STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EDNA C. JOHNSON, Complainant, vs. AFSCME, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION, Respondent.	Case 2 No. 33662 PP(S)-113 Decision No. 21980-C

Appearances:
Castellani, Sheedy & McCormick, by Mr. Michael T. Sheedy, 829 North Marshall Street, Milwaukee, Wisconsin 53202, appearing on behalf of Complainant Edna C. Johnson.
Lawton and Cates, S.C., by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703, appearing on behalf of Respondent AFSCME, Council 24.

ORDER AFFIRMING IN PART AND MODIFYING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION TO DISMISS

Examiner Mary Jo Schiavoni having on November 1, 1989 issued Findings of Fact, Conclusion of Law and Order Granting Motion to Dismiss in the above matter wherein she concluded that she could not exercise Commission jurisdiction over a complaint and amended complaint filed by Respondent Edna C. Johnson against Respondent AFSCME, Council 24 because said complaints were not timely filed within the meaning of Secs. 111.84(4) and 111.07(14), Stats.; and Complainant Johnson having on November 13, 1989 filed a petition with the Commission seeking review of the Examiner's decision; and the parties thereafter having filed written argument the last of which was received on December 15, 1989; and the Commission having considered the matter and being fully advised in the premises, makes and issues the following

ORDER

A. The Examiner's Findings of Fact 1-11 are affirmed.

B. The Examiner's Findings of Fact 12-15 are set aside.

C. The Commission makes the following Finding of Fact 12:

> 12. That with the exception of the allegation in the amended complaint that on October 10, 1984, Respondent Council 24 improperly refused to proceed to arbitration in Grievance Arbitration Case 4053, all of the unfair labor practices which Respondent Council 24 is alleged by Complainant to have committed occurred more than one year prior to the filing of the initial complaint on August 8, 1984.

D. The Examiner's Conclusion of Law is set aside.

E. The Commission makes the following Conclusions of Law:

1. As to those alleged unfair labor practices which occurred more than one year prior to the filing of the initial complaint on August 8, 1984, it is not appropriate to toll the application of the one year statute of limitations established by Secs. 111.84(4) and 111.07(14), Stats.

2. As to those alleged unfair labor practices which occurred more than one year prior to the filing of the initial complaint on August 8, 1984, the Commission is without jurisdiction to proceed.

3. As to the alleged unfair labor practice which the amended complaint asserts occurred on October 10, 1984 regarding Grievance Arbitration Case 4053, the Commission presently

has jurisdiction to proceed.

F. The Examiner's Order is set aside.

G. The Commission makes the following Order.

> The original and amended complaints are dismissed except for the allegation that Respondent Council 24 committed an unfair labor practice on October 10, 1984 as to Grievance Arbitration Case 4053. Said allegation is remanded to the Examiner for further proceedings, as appropriate.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of February, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner

Chairman A. Henry Hempe did not participate in this case.

AFSCME, COUNCIL 24, WISCONSIN STATE EMPLOYES UNION

MEMORANDUM ACCOMPANYING ORDER AFFIRMING IN PART, AND MODIFYING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION TO DISMISS

BACKGROUND

On August 8, 1984, Complainant Johnson filed a complaint alleging that Respondent Council 24 had violated the State Employment Labor Relations Act (SELRA) by failing to fairly represent her as to various disciplinary actions taken against her by the State of Wisconsin. Her complaint stated:

> On September 17, 1981, I was fired from my job at University of Wisconsin-Milwaukee, where I worked at Payroll and Benefits Specialist IV. I had worked for the University for 16 years, with excellent and outstanding annual evaluations.
>
> 12-31-81 I wrote to Tom King, President of Wis. State Employes Union asking him when I can expect action to recover 30 hours pay which I believe I was defrauded - appealed to on or about arbitration on 9-17-81(?)
>
> (2)Pls. cite section of Labor Contract where Union negotiated to deny me retroactive pay increase from July thru May 9-17-81 termination (never received).
>
> 9- -81Discharge/grievance filed over discharge.
>
> 11-3-81 I had hearing re 3rd step of Aug. 12 rep-rimand on October 28 wherein the termination was validated by a subordinate of the individuals who terminated me.
>
> 2-18-82 Mr. Tom King wrote me denying my request that the Union represent me in Arbitration over my discharge, saying "based on your previous work record we could not prevail at arbitration in this case." (copy attached hereto) I was further advised I could pursue the grievance thru my local union or by myself, poss. with aid of an attorney of my choice. I was further referred to my local union rep. or Mr. Emil Muelver, a Field Representative for the Union.
>
> I contacted my union rep, Mr. Tom Taubel, as I was confused about the conclusion as to why I could not "prevail at arbitration." Tom Taubel told me Emil Muelver had told him he's (sic) be over to look at my file, but he never came, and Mr. Taubel had released my file to no one else.
>
> 2-25-82 I wrote to Hattus Alexander, President of Local 82, asking that the Local represent me in Arbitration over my discharge.
>
> 3-09-82 Mr. Tom King wrote me denying help from their/my Union in the matter of the letter of reprimand and 3-day suspension which I had appealed to arbitration.
>
> This 3-day suspension cost me more than $200.00. The suspension came from baseless charges devolved from a meeting of over 45 minutes, we each had the same question for one another: "What was the purpose of this meeting?" Yet management used it as a base for an over $200.00 fine, and the Union refused to arbitrate for recovery.
>
> 3-12-82 Mr. John Michaelis, Secretary, Local 82, wrote me denying help of my local in taking my discharge to arbitration. "The Local has decided not to take your discharge case to arbitration."
>
> *See paragraph below.

> Subsequent to the above events, I did engage an attorney and went forward to prosecute and to prevail in the Arbitration, the result of which was reinstatement at UWM in my same position. This action caused me great mental stress, great expense, and raised the question, "Why have a Union, what good is the Union?" if it won't assist aggrieved individuals. I believe the Union was remiss in its duty in this matter, and that the Union owes me, at very least, the costs, expenses and disbursements including the charges for the Arbitrator, Court Reporter and Attorney fees. This does not address my trauma in having to furnish my attorney all those materials of which the Union was cognizant regarding my rights and the violation thereof. In addition I later learned that the Union in negotiation with the employer agreed to drop outstanding grievances (copy of contract attached hereto).
>
> *My Union steward knew Management was setting me up. He testified he wrote on his calendar the date he predicted I'd be fired, and I was fired ahead of that date. Why wouldn't the Union defend me?

On October 10, 1984, Respondent filed a Motion to Dismiss alleging the complaint was untimely. Complainant initially responded to the Motion by letter dated October 17, 1984, which asserted:

> We are in receipt of the defendant's Motion to Dismiss, which we believe is inappropriate. The Union refused to pay for the cost of arbitration within the last year and in addition continues to fail to fairly represent Mrs. Johnson. By way of amendment, we are enclosing recent documentation that this is an ongoing problem with the Union and consider these documents to be in the nature of an amendment to our request for hearing relating to the ongoing refusal to properly represent Mrs. Johnson. Inasmuch as this is continuing in nature, we believe the Motion to Dismiss is without merit.

Attached to the October 17 response were copies of the following two letters:

> September 25, 1984
>
> Edna Johnson
> WSEU Local 82
> 1909 E. Kenwood Blvd.
> Milwaukee, WI 53211
>
> Dear Sister Johnson:
>
> I have reviewed, along with other members of the Wisconsin State Employees Union staff, your grievance relating to Article 1, Article 3 and Article 11 -- harassment -- which has been appealed to arbitration.
>
> After reviewing your case with our staff, it is our decision, based on the fact that the relief sought as outlined in the 3rd step grievance form has been granted, not to pursue this case to arbitration.
>
> Please be advised that you may continued with your grievance either through your local union or, if this is not possible, you have the right to pursue your grievance yourself or with the aid of an attorney of your choice.
>
> For any further information or help regarding your case, please contact your field representative Cindy Manlove at 414-769-0220.
>
> Yours in the Union,
>
> Karl Hacker
> Assistant Director
>
> October 10, 1984
>
> Ms. Edna Johnson
> Sandburg Hall West, Benefits Office
> Milwaukee, WI 53201
>
> RE: Grievance Arbitration Appeal Case #4053
> (Harassment)

Dear Ms. Johnson:

> The Union has withdrawn it support of the above-entitled matter. You may continue your appeal before an arbitrator provided you assume the costs of the arbitra-tion. The sharing or assumption of costs of the arbitrator, court reporter, and witnesses is specifically addressed in the labor agreement. All other costs, including your own attorney fees, will be your full responsibility.
>
> If you wish to proceed to arbitration on this matter, please formally notify me in writing prior to November 12, 1984. If no appeal is received by me at the following address by that date, your appeal will be processed as withdrawn.
>
> Sincerely,
>
> Kristiane Randal, Administrator

On October 22, 1984, following its receipt of Complainant's letter dated October 17, 1984, Respondent filed a Motion to Dismiss alleging that the Complainant had not stated a cause of action. On October 26, 1984, Complainant filed a response to Respondent's most recent Motion to Dismiss.

On December 10, 1984, Complainant filed an amended complaint with Examiner Schiavoni. The amended complaint stated in pertinent part:

> By way of amendment to the original complaint of prohibited practices in state employment the com-plainant hereby incorporates by reference her original complaint as if set forth more fully herein and alleges that within the last calendar year the union, AFSCME, has refused to pay for the costs or arbitration to date and in addition continues to unfairly represent Mrs. Johnson. At present the arbitration continues upon a remand from the Wisconsin Court of Appeals to the arb-itrator, Mr. Jay Grenig, for a determination of the appropriate amount of back pay and deductions therefrom. The union, in addition to failing to properly represent the complainant in the arbitration concerning just cause has also, on October 10, 1984, informed the State of Wisconsin, Collective Bargaining Division, that it has also withdrawn support in Grievance Arbitration Case 4053. That these actions have occurred since the filing of the original complaint against prohibited practices under Wis. Stats. 111.84 and are evidence of the continuing refusal of the union to properly represent Mrs. Edna Johnson. Upon information and belief there is no basis for this failure. This document is filed as an addition and amendment to the complaint attached hereto.

A hearing on the complaint and amended complaint was held on January 17 1985, during which the parties agreed to an indefinite postponement of the matter pending the outcome of other litigation.

Ultimately, on July 20, 1989, hearing was conducted by Examiner Schiavoni on Respondent Council 24's Motion to Dismiss. Following said hearing, the parties submitted written argument to the Examiner.

In its initial brief to the Examiner, Respondent renewed its assertion that the complaint and amended complaint should be dismissed as untimely filed because they were filed more than one year from Respondent Council 24's February 18, 1982 refusal to arbitrate Complainant's discharge grievance.

In its responsive brief, Complainant argued that her cause of action against Respondent Council 24 did not accrue until she had met her legal obligation to exhaust her contractual remedies by proceeding to grievance arbitration. Complainant also urged the Examiner to conclude that Complainant's cause of action as to her discharge grievance did not accrue when the Respondent refused to proceed to grievance arbitration because at that time Complainant did not possess evidence that Respondent's decision was arbitrary. Complainant asserted that only once she became aware of evidence of arbitrary union conduct as she proceeded through the grievance arbitration process should her action against the Respondent accrue, and then only upon exhaustion of the contractual arbitration process.

In reply to Complainant's responsive brief, Respondent Council 24 urged the Examiner to reject Complainant's exhaustion argument because it asserted that the outcome of the arbitration would have no bearing on the duty of fair representation allegation made against Respondent. Respondent argued that the exhaustion doctrine referred to by Complainant is only applicable where there

is a claim that the employer violated the collective bargaining agreement.

By way of response to Respondent's reply brief, Complainant asserted that she was unable to allege that the State of Wisconsin had violated the collective bargaining agreement because her exclusive remedy for such a contractual violation was through the contractual grievance arbitration process. Thus, Complainant argued that Respondent's argument as to the inapplicability of the exhaustion doctrine to the instant complaint should be rejected.

THE EXAMINER'S DECISION

In her decision, the Examiner, noting that the complaints did not contain any breach of contract allegation, rejected Complainant's argument that her cause of action against Respondent Council 24 could not have been filed until she exhausted the grievance arbitration process. The Examiner then concluded that all allegations in the complaint and amended complaint stemmed from Respondent's refusal to proceed to grievance arbitration on Complainant's behalf in February and March of 1982. Based upon this determination, the Examiner concluded that the one year statute of limitations began to run at that time. In reaching her conclusion in this regard, the Examiner rejected Complainant's argument that her cause of action against Respondent did not accrue until 1984 when she discovered evidence of the Respondent's alleged arbitrary conduct. Accordingly, the Examiner dismissed the initial and amended complaint as being untimely filed.

THE PETITION FOR REVIEW

Complainant's petition for review states:

1. That the findings and conclusion are against the great weight and preponderance of evidence.

2. That inter alia petitioner takes specific exception to the finding of fact that the Unions failed to reply to Edna Johnson's request regarding exhaustion of union remedies does not toll the statute of limitations.

3. The decision fails to note that the examiner previously heard this motion and denied the motion.

4. The decision notes that the "issue of when the statue of limitations is triggered in a duty of fair representation case has never been directly presented to the Commission." However the examiner is applying federal case law completely disregards precedential case law concerning, (1) discovery, (b) accrual and (c) the doctrine of exhaustion.

Furthermore, the examiners (sic) findings that heard (sic) Edna Johnson exercised due diligence she could have discovered **"much"** of the new evidence is contradictory and completely contrary to the evidence in the record for this information was solely in the possession of the Union which concealed such until discovery.

Finally as to exhaustion of remedies alleged, the examiner concedes that the WERC required exhaustion and also acknowledged that Mrs. Johnson sought to exhaust, however completely disregards the case law that exhaustion did not apply.

This is contrary to Clayton v. Automobile Workers, 451 US (1981) wherein the United States Supreme Court states:

"In republic (sic) Steel Corporation v. Maddox, 379 U.S. 650 (1965), we were asked to decide whether an employee alleging a violation of the collective bargaining agreement between his union and the employee must attempt to exhaust exclusive contractual grievance and arbitration procedures before bringing suit under section 301(a). A contrary rule, allowing an employee to bring suit under section 301 without attempting to exhaust the contractual grievance procedures would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances."

The apparent reasoning of the examiner is illogical. Apparently the ruling is if Mrs. Johnson made a complaint against the employer, then there would be an exhaustion requirement.

The decision cited by the Union regarding the doctrine of exhaustion is distinguishable because it concerns itself with a different set of circumstances, to wit: a municipal employee with an unfair labor practice complaint against a municipality, Wis. Stats. Sec. 111.70(3)(a)(1), and a corresponding Duty of Fair Representation (DFR) complaint, Wis. Stats. Sec. 111.70(3)(b)(1) against his union. As you are aware, both of these proceedings can be consolidated under the Wis. Stats. Sec. 111.70(4) before a common forum for Wisconsin Employment Relations Commission.

Mrs. Johnson, a state employee, had a claim for unjust termination against UWM, wherein her exclusive remedy for a contractual grievance was an arbitration under the express provision of her collective bargaining agreement. The WERC would not have been the proper forum for this dispute because of a lack of jurisdiction over that type of a contractual dispute, nor would a private arbitration be the proper forum for a DFR claim against the Union because the WERC is vested with the ministerial duty to address claims of unfair practices. In fact the arbitrator ruled that he

> would not hear any issue regarding the Union. See attachment of Johnson Arbitration Vol. VI, pp. 53-4. Clearly, Mrs. Johnson could not combine claims of unfair labor practice, Wis. Stats. Sec. 111.84(2)(a) and unjust discharge before the contract arbitrator nor the WERC.
>
> In this instance the United States Supreme Courts (sic) requirement of exhaustion found in Republic Steel Corporation vs. Maddox, 379 US 650 (1965) must be met.
>
> Furthermore, as noted in the claimant's prior memorandums, Mrs. Johnson's claim had not accrued nor had she discovered the breach of contract dated in 1982. Inasmuch as the Respondent has not addressed these legal issues the Claimant can only conclude that the Respondent concedes these points.
>
> In light of the factual and legal issues the Commission should review this matter.

Complainant supplemented its petition for review by referring to its legal argument as filed previously with the Examiner.

Respondent Council 24 filed a response to the petition for review which urged the Commission to affirm the Examiner and directed the Commission's attention to the legal argument it had previously filed with the Examiner.

DISCUSSION

The original complaint filed by Complainant Johnson on August 8, 1984 1/ alleges Respondent Council 24 violated Sec. 111.84, Stats., by taking certain action in its capacity as her collective bargaining representative. Hearings before Examiner Schiavoni on January 17, 1985 2/ and July 20, 1989 and the written argument filed by the parties make it clear that Complainant is asserting Respondent Council 24 breached its duty to fairly represent Complainant and thus violated Sec. 111.84(2)(a), Stats.

Section 111.07(14), Stats., which is made applicable to the instant complaint by Sec. 111.84(4), Stats., states:

> The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

All of the acts attributed by Complainant Johnson to Respondent Council 24 in the original complaint occurred more than one year prior to August 8, 1984. However, Complainant Johnson nonetheless asserts several reasons why the Examiner erred when finding the original complaint untimely.

Complainant argues that where, as here, the individual employe has a right to proceed to grievance arbitration at the employe's expense, the duty of fair representation complaint against the union cannot be filed until the employe "exhausts" the arbitration process. The Examiner responded to this argument by citing International Union of Operating Engineers, Local 950, Dec. No. 21050-C (WERC, 7/84) and Dec. No. 21050-F (WERC, 11/84) aff'd Case No. 655-705, (CirCt Milw 8/85), for the proposition that the duty of fair representation allegation must ordinarily be filed within one year of the union's alleged wrong act or omission unless accompanied by violation of contract claim against the employer, in which case the statute of limitations for both the duty of fair representation and the violation of contract claims are tolled pending exhaustion of contractual remedies. As the instant complaint has no violation of contract component, the Examiner reasoned that it was not appropriate to toll the statute of limitations pending Complainant's exhaustion of her contractual remedy.

1/ Pursuant to Sec. 111.94(2), Stats., a complaint is not deemed filed with the Commission unless and until the statutorily mandated filing fee is received. Thus, although the original complaint herein was received on July 13, 1984, it was not filed until August 8, 1984 when the filing fee was received. We have amended the Examiner's Findings of Fact to reflect the August 8, 1984 date.

2/ In the petition for review, Complainant asserts that the Examiner's decision "fails to note that the examiner previously heard this motion (to dismiss) and denied the motion." Page 5 of the transcript of the January 17, 1985 hearing reflects that the Examiner was unwilling to grant Respondent's motion to dismiss "prior to receipt of any evidence. . . ." Thus while the motion had previously been denied, the denial was subject to Respondent's right to renew same after hearing. Such hearing was held on July 20, 1989 and the motion was then properly before the Examiner again for a ruling.

While the Local 950 decisions did not involve a circumstance in which the employe retained and exercised the option to proceed to arbitration without the union's participation, said decisions do provide dispositive guidance herein. 3/ In both Dec. No. 21050-C and F, we set forth the following policy considerations applicable to tolling the statute of limitation as to duty of fair representation allegations.

> 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. 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. 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 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 an 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 violation 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 here, 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

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3/ While Local 950 involved an interpretation of the Municipal Employment Relations Act and the instant case involves the State Employment Labor Relations Act, we find no basis for reaching a different result herein. The applicable statute of limitation and unfair labor practice language and the underlying policy considerations are essentially identical under both statutes. See also Dept. of Employment Relations v. WERC, 122 Wis.2d. 32 (1985).

> 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. (footnotes omitted-emphasis not supplied in original text).

The quoted portion of the Local 950 rationale underlined for emphasis by us above provides persuasive rationale herein. Here, where the alleged wrong committed by Respondent Council 24 is the failure to proceed to arbitration, the ultimate merit of the claim against the employer as determined by an arbitrator is immaterial to a determination of that issue. 4/ In such circumstances, allowing the immediate availability of Commission complaint procedures as a means to prevent future violations and to obtain make whole relief best serves the interests protected by the State Employment Labor Relations Act (SELRA).

Given the foregoing, we reject Complainant's argument that she was obligated to wait until she had exhausted her contractual remedy before filing a complaint against Respondent Council 24.

Complainant has also argued that her complaint should be deemed timely because she never received a response from Respondent Council 24 to her letter of March 27, 1982 which stated:

> Will you kindly send me a written reply to the following question at your earliest convenience?
>
> Does the State Council's refusal to take my discharge to arbitration mean that my mandatory remedies under the contract have been exhausted and I am free to go to the courts?
>
> Thank you for the courtesy of a prompt reply.;

The Examiner responded to this argument by concluding that Council 24's failure to reply should reasonably have been viewed by Complainant as a determination "that she had exhausted any internal union appeals procedure." The Examiner also noted that within a month of the March, 1982 letter, Complainant was proceeding to grievance arbitration.

Contrary to the Examiner, we do not see the March 1982 letter as asking whether there were internal union procedures by which she could use to seek reversal of Respondent's decision. Rather, the letter can most reasonably be viewed as posing the question of whether Complainant was now free to use the judicial process to challenge her discharge. Because the answer to this question is irrelevant to the issue of whether Respondent Council 24 violated SELRA by refusing to proceed to arbitration on Complainant's discharge, the failure of Council 24 to respond does not provide a basis for tolling the statute of limitations.

Complainant lastly contends that she was not obligated to file her complaint within one year of Respondent Council 24's February and March 1982 action because she did not discover the allegedly arbitrary nature of the Respondent's decision until 1984. The Examiner rejected this argument citing Harris v. Victor Division- Dana Corp, 121 LRRM 3524 (N.D. 111 1986) which she quoted in pertinent part as follows:

> Even assuming that Harris could prove his allegations of conspiracy, the mere fact that he recently uncovered the alleged motivation underlying the denial of his grievance is insufficient to toll the statute of limitations. The public interest in industrial peace is strong, and cannot be sacrificed each time an individual employee believes he has discovered some new shred of evidence bearing on the disposition of one of his grievances. To allow Harris to resurrect his cause of action at this late date would be to subject final grievance resolutions to attack indefinitely, and would undermine the federal policy of encouraging rapid and final resolution of labor disputes. This we are unwilling to do. (footnote omitted)

4/ When deciding whether to arbitrate a grievance, a union is obligated to consider the chances of prevailing before an arbitrator. See Mahnke v WERC, 66 Wis2d 524 (1975); State of Wisconsin, Dec. No. 11457-H (WERC, 5/84). However, because the union obviously must make this determination before a decision is obtained and based on the information it then possesses, the ultimate outcome of the case before the arbitrator is not relevant to any claim that the union failed to meet its duty to fairly represent the employe.

We, like the Examiner, find this rationale persuasive and thus reject this Complainant argument. Given this conclusion, we need not determine whether we concur with the Examiner's belief as expressed in her decision that Complainant "with due diligence" could have uncovered the evidence of alleged arbitrary conduct by Council 24 within one year of March 1982.

Given the foregoing, we have affirmed the Examiner's determination that the complaint is untimely as to Respondent Council 24's action challenged in the original complaint.

Turning to the timeliness of the amended complaint, Complainant therein presented two additional allegations. Complainant asserted that : (1) "within the last calendar year" Respondent has refused to pay the costs of the arbitration proceeding; and (2) on October 10, 1984, Respondent withdrew support in what is identified only as "Greivance (sic) Arbitration Case 4053."

In our view, the alleged refusal to pay Complainant's arbitration costs is a direct consequence of the alleged initial refusal to proceed to arbitration and as such does not constitute a potentially independent unfair labor practice. Respondent's refusal to pay arbitration costs would only be violative of SELRA if the original and untimely challenged refusal to proceed to arbitration was illegal. As we recently held in Moraine Park Technical College, Dec. No. 25747-D (WERC, 1/90), where there is an unfair labor practice allegation which inextricably relies on alleged illegal conduct committed more than one year prior to the filing of the complaint, such allegation is also untimely. Therefore, we have affirmed the dismissal of this portion of the amended complaint.

However, we conclude the Examiner erred when she dismissed the allegation in the amended complaint regarding an October 10, 1984 withdrawal of support in "Arbitration Case 4053." The Examiner concluded that the allegation regarding "Arbitration Case 4053" was untimely because it related to a reprimand/suspension grievance which the initial complaint alleges Respondent refused to process to arbitration in March, 1982. The record before her did not provide a basis for her conclusion that these two references were one and the same grievance. The relationship found by the Examiner is not present in the amended complaint itself and the evidence presented at hearing makes no reference to "Arbitration Case 4053." Indeed, the two letters attached to the Complainant's October 17, 1984 response to Respondent's Motion to Dismiss strongly suggest that "Arbitration Case 4053" involves a "harassment" grievance which is unrelated to the various disciplinary grievances filed by Complainant. Thus, based on the record before her, the Examiner was confronted with a separate duty of fair representation allegation which was timely filed and should not have been dismissed. Therefore, we have remanded the "Arbitration Case 4053" portion of the amended complaint to the Examiner for further proceedings, as appropriate.

Dated at Madison, Wisconsin this 27th day of February, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner

Chairman A. Henry Hempe did not participate in this case.