

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

Case LI
No. 21916 MP-772
Decision No. 15725-B

Examiner Duane McCrary having, on January 31, 1979, issued Findings of Fact, Conclusion of Law and Order in the above-entitled matter, wherein said Examiner dismissed the complaint initiating the matter on the basis that the complaint alleged prohibited activity which occurred more than one year prior to the date on which the complaint was filed; and the Complainant having timely filed a petition with the Wisconsin Employment Relations Commission, pursuant to Section 111.07(5), Wis. Stats., requesting the Commission to review the Examiner's decision and to reverse same; and the Commission, having reviewed the entire record, the Examiner's decision, the petition for review, and the brief filed in support thereof, makes and issues the following

IT IS HEREBY ORDERED

1. That the Examiner's Findings of Fact be, and the same hereby are, affirmed.
2. That the Examiner's Conclusion of Law be, and the same hereby is, amended to read as follows:

That, since the alleged prohibited practices occurred on a date more than one year preceding the date on which the complaint was filed, Sections 111.70(4)(a) and 111.07(14), Wis. Stats., precludes the Wisconsin Employment Relations Commission from exercising its jurisdiction over the merits of said complaint.

3. That the Examiner's Order be, and the same hereby is, affirmed.

Given under our hands and seal at the
City of Madison, Wisconsin, this 8th
day of June, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney, Chairman

Herman Torosian, Commissioner

Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,
REVISING EXAMINER'S CONCLUSION OF LAW AND
AFFIRMING EXAMINER'S ORDER

The instant complaint proceeding was initiated by the filing of a complaint by David A. Katz, an employee of the City of Madison, wherein Katz alleged that the City had committed prohibited acts of interference and discrimination by transferring Katz from a higher paid position in its Water Utility to a lower paid position because Katz had filed grievances on his own behalf relating to his pay rate, as well as to such transfer. The City, in its answer, denied the commission of any prohibited practices, contending that of the two grievances filed by Katz, the first was resolved, and that the second was withdrawn prior to proceeding to arbitration thereon.

The Examiner's Decision:

The Examiner found that the alleged discriminatory act - that of the job transfer - occurred on July 27, 1976, and that the complaint initiating the instant proceeding was filed on July 28, 1977. 1/ The Examiner dismissed the complaint, after a full hearing, on the basis that it was untimely filed, since it was filed more than one year following the occurrence of the alleged prohibited activity involved. The Examiner premised his decision on Section 111.07(14), Wis. Stats., which reads as follows:

"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."

The Examiner also set forth that Section 111.70(4)(a) incorporates Section 111.07(14) in prohibited practice cases involving municipal employees and employers.

The Petition for Review:

In his petition requesting the Commission to review the Examiner's decision, and in the brief supporting same, Katz would have the Commission reverse the Examiner's dismissal of the complaint, contending that (1) Section 111.07(14) does not apply to prohibited practice complaints filed under the Municipal Employment Relations Act; (2) even if said statutory provision was applicable, the complaint was timely filed, and, further, that the period therein was tolled as a result of the processing of Katz's second grievance up to the point of arbitration; and (3) assuming said section did apply, it did not bar the Examiner from considering post July 28, 1976 conduct. Katz therefore would have the Commission consider the merits of the complaint and conclude that the City committed the alleged prohibited practices. Katz also contends that the Examiner erred in failing to find that during the processing of Katz's grievance, which was filed in August 1976, agents of the City committed ~~independent~~ acts of interference in violation of Section 111.70(3)(a)1 of the Municipal Employment Relations Act by making threats of reprisals because of the filing and processing of the transfer grievance. The City did not respond to the petition for review nor to the brief filed in support thereof. 2/

1/ Hearing before the Examiner was completed on December 13, 1977. Final brief was received by the Examiner on June 30, 1978, and the Examiner issued his decision on January 31, 1979.

2/ The City had until May 18, 1979, to file a reply brief.

Discussion:

Katz argues that Section 111.07(14), the statute of limitations, does not apply to complaint proceedings under the Municipal Employment Relations Act (MERA), although Section 111.70(4)(a) of MERA provides:

"Section 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term 'unfair labor practices' appears in s. 111.07 the term 'prohibited practices' shall be substituted."

Katz contends that such provision is procedural and is not intended to constitute a statute of limitations.

The above-quoted statutory provision clearly incorporates all the subsections of Section 111.07 into MERA, including subsection (14), and, therefore, said statute of limitations is applicable in this proceeding.

Katz would have the Commission conclude that, in calculating the one year period, said period should include more than the normal 365 days, and in that regard should adopt the definition of the term "year" as set forth in Barnhart, American College Dictionary (Random House, 1961) as follows:

"year ...the time interval between one vernal equinox and the next, or the period of one complete apparent circuit of the ecliptic by the sun, being equal to about 365 days, 5 hours, 48 minutes, 46 seconds...the true period of the earth's revolution round the sun; the time it takes for the apparent traveling of the sun from a given star back to it again, being about 20 minutes longer than the tropical year, which is affected by the precession of the equinoxes...the time in which any planet completes a revolution round the sun...a full round of the seasons."

We do not believe that the legislature, in adopting the statutory provisions involved, ever intended to apply such an extra-terrestrial definition to the term "one year." Rather, we believe the legislature intended the term to have the statutory definition set forth in Section 990.01(49), Wis. Stats., defining "year" as the calendar year.

We are not persuaded that the one year period for filing the complaint herein was tolled by the processing of the grievance up to the point of arbitration. The processing of the grievance involved an alleged violation of the provisions of the collective bargaining agreement, while the complaint was premised on alleged statutory violations, independent of the provisions of the collective bargaining agreement.

The alleged statutory violations alleged in the complaint related to the transfer of Katz from the classification of Water Works Operator I to Plant Works Maintenance Worker I, which occurred on July 27, 1976. Katz, on August 3, 1976, filed the grievance protesting such transfer, and therein indicated, among other things, that the transfer was motivated by the exercise of Katz's protected right to file the initial grievance on July 20, 1976, relating to Katz's claim that he was not being properly paid.

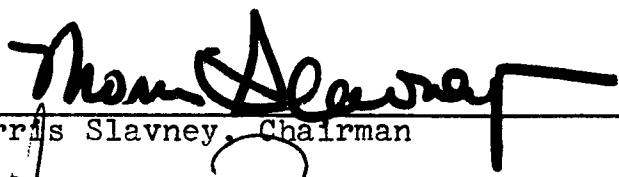
Since the alleged act of discrimination occurred on July 27, 1976, and since the complaint herein was filed on July 28, 1977, one year and a day later, we agree with the Examiner's conclusion that the complaint herein was untimely filed. With respect to the contention that the


Examiner erred in not finding an independent violation of interference as a result of alleged threats of reprisals surrounding Katz's transfer grievance, it should be noted that the complaint filed herein does not allege, nor can it be construed to allege, any act of interference, separate and apart from Katz's transfer. Furthermore, while evidence was adduced with regard to such threats, it should be noted that the hearing 3/ in this matter occurred more than one year following the date on which such activity was alleged to have occurred. We have revised the Examiner's Conclusion of Law to more accurately reflect the legal conclusion resulting in the dismissal of the complaint.


Dated at Madison, Wisconsin, this 8th day of June, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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3/ The first occasion on which it can be construed that Katz claimed that the City committed an independent act of interference.