for lack of subject matter jurisdiction on December 1, 2010. The Respondent argues that matters of employment, such as hiring and firing personnel, are matters of state wide concern and therefore such matters are beyond the

purview of the city's local equal opportunities ordinance. The Respondent also argues that it is an agent of the state and as such it is not subject to the EOD's jurisdiction. The Respondent further contends that, even if the EOD has jurisdiction, a recently enacted state law expressly divests the EOD of the authority to award compensatory or punitive damages against the MMSD.

MEMORANDUM DECISION

First, it must be observed that the Respondent treats somewhat imprecisely the authority under which the City of Madison adopted the Equal Opportunities Ordinance. Essentially, the Respondent asserts that the City cannot exercise any authority under the state constitution's home rule authority because education is a matter of statewide concern. From this, the Respondent apparently argues that there cannot be a separate statewide interest in assuring the residents of Wisconsin places of employment free from discrimination. However, the Respondent appears to accept that the City would have authority to adopt an Equal Opportunities Ordinance under the statutory home rule authority, Wisconsin Statute section 62.11(5).

The Respondent asserts that the City of Madison did not adopt its Equal Opportunities Ordinance using the constitutional home rule authority. The Respondent maintains that the City accepted this proposition in a footnote in Federated Rural Electric Insurance Corporation v. MEOC, et al., 1981 Wisc. App. LEXIS 4143 (Wis. Ct. App. 1981) (unpublished), *aff'd by an equally divided court,* 319 N.W.2d 177 (Wis. 1982). The record in Federated Rural Electric is unclear as to the context in which this concession was made. Further, the crux of the issue before the Hearing Examiner is not whether the Equal Opportunities Ordinance was adopted from constitutional home rule authority. Rather, it is whether the statutory home rule authority granted to the City under section 62.11(5) is superseded by the state constitution.

The City of Madison acknowledged in Anchor Savings & Loan v. MEOC that the issue of credit regulation is a matter of statewide concern and a matter of local concern. Anchor Savings & Loan v. MEOC, 355 N.W.2d 234, 237 (Wis. 1984). This is because the home rule amendment to the state constitution grants municipalities the power to determine their "…local affairs…subject only to this constitution and to such enactments of the legislature of state-wide concern . . . ." See Wisconsin Constitution, Art. XI, sec. 3(1); Wis. Environmental Decade, Inc. v. DNR, 271 N.W.2d 69, 75 (Wis. 1978). Given that the case involved a mixed issue of state and local concern, the court employed a particular method of determining whether the city ordinance must be subordinated to state law. See Anchor Savings & Loan, 355 N.W.2d at 238 ("If a municipality acts within the legislative grant of power but not within the constitutional initiative, the state may withdraw the power to act; so if there is logically conflicting legislation, or an express withdrawal of power, the local ordinance falls. Furthermore, if the state legislation does not logically conflict, or does not expressly withdraw power, it is possible that the local ordinance nevertheless must fall if an intent that such an ordinance not be made can be inferred from the fact that it defeats the purpose or goes against the spirit of the state legislation") (quoting Solheim, Conflicts Between State Statutes and Local Ordinance in Wisconsin, 1975 Wis.L.Rev. 840, 848).

As the discussion below demonstrates, the allegation of employment discrimination lodged against the MMSD constitutes a mixed issue of state and local concern. Since the City elects to exert statutory home rule authority over the MMSD, the Respondent must demonstrate an irreconcilable conflict of laws such that the EOD cannot enforce the Madison General

Ordinance (MGO) in this instance. Alternatively, if there is no discernible conflict of laws, the Respondent must argue that the MGO must nevertheless fall because it defeats the spirit and purpose of state law.

The Respondent's contention, that the EOD is without jurisdiction to issue a determination of liability regarding the Complainant's allegation of retaliation, is multi-faceted. For the sake of clarity, the Hearing Examiner will attempt to separately address each of the Respondent's arguments.

Equal Opportunities Division and Constitutional Home Rule Authority

Turning to the Respondent's first argument, the Respondent asserts that the EOD lacks jurisdiction over the MMSD because public school education is a matter of state wide concern. The Respondent cites Anchor Savings & Loan v. MEOC, 355 N.W.2d 234 (Wis. 1984) and State ex rel. Harbach v. Mayor, et al., 206 N.W. 210 (Wis. 1926) as foundation for the propositions that public education is a matter of statewide concern and that cities do not have constitutional home rule powers as to matters of statewide concern. The Respondent argues that the City of Madison's constitutional home rule power does not provide a basis for asserting jurisdiction over the MMSD, because education and the supervision of public schools is a matter of statewide concern. The Respondent concludes that the decision in Anchor Savings & Loan precludes jurisdiction based on the City's constitutional home rule power.

However, the Respondent misapplies the rule of the court in Anchor Savings & Loan. In that case, the court did not find that cities do not have constitutional home rule powers as to matters of statewide concern. In Anchor Savings & Loan, the court considered whether the EOD's ordinance covering marital status discrimination in extensions of credit was superseded by a state law setting standards and requirements for loan modification. Id. at 235-36. Specifically, the question was whether the EOD could issue a damages award that called for the Respondent, a provider of credit, to modify its underwriting standards. Id. at 238-40. The court held that state law already set the standards and requirements for loan qualification and, as such, the EOD's mandate was incongruent with the criteria established at the state level regarding lending practices. Id. Thus, the court found that the EOD's application of ordinance section 3.23(3) [now 39.03(3)] to the Respondent's credit practice went against the spirit of state legislation relating to the practices of savings and loan associations. Id. The court further held that the ordinance could not logically coexist with said state legislation, because it clearly preempted the ordinance. Id.

The EOD's act of deciding whether the MMSD retaliated against the Complainant for the exercise of a right protected by the ordinance does not constitute impermissible regulation of public education. The court in Anchor Savings & Loan recognized that "a city ordinance may be authorized by sec. 62.11(5), Stats., notwithstanding statewide concern in the matter it regulates…." Id. at 237. The question before the court was whether the state law and the ordinance conflicted such that one must be subordinated to the other. Id. at 238. It is apparent that Anchor Savings & Loan involved a clear conflict of laws and that state law superseded the City's authority to enforce the ordinance. However, in this regard, the Respondent failed to identify an actual conflict of laws. Under Wisconsin Statute section 62.11(5), unless state law provides otherwise by express language, the City "shall have the power to act for the government and good order of the city…for the health, safety, and welfare of the public…." The state constitution's recognition of public education as a matter of statewide concern does not render the ordinance inapplicable to claims of discrimination and retaliation lodged against a

school district as there is no logical or unavoidable conflict between education and the prevention of discrimination.

Also, the Respondent takes an unjustifiably broad stance regarding the State's interest in education. In the Respondent's view any activity, including the ordering of cleaning supplies, if done by a school district, would be exempted. This logical absurdity demonstrates the fallacy in the Respondent's apparent position that activities not logically connected with education must be reserved solely to the state.

In the present matter, the Respondent allegedly denied the Complainant the position of School Security Assistant. While the security of students has become an issue of increasing concern to schools and school districts, it does not follow that it is the type of activity so intrinsically involved in education that only an agency of the state must be in charge of it.

Though education and the establishment of educational policy is a matter of statewide concern, the Respondent casts too broad a net over what is involved in educational policy and in the furtherance of education.

Equal Opportunities Division's Authority to Review Madison Metropolitan School District Employment Decisions

Second, the Respondent contends that the state has established a comprehensive and all-encompassing scheme regarding school district governance and, therefore, the EOD does not have the authority to review employment actions involving the MMSD. The Respondent asserts that the City of Madison does not have express authority over a school district's employment discrimination matters. Essentially, the premise of the Respondent's argument rests on the holding in Anchor Savings & Loan that cities may not exercise their statutory general welfare power under Wisconsin Statute section 62.11(5) where the state has enacted comprehensive legislation in the field. It is important to reiterate that Anchor Savings & Loan involved a clear regulatory conflict regarding a financial institution's underwriting practices.

In support of its argument that the EOD is without authority to review employment actions involving the MMSD, the Respondent cites City of Manitowoc v. Board of Education, 229 N.W. 652 (Wis. 1930) and State ex rel. Harbach v. Mayor, et al., 206 N.W. 210 (Wis. 1926). The Respondent argues that, under Manitowoc, the City of Madison does not have express authority over employment discrimination matters. The Respondent contends that the court in Manitowoc ruled that the power of municipalities to act with respect to school district matters has been removed by the legislature. However, the Respondent paints the court's decision in Manitowoc with an overly broad brush. In Manitowoc, the city council of Manitowoc sought to prevent the transfer of a school district building to the city vocational education board. 229 N.W. at 654. The court recognized that Wisconsin Statute section 40.16 [now 119.16(1m)] granted the common school board "possession, care, control and management of property and affairs of the district" and that this statute expressly limited the authority vested in the City under section 62.11(5) to manage and control city property. Id. Similar to Anchor Savings & Loan, the Manitowoc case presented a clear conflict of laws and an express, statutory withdrawal of authority.

The Respondent concludes that Manitowoc, "clearly establishes that the City of Madison has no authority to exercise supervisory control over the MMSD in managing the affairs of the school district, because it has been removed by the legislature." However, the Respondent overstates the relevance and application of Manitowoc to the case at hand. The court did not

hold that the City of Manitowoc did not have the power to act with respect to "school district matters." The Manitowoc case exemplified a power struggle between the city council and the district school board. The city council approved the school board's plans for the school district buildings, but later rescinded that approval. The court held that the rescission of approval was immaterial because Wisconsin Statute section 40.16 permits the school board to take action on this issue without having to seek city approval.

It is in this context that the court held the law "clearly removes the power of the care, control, and management of school property from the common council and vests it in the board of education and vocational board." Id. at 655. The Respondent's use of that quote to demonstrate that the City of Madison is without authority to review employment actions against the MMSD is misguided. Manitowoc dealt with a specific conflict of laws and involved a state statute that used express language to demonstrate its superiority over the home rule power at issue. It is a logical leap to conclude from Manitowoc that the City is in a similar conflict with the MMSD, as the City does not seek to regulate the school district by interfering with its management and control of school district matters.

The Respondent goes on to conclude that, under the Anchor doctrine, the EOD has no jurisdiction over the MMSD. However, the Respondent makes this assertion without supporting foundation. Anchor Savings & Loan involved a conflict of laws, in other words, a conflict between an ordinance originating from the City's home rule authority and a state law. As with the Manitowoc case, it is difficult to conclude that Anchor Savings & Loan involves a similar let alone applicable conflict of laws.

The Respondent quotes Harbach v. Mayor for the court's recognition of the fact that "throughout all the years the legislature has zealously guarded against a merger of school affairs with ordinary municipal affairs…." 206 N.W. at 212. According to the Respondent, the court also held that the state law at issue in the case "indicates a legislative understanding that there was nothing in common between school matters and ordinary municipal affairs, but, on the contrary, they constitute distinct and proper fields." Id. The Respondent, therefore, holds that the Harbach decision is on par with the holdings in Manitowoc and Anchor Savings & Loan.

Again, the Respondent overstates the application and relevance of Harbach. In that case, the City of Milwaukee argued that the law raising the tax limit for valuation of taxable city property, which includes school buildings, was unconstitutional because it interfered with the City of Milwaukee's home rule power to determine its local affairs and government. Id. at 211. A review of the state constitution revealed that "the management of the schools has been kept separate and distinct from the management of the ordinary municipal affairs." Id. at 212. The court also recognized that "[s]chool buildings are an essential agency in the state's educational scheme" and allowing municipalities to interfere with their construction, repair, control, or management permits frustration of the state's plan in promoting state-wide education. Id. Unlike Manitowoc and Harbach, however, the complaint against the MMSD does not involve an interference with property management or maintenance. Rather, it involves an allegation of retaliation for the exercise of a right protected under the ordinance. The MMSD is not granted express statutory authority to police itself on this issue. The legislature vested in the City of Madison the authority to monitor and redress discriminatory employment practices. See generally State ex rel. McDonald's Restaurant v. MEOC (Karaffa), No. 82-CV-2423 (Dane County Cir. Ct., 7/6/83), *aff'd* No. 83-1571 (Ct. App. 8/28/84); Potter v. Madison Gospel Tabernacle, MEOC Case No. 21269 (Ex. Dec. 2/14/94); Federated Rural Elec. Ins. Corp. v.

MEOC, et al., 1981 Wisc. App. LEXIS 4143 (Wis. Ct. App. 1982) (unpublished), *aff'd by an equally divided court,* 319 N.W.2d 177 (Wis. 1982).

Nevertheless, the Respondent argues that Wisconsin Statute section 118.001 establishes that the legislature expressly withdrew from the City of Madison the power to assert jurisdiction over the MMSD. The Respondent contends that Chapter 118 of the Wisconsin Statutes governs general school operations; that Wisconsin Statute section 118.001 vests in school boards broadly construed duties and powers to authorize any school board action, so long as that action does not violate state and/or federal law; and that Wisconsin Statute sections 118.22 and 118.24 grant school boards powers and duties to hire personnel. The Respondent asserts that Wisconsin Statute section 118.001 makes no mention of school boards being subject to local law or ordinances in the exercise of their statutory powers and duties, which includes hiring personnel. From this, the Respondent concludes that Wisconsin Statute section 118.001 reaffirms the principle announced in Manitowoc that the statutes give the school board, and not the city, supervisory control over school district affairs, including employment decisions.

However, the Respondent ignores the language of Wisconsin Statute section 62.11(5) which states that, unless state law provides otherwise by express language, the powers conferred by section 62.11(5) must remain undisturbed. Anchor Savings & Loan, Manitowoc, and Harbach all involved a statute that, by express language, clearly mandated the subordination of conflicting authority. In this case, however, Wisconsin Statute section 118.001 does not expressly remove the City's authority to enforce the ordinance where employment decisions of a school district are concerned. Here, the absence of an express limitation in Wisconsin Statute section 118.001 is not the same as the existence of such limitation. The City's home rule authority cannot be subordinated by mere implication. The Respondent provided no evidence to support the contention that there is an irreconcilable conflict among local, state, and/or federal law.

Further, the EOD is not interfering with the management and control of MMSD's hiring practices. The EOD is neither attempting to control who the MMSD chooses to hire or terminate, nor is the EOD interfering with the standards and practices developed by the MMSD to hire and fire personnel. Rather, there is an allegation of retaliation for the exercise of a right protected by the ordinance—namely, the right to bring a complaint of discrimination before the EOD without being subject to, among other things, intimidation, threats, harassment, or retaliation. In this regard, the EOD is well within its authority to assert jurisdiction over the MMSD.

Equal Opportunities Division's Authority to Assert Subject Matter Jurisdiction over the Madison Metropolitan School District

Third, the Respondent argues that the City of Madison lacks subject matter jurisdiction over the MMSD, in part, due to the preemption doctrine in Anchor Savings & Loan. The Respondent contends that the court in Anchor Savings & Loan held that the City of Madison could not regulate equal opportunity in credit because the state occupied the field of regulating credit institutions. The Respondent asserts that, analogously, school districts are extensively regulated by Wisconsin Statute Chapters 115-121 and points specifically to Wisconsin Statute sections 118.21 (teacher contracts), 118.22 (renewal contracts), and 118.24 (issuance and renewal of school administrator contracts). Wisconsin Statute section 118.20, the Respondent argues, thoroughly regulates teacher discrimination in education as it specifically prohibits sex, race, and nationality discrimination. The Respondent also highlights the fact that section 118.20 provides a comprehensive complaint procedure and the fact that the state provides a

comprehensive plan for teacher discrimination complaints in the Wisconsin Fair Employment Act (WFEA). From this, the Respondent concludes that the Anchor doctrine dictates that the City may not exercise its statutory general welfare power under Wisconsin Statute section 61.11(5) over the employment practices of the MMSD, because the application of the equal opportunities ordinance to the MMSD is contrary to the spirit of the state's structure regulating all aspects of education and is in conflict with the state's comprehensive procedure for discrimination complaints.

While Wisconsin statute section 118.20 prohibits sex, race, and nationality discrimination in employment, it is immaterial as this case involves a claim of retaliation in employment. In addition, section 118.20 prohibits discrimination against teachers, and the Respondent did not seek to employ the Complainant as a teacher. Rather, the position sought by the Complainant was a non-academic position. Specifically, the Complainant applied to become a School Security Assistant. She was not required to possess a teacher certificate or license. See Wis. Stat. § 118.19 (2010) ("…any person seeking to teach in a public school, including a charter school, or in a school or institution operated by a county or the state shall first procure a license or permit from the department"). Section 118.20 is simply not applicable to this case.

If allegations of sex, race, and/or nationality discrimination were at issue in this case, there would not be a discernible conflict of laws. Both the Madison General Ordinance (MGO) and Wisconsin Statute section 118.20 can operate in tandem without coming into conflict. Insofar as the spirit and purpose of section 118.20 is to prohibit discrimination in employment, assignment, or reassignment on the bases of sex, race, and nationality, both the statute and the ordinance remain in perfect harmony. Further, there is no language in section 118.20 requiring an aggrieved teacher to exhaust administrative remedies before he or she resorts to remedies available under local, state, or federal law. See Kurtz v. City of Waukesha, 280 N.W.2d 757 (Wis. 1979). In fact, the Respondent acknowledged that section 118.20 is not the exclusive remedy of a wronged teacher.

Nonetheless, the Respondent contends that, in addition to Wisconsin statute section 118.20, the WFEA provides a comprehensive plan for teacher discrimination complaints and that application of the equal opportunities ordinance conflicts with the plan provided for in the WFEA. However, there is no such conflict, as both the ordinance and the WFEA share a common purpose. See Federated Rural Elec. Ins. Corp. v. MEOC, et al., 1981 Wisc. App. LEXIS 4143 (Wis. Ct. App. 1982) (unpublished), *aff'd by an equally divided court,* 319 N.W.2d 177 (Wis. 1982). One of the issues before the court in Federated Rural Electric was whether the City of Madison possessed authority under Wisconsin Statute section 62.11(5) to prohibit employment discrimination based on factors other than those specified in the WFEA. Id. at *1-2. Accepting that the subject of employment discrimination is a matter of mixed statewide and local concern, the court nevertheless held that the City's otherwise legitimate exercise of powers conferred by the home rule statute "is not rendered invalid and constitutionally defective merely because it deals with a matter of state-wide concern." Id. at *3. The court further acknowledged that the ordinance and the WFEA have a common purpose: "They are intended to protect the general public and individual citizens from the harmful effects of discrimination based upon factors legislatively presumed to bear no reasonable relationship to job performance." Id. at *7. The court found that Wisconsin Statute section 66.433(9) [now 66.0125] governing general administrative powers does not confer power or authority to municipalities to regulate on the subject of discrimination. Id. at *13. However, that section "assumes the existence of the police powers conferred by the general charter laws and issues a broad invitation to municipalities to

direct these powers towards ameliorating a broad variety of problems caused by discrimination at the local level." Id.

Namely, the court in Federated Rural Electric held that the enforcement of the ordinance provisions relating to marital status and physical appearance did not contravene the spirit or purpose of the WFEA, even though the WFEA did not cover such bases of discrimination. Id. at *15. To the contrary, the court found that the ordinance complemented the WFEA's provisions "by addressing employment discrimination practices determined by the city council to present problems for residents of Madison." Id. Hence, the court recognized that state and local law can occupy the realm of employment discrimination without coming into conflict. See also State ex rel. McDonald's Restaurant v. MEOC (Karaffa), No. 82-CV-2423 (Dane County Cir. Ct., 7/6/83), *aff'd* No. 83-1571 (Ct. App. 8/28/84) (acknowledging that, while employment discrimination is a matter of statewide concern, municipalities may nevertheless regulate employment discrimination under the home rule statute (citing Madison Association of Food Dealers v. City of Madison, 293 N.W. 2d 540, 544 (Wis. 1980))); Potter v. Madison Gospel Tabernacle, MEOC Case No. 21269 (Ex. Dec. 2/14/94) (finding that the WFEA does not preempt the ordinance because there is no express language in the Act preempting local law and reiterating the Wisconsin Supreme Court's recognition of the EOD's authority to regulate employment discrimination despite state regulation in that area (citing Anchor Savings & Loan, 355 N.W.2d at 234)).

In Harbach, the court held that allowing municipalities a voice in the construction, repair, control, or management of school buildings allows them to frustrate the state's plan in promoting statewide education. From this, the Respondent argues that municipalities should not have a voice in the employment and management of school personnel, because it would allow a similar frustration of the state's plan in promoting education throughout the state. However, the EOD does not seek to regulate the employment and management of school personnel. The Hearing Examiner recognizes that Title VII of the Civil Rights Act provides employers with a great deal of discretion regarding its hiring and firing decisions. Nevertheless, the fact remains that the discrimination claim at issue in this case is within the EOD's purview. The EOD is exercising its statutory authority to monitor, investigate, and redress claims of discrimination in employment, including retaliation claims. It is well established that, unless there is an express statutory withdrawal of authority or a legitimate assertion that the ordinance either infringes the spirit of state law or policy or that it is logically inconsistent with state law, the EOD is authorized to regulate employment discrimination.

Nevertheless, the Respondent maintains that Article X, sections 1 and 3 of the Wisconsin Constitution require uniformity and provide for exclusive state control over school districts. The Respondent asserts that Article X is evidence that the legislature intended to preclude municipal regulation, and that allowing municipal regulation of school districts may result in different sets of laws governing school districts. The Respondent contends that such municipal regulation is contrary to the uniformity clause of the state constitution. However, the Wisconsin Court of Appeals addressed a similar argument in Federated Rural Electric. In that case, the company argued that the MGO thwarted the WFEA's discrimination policies which, according to the company, the legislature intended to apply with uniformity throughout the state. 1981 Wisc. App. LEXIS at *11. The court held that, employers doing business in multiple municipalities may be subject to differing regulations, such as those relating to building permits, sales permits, zoning, and other local laws. Id. at *15. The court held that "compliance is a legitimate cost of doing business in a given community," and the legislature recognized that the state may have "differing problems arising out of discriminatory practices…that…should be

addressed at the local level…." Id. at *11, *15. Analogously, the MMSD is in the business of providing quality education to students of the Madison community. To that end, the MMSD is authorized to hire and fire necessary personnel, including teachers. However, the MMSD's authority, in this regard, is limited by local, state, and federal law. The MGO is simply one of many regulations with which the MMSD must lawfully comply.

Going forward, the Respondent makes a reference to the MGO's provisions relating to arrest and conviction records and argues that the provision of time limitations on an employer's consideration of an applicant's conviction record is inconsistent with the WFEA, which contains no such time limitations. The Respondent asserts that the MGO's time limitation is repugnant to the state's comprehensive plan for regulation of public schools, because it conflicts with the statutory authority of the school board to make personnel decisions. However, it is difficult to ascertain the relevance of the Respondent's argument, as this case involves a claim of retaliation, not a claim of discrimination on the basis of an arrest or conviction record. The Hearing Examiner declines to reach issues which are not properly framed by the facts of the record.

The Respondent's most interesting argument is that it is an agent of the state, and as such, it is not subject to the EOD's jurisdiction. The Respondent's argument is two-fold. First, the Respondent asserts that it is an agent of the state for the purposes of administering the state's system of public education and cites Zawerschnik v. Joint County School Committee of Milwaukee and Waukesha Counties, 73 N.W.2d 566 (Wis. 1955) and State ex rel. Wasilewski v. Board of School Directors, 111 N.W.2d 198 (Wis. 1961). Second, the Respondent contends that the MGO does not expressly cover the MMSD, because its definition of "person" applies only to agents of the City of Madison, as opposed to agents of the state.

Regarding the Respondent's first argument, the Hearing Examiner finds that the MMSD is more akin to a local agency carrying out a particular function on behalf of the state. See State ex rel. Board of Education v. City of Racine, 236 N.W. 553, 555 (Wis. 1931) (finding that the legislature most likely intended "that school affairs shall constitute a municipal function in cities and that the board of education is merely a city agency the same as the board of public works…."). The Respondent cites Zawerschnik for the proposition that the MMSD is an agent of the state for the purposes of administering the state's system of public education, including matters involving employment discrimination in schools. However, Zawerschnik does not hold that school districts are state agencies, simply because they administer the state's system of public education.

In Zawerschnik, the issue was whether the County School Committees of Milwaukee and Waukesha (Joint Committee) abused or exceeded their power to reorganize school districts. 73 N.W.2d at 570. The court recognized that the legislature, "may vest power in proper boards or offices to establish school districts and change the boundaries of existing districts." Id. at 572. The court also recognized that, by law, a county school committee "possesses the power to order the creation, alteration, consolidation, or dissolution of school districts within its jurisdiction." Id. In order to make this point clear, the court analogized a town board's relation to the judiciary to a school board's relation to a state agency. Id. at 573. The court acknowledged that a town board has statutory authority to exercise its discretion and form school districts that, in its best judgment, will promote the cause of education. Id. An appeal from a town board's decision is generally appealed to the state superintendent, and the power of the superintendent, in this respect, is quasi-judicial in nature. Id. Analogously, the court held that the power "conferred upon the county committee on common schools is the same as that conferred upon

the state superintendent…." Id. The court found that, if there can be no constitutional objection to the power of a superintendent to exercise his or her quasi-judicial power, then there can be no such objection to the Joint Committee's exercise of its statutory power to reorganize school districts. Id. It is in this context that the court regarded a school district as an agent of the state for the purpose of administering the state's system of public education. Id.

Six years later, the court in Wasilewski made it clear that, at its core, a school board is an administrative body of the city performing an administrative function. 111 N.W.2d at 210. In that case, one of the issues to be decided by the court was whether a school board acted lawfully when it discharged a teacher pursuant to an informal hearing. Id. at 205. The court held that, in reviewing an action of an administrative board, a court must determine whether the board acted according to law. Id. The court further held that the Wisconsin Administrative Procedure Act (WAPA) relating to hearings and determinations in contested cases defined "agency" to include state government agencies. Id. at 210. The Act defined "agency" to mean "any board, commission, committee, department, or officer in the state government, except the governor or any military judicial officer of this state." Id. (original emphasis retained). This led the court to overrule a 1926 Wisconsin Supreme Court case which cited Harbach for the proposition that a school board is an administrative body of the state. Id. (citing State ex rel. Nyberg v. School Directors, 209 N.W. 683 (Wis. 1926); State ex rel. Harbach v. Mayor, 206 N.W. 210 (Wis. 1926)).

The Respondent does not fully address the holding in Wasilewski. Instead, the Respondent turns the Hearing Examiner's attention to section 111.32(6)(a) of the WFEA and argues that it defines "employer" to mean "the state and each agency of the state and…any other person engaging in any activity, enterprise or business employing at least one individual." The Respondent further argues that, under that section, "agency" means "an office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts." From this, the Respondent concludes that, not only is it an agent of the state, but that the WFEA cannot apply to it unless it is an agent of the state.

However, both of those conclusions are incorrect. First, the WFEA's definition of agency contemplates an agent of state government, which the Respondent is not. This is apparent given the seven listed types of agencies followed by the phrase "or other body in state government…." Second, the WFEA's definition of "employer" includes not only state agencies, but also employers that cannot be considered agents of the state. The WFEA's catch-all provision makes it clear that it applies to the state, agents of the state and "…any other person engaging in any activity, enterprise or business employing at least one individual." Wis. Stat. § 111.32(6)(a) (2010).

The Hearing Examiner does not find any reason to construe the definition of agency in the WFEA any differently than the Wisconsin Supreme Court construed the term in the context of the WAPA in Wasilewski. The language used in both definitions is strikingly similar and, as previously discussed, it is not the case that the WFEA applies only to states and agents of the state. Further, the weight of case law regards a school board as a city agency carrying out a state function, rather than an agent of the state government. Thus, the MGO clearly applies to the Respondent, as its definition of "person" includes agents of the City of Madison. See M.G.O. § 39.03(2)(aa).

Further, as the discussion below demonstrates, the Respondent erroneously maintains that it is not subject to regulation of any kind. This is because the Respondent argues that the WFEA cannot apply to it unless it is an agent of the state government; but also argues that, because it is a local governmental unit, it is exempt from any action brought under the WFEA.

Equal Opportunities Division's Authority to Award Compensatory and/or Punitive Damages Against the Madison Metropolitan School District

Here, the Respondent argues that the MMSD is a local governmental unit and therefore it is exempt from any action under the WFEA for the recovery of compensatory or punitive damages. According to the Respondent, Wisconsin Statute section 111.397(1)(a) holds that "[t]he department or a person discriminated against or subjected to unfair honesty testing or unfair genetic testing may not bring an action under this paragraph against any local governmental unit, as defined in s. 19.42(7u)…." The Respondent maintains that Wisconsin Statute section 19.42(7u) defines a "local governmental unit" to mean "a political subdivision of [the state of Wisconsin], a special purpose district in this state, an instrumentality or corporation of such a political subdivision or special purpose district, a combination or subunit of any of the foregoing or an instrumentality of the state and any of the foregoing." However, Wisconsin Statute section 19.42(7u) does not regard a school district as a political subdivision of the state, nor does it even refer to school districts. Still, without any foundation, the Respondent concludes that the definition of "local governmental unit" applies to it and that it is exempt from any action under the WFEA for the recovery of compensatory and/or punitive damages. The Hearing Examiner declines to adjudicate on this particular issue unless or until it is further developed by the Respondent.

The Respondent further asserts that even if the MGO applies to the MMSD, the EOD has no authority to award compensatory or punitive damages against the MMSD. However, an analysis of section 111.397(1)(a) reveals neither an express nor an implied withdrawal of power from the EOD.

Wisconsin Statute section 111.397 provides a person who is a victim of employment discrimination with the option of enforcing an administrative judgment in circuit court to obtain compensatory and punitive damages, in addition to back pay, reasonable costs, and attorney fees. In the context of an administrative hearing involving allegations of employment discrimination, damages awards often include back pay, front pay, and emotional distress damages. Although, section 111.397 allows for an award of punitive damages in circuit court, the EOD as an administrative agency is not permitted to make such an award. Further, even though back pay and front pay are quasi-compensatory damages, they are nevertheless largely considered to be equitable remedies. See Sands v. Menard, 787 N.W.2d 384, 393, 401 (Wis. 2010). Thus, the only issue before the Hearing Examiner is the EOD's authority to make a compensatory damages award against the MMSD in the form of emotional distress damages.

It is highly unlikely that section 111.397(1)(a) applies to the EOD. An analysis of section 111.397(1)(a)'s legislative history reveals that subsection (1)(a) is most applicable to the Department of Workforce Development (DWD) and the Labor and Industry Review Commission (LIRC). Thus, section 111.397(1)(a) does not preclude the EOD from making a compensatory damages award against the MMSD.

Past versions of Senate Bill 20 (SB 20) shed light on the spirit and purpose of section 111.397. See S.B. 20, 99th Leg., 2009-10 Reg. Sess. (Wis. June 22, 2009). According to the

initial language of SB 20, section 111.397 was created to give an individual the opportunity to obtain compensatory and punitive damages in proceedings before DWD and LIRC, except where a local governmental unit is involved. S.B. 20, 99th Leg., 2009-10 Reg. Sess. (Wis. Jan. 28, 2009). The fair employment law in force at the time SB 20 was introduced did not allow the DWD "to order the payment of compensatory or punitive damages or any other surcharges or penalties in a case of employment discrimination." Wis. S.B. 20. (Jan. 28). Also, at that time, the DWD could only issue awards including reinstatement, back pay, costs, and attorney fees. Wis. S.B. 20. (Jan. 28). Thus, the legislature wanted the DWD and the LIRC to have the additional power to make compensatory damages and punitive damages awards, but not in cases involving a local governmental unit.

Accordingly , it is clear that section 111.397(1)(a) is only concerned with administrative proceedings before the DWD and the LIRC. If the legislature intended to include proceedings before the EOD, it could have made that quite clear in SB 20. See Storm v. Legion Ins. Co., 665 N.W. 2d 353, 363 (Wis. 2003) ("[W]hen the legislature enacts a new statute, it is presumed to know the new statute's relationship with existing and contemporaneously created statutory provisions, especially those directly affecting the statute").

Furthermore, the legislature uses definite articles to describe the DWD and the LIRC. In section 111.397(1)(a), the statute reads "*the* department or a person discriminated against" and in subsection (b) the statute reads "…if that decision is reviewed by *the* commission…." (emphasis added). If the statute said "a department" and "a commission," then it would make sense to find that it applies to the EOD and the Equal Opportunities Commission. However, the statute clearly references a single department and commission with the use of a definite article. This is further evidence of the legislature's intent to limit the scope of the statute to include only administrative proceedings before the DWD and the LIRC.

ORDER

For the aforementioned reasons, the Hearing Examiner finds that the Respondent failed to establish that the EOD does not have the authority to exercise subject matter jurisdiction over the MMSD. Further, the Hearing Examiner finds that Wisconsin Statute section 111.397(1)(a) neither expressly nor impliedly withdraws power from the EOD to issue an award of compensatory damages in a case involving a school district.

IT IS HEREBY ORDERED that the Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction is denied.

Signed and dated this 9th day of June, 2011.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: David E Rohrer