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

Marlon H Banks
525 Aztalan Dr
Madison WI 53718

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. 20102172

EEOC CASE NO. 26B201000068

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 Marlon Banks. On September 22, 2010, Banks 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 in terms and conditions of employment on account of his race and color in violation of Equal Opportunities Ordinance sec. 39.03(8)(a), Mad. Gen Ord. In particular, the Complainant argues that the Respondent failed to provide support when he received parental complaints about deficient performance. The Respondent denies discriminating against the Complainant and essentially asserts that the Complainant misinterpreted parents' efforts to advocate on behalf of their autistic child.

In an Initial Determination issued on March 14, 2011, an Investigator/Conciliator found that there was probable cause to believe that the Respondent discriminated against the Complainant on the bases of race and color in terms and conditions of employment. As a result, the Investigator/Conciliator transferred the case to conciliation. Subsequent to unsuccessful conciliation efforts, the parties attended a Pre-Hearing Conference on April 26, 2011. 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 June 3, 2011. 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 another enactment.

The court determined in Anchor Savings & Loan 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).

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

On December 1, 2010, the Respondent filed with the EOD a strikingly similar motion to dismiss for lack of subject matter jurisdiction in an unrelated discrimination case. See Rhyne v.

Madison Metropolitan School District, MEOC Case No. 20092030 (Ex. Dec. 6/9/11) (finding that the Respondent failed to establish a discernible conflict of laws and that the Respondent failed to establish that the EOD does not have the authority to issue a compensatory damages award against a school district). In Rhyne, the Respondent submitted a motion outlining a host of reasons for why the complaint should be dismissed for lack of jurisdiction. The Respondent in the present case submitted a motion to dismiss delineating virtually all of the same reasons verbatim as those presented in Rhyne. Therefore, for the purposes of adjudicating this motion, the Hearing Examiner incorporates by reference the reasoning and conclusions set forth in Rhyne. Incidentally, the Hearing Examiner's decision in Rhyne disposes of all arguments contained in the Respondent's present motion to dismiss, except one.

In its present motion to dismiss, the Respondent provided an additional basis for asserting a lack of jurisdiction over the MMSD. The Respondent maintains that it is an agent of the state and therefore the EOD cannot exercise jurisdiction over it. In support of this assertion, the Respondent offers three arguments. While the first two arguments are a reiteration of arguments raised in the Rhyne case, the third argument is quite new and flows directly from the previous two. First, according to the Respondent, it is an agent of the state for the purposes of administering the state's system of public education. Second, the Madison General Ordinance does not apply to state agencies. Third, the EOD expressly stipulated that it does not have jurisdiction over another educational institution deemed to be an agency of the state.

Even if the Hearing Examiner were to accept the Respondent's contention that, due to the importance placed on education in the Wisconsin constitution, the Respondent is the "agent" of the state for purpose of educational policy, the Respondent fails to explain to what extent this status is unique and/or universal. The Hearing Examiner can accept that there is an arguable need for a single authority for the establishment of educational standards, such as courses to be taught or curriculum standards or other appropriate measures of uniformity. However, the Hearing Examiner finds that the Respondent has totally failed to explain how decisions about hiring and firing staff, such as security personnel or even academic personnel, require statewide uniformity. While it may be that there is an interest in establishing some uniform minimum standards of achievement for teachers or other academic professionals, there is nothing in this record that demonstrates that the Respondent has the requisite authority, as opposed to the Wisconsin Department of Public Instruction, to establish and enforce those standards.

While the Respondent lays claim to some legacy of state power derived allegedly from the state constitution, it fails to demonstrate why the Department of Public Instruction is not the more appropriate holder of that legacy. Similarly, the Respondent fails to demonstrate why a local municipality, such as the City of Madison, does not have a compelling interest in assuring that its residents do not experience discrimination in what are essentially jobs that are identical in most aspects to those of any other employer within the City of Madison.

Consequently, the Respondent's third argument serves as the only remaining support for its motion to dismiss, as the Hearing Examiner disposed of its previous two arguments in the Rhyne decision. The Respondent relies primarily upon the employment discrimination case, State ex rel. Area Vocational, Technical and Adult Education District No. 4, by its Board v. Equal Opportunities Commission of the City of Madison (VTAE v. MEOC), in which the Madison Area Technical College (MATC) petitioned the circuit court for an absolute writ of prohibition against the EOD. 91-CV-1537 (Dane County Cir. Ct. 1991). In VTAE, the MATC alleged that, as an agent of the state, the EOD had no jurisdiction over it. Id. Ultimately, the City of Madison and the MATC entered into a Consent Decree under which the MEOC, now the Department of Civil

Rights EOD, agreed not to bring further proceedings against the MATC as an employer or regarding its governance of student academic activity or status. Id.

The Respondent asserts that, like the MATC, it is an agent of the state and therefore it is entitled to immunity from suit. The Respondent points out that the Hearing Examiner and the City of Madison conducted research on the issues presented in VTAE and concluded that the MEOC is without authority to regulate employment discrimination claims against the MATC. Acknowledging that this research is not part of the record in VTAE, the Respondent maintains that the Stipulation entered into by the EOD is instructive for three reasons. First, the Respondent argues that there can be no doubt that the MMSD, like the MATC, is an agent of the state. Second, the Respondent asserts that, similar to the MATC, the MMSD owns properties outside of the geographical boundaries of the City of Madison. As a result, an unauthorized exercise of jurisdiction by the EOD creates a situation in which, due to the location in which they occur, acts by the MMSD could be subject to EOD jurisdiction while others would not. Finally, the Respondent argues that, like the MATC, the MMSD currently has four matters pending before the EOD and that the MMSD will continue to be highly prejudiced by being forced to appear in four pending cases to defend claims before a tribunal that has no jurisdiction.

In response to this, the Complainant argues that the Respondent's argument rests on a voluntary agreement between two parties, neither of which is affiliated with the Respondent. The Complainant further asserts that the Respondent bases its argument on alleged superficial similarities and on little or no legal bases. The Respondent counters that the Complainant neither distinguished the MATC and the MMSD nor proved that lack of jurisdiction over one has no relation to lack of jurisdiction over the other. The Respondent further contends that the Hearing Examiner's decision in Rhyne does not address the inconsistency of disavowing jurisdiction over one educational state agency while simultaneously asserting jurisdiction over another.

The Hearing Examiner finds that the primary problem with the Respondent's argument is that it rests on a logical inconsistency. The proposition forming the basis of the Respondent's argument, that it is an agent of the state, has already been invalidated by a previous decision. The Rhyne decision aptly and thoroughly addressed and disposed of the Respondent's contention. In Rhyne, the Hearing Examiner concluded that case law clearly regards educational institutions as local agencies that carry out particular functions on behalf of the state. As with the motion filed in the Rhyne case, the Respondent in this case fails to address the fact that the weight of case law regards a school board as a local agency carrying out a state function, rather than an agent of the state government. The Respondent essentially ignores the Hearing Examiner's findings in Rhyne and makes no attempt to reconcile those findings. Nevertheless, without adequate foundation, the Respondent insists that, as an agent of the state, it is entitled to immunization from suit. Although the Respondent asserts that the onus is on the Complainant to show a distinction between the MMSD and the MATC, the Hearing Examiner finds that the Respondent failed to supply a sufficient connection between the two entities.

While the Respondent asserts that the Rhyne decision does not address the inconsistency of relinquishing jurisdiction over one educational state agency while simultaneously asserting jurisdiction over another, the Hearing Examiner reiterates that this particular argument rests on a faulty presupposition. Namely, that the Respondent is an agent of the state. In light of the decision in Rhyne, the Hearing Examiner finds no such inconsistency.

The Respondent cannot demonstrate that it is a state agency simply by pointing to an unpublished circuit court case with an incomplete record involving a different educational institution. The Respondent must supply some reasonable connection grounded in law and fact. The Respondent acknowledged that legal research by the City Attorney's Office and by the Hearing Examiner played a role in the VTAE decision. However, the legal reasoning of the City Attorney and the Hearing Examiner was not made part of the record. Hence, it is difficult to know how the legal conclusion in VTAE was reached. As such, there is an insufficient basis to conclude, as the Respondent asserts, that the MMSD and the MATC are similarly situated.

Accordingly, the Hearing Examiner finds that the Respondent failed to provide a cognizable nexus between the VTAE case and the present case. In addition, it is difficult to understand the Respondent's overall basis for contending that, since it is a state agency, it shares a similarity with the MATC. This particular assertion by the Respondent is simply unsupported by the record.

The Hearing Examiner is amused by the Respondent's contention that the Hearing Examiner's failure to address this particular issue in the Rhyne decision represents either some form of concession or a shortcoming on the part of the Hearing Examiner. It must be pointed out that the Respondent, though represented by different counsel in the Rhyne matter, did not raise this as an issue or grounds for a different outcome in that case. While the Hearing Examiner frequently is required to conduct independent research, it would be inappropriate for him to represent a party's interest especially where that party is already represented by counsel.

ORDER

Given the Hearing Examiner's decision in Rhyne v. Madison Metropolitan School District, MEOC Case No. 20092030 (Ex. Dec. 6/9/11) and the fact that the Respondent raises no new arguments other than those discussed herein, it is hereby ordered that the Respondent's motion is dismissed.

Signed and dated this 3rd day of August, 2011.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Linda Harfst
Matthew W Bell