STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENNETH A. KRAUCUNAS, Complainant, vs. LOCAL 950, INTERNATIONAL UNION OF OPERATING ENGINEERS, Respondent.	Case I No. 32213 Cw-358 Decision No. 21050-B

Appearances:

Mr. Kenneth A. Kraucunas, 831 West Wisconsin Avenue, Milwaukee, Wisconsin 53233, appearing pro se.

Mr. Alfred Rozran, Attorney at Law, 710 North Plankinton Avenue, Milwaukee, Wisconsin 53203, appearing for Respondent Union.

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

Kenneth A. Kraucunas, an individual, having on September 21, 1983, filed a complaint with the Wisconsin Employment Relations Commission alleging that Local 950, International Union of Operating Engineers, had violated Section 111.70, Wis. Stats., by failure to represent him fairly at the arbitration hearing concerning his discharge from his position as a boiler attendant employed by the Milwaukee Board of School Directors; and the Commission having appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter; and Respondent Union having, on October 10, 1983, filed a Motion to Dismiss the complaint based, in part, on untimeliness of the complaint; and the Examiner having, by Order dated November 9, 1983, taken notice of the Arbitration Award issued in the related grievance by Arbitrator Richard U. Miller, and of the dates of hearing, briefing and decision specified in said Award; and the Examiner having, on the same date, given Complainant fourteen days to show cause in writing why the complaint should not be dismissed because of untimeliness; and no cause having been shown by the Complainant why the complaint should be found to be timely, the Examiner makes and files the following Findings of Fact, Conclusion of Law and Order Granting Motion to Dismiss.

FINDINGS OF FACT

1. That Complainant Kenneth A. Kraucunas is an individual whose address is 831 West Wisconsin Avenue, Milwaukee, Wisconsin 53233; and that Complainant was employed from approximately 1972 until March 15, 1982, by the Milwaukee Board of School Directors.

2. That Local 950, International Union of Operating Engineers, AFL-CIO, is a labor organization within the meaning of Section 111.70(1)(j), Wis. Stats., and has its offices at 8600 West Olive Street, Milwaukee, Wisconsin 53222.

3. That on August 10, 1982, Arbitrator Richard U. Miller held hearing in the matter of the arbitration of the dispute between Respondent Union and the Milwaukee Board of School Directors concerning the discharge of the Complainant; that all briefs in that matter were received by the Arbitrator by September 18, 1982; that the Arbitrator issued his Award on November 3, 1982; and that the complaint in this matter was filed on September 21, 1983.

4. That the specific acts alleged by Complainant to be unlawful are the failure of the Union to draw out relevant and material testimony favoring Complainant at the arbitration hearing, and prior unspecified actions by the Union having the effect of covering up "serious management misconduct"; and that all of these alleged 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 issues files the following

CONCLUSION OF LAW

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

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. 1/

Dated at Madison, Wisconsin this 5th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, 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 ORDERING GRANTING MOTION TO DISMISS

The complaint alleges that the Union failed to represent the Complainant fairly, by failing to call at his discharge arbitration hearing a witness whose testimony would have shown that other employes with worse absenteeism records than the Complainant's had not been disciplined, and also by prior unspecified acts of alleged collusion with management. The Employer, the Milwaukee Board of School Directors, was not charged. According to the complaint, the Complainant's discharge occurred on March 15, 1983; the date of the arbitration hearing was not specified.

Respondent Union filed an answer denying that it had committed any prohibited practice, and also filed a Motion to Dismiss the complaint based on res judicata and on untimeliness. The Respondent alleged therein that the arbitration hearing took place on March 15, 1982, and did not specify the date of the discharge.

The Examiner, by letter to the parties dated October 14, 1983, indicated that notice might be taken of the Arbitrator's Award and of the dates of hearing, briefing and decision specified in the Award, and invited both parties, pursuant to Section 227.08(3), Wis. Stats., to object in writing to the notice or to the accuracy of the specified dates. No objection was received either to the taking of notice or to the dates themselves, and notice was taken by the Examiner in an Order dated November 9, 1983. 2/

The Examiner's Order Taking Notice of the Arbitration Award also ordered the Complainant to show cause within fourteen days why the complaint should not be dismissed as out of time. On November 14, the Complainant advised the Examiner that he had changed his address, and the Examiner thereupon extended the time for response to the Order to Show Cause until November 28, 1983. On November 29, 1983, a letter, dated November 22, was received from the Complainant. This letter objects to the proposed dismissal of the complaint, but does so only on grounds related to the merits of the complaint and does not address the question of timeliness. The Complainant has accordingly presented nothing that would rebut the evidence contained in the Arbitration Award, which shows that the hearing was held on August 10, 1982, and that the briefs were filed by September 18, 1982.

The Arbitrator's Award was issued on November 3, 1982, however, and a determination is therefore necessary as to what event triggered the running of the one-year statute of limitations specified in Sections 111.07(14) and 111.70(4)(a), Wis. Stats. On its face, the complaint alleges as unlawful actions occurring on or prior to the date of the arbitration hearing. But the Commission has held that where a collective bargaining agreement provides procedures for the voluntary settlement of disputes, it would not entertain a complaint, on the merits, that either of the parties has violated such an agreement before the parties have exhausted the voluntary procedures for resolving disputes. 3/ In effectuating this policy, the Commission concluded that a cause of action involving an alleged violation of contract does not arise until the grievance procedure has been exhausted and that, therefore, the one-year limitation period for filing a complaint is computed from the date when the grievance procedure is exhausted, provided that the complainant has not unduly delayed the grievance procedure. 4/

2/ Decision No. 21050-A.

3/ Harley-Davidson Motor Company, Decision No. 7166, 6/65; Prairie Farm Joint School District, 12740-A, B, 6/75.

4/ Prairie Farm Joint School District No. 5, supra.

This complaint does not allege a violation of contract, but a violation of the duty of fair representation. But because complaints of this type are commonly filed in concert with a claim of violation of contract by the employer involved, the question of what statute of limitations should apply has proved problematic, under statutes similar to the Municipal Employment Relations Act. In DelCostello v. Teamsters 5/, the U.S. Supreme Court recently determined that in "hybrid" actions of that type arising under Section 301 of the National Labor Relations Act, the six-month statute of limitations specified in Section 10(b) of that Act would be applied rather than state statutes of limitations for vacating arbitration awards. This holding applied to both the employer and the union involved, although the question of what events start the six-month period to run did not arise in that case. By extension, however, it might be argued that the time period for a complaint to be filed against the union should be the same as that applicable to the employer, in such related causes of action. Under this theory, the argument could be made that where a complaint may be filed against an employer up to one year after exhaustion of the grievance procedure, a related duty of fair representation complaint should also be considered timely if filed within one year from the same date.

It is possible that such an interpretation would serve a legitimate purpose in reducing litigation, as in certain cases "preemptive" complaints might be filed against the union when the arbitrator has not yet ruled. But relatively few arbitration awards are issued as late as a year after the hearing, and MERA already allows twice as long for a complaint to be filed as does the National Labor Relations Act. It is also possible that an inequity could arise as a result of a complainant having a longer time in which to litigate against an employer than against a union. These policy considerations, however, cannot outweigh a clear statutory intent to apply a strict statute of limitations. As noted in the Memorandum Accompanying the Order to Show Cause issued in this matter 6/, the one-year period has been applied strictly by the Commission and the Courts. Moreover, the purpose of a complaint against a union for violation of the duty of fair representation is different from the purpose of a complaint against an employer for violation of contract. In DelCostello the Court quoted with approval a prior opinion by Justice Stevens to the effect that "the arbitration proceeding did not, and indeed, could not, resolve the employee's claim against the union. Although the union was a party to the arbitration, it acted only as the employee's representative; the (arbitration panel) did not address or resolve any dispute between the employee and the union . . ." 7/ Furthermore, the Commission has drawn a careful distinction between allegations for which the time period runs only after exhaustion of the grievance procedure and other allegations. 8/ There is, therefore, neither clear statutory authority nor Commission precedent for treating all alleged violations, even in related "hybrid" cases where violation of contract is also alleged, according to the same standard of timeliness as is applied to a contract-violation allegation. Finally, the particular case presented here is not the "hybrid" type of claim, as no complaint has been filed against the employer.

For all of these reasons, the Examiner concludes that nothing here warrants the extension of the Harley-Davidson rule to this duty of fair representation case. As the issuance of the Arbitration Award is the only related event which falls within the one-year statute of limitations, absent a finding that the completion of the grievance process was the applicable date, the complaint must be found to be out of time. The Examiner so finds, and the complaint is therefore dismissed.

Dated at Madison, Wisconsin this 5th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____