STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GARY STUBNER and JOHN D. STUDNICKA,		
Complainants,		Case III No. 30938 MP-1422
vs.		Decision No. 20369-A
VILLAGE OF HARTLAND,		
Respondent.		

Appearances:

Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman S.C., Attorneys at Law, 788 North Jefferson Street, P.O. Box 92099, Milwaukee, Wisconsin 53202, by Mr. Robert E. Gratz, appearing on behalf of the Complainants.

Mulcahy & Wherry, S.C., Attorneys at Law, 815 East Mason Street, Suite 1600, Milwaukee, Wisconsin 53202, by Mr. Jon E. Anderson, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER GRANTING MOTION TO DISMISS

Gary Stubner and John D. Studnicka, individuals, having on January 5, 1983, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Village of Hartland, had committed prohibited practices within the meaning of Sections 111.70(2), 3(a)(1) (2), (3) and (4), Wis. Stats.; and the Commission having appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusion of Law and Order, as provided in Section 111.07(5), Wis. Stats.; and Respondent having filed a motion to dismiss the complaint on the basis that the complaint is out of time; and the parties having jointly requested that the matter be held in abeyance pending attempts to settle; and hearing on the complaint having subsequently been held at Hartland, Wisconsin on August 4, 1983 before the Examiner; and briefs having been filed by both parties, and the record having been closed on October 3, 1983; the Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order Granting Motion to Dismiss.

FINDINGS OF FACT

1. That Complainant Gary H. Stubner is an individual residing at 711 Benson Road, Hartland, Wisconsin; that Complainant John D. Studnicka is an individual residing at W299 N6444 Highway E, Hartland, Wisconsin; and that both Complainants have been employed by Respondent Village of Hartland.

2. That the Village of Hartland, herein referred to as Respondent or the Village, is a municipal employer within the meaning of Sec. 111.70(1)(a), Wis. Stats., and has its offices at the Village Hall, 210 Cottonwood Avenue, Hartland, Wisconsin 53209.

3. That on or about December 7, 1981 Richard Myrhum, then Chairman of Respondent's Personnel and Finance Committee, notified both Complainants in separate but identically worded layoff notices as follows:

> The Village of Hartland has determined that a layoff of 2 employees is necessary in its Department of Public Works. This layoff is necessitated by the current economic crisis facing the Village.

> The Agreement between the Hartland DPW Union and the Village provides that in the event of a layoff the last hired will be the first laid off. It has been determined that you will be laid off because of your date of hire.
>
> This layoff shall become effective at the end of the work day of December 31, 1981. Your last paycheck will be for the period ending December 31, 1981, and you will receive it on January 4, 1982. It is anticipated that the layoff shall continue (through indefinitely or indefinitely). (sic).

4. That on December 31, 1981 both Complainants were laid off indefinitely pursuant to the notices referred to above; that both Complainants were temporarily recalled to work on or about January 5, 1982 because of a snow storm; that the last day worked by Complainant Studnicka was January 11, 1982; and that the last day worked by Complainant Stubner was January 20, 1982.

5. That in early January, 1983 both Complainants received substantially identical letters from David Wolken, then Chairman of the Finance and Personnel Committee of Respondent, stating as follows:

> Approximately one year has passed since the effective date of your layoff. We have recently completed our budgeting process for the 1983 fiscal year. As you know, there is no money in the budget to provide for a recall. Accordingly, your layoff is permanent and your service with the Village will be terminated effective one year after your last day of service with the Village. Your last day of service with the Village was January 20, 1982. 1/ Accordingly, your termination date is January 20, 1983. 2/
>
> This action is not being taken on the account of any performance deficiency on your part, nor is this action being taken for disciplinary reasons. Rather, the action represents our desire to inform you of your status in light of the economic situation of the Village. Moreover, this letter is being sent to you to allow you to pursue a separation benefit from the Wisconsin Retirement Fund, should you choose to to so. We will cooperate with you fully in that regard.
>
> If you desire, we would be happy to provide prospective employers with references for your future employment. Thank you for your service to the Village.

6. That on January 5, 1983 the Complainants filed the complaint in this matter, alleging that they had engaged in protected concerted and union activity prior to their December, 1981 layoffs and that said layoffs were made in retaliation for such activity by the Complainants and other employes.

7. That the specific acts alleged by Complainants to be unlawful are the initial decision by Respondent to lay them off, the December 7, 1981 notification of layoff and the December 31, 1981 effective date of layoff; and that all of these acts took place more than one year prior to the filing of the complaint.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSION OF LAW

That because the complaint is filed out of time within the meaning of Sec. 111.70(4)(a) and 111.07(14), Wis. Stats., the Commission is without jurisdiction to determine the merits of the complaint.

1/ January 11 on the letter to Studnicka.

2/ Ibid.

Upon the basis of the foregoing Findings of Fact, and Conclusion of Law, the Examiner makes and renders the following

ORDER GRANTING MOTION TO DISMISS

That the motion filed by Respondent that the complaint in this matter be dismissed is hereby granted, and the complaint is hereby dismissed. 3/

Dated at Madison, Wisconsin this 2nd day of November, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

3/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER GRANTING MOTION TO DISMISS

The complaint alleges that after alleged bad-faith negotiations by Respondent with the independent union then representing the Department of Public Works employes, various employes contacted an official of District No. 10, International Association of Machinists with a view to obtaining representation. The complaint alleges that following this union and concerted activity, the Respondent made good on a threat to lay off employes in retaliation, and that Complainants' layoff was the result.

Respondent filed an answer denying the commission of any prohibited practice and alleging as an affirmative defense that the complaint was out of time. Following protracted but unsuccessful settlement attempts, hearing was held concerning both the merits and the timeliness question, because of a factual dispute as to the date of the Complainants' layoff. At the hearing and in its brief, the Respondent moved for dismissal based on untimeliness.

The question of timeliness of a complaint under Sec. 111.70 is governed by Sec. 111.07(14), Wis. Stats., which 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 prohibited practice alleged. 4/

The complaint was filed on January 5, 1983; the determination of whether the complaint is timely therefore requires a judgment as to what is the act or prohibited practice that is being alleged to be a violation.

The complaint in its third paragraph alleges that Complainant Stubner was an employe of the Village from July, 1979 to January 20, 1982 and that Complainant Studnicka was an employe of the Village from April 17, 1978 to January 11, 1982. But the complaint goes on to allege a course of negotiations conduct which took place in the fall of 1981, and clearly challenges as a violation of MERA the initial layoff of both Complainants. The central question is therefore whether the initial layoff is the essential act complained of. (At the hearing the Complainants withdrew any allegation concerning refusal to bargain or domination of a labor organization).

Complainants argue first that the layoff is a "continuing violation" which brings the act of layoff up to the present date, citing Local 2494, Wisconsin Council of County & Municipal Employees 5/ and School District of Wausau 6/, in which an Examiner and the Commission respectively proceeded to the merits on complaints arising more than one year from the initial acts involved. Both of these cases, however, involve the receipt of monies at regular intervals, as they concern allegedly improper fair-share deductions. The theory under which the Local 2494 case was found to be "continuing" was essentially that it involved recurring violations, at the intervals of the pay deductions. The Wausau complaint was found timely essentially because it was timely filed originally in court and was thereafter referred to the Commission by court order. Neither case involved so defined and non-repetitive an act as layoff or discharge.

Complainants also argue that their time limitation did not begin to run until they knew or should have known that their statutory rights were violated. Complainants cite two National Labor Relations Board decisions for this contention, and argue that because of the Complainants' recall shortly after their

---

4/ Sec. 111.70(4)(a) serves to replace the term "unfair labor practice" with the term "prohibited practice".

5/ Decision No. 20138-B, Houlihan, May 1983.

6/ Decision No. 17888-A,B, November, 1980.

initial layoff, they entertained hopes of reemployment until their receipt of the December 30, 1982 letter. For this reason, Complainants argue, the receipt of that letter was the cause of action which gave rise to the complaint, which followed within a few days. The Examiner rejects this contention because it is clear that the December 30, 1982 letter is not an independent act but a derivative result of the prior layoffs. In and of itself it merely states that the Complainants' right to reemployment had expired pursuant to the collective bargaining agreement reached subsequent to the layoffs between Respondent and Machinists, and inquires as to their intentions concerning their accrued pension monies. There is accordingly nothing in that letter that is not derivative of the original layoffs. 7/

Complainants also argue that in this matter there are a number of acts constituting a pattern of discrimination, and that at least some of those acts fall within the required 1-year period from the filing of the complaint. One of the acts which the Complainants allege constituted a continuing pattern of discrimination was the Respondent's failure to call in either Complainant to perform temporary summer work which was similar to parks work which Studnicka had previously performed. But this contention is not one of the allegations of the complaint, and further, both it and the second layoff which occurred in January, 1982 could be considered to be violative of the Act only if the initial layoff was also a violation, because there is no evidence that either Complainant engaged in union or protected concerted activity after the date of the initial layoff. In the Bryan Manufacturing case cited above, the U.S. Supreme Court addressed the question of the effect of alleged unfair labor practices occurring outside the statutory limitation period. Although in that case the period involved, under Section 10(b) of the National Labor Relations Act, was six months, the principle is the same and the Court's distinction is applicable here. The Court distinguished two situations, in one of which the conduct occurring outside the statutory period could, and in one of which it could not, be relied on:

> . . . The first is one where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Sec. 10(b) ordinarly does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. 8/

Although the statute involved was different, the principles underlying Section 10(b) of the NLRA and Section 111.07(14), Wis. Stats., are the same; the intention of preventing stale claims and of asserting the value of stability of employer-employe relationships is the same regardless of whether the employment covered is in commerce or municipal. 9/ Because there is no evidence of any union or protected concerted activity, or animus by employer officials, occurring within the statutory period, and because both Complainants' testimony shows clearly that the recall to work on or about January 5, 1982 was understood to be an unexpected and temporary situation, there is no basis here for asserting that the second layoff from that temporary recall constitutes an independent act of discrimination by the Village. In and of itself, it is nothing more than the expected result of

---

7/ See the discussion below of Local Lodge No. 1424 vs. National Labor Relations Board (Bryan Manufacturing Company), 362 U.S. 411 (1960), 45 LRRM 3212.

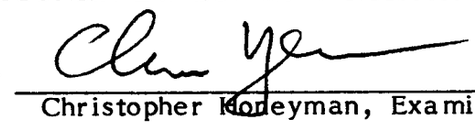
8/ At 45 LRRM 3214-3215.

9/ See School District of Clayton, Decision No. 20477-B, October, 1983, and cases cited therein.

the completion of temporary work for which the Complainants were reemployed. For it or for the subsequent failure of the Village to call in the Complainants for summer work to be seen as acts of unlawful discrimination, absolute reliance would therefore have to be placed on a finding of illegality in the initial layoff; and the Bryan analysis is unavoidable in this situation. Under that analysis, it is apparent that all of the acts by Complainants and Respondent which could have the effect of rendering Respondent's conduct unlawful occurred outside the statutory limitation period. For this reason, the Examiner finds that Respondent's motion to dismiss is merited, as the acts complained of are outside the statutory period for filing of the complaint. The motion to dismiss is therefore granted.

Dated at Madison, Wisconsin this 2nd day of November, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner