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-F

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

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, the Complainant timely filed a petition requesting that the Commission review the Examiner's decision pursuant to Section 111.07(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.

On July 13, 1984, the Wisconsin Employment Relations Commission issued an Order Setting Aside Examiner's Findings of Fact, Conclusions of Law and Order and Remanding Complaint for Further Examiner Processing wherein it concluded that unless Local 950 or the Milwaukee Board of School Directors could present significant rebuttal evidence, certain correspondence between the Commission and Kraucunas would constitute a basis for allowing Kraucunas to amend his complaint to name the Board as a respondent, thereby allowing Kraucunas to have timely filed claims that his discharge by the Board violated Section 111.70(3)(a)5, Stats., and that Local 950 processed his discharge grievance in a manner which violated Section 111.70(3)(b)1, Stats.

On October 22, 1984, Circuit Judge Rudolph T. Randa issued an Order wherein he granted the Board's petition for review of the Commission's July 13, 1984 Order, set aside the Commission's July 13, 1984 Order, and remanded the case to the Commission for further proceedings consistent with the Judge's oral decision and Order.

On November 2, 1984, the Commission issued an Order to Show Cause Why Complaint Should Not be Dismissed, wherein Complainant was given the opportunity to show any cause which he may have as to why the Commission should not proceed to dismiss his complaint against Respondent Local 950, International Union of Operating Engineers as having been filed with the Commission more than one year after occurrence of the alleged prohibited practice.

On November 6, 1984, Complainant Kraucunas filed his response to the Commission's Show Cause Order. Respondent Local 950 filed its position with the Commission on November 13, 1984. On November 14, 1984, the Commission received a copy of the transcript of Judge Randa's October 9, 1984 oral decision, which preceded the Judge's October 22, 1984 Order.

Having considered the record, Judge Randa's decision and Order, and the positions of the parties, the Commission is satisfied that it should affirm Examiner Honeyman's dismissal of complaint against Local 950 as untimely filed.

NOW, THEREFORE, it is

ORDERED 1/

That Examiner Christopher Honeyman's Findings of Fact, Conclusion of Law and Order are hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 21st day of November, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for

rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

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

The procedural posture of this case set forth in the preface, above, need not be repeated here. Suffice it to say, we are now confronted with the question of whether we should affirm Examiner Honeyman's dismissal of Kraucunas' complaint against Local 950 as having been untimely filed.

At page 12 of our July 13, 1984 decision, we noted that:

> . . . had Complainant (Kraucunas) 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.

Judge Randa has ruled that the Commission cannot grant Kraucunas an opportunity to amend the complaint to name MBSD as a co-respondent. Given the Judge's ruling, it would follow from the rationale for the above-quoted conclusion set forth at pp. 8 - 10 of our July 13, 1984 decision that the instant complaint was timely as to neither MBSD nor the Union. We stated our rationale in that regard as follows:

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. (Footnote 12 omitted.) The Harley-Davidson decision provides 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.
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> Had the instant complaint named MBSD as respondent 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.

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.

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 resoltuion of their disputes. To ignore such procedures would constitute a violation of the collective barganing (sic) 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 (sic) a collective bargaining agreement contains procedures for the voluntary settlement of disputes arising thereunder and where the parties thereto have attempted to resolve such dispute with such 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).

In response to our Order to Show Cause Why Complaint Should Not be Dismissed, Kraucunas has argued that Local 950's alleged failure to fairly represent him during an arbitration proceeding continued in time until the November 1982 issuance of the arbitrator's award and thus that his September 21, 1983 complaint was filed within the one-year statute of limitations established by Sections 111.07(14) and 111.70(4)(a), Stats. Kraucunas reasons, in essence, that the August 12, 1982 arbitration hearing (during which Local 950 allegedly failed to represent him) "continued" until the date of the award because of the need for the arbitrator to study the hearing's content through the subsequently produced hearing transcript and briefs. We do not agree. Where, as here, the duty of fair representation allegation is premised upon a failure "to represent Complainant properly at his arbitration case" 2/ and where, as here, it is not alleged that the employer has committed a violation of contract prohibited practice, the Examiner correctly concluded that it is the date of the hearing which triggers the

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2/ Kraucunas' September 21, 1983 complaint.

running of the one-year statute of limitations. Thus, we also share the Examiner's conclusion that because Kraucunas' September 21, 1983 complaint was filed more than one year after the August 10, 1982 arbitration hearing, the complaint was untimely and must be dismissed on that basis. 3/

Dated at Madison, Wisconsin this 21st day of November, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

3/ This result is consistent with Judge Randa's oral decision and Order. We note that on page 9 of his oral decision the Judge commented: ". . . it is the Court's conclusion that the Union shall prevail on this matter . . ." and when concluding his decision on pages 10 and 11 stated:

> . . . I'm going to grant the relief sought by the Milwaukee School Board and the Union to set aside the July 13th decision and order and that will mean that the order of December 5th, 1983, ordering the dismissal on its merits of the Complaint in that action will be granted . . . .