STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROGER THOMPSON, Complainant, vs. SCHOOL DISTRICT OF CLAYTON AND CLAYTON PROFESSIONAL EDUCATORS, Respondents.	Case X No. 31043 MP-1432 Decision No. 20477-B

Appearances:

Mr. Roger Thompson, Route 1, Luck, Wisconsin, 54853, and Mr. Alan D. Manson, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Complainant.

Mr. Michael J. Burke, Mulcahy and Wherry, S.C., Attorneys at Law, 21 South Barstow, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the School District of Clayton.

Mr. John S. Williamson, Jr., Habush, Habush and Davis, S.C., Attorneys at Law, First Wisconsin Center, Suite 2200, 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-5381, appearing on behalf of the Clayton Professional Educators.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Roger Thompson, having, on January 20, 1983, filed a complaint with the Wisconsin Employment Relations Commission, in which he alleged that the School District of Clayton and the Clayton Professional Educators had committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission, on March 30, 1983, having appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a) and Sec. 111.07 of the Wisconsin Statutes; and a hearing having been conducted on the complaint in Clayton, Wisconsin, on May 5, 1983; and a transcript of that hearing having been provided to the Examiner on May 23, 1983; and the parties having filed briefs and waivers of reply briefs by August 8, 1983; and the Examiner having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Roger Thompson is an individual who lives at Route 1, Luck, Wisconsin 54853.

2. That the School District of Clayton, hereinafter referred to as the District, is a municipal employer which has its offices located at Clayton, Wisconsin 54004, and which operates a public school district organized under the laws of the State of Wisconsin.

3. That the Clayton Professional Educators, Wisconsin Federation of Teachers, American Federation of Teachers, hereinafter referred to as the CPE, is a labor organization which has its offices located at Clayton, Wisconsin 54004, and which exists, at least in part, for the purposes of collective bargaining with the District concerning the wages, hours and conditions of employment for certain teaching personnel.

4. That the District and the CPE are parties to a collective bargaining agreement which was in effect for the 1981-1982 school year, and which contains, among its provisions, the following:

REGOGNITION

The Board recognizes CPE as the exclusive certified bargaining representative on matters of wages, hours and conditions of employment for all certified teaching personnel including classroom teachers, teachers for exceptional children, librarians and regular part-time teachers employed by the District (hereinafter referred to as teachers) but excluding substitute teachers, principals, supervisors, non-instructional personnel such as nurses, social workers, office clerical, maintenance and operating employees, and all other employees employed by the Board or in the District.

. . .

GRIEVANCE PROCEDURE

A. The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this agreement. A determined effort shall be made to settle any differences at the lowest possible level in the grievance procedure.

B. Definition - For the purpose of this agreement a grievance is defined as a difference of opinion regarding interpretation or application of this agreement. The term "days" shall mean calendar days. These days would exclude holiday vacation periods; Example: Christmas. A "grievant" may be a teacher or group of teachers.

C. It is hereby declared to be the policy of the parties to attempt to resolve concerns or complaints of staff members informally by means of oral discussion with their supervisors. In the event of such a complaint, the teacher shall perform his/her assigned work task and grieve later.

Grievances shall be processed in accordance with the following procedure:

STEP I

A. If a satisfactory solution is not found as a result of the oral discussion, the aggrieved person may invoke the grievance procedure by giving a written grievance to his principal or immediate supervisor within thirty (30) days after he knew or should have known of the cause of such grievance. The written statement shall contain the name of the grievant, the specific provision of the agreement alleged to have been violated, a statement of pertinent facts, and the desired remedy.

STEP II

A. If not settled in Step I, the grievant shall within 10 days of presentation file the grievance in writing stating the facts upon which the grievance is based, the issues involved, those sections of the agreement alleged to have been violated and the remedy sought.

B. Within 10 days after the receipt, the superintendent may meet with the grievant in an effort to resolve it.

STEP III

A. If the grievant is not satisfied with the disposition of his grievance in Step II, or if no decision has been given within 10 days, the grievant may file the grievance in writing with the Board of Education.

B. The Board shall issue its written decision 10 days following the next regularly scheduled Board meeting.

and that the grievance procedure culminates with the Board's decision at Step III B.

5. That Mr. Thompson was employed by the District as a classroom teacher on a full-time basis during the 1980-1981 school year; that in the spring of 1981, the District offered, and Mr. Thompson accepted, a one-half time teaching contract for the 1981-1982 school year; that Mr. Thompson, after consulting the District Administrator, believed that if he could recruit a sufficient number of students for certain classes, he would be restored to a full-time teaching assignment; that the first day of the student 1981-1982 school year was a Monday, and that school day lasted one-half day; that at the close of that school day Mr. Thompson contacted John Haugen, the president of the CPE, to inform him that Mr. Thompson had determined there was sufficient student interest to warrant a full-time teaching assignment for Mr. Thompson; that Mr. Haugen and Mr. Thompson spoke with the Building Principal and with the District Administrator regarding the possibility of a full-time teaching assignment for Mr. Thompson; that Mr. Haugen, during the meetings, argued that Mr. Thompson should be granted a full-time assignment; that the District Administrator informed Mr. Thompson and Mr. Haugen that only the School Board could make that determination; that the following day Mr. Thompson set up a tentative schedule of classes which constituted a full-time teaching load; that Mr. Thompson taught that schedule for the balance of the first week of the 1981-1982 school year; that Mr. Thompson was paid a salary commensurate with a full-time teaching assignment for that week; that the School Board met on Thursday evening of the first week of the 1981-1982 school year to consider the District's class schedule; that on the Friday following that Board meeting, Mr. Thompson was informed that the Board had decided that he would teach on a one-half time basis; that Mr. Thompson contacted Mr. Haugen later that day to determine what, if anything, could be done to change the Board's decision; that Mr. Haugen decided to contact Fred Skarich, a Wisconsin Federation of Teachers representative; and that on the Monday following the aforementioned Board meeting, Mr. Thompson returned to teaching a one-half time teaching assignment.

6. That at 4:00 p.m. of the Tuesday of the second week of the student 1981-1982 school year, Mr. Thompson and Rae Nell Parker, another teacher who had been reduced to a one-half time teaching assignment, met with Mr. Haugen and Mr. Skarich; that the meeting lasted roughly one hour and concerned what action would be appropriate to restore them to a full-time teaching assignment; that Mr. Thompson left that meeting with the understanding that Mr. Skarich would "take care of everything" and "would be getting back to us"; that Mr. Thompson understood Mr. Skarich's advice to be that a class action suit would be the appropriate response to the Board's actions, and that it would not be necessary to file a grievance in the matter; that Mr. Thompson was not specifically told, at this meeting, either to file, or not to file a grievance; that Mr. Thompson regularly contacted Mr. Haugen in the weeks following this meeting to determine what progress was being made; that in response to these repeated inquiries, Mr. Haugen informed Mr. Thompson that he had been unable to reach Mr. Skarich, and had not otherwise heard from him; that on Mr. Haugen's suggestion, Mr. Thompson attempted to reach Mr. Skarich directly; that shortly before Christmas in 1981, Mr. Thompson reached Mr. Skarich, who informed Mr. Thompson that the matter was being turned over to attorney John Williamson; that Mr. Thompson contacted Mr. Williamson after Christmas during the latter part of December, 1981, but did not receive any specific advice during this conversation, and concluded that Mr. Williamson was evaluating the case, and would be back in touch with him; that the final day of the first semester of the 1981-1982 school year was January 18, 1982; that sometime after the close of the first semester, in late January or early February, 1982, Mr. Thompson again spoke with Mr. Williamson; that Mr. Thompson concluded from the conversation that Mr. Williamson's advice to him was that Mr. Thompson should file a grievance, whether it would be considered

timely or not, before the CPE could take any further action; that neither Mr. Thompson nor Ms. Parker filed a grievance regarding their reduction to one-half time status; and that Mr. Thompson's contact with Mr. Williamson in late January or early February, 1982, was Mr. Thompson's final contact with the CPE regarding compelling the District to return him to full-time status.

7. That Mr. Thompson, contrary to the District, contends that the District, by its action in reducing him to one-half time and one-half pay during the first and second weeks of the student school year in 1981-1982, violated Sections 111.70(3)(a)1,2 and 3 of the MERA; that Mr. Thompson does not contend that the District's actions in effecting this reduction violated the collective bargaining agreement mentioned in paragraph 4 above; that Mr. Thompson, contrary to the CPE, contends that the CPE failed to take effective action to restore him to full-time status after its representatives had instructed him they would do so, and that the CPE thus violated Sections 111.70(3)(b)1 and 3 of the MERA; and that Mr. Thompson, contrary to the District and the CPE, contends that his complaint alleging the above stated statutory violations was timely filed.

8. That Mr. Thompson filed his complaint with the Commission on January 20, 1983; that the District's reduction of Mr. Thompson from full-time to one-half time teaching status during the first and second weeks of the first semester of the 1981-1982 student school year is the occurrence which constitutes the specific act or prohibited practice alleged by Mr. Thompson against the District; that this reduction did not occur within the one year period preceding the filing of Mr. Thompson's complaint, although certain effects of that reduction did continue into that one year period; that Mr. Thompson has alleged certain advice and representations given to him by various CPE representatives constitute prohibited practices; that none of the advice or representations were given in bad faith toward him, or for the purpose of discriminating against him; that the advice and representations complained of by Mr. Thompson occurred from the second week of the first semester of the 1981-1982 student school year until late January or early February of 1982; that the advice and representations which could have exposed Mr. Thompson to the exhaustion of the timelines contained in the grievance procedure set forth in Finding of Fact No. 4 occurred during the first semester of the District's 1981-1982 school year; and that Mr. Thompson's final conversation with Mr. Williamson in late January or early February, 1982, is the only occurrence complained of which falls within the one year preceding the filing of Mr. Thompson's complaint, even though certain arguable effects of that occurrence may have continued into that one year period.

Based upon the above and foregoing Findings of Fact, the Examiner issues the following

CONCLUSIONS OF LAW

1. That Roger Thompson was a "Municipal employe" within the meaning of Section 111.70(1)(b), Wis. Stats., during the Clayton School District's 1981-1982 school year.

2. That the School District of Clayton was a "Municipal employer" within the meaning of Section 111.70(1)(a), Wis. Stats., during the District's 1981-1982 school year.

3. That the Clayton Professional Educators, WFT, AFT, was a "Labor organization" within the meaning of Section 111.70(1)(j), Wis. Stats., during the Clayton School District's 1981-1982 school year.

4. That Roger Thompson has no right to proceed against the District or the CPE under Section 111.70(3), Wis. Stats., because he has not established any specific acts committed by either the District or the CPE which in and of themselves constitute prohibited practices within the meaning of Section 111.70(3), Wis. Stats., and which occurred within the one year limitations period set forth in Sections 111.07(14) and 111.70(4)(a), Wis. Stats.

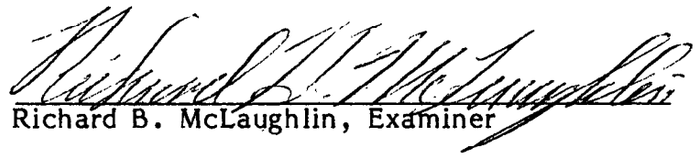
Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner issues the following

ORDER

That the complaint be, and hereby is, dismissed. 1/

Dated at Madison, Wisconsin this 11th day of October, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

1/ 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

THE PARTIES' POSITIONS

According to the Complainant, the facts are not disputed and the issue is whether or not those facts establish that his "protected employee rights were violated." The Complainant argues his rights were, in fact, violated because "by implying or directly communicating that the Respondent CPE was in the process of actively representing the Complainant," the CPE made the Complainant "vulnerable to exhausted time lines," and thus "deprived the Complainant of the ability to exercise his protected rights under 111.70."

The Complainant contends that neither the District nor the CPE can defend their behavior by asserting that the complaint was not timely filed. Because of the continuing nature of his grievance with the District, the CPE cannot, according to the Complainant, claim that "by the end of January, 1982, the time lines for a grievance had expired." Similarly, the continuing nature of his dispute with the District means that "the Respondent District is clearly liable for any improperly reduced wages after January 20, 1982." The Complainant roots the continuing nature of his dispute with the Respondents in the fact that "the pay of the Complainant was one-half of the amount . . . it should have been all year," and on a series of conversations between himself and various CPE representatives.

The District argues that the complaint was not timely filed under Sections 111.70(4)(a) and 111.07(14), Wis. Stats., and must be dismissed.

The CPE also argues that the complaint was not timely filed. Even assuming it was, the CPE argues that the Complainant did not allege any contractual violation, and did not prove the CPE's representation of him was "dishonest, in bad faith or discriminatory." In addition, the CPE argues that "Complainant neither alleged nor proved that he exhausted his internal union remedies or circumstances that would excuse him from doing so."

DISCUSSION

The parties' conflicting contentions pose two potential issues for decision in this case: Is the Complainant's right to proceed against the CPE and the District barred by Sections 111.07(14) and 111.70(4)(a), Wis. Stats.? If not, did the CPE or the District commit any prohibited practices within the meaning of Sections 111.70(3)(a)1, 2, 3, or 111.70(3)(b)1 and 3, Wis. Stats.? 2/

Section 111.07(14), Wis. Stats. governs the issue of timeliness, and provides:

> 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 3/ alleged.

The complaint was filed with the Commission on January 20, 1983. Thus, application of Section 111.07(14) requires a determination of when the "specific act or prohibited practice" alleged against the District and the CPE occurred.

2/ Some of the District's and the CPE's contentions were raised during the hearing, in the form of motions. All of those motions will be fully addressed by a resolution of these issues.

3/ See Section 111.70(4)(a), which provides:

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

This determination demands an examination of the Complainant's contention that his complaint is timely because it alleges acts of a continuing nature, some of which fall within the one year limitations period.

The most presuasive guide for assessing the Complainant's continuing violation theory of timeliness is a decision of the United States Supreme Court involving the Bryan Manufacturing Co. 4/ In that case, the Court assessed the significance of events falling outside of the relevant statutory limitations period (i.e. Section 10(b) of the National Labor Relations Act) by distinguishing two types of situations. The two situations, and the effect of each situation, were detailed thus:

> . . . 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) ordinarily 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 timebarred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. (5/)

The Bryan decision is an appropriate guide for applying Sec. 111.07(14), Wis. Stats., because both the federal and state acts serve the same underlying purposes. Both acts involve a legislatively enacted limitation on legislatively created employe rights. Each act limits the time for asserting those rights to preclude the resolution of labor disputes on stale evidence, and to foster the stability of employer/employe relations by demanding that disputes be promptly asserted and not be left to fester indefinitely. 6/ Thus, to determine whether the continuing violations alleged by the Complainant constitute timely "specific acts or prohibited practices" within the meaning of Sec. 111.07(14), Wis. Stats., the Bryan analysis will be employed.

Under the Bryan analysis, the Complainant has not alleged any District act which falls within the one year limitations period, and which, in itself, constitutes a prohibited practice. That the District paid the Complainant a one-half time salary throughout the year, and did not offer him a full-time position at the semester break in January, 1982, are both occurrences which have meaning only through reliance on an earlier alleged prohibited practice. The Complainant has not alleged the District could not reduce him to one-half time status under appropriate circumstances. His contentions challenge whether the District's action in reducing him to such status at the start of the first semester of the 1981-1982 school year constitute such appropriate circumstances. Thus, his receipt of a one-half time salary in the second semester can be understood as improper only with reliance on the original reduction to one-half time status which occurred outside of the statutory limitations period. Similarly, the District's failure to offer him a full-time position for the second semester can be understood as improper only in reliance on the circumstances surrounding his reduction in the first semester. Any other conclusion would mean the Sec. 111.07(14) limitations period could never be triggered, and the underlying purposes of that section would be frustrated.

4/ Local Lodge No. 1424 v. National Labor Relations Board (Bryan Mfg. Co.), 362 US 411 (1960), 45 LRRM 3212.

5/ Ibid., at 3214-3215.

6/ See Bryan Mfg. Co. at 3218, and compare to Katz v. WERC, (Circuit Court, Dane County), (15725-B) 6/80, at 2.

The Complainant's continuing violation theory asserted against the CPE centers on a series of discussions between himself and the CPE's representatives. All of these discussions, except the final conversation between the Complainant and the CPE's attorney, occurred before the close of the first semester on January 18, 1982. Thus, except for that final conversation,the entire series of discussions falls outside of the one year limitations period. The final conversation occurred after the close of the first semester, most probably in late January or early February 1982. 7/ Thus, this final conversation, although not precisely dated, must have occurred within the one year period triggered by the Complainant's filing of his complaint on January 20, 1983.

According to the Complainant, the CPE's attorney advised him, in that final conversation, that he should file a grievance, whether or not it would be considered timely. An examination of the Complainant's contentions does not reveal any theory which would make this advice, standing alone, a prohibited practice. The Complainant has not alleged that any of the advice he received was proposed in bad faith or for discriminatory purposes. The Complainant has alleged that this final conversation, and those which preceded it, exposed him to exhausted time lines. The only time line covered by the Complainant's arguments is contained in the grievance procedure of the parties' collective bargaining agreement, 8/ yet the Complainant's arguments do not establish how this final conversation exposed him to the exhaustion of this time line. The Complainant has asserted that the "CPE cannot legitimately claim as a defense that by the end of January, 1982, the time lines for a grievance had expired." If this assertion is accepted, then the CPE's attorney's advice could not have been illegal since he advised the Complainant to file a grievance which would have been timely. However, as noted above, the Complainant did not file a grievance as a result of the advice. On the other hand, the Complainant has argued that the grievance procedure's time lines were exhausted in the first semester. Even under this contention, the advice received by the Complainant in the final conversation cannot be considered, standing alone, a prohibited practice. The Complainant has not pleaded or in any way argued that the collective bargaining agreement between the District and the CPE was violated. Thus, the advice received by the Complainant from the CPE's attorney cannot be considered to have prejudiced the Complainant. That, in the Complainant's view, this advice should have been given to him early in the first semester does not establish that the later advice, standing alone, is a prohibited practice. Such a view gains meaning only in reliance on the earlier, allegedly improper, advice which cannot be timely challenged under Section 111.07(14), Wis. Stats. In sum, the Complainant has not established any act on the CPE's part which, standing alone, constitutes a prohibited practice occurring within the one year limitations period. 9/

Under Sections 111.07(14) and 111.70(4)(a), Wis. Stats., the right of a person to proceed under Section 111.70(3), Wis. Stats. does not extend beyond one year from the specific act or prohibited practice alleged. The Complainant has argued a continuing violation theory of timeliness to ground his right to proceed in this case. However, under the Bryan analysis, the Complainant has not estab-

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7/ The Complainant's testimony on this point must be accepted. The Complainant was a credible witness, and although both the District and the CPE were afforded an opportunity to present rebuttal evidence, neither chose to do so, but instead chose to rest their cases after the Complainant presented his.

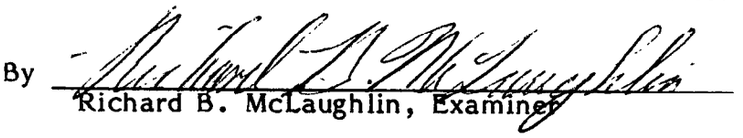
8/ Although the Complainant has asserted that the CPE should have filed "a grievance, a prohibited practice, or other potential remedy," there has been no evidence or argument to indicate either that he requested a prohibited practice or other remedy to be pursued after the close of the first semester of the 1981-1982 school year, or that such remedies could not have been timely pursued at that time.

9/ The Complainant's receipt of a one-half time salary during the second semester of the 1981-1982 school year has already been discussed regarding the Complainant's allegations against the District. The same analysis applies to the Complainant's allegations against the CPE, since the receipt of a one-half time salary is not, in itself, the act claimed illegal by the Complainant. The receipt of that salary becomes improper only with reliance on the behavior of CPE representatives during the first semester.

lished the occurrence of any act which, in itself, constitutes a prohibited practice and which falls within the limitations period. Those acts and prohibited practices alleged by the Complainant which occurred within the limitations period can be understood as improper only with reliance on events which occurred during the first semester. Thus, the complaint cannot be considered timely, and the Complainant does not have any right to proceed under Section 111.70(3), Wis. Stats. Thus, the merits of the Complainant's contentions against the District and the CPE cannot be addressed, and the complaint has been dismissed.

Dated at Madison, Wisconsin this 11th day of October, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
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