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-C

Appearances:

Mr. Kenneth A. Kraucunas, 831 West Wisconsin Avenue, Milwaukee, Wisconsin 53233, appearing on his own behalf.

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

ORDER SETTING ASIDE EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AND REMANDING COMPLAINT FOR FURTHER EXAMINER PROCESSING

On December 5, 1983, Examiner Christopher Honeyman issued Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss with accompanying Memorandum wherein he granted the above-named Respondent's October 10, 1983 motion to dismiss the subject complaint which was filed by the above-named Complainant on September 21, 1983. The Examiner issued his Order dismissing the complaint because the complaint had been filed more than one year after the occurrence of each of the acts or prohibited practices alleged in it.

On December 14, 1983, Complainant timely filed a petition requesting that the Commission review the Examiner's decision pursuant to Sec. 111.70(5) Stats. The parties filed written statements of their positions concerning the petition for review the last of which was received on January 20, 1984. The Commission having reviewed the petition for review, the parties' statements of positions and the evidence of which the Examiner took administrative notice, and being fully advised in the premises, and being satisfied that the Examiner's decision should be set aside and the complaint remanded for further processing by a substitute examiner;

NOW, THEREFORE, it is

ORDERED

1. That Examiner's Findings of Fact, Conclusions of Law and Order Granting Motion to Dismiss in the instant matter dated December 5, 1983, shall be and hereby are set aside.

2. That the complaint filed by Complainant on September 21, 1983, shall be, and hereby is, remanded for further examiner proceedings consistent with this decision.

3. That Lionel L. Crowley shall be, and hereby is, substituted as examiner for the purposes of the further processing of the instant complaint.

4. That said examiner shall develop an evidentiary record concerning pre-complaint correspondence from Complainant to the Commission dated August 4 and August 12, 1983, and from the Commission to Complainant dated September 12, 1983, and any rebuttal evidence and arguments the Union or Milwaukee Board of School Directors (herein MBSD) may have as regards whether said correspondence constitutes a basis for granting Complainant an opportunity to amend his complaint to name MBSD as a respondent and to allege that MBSD's March 1982 discharge of Complainant violated Sec. 111.70(3)(a)5, Stats., and for treating such amended complaint as timely filed claims against both the Union and MBSD.

5. That unless the Union and/or MBSD present significant rebuttal evidence, said correspondence, in the interest of justice, shall constitute a basis for the examiner to immediately grant Complainant an opportunity to amend his complaint to name MBSD as a respondent and to allege that MBSD's March 1982 discharge of Complainant violated Sec. 111.70(3)(a)5, Stats., and for the examiner to treat such amended complaint as timely filed as to claims that the MBSD's discharge of Complainant violated Sec. 111.70(3)(a)5 and that the Union's processing of Complainant's grievance challenging that discharge involved violations of the Union's Sec. 111.70(3)(b)1 duty of fair representation.

6. That in no event, however, will the complaint with or without amendment, be deemed timely filed as to claims relating to any other acts or prohibited practices occurring prior to September 1, 1982.

7. That if the foregoing steps result in amendment of the Complaint in the manner noted in 5, above, the examiner shall provide both the Union and MBSD an opportunity to answer the amended complaint and shall thereafter process the resultant pleadings conventionally.

Given under our hands and seal at the City of Madison, Wisconsin this 13th day of July, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

LOCAL 950, INTERNATIONAL UNION OF OPERATING ENGINEERS, Case I, Decision No. 21050-C

MEMORANDUM ACCOMPANYING ORDER SETTING ASIDE EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AND REMANDING COMPLAINT FOR FURTHER EXAMINER PROCESSING

BACKGROUND

The Examiner found, and no party has disputed, the following facts: Complainant was terminated by Milwaukee Board of School Directors (MBSD) on March 15, 1982. 1/ A grievance was filed challenging the discharge and Local 950, International Union of Operating Engineers (Union) took that grievance to arbitration wherein it was heard on August 10, 1982, before Arbitrator Richard U. Miller. At that hearing, Complainant was represented by the Union. On November 3, 1982 the Arbitrator issued his award denying the grievance and finding just cause for Complainant's discharge.

The Complaint

On September 21, 1983 Complainant filed the instant complaint against the Union only. The complaint alleged that the Union had "violated Chapter 111 of the Wisconsin Statutes", in several respects, the latest in time being an alleged failure to fairly represent Complainant at his August 10, 1982 arbitration hearing. 2/ The Complainant did not specify what statutory subsection(s) was allegedly violated, however.

1/ Although the complaint asserts that the discharge was on March 15, 1983, it is clear that Complainant's discharge occurred on March 15, 1982. The Examiner so found, and no issue has been joined herein concerning that finding.

2/ The complaint, in its entirety, reads as follows:

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Kenneth A. Kraucunas
2616A W. Beecher St.,

Complainant,

v.

Local 950, International Union
of Operating Engineers,
8600 W. Olive St.,

Respondent.

COMPLAINT

The Complainant above named complains that the Respondent has engaged in and is engaging in unfair labor practices contrary to the provisions of Chapter 111 Wisconsin Statututes, and in that respect alleges:

That the Complainant was a member of Local 950 while he was employed by the Milwaukee Board of

(Footnote 2 continued on Page 4)

As a remedy, Complainant requested "the WERC to order him reinstated with full backpay, seniority, pension and any other remedy the WERC thinks appropriate."

The Union's Answer And Motion To Dismiss

On October 10, 1983, the Union filed its answer herein (in which it denied violating Sec. 111.70, Stats.) and a Motion to Dismiss on the grounds, that the complaint was untimely filed and that some of the facts and circumstances upon which the complaint was based had been the subject of previous complaints before the Commission which were dismissed. 3/

2/ School Directors. Complainant resides at 261A W Becher St. Respondent at 8600 W Olive St.

That the Union failed to represent Complainant properly at his arbitration case concerning his termiantion of March 15, 1983 in that the Union failed to draw out relevant material testimony that:

A. Management had abused and maltreated complainant in keeping false files on Complainant for malicious reasons, thus subjecting him to cruel and unusal (sic) punishment.
B. Management arbitrarily treated Complainant in that they unreasonably denied him to work on 3rd shift, while permitting another employee from a different bargaining unit, to hurt or annoy him.
C. The Union permitted Management to abuse me, the Complainant, in treating me unfairly in A and B above.

That because of the Union's allowing Management to treat me unfairly, the union breached their fiduciary duty to fairly represent all members. And because of the Union's actions indicated above, it has discriminated against the Complainant (a school boiler attendant) and established themself as an illegal company dominated union.

That the Milwaukee Board of School Directors is a political subdivision of the State of Wisconsin and therefore prohibited from treating employees under their jurisdiction arbitrarily or unreasonably. It must be mentioned that the former president of Local 950, Mr. Thomas Beck, had testified that I didn't have the worst abseentism record. This, being true should have been introduced at my arbitration hearing, but Mr. Beck was not present. That because of this, and that the Union had a history of taking Management's side--going so far as to cover up serious management misconduct when they falsified records of Complainant, demonstrate that the Union is not acting for the Union or its member's interests, clearly an illegal company dominated union.

Therefore, the Complainant requests the WERC to order him reinstated with full backpay, seniority, pension, and any other remedy the WERC thinks appropriate.

Kenneth A. Kraucunas

3/ Milwaukee Board of School Directors, Case XCVII, Dec. No. 16329-A (Malamud, 2/79); Milwaukee Public Schools, Case CXXXV, Dec. No. 19871-B. (Yaeger, 10/82).

On October 14, 1983, after receiving the above-noted Motion and examining Commission records concerning the grievance arbitration referred to in the pleadings, 4/ the Examiner notified the parties of his intent to take administrative notice the existence of Arbitrator Miller's November 3, 1982 award and of the following facts recited therein: the date of the arbitration hearing, dates comprising the briefing schedule, and the date of issuance of the award. After being served with the Examiner's communication of intent to take notice, neither party objected to, or otherwise responded to the Examiner's taking such notice.

On November 9, 1983 the Examiner issued an Order in which he took administrative notice of the above dates and of the contents and date of filing of the Complaint and ordered the parties to show cause why the complaint should not be dismissed as untimely filed. 5/

On November 29, 1983 Complainant filed a letter opposing dismissal, advancing various factual assertions going to the merits of the complaint and its importance but not addressing the issue of the timeliness of the complaint. On December 5, 1983 the Examiner issued his decision herein.

The Examiner's Decision

The Examiner found that on August 10, 1982, Arbitrator Miller held a hearing concerning Complainant's March 15, 1982 discharge; that by September 18, 1982 the Arbitrator had received all briefs in the case; that on November 3, 1982, the Arbitrator issued his award; that the complaint herein was filed against the Union alone on September 21, 1983 alleging violations of Chapter 111 and that the most recent act or prohibited practice alleged in the complaint was that the Union failed to draw out certain testimony at Complainant's August 10, 1982 arbitration hearing. The Examiner concluded that since all of the complaint allegations concerned conduct which had taken place more than one year prior to the filing of the complaint, the complaint was untimely filed. The Examiner, therefore, granted the Union's Motion to Dismiss on the ground that the complaint was not filed within the one year statutory limitation period in Sec. 111.07(14), Stats. 6/

The Examiner rejected Complainant's argument that exhaustion of the grievance procedure was necesssary before a complaint of unfair representation in the arbitration would be ripe, essentially on the ground that the resolution of the discharge grievance would not resolve Complainant's dispute with the union concerning the quality of its representation of Complainant at the arbitration. Specifically, the Examiner observed that, on its face, the complaint alleges as unlawful actions which occurred more than one year prior to the filing of the complaint. The Examiner acknowledged that in complaint cases filed against employers alleging violation of a collective bargaining agreement, the Commission has held that a Complainant's failure to exhaust available contractual remedies is a valid defense and that the cause of action in such a case against the employer generally would not arise until the grievance procedure was exhausted. However, the Examiner observed the instant complaint alleged only a violation of the union's duty of fair representation, not a contract violation, and the complaint did not name the MBSD as a respondent or charge it with a prohibited practice. He therefore concluded that the exhaustion doctrine is inapplicable

---

4/ Commission Grievance Arbitration file No. A/PM-M82-396.

5/ The Examiner took administrative notice of the Arbitrator's Award and certain dates contained therein pursuant to Sec. 227.08, Stats. Examiner's Memorandum at p. 2.

6/ The applicable statute of limitations as set forth in Sec. 111.70(14), Stats., and as incorporated and made applicable to the municipal sector by Sec. 111.70(4)(a), Stats., 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 prohibited prctice alleged.

since the resolution of the grievance would not resolve Complainant's dispute with the Union concerning alleged unfair representation. The Examiner found similar reasoning in Del Costello v. International Brotherhood of Teamsters, ___ U.S. ___ , 103 S. Ct. 2281, 76 L. Ed.2d 476, 113 LRRM 2737 (1983), 7/

Finding no Commission precedents favoring expansion of the exhaustion doctrine to cases in which the employer is not a party respondent, the Examiner concluded that he should give effect to the plain meaning of Sec. 111.07(14) and he found support for requiring strict complaince with that provision in City of Madison, Dec. No. 15725-B (WERC, 6/79). The Examiner did not address the res judicata issue raised by the Union because he found the complaint had been untimely filed.

Petition For Review And The Positions of The Parties Concerning Same

In his Petition for Review, Complainant asserts that his complaint should have been deemed timely filed because WERC failed to respond to his pre-complaint correspondence to Wisconsin Employment Relations Commission dated August 4 and 12, 1983, until a September 12, 1983 letter received by Complainant on or about September 18, 1983. The agency's delays in sending that reply he argues, were "responsible for my complaint being ruled untimely." 8/ He also argues that the one-year time period for filing the instant complaint "should be from the date of the arbitration award" because "up until that time the Union could have provided the arbitrator with information" favorable to Complainant that could have turned the award in Complainant's favor. He concludes his Petition for Review with a request that the Commission issue an order reversing the Examiner's decision and directing that a hearing of the merits of the complaint be conducted.

7/ Del Costello, was an action against both a union and an employer, wherein Complainant alleged that the union had breached its duty of fair representation and that the employer had violated its contract with the union under Section 301 of the NLRA. The Court applied the same statute of limitations to both respondents -- the six months statute of limitations contained in Section 10(b) of the National Labor Relations Act, rather than applying a state statute of limitations governing suits for vacation of arbitration awards. The Examiner acknowledged that Del Costello did not address the issue of what events trigger the running of the limitations period in such cases, but that opinion did rely in part on the concept that a resolution of an underlying contract violations claim against an employer will not resolve the grievant's claims of union failure to fairly represent.

8/ In that regard, the Petition for Review contains the following assertions, among others:

> ". . . I contacted WERC in my August 4, 1983 letter requesting that the Commission correct alleged wrongs in . . . Dec. No. 16329-A (WERC, 1979) (No response from the WERC.)
>
> Because of no response by the WERC I contacted the WERC once again in my August 12, 1983, request for re-hearing of my arbitration case, A/PM-M82-390 . . . because the Union unfairly represented me, covered up management's misconduct and malice towards me--allowing the Milwaukee Public Schools to arbitrarily disciminate against me and otherwise injure me, i.e., abuses in unfair treatment in keeping me off desired shift while allowing other employees from another local to do so without justification, and others not specifically mentioned. Also I attached my "Memorandum, Kraucunas v. Milwaukee Board of School Directors", that gave a history regarding my case of 1979 above.

(Footnote 8 continued on Page 7)

In its response to the Petition for Review, the Union urges the Commission to affirm the Examiner's dismissal of the complaint. The Union argues that Complainant's untimely complaint filing is not and cannot be excused by an alleged WERC "failure to respond as quickly as Complainant would like" 9/ to correspondence from Complainant as to which, Respondent argues, the WERC had "no obligation of response". The Union asserts that, as the Examiner concluded, the statutory limitation has been and should continue to be strictly interpreted, citing City of Madison, Dec. No. 15725-B (WERC, 6/79). Hence, the Commission is without jurisdiction to hear and decide the acts and prohibited practices referred to in the complaint because all are alleged to have occurred in excess of one year before the September 21, 1983 date of filing of the complaint. 10/ For those reasons and because, in Respondent's view, much of the substance of the complaint has been previously disposed of by Commission dismissal orders rendering such matters res judicata, the Union requests that the Commission affirm the Examiner's dismissal of the complaint.

In his written reply to the Union's response, Complainant elaborated on the two alternative grounds for reversal set forth in the Petition for Review. He notes that his August 12, 1983 letter to the Commission petitioned WERC for a rehearing of his grievance arbitration; and that he received no response from WERC

8/ I didn't hear from the WERC until the WERC contacted me on or about September 18 notifying me that I could charge Local 950 with unfair representation. That is why my complaint was filed on September 21, 1983. Had the WERC responded to my August 4 and 12 letters more promptly and efficiently, the question of untimeliness wouldn't have been a factor. Surely you can see that the WERC was responsible for my complaint being ruled untimely. And therefore, I am being further prejudiced because of WERC actions that contributed to this situation. I shouldn't be punished because of lax administration of WERC personnel.

In Mr. Honeyman's Findings of Fact, he never considered this. That is probably more my fault since I am not a lawyer and I'm not familiar with all the legal intricacies involved in administrative law. In my November 22, 1983 letter to Mr. Honeyman and the WERC, I gave merit reasons why my complaint shouldn't be dismissed. I assumed that he knew of my August 4 and 12 (& attachment) letters to the WERC. I could easily have been mistaken on this point. Now I pray that you reconsider the dismissal in this new light. I think that it is relevant that the questionable handling and administation of complaint and requests should be considered in reversing this dismissal--and that the WERC should reverse and reschedule the hearing so that the WERC could better administer and enforce Employment Relations Statutes.

9/ Union's response at 2.

10/ Citing, Peterson v. State Natural Resources Board, 94 Wis.2d 587, 592 (1980); Village of Silver Lake v. State Department of Revenue, 87 Wis.2d 463, 468 (CtApp, 1978); and State Department of Administration v. State DILHR, 77 Wis.2d 126, 136 (1976).

until "on or about September 18, 1983". 11/ Complainant disputes the Union's contention that the Commission is without the statutory authority to remedy the harm it has caused Complainant by means of an order that the merits of Complainant's complaint be heard at this time.

Complainant also argues that the briefs to the arbitrator "were used and relied on by the Arbitrator AFTER September 18 and that the November 3 date is more realistic" as the starting time for the running of the statute of limitations. Further, Complainant argues that because there are references in his complaint to MBSD's abuse and unfair treatment of him the complaint constitutes a complaint against the employer as well as the Union. As such, the complaint should be deemed timely filed anytime within one year of the exhaustion of the underlying grievance against the employer which was ruled upon by the November 3, 1982 award. Complainant cites the Commission's decision in Harley-Davidson Motor Company, Dec. No. 7166 (WERC, 6/65) in support of his position.

DISCUSSION

Relevant Legal Standards

Although Complainant did not specify what portion(s) of Chapter 111, Stats., he was claiming were violated, municipal employe complaint that his union has violated its Chapter 111, Stats., duty of fair representation translates to an alleged violation of Sec. 111.70(3)(b)1., Stats., which makes it a prohibited practice for a municipal employe . . . in concert with others . . . to coerce or intimidate a "municipal employe in the enjoyment of his legal rights, including those guaranteed in sub.(2)."

Ordinarily, a complaint naming only the union as respondent and alleging only a Sec. 111.70(3)(a)1, Stats., would have to be filed within one year after the union's wrongful act or omission to be timely under the applicable statutory limitation on time of complaint filing. 12/ The Harley-Davidson decision pro-

---

11/ In this regard, Complainant's Response reads as follows:

> . . . August of 1983, I contacted the WERC as a non-lawyer with a petition for a rehearing for the reasons indicated in my letter dated August 12, 1983. I listed the reasons why I felt that I didn't get a fair hearing and gave several illustrations how both the Local and Board subjected me to arbitrary and unfair treatment for malicious reasons.
>
> . . .
>
> Although I contacted the WERC with my August 4 and 12 letters, the WERC didn't get back to me until . . . on or about September 18, 1983 notifying me that I could file a complaint against Local 950 for unfair representation. I promptly filed a complaint as advised on September 21, 1983. The WERC cannot ignore the role they played in having my complaint dismissed. I don't think I should be punished or denied justice because of the WERC's sloppy administration or abuse of discretion. The WERC cannot wash their hand of this.

12/ The applicable statute of limitations as set forth in Sec. 111.70(14), Stats., and as incorporated and made applicable to the municipal sector by Sec. 111.70(4)(a), Stats., 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 prohibited prctice alleged.

vides for tolling the statutory limitation against a claim of violation of contract only once contractual grievance procedures have been exhausted concerning the contract dispute involved. 13/ However, the justification for such tolling is to permit/require the parties to settle the subject matter of the complaint in the procedure they agreed upon for that purpose. That justification would not exist where the complaint concerns the quality of the union's grievance procedure representation complainant is pursuing rather than the merits of the grievance itself.

Had the instant complaint named MBSD as repondent and charged MBSD with a violation of Sec. 111.70(3)(a)5, Stats., then the complaint against MBSD would have been timely under the Harley-Davidson principle.

Moreover, it is our view that, had the instant complaint asserted both a (3)(a)5 against MBSD and a (3)(b)1 prohibited practice against the Union, the latter claim would also have been timely filed in the context of its filing as a companion charge to the related violation of contract claim against the employer. For, where a Sec. 111.70(3)(b)1, Stats., failure to fairly represent complaint is combined with a claim of prohibited practice against the municipal employer charging violation of the terms of the collective bargaining agreement, there are significant policy reasons for treating the two claims alike as regards tolling the statute of limitations pending a exhaustion of contractual remedies. In our opinion, it would be appropriate to extend the Harley-Davidson rule to apply as well to companion claims against the union when, but only when they are included in complaints filed against employers alleging violation of collective bargaining agreement.

13/ The Commission's Harley-Davidson decision cited by Complainant involved a complaint against the employer for violation of collective bargaining agreement. The complaint was filed more than one year after the alleged contract violation but less than one year after the employer's final grievance disposition marked exhaustion of the grievance procedure. In holding that the complaint in that case was not barred by Sec. 111.07(14) the Commission stated the following:

> This Board has long recognized the policy of encouraging parties to a collective bargaining agreement to settle their differences through the voluntary processes established by them in their agreement, . . . and if the agreement contains procedures for the voluntary settlement of their disputes, the Board, before it will entertain, on its merits, a complaint that either of the parties thereto has violated same, when called to its attention, must be satisfied that the parties have exhausted the voluntary procedure for the resolution of their disputes. To ignore such procedures would constitute a violation of the collective barganing agreement. The filing of a formal complaint of unfair labor practices with the Board, alleging a violation of collective bargaining agreement, prior to the conclusion of the voluntary process for settlement of the dispute, would probably, in most cases, prejudice the opportunity for a voluntary settlement thereof.
>
> In effectuating the policies of the Wisconsin Employment Peace Act, we conclude that were a collective bargaining agreement contains procedures for the voluntary settlement of disputes arising thereunder and where the parties thereto have attempted to resolve such disputes with such

(Footnote 13 continued on Page 10)

Such an extension of Harley-Davidson has the following clear-cut advantages. The immediate availability of a means to prevent future violations is protected since a complainant can pursue, cease and desist and notice posting relief without awaiting grievance procedure exhaustion. On the other hand, a complainant concerned that union misconduct may have adversely affected the employe's chances for a fair grievance procedure disposition is not required to initiate a complaint to that effect merely to protect against untimeliness at a time when all parties are awaiting the ultimate resolution of the matter in the grievance procedure, before any such complaint could be timely filed against the employer and before the complainant can know the extent to which he has been harmed by the alleged union misconduct. Rather, under the approach adopted herein, such a complainant would know the grievance procedure outcome before being required to initiate any complaint that the union unlawfully contributed to an unsatisfactory grievance procedure outcome as regards what he believes was a meritorious claim that the employer violated the terms of the collective bargaining agreement. However, to do so, the employe would necessarily have to name the employer as a party respondent. Otherwise, the merits of the grievant's contract claim against the employer becomes immaterial to the determination of the issues presented in the complaint, making exhaustion of grievance remedy unnecessary and hence, no justification for tolling the statute of limitation.

The instant complaint refers to MBSD and requests relief that only MBSD could be ordered to provide (e.g., reinstatement), the only party actually named as a respondent in the complaint is the union. Hence, we cannot take issue with the Examiner's conclusion based on the record and arguments before him that the instant complaint alleges only a violation of the Union's duty of fair representation and contains no allegation that MBSD committed a Sec. 111.70(3)(a)5, Stats., violation of contract prohibited practice by its March, 1982 termination of Complainant referred to in the complaint.

However, the Complainant has pointed to pre-complaint-filing correspondence between himself and Commission which complainant did not call to the Examiner's attention and which were not considered by the Examiner in his decision to dismiss the complaint as untimely filed.

We do not find it appropriate at this time to take notice of that correspondence since neither the Union nor MBSD has either been provided a copy thereof or an opportunity to present evidence and arguments concerning same. However, we have reviewed the correspondence from Complainant dated August 4 and August 12 and from the agency to complainant dated September 12, 1983 as if it were an offer of proof contained in a request for reopening the hearing concerning timeliness of the complaint. Since, to our knowledge, neither the Union nor MBSD has received copies of those documents, we are herewith forwarding same to them.

Based on that review of those documents, we are satisfied that if the latter two documents were received into evidence and not effectively rebutted, they would establish (1) that the time taken in responding to Complainant's above-noted

---

13/ procedures, the cause of action before the board cannot be said to arise until the grievance procedure has been exhausted, and therefore we shall compute the one-year period of limitation for the filing of complaints of unfair labor practices from the date on which the grievance procedures have been exhausted by the parties to the agreement, provided that the complaining party has not unduly delayed the grievance procedure. The application of this rule shall not preclude any party from pleading equitable or other defenses.

Dec. No. 7166 (WERC, 6/65) at 8 (emphasis added).

inquiry did not prejudice Complainant; 14/ but that (2) the advice contained in

---

14/ We find no merit in Complainant's contention that the Commission's failure to respond to his August 4 and 12, 1983 correspondence until September 12, 1983 constitutes a circumstance on the basis of which any cause(s) of action alleged in the complaint can be deemed to arise within one year period preceeding Complainant's September 21, 1983 filing of his complaint.

The Commission received the August 4 letter on August 5, 1983. That letter consisted of two typed, single-spaced-pages and an attached copy of a one-page newsletter. The August 4 letter makes no reference to the Complainant's discharge or to the November, 1982 arbitrator's award sustaining that discharge. The letter seeks redress for a variety of alleged wrongs committed against Complainant by MBSD, the Union and the WERC, all of which related to 1977 and 1979 complaints of prohibited practice filed by Complainant against MBSD and (in the letter instance) against the Union. The Commission's September 21 reply to that letter was as follows:

> As to the concerns expressed in your August 4th letter regarding Milwaukee Board of School Directors, Dec. Nos. 16329-A (WERC, 2/79) and 16329-B (WERC, 4/79), the Commission's records reflect that Examiner Malamud's decision dismissing your complaint was appealed to the Commission. Our records also reveal that Examiner Malamud's decision was subsequently affirmed by the Commission after a review of the record and your petition for review. The Wisconsin Statutes provide the right of appeal of Commission decisions to the courts as well as a right to petition the Commission for rehearing. However, I regret to inform you that the statutorily established time limitations for taking such action have expired. Thus, it would appear that the established review procedures are no longer available to you and further that the Commission is without jurisdiction to take any action.

As the Commission's reply above confirms, the matters addressed in the August 4 letter were not such that the time at which the agency responded could affect the Complainant's right to proceed concerning same. The matters referred to in the August 4, 1983 letter could not have been timely complained about as of the date that letter was received by the Commission. We fail to see a causal relationship between the timing of the Commission's reply to the August 4 letter and the untimeliness of his September 21, 1983 complaint.

Complainant's letter dated August 12, 1983 consisted of two single-spaced type typewritten pages, with an 11-page single-spaced typewritten dated August 15, 1983 attached. The opening four lines of that letter expressly request a "rehearing" of the arbitration of his 1982 discharge and the closing three lines request WERC to "consider allowing me the re-hearing to get my job back though reinstatement with back pay because of prejudiced and maliscious Board and unfaithful Union . . .". The remainder of the 2-page single-spaced letter focuses primarily on deficiencies in the Union's representation of Complainant, and the 11-page single-spaced "memorandum of history" attached to that letter dealt with historical matters as to which Complainant was without further recourse due to the passage of time.

The Commission received those documents on August 17, 1983. It replied to the 13-page single spaced document 26 days later on September 12, 1983. Whether the Commission had replied by return mail (e.g., August 18, 1983) or on September 12, 1983 when it did, appears to have had no effect on the Complainant's timeliness of complaint filing in this matter. For, by August 12, 1983, one year had already passed since the latest-in-time wrong committed by the Union (improper handling of the arbitration hearing on August 10, 1982). We therefore find no causal relationship between the time taken by the Commission to respond to the August 12, 1982 letter and the ultimately untimeliness of Complainant's complaint herein.

the WERC letter dated September 12, 1983 was prejudical to Complainant's filing of a timely complaint such (3) that it would establish the validity of Complainant's Petition for Review contention that WERC's "questionable handling and administration of complaint and requests (for information) were responsible for my complaint being ruled untimely" and (4) would warrant permitting Complainant to amend the complaint to name MBSD so as to render the complaint timely as to both the Union and MBSD.

As noted above, Complainant's August 12 letter requested that the Commission order a rehearing of Complainant's grievance arbitration against MBSD because the Union "threw" the case. That letter specifically stated that Complainant was seeking a means of pursuing reinstatement with back pay. The Commission's September 12, 1983 reply letter stated, in pertinent part:

> As to the arbitration case referenced in your letter of August 12, 1983, A/PM-M82-396, please be advised that if you believe the Union failed to fairly represent you in that proceeding you have a right to file a complaint with this agency alleging that the Union's conduct constituted a statutory violation. In such case the burden would be upon you to prove the Union acted arbitrarily. Should you wish to file a complaint, kindly advise and I will send you the appropriate forms.

In the context of the letter to which it was responding, the information provided Complainant may well have been prejudicially misleading. It communicated the idea that filing a complaint against the Union was an available means of obtaining the equivalent of a rehearing of the arbitration and of pursuing remedies including reinstatement. In reality, reinstatement relief would be available to Complainant, if at all, only be means of a complaint against the employer for violation of the collective bargaining agreement. The same appears to be true of back pay. 15/

Had the Commission merely responded by directing Complainant to confer with the lawyer or labor relations advisor of his choice for answers to his questions, or had it merely informed him that the filing of a complaint of prohibited practice (without specifying against whom) was the only possible means by which the Commission could grant him the relief he was seeking, the Commission could have avoided misleading the Complainant.

However, by specifically identifying the availability of a complaint against the Union in the context of Complainant's inquiry, the Commission may well have misled Complainant to his significant detriment. For, as noted above, had Complainant named MBSD as a co-respondent, the complaint would have been timely as to both MBSD and the Union. By naming only the Union, the complaint was timely as to neither.

It is certainly true that Complainant bears the responsibility in representing himself before the Commission to draft and prosecute his own complaint. The agency is neither charged nor equipped to serve as counsel to individuals in his situation. Nevertheless, where, as here, the agency responds to an inquiry from a member of the public in a way that may well have

---

15/ Several Wisconsin Supreme Court cases have held that because the backpay reference in the agency's Sec. 111.07, Stats., remedial authority is to "reinstatement with or without backpay", backpay can be imposed only against an employer even where the Union is held to have caused the employer to commit the unfair labor practice involved. WERB v. Algoma Plywood, 252 Wis. 549, 560-61 (1948), aff'd as to jurisdiction 336 US 301 (1949); International Brotherhood of Paper Makers Local No. 66 v. WERB, 249 Wis. 362 (1946); and UAW Local 283 v. WERB 245 Wis. 417, 435 (1944). Those decisions predated the development of significant and potentially influential federal case law developments to the contrary, such as Vaca v. Sipes, 386 U.S. 171, 196-98, 64 LRRM 2369 (1967) and Bowen v. U.S. Postal Service, ___ U.S. ____ , 112 LRRM 2281 (1983) (approving the concept of allocation of back pay liability between employer and union according to comparative fault in suits for union failure to fairly represent and for employer violation of collective bargaining ageement).

detrimentally misled a potential complainant, the Commission is duty bound to exercise its jurisdiction in a manner that remedies that harm to the extent that it is possible to do so without creating a greater overall injustice to others.

Here, we note that MBSD and the Union were both notified of the pendency of the complaint shortly after the filing thereof, by means of the notice of hearing issued in the matter on October 7, 1983. The complaint theretofore filed by Complainant contained a request for relief that, in part, could be meaningfully ordered only against MBSD, and not the Union. The Complaint also referred to MBSD by name, asserted that MBSD is a subdivision of the state (one determinant of "municipal employer status under the Sec. 111.70(1) definition), asserted that MBSD was obligated not to treat its employes arbitrarily or unfairly, that MBSD had terminated Complainant's employment, and that the Union had failed to fairly represent Complainant in the arbitration concerning that termination.

In the foregoing circumstances, we conclude that, absent significant countervailing evidence from MBSD or the Union, it would not effect a significant injustice on either MBSD or the Union for the instant complaint proceeding to be reopened for the purpose of permitting amendment of the complaint include MBSD as a named respondent and for processing of the amended complaint thereafter as timely filed against both respondents. Especially so, when the apparent impact of our decision to that effect is compared with the manifest injustice that would be done Complainant were we to affirm the dismissal of his complaint as untimely in the context of the pre-complaint correspondence noted above.

Accordingly, we have ordered that Examiner Honeyman's Findings, Conclusions and Order be set aside; that the matter be remanded for an examiner hearing in which the above-noted pre-complainant correspondence and any rebuttal by the Union and MBSD evidence will be received into the record; that if the Union and MBSD do not present significant rebuttal evidence, the examiner is authorized and directed, in the interests of justice, to permit Complainant to amend his complaint to name MBSD as a respondent and to alleged that MBSD violated Sec. 111.70(3)(a)5, Stats., by its March 1982 termination of the Complainant; and that if Complainant so amends the complaint, the examiner is further authorized and directed to find the amended complaint timely filed as against both the Union and MBSD, but only as regards claims that MBSD violated the contrct by its March 1982 termination of Complainant's employment and that the Union violated its duty of fair representation by its acts and omissions as regards its processing of the grievance challenging that discharge. For, alleged Union failures to fairly represent the Complainant (1) at any time prior to the discharge of (2) at any time prior to September 21, 1983 as regards any Union misconduct alleged that does not relate to the processing of Complainant's challenge of the discharge, are matters barred by the one-year statute of limitations and for which there is deemed to be no equitable tolling even under the Harley-Davidson rule as expanded herein.

It should be noted that this decision does not address any other defenses than the statutory untimeliness issue upon which the examiner based his dismissal order. Both the Union and MBSD are to be given an opportunity to formally answer the complaint when it is amended pursuant to the opportunity for same being afforded herein, and both shall be free to argue any other defenses to the amended complaint that they may have.

It should also be noted that this decision also does not necessarily guarantee that the merits of the discharge will be heard by the examiner or, if heard, that the merits of the discharge will be decided by the examiner or by the Commission. For, in such cases the merits of the discharge are only reached for decision if Complainant proves the Union failed to fairly represent him in its processing of the challenge to the discharge, including the Union's conduct at the arbitration hearing. It is for the examiner to decide whether to hear the unfair

representation question before the violation of contract issue against MBSD or to hear those claims at the same time.

Dated at Madison, Wisconsin this 13th day of July, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner