STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PREMA ACHARYA and P.V.N. ACHARYA, Complainants,	:	
vs.	:	Case 3 No. 34457 PP(S)-0114 Decision No. 22320-A
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION (WSEU), AFL-CIO, LOCAL NO. 1, Respondent,	:	

Appearances:

Mr. P.V.N. Acharya, 729 Liberty Drive, DeForest, Wisconsin, 53532, with Mr. Spencer A. Markham, Markham Law Offices, 102 West Water Street, Princeton, Wisconsin, 54968, appearing on behalf of Prema Acharya and P.V.N. Acharya, referred to below as the Complainant.

Mr. Richard V. Graylow, Lawton and Cates, Attorneys at Law, 110 East Main Street, Madison, Wisconsin, 53703-3354, with Mr. Kirk Strang, appearing on behalf of American Federation of State, County and Municipal Employees (AFSCME), Council 24, Wisconsin State Employees Union (WSEU), AFL-CIO, Local No. 1, referred to below as the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant filed an action in Dane County Circuit Court on April 30, 1984. After a series of pleadings and proceedings, that court, on December 21, 1984, issued an Order referring the matter to the Wisconsin Employment Relations Commission. The Commission, on February 1, 1985, appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.84(4) and Sec. 111.07 of the Wisconsin Statutes. A hearing on the matter was conducted on February 25, 1985. The parties, with the concurrence of the Examiner, agreed at the February 25, 1985, hearing to divide the evidentiary hearing into two parts. The first part would be directed solely to the issue of the alleged Union commission of Unfair Labor Practices within the meaning of the State Employment Labor Relations Act (SELRA). The second part would occur only if the Union was found to have committed an Unfair Labor Practice, and would be directed solely to the issue of remedy. Hearing on the first part of this procedure continued on April 25 and 26 of 1985. A transcript of each of the three days of hearing was provided to the Examiner by July 18, 1985. The parties filed briefs and reply briefs by September 16, 1985.

FINDINGS OF FACT

1. Prema Acharya (the Complainant) is a female individual of Asian heritage who lives at 729 Liberty Drive, DeForest, Wisconsin 53532. P.V.N. Acharya is a male individual of Asian heritage who is the husband of the Complainant and who also lives at 729 Liberty Drive, DeForest, Wisconsin 53532. The Complainant was employed by the State of Wisconsin (the State) from October 23, 1978, until at least June 30, 1981.

2. The American Federation of State, County and Municipal Employees (AFSCME), Council 24, Wisconsin State Employees Union (WSEU), AFL-CIO, Local No. 1, (the Union), is a labor organization which has its offices located at 5 Odana Court, Madison, Wisconsin, 53719.

3. The State hired the Complainant under the terms of the WIN program, which is a federally funded program to provide employment for recipients of AFDC. In May and June of 1981, the Complainant was classified as a Clerical Assistant 2, and worked for the State's Division of Management Services. The Complainant's duties at that time included typing, as well as the folding and filing of correspondence.

4. The Union and the State were parties to a collective bargaining agreement covering the period from November 9, 1979, to June 30, 1981. That agreement covered the members of the Clerical and Related bargaining unit of which the Complainant was an individual member in May and June of 1981. Among the provisions of that agreement were the following:

ARTICLE 2
RECOGNITION AND UNION SECURITY

. . .

SECTION 4: PERSONNEL TRANSACTIONS

. . .

2/4/0/C The Employer will furnish the treasurers of the local Unions a list of dues check-off information, seniority information, and personnel transactions affecting employees in the units covered by this Agreement. This information will be included with the dues checks received from the payroll department on a biweekly basis, including "C" payroll periods, and will include the following information:

(1) bargaining unit
(2) employee name
(3) social security number
(4) classification (old,new)
(5) work telephone number
(6) home and work addresses
(7) seniority date and tie-breaker information
(8) ethnic group
(9) sex
(10) amount of dues deducted
(11) effective date of the dues deduction
(12) personnel transaction and effective date
(13) "add" if new employee
(14) "C" to indicate a change in employee information

. . .

ARTICLE 4
GRIEVANCE PROCEDURE

SECTION 1: DEFINITION
PART 1: DEFINITION

4/1/1 A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement.

. . .

PART 4: TIMELINESS

4/1/4 All grievances must be presented promptly and no later than thirty (30) calendar days from the date the grievant first became aware of, or should have become aware of with the exercise of reasonable diligence, the cause of such grievance.

SECTION 2: GRIEVANCE STEPS
PART 1: STEP 1

4/2/1 Within seven (7) calendar days of receipt of the written grievance from the employee(s) or his/her representative(s), the supervisor will schedule a meeting with the employee(s) and his/her representative(s) to hear the grievance and return a written decision to the employee(s) and his/her representative(s).

PART 2: STEP 2

4/2/2 If dissatisfied with the supervisor's answer in Step One, to be considered further, the grievance must be appealed to the designated agency representative within seven (7) calendar days from receipt of the answer in Step One.

. . .

PART 3: STEP 3

. . .

4/2/3/B (CR) If dissatisfied with the Employer's answer in Step Two, to be considered further, the grievance must be appealed to the designee of or where there is no designee to the appointing authority (i.e. division administrator, bureau director, or personnel office) within seven (7) calendar days from receipt of the answer in Step Two.

. . .

PART 4: ARBITRATION

. . .

ARTICLE 8
LAYOFF PROCEDURE

. . .

SECTION2: GENERAL
LAYOFF PROCEDURES

8/2/0 When a layoff occurs, the following general rules shall apply:

(1) Layoff shall be by employing unit within the bargaining unit.

(2) Layoff shall be by class as set forth in job specifications.

(3) Employees within the layoff unit within the same . . . class shall be laid off by seniority . . . with the least senior laid off first, except that the Employer may exercise one of the two following options:

(A) The Employer may lay off out of line seniority to maintain a reasonable affirmative action program or where there is a demonstrable need for special skills; or

(B) That 5% of the employees within an employing unit within the same class may be exempt from the procedure by management. Such 5% shall not be less than one person.

. . .

SECTION 3: NOTICE OF LAYOFF
PART 1: IMPENDING LAYOFF

8/3/1 In the event management becomes aware of an impending reduction in work force, they will notify the Union as soon as practicable but not less than thirty (30) days.

. . .

SECTION 5: TRANSFERS AND BUMPING
PART 1: INTRODUCTION

8/5/1 Within five (5) calendar days of notification of layoff, the employee shall elect to either transfer or bump in accordance with this section, as follows:

PART 2: TRANSFERS

8/5/2

(1) Within the Department - The employee shall be afforded the opportunity to transfer laterally to vacant positions in the same class in any employing unit within the department . . .

(2) Between Departments - The employee who is to be laid off may file a request for transfer to any department in state service. Upon approval of that department, such employee may be appointed to any vacancy in the same class or any similar class for which he/she might meet the necessary qualifications in the same or lower salary range as the position from which he/she was laid off.

PART 3: BUMPING

8/5/3 Within any employing unit within the bargaining unit, any employee, . . . may elect to bump downward to a position for which they are capable of performing in a lower class in the same series or to a position in a class within the employing unit in which they had previously obtained permanent status in the classified service.

PART 4: ORDER OF BUMPING

8/5/4/A When an employee elects to bump, the bumping will be by seniority . . .

. . .

PART 6: SALARY

8/5/6

(1) Upon bumping, an employee shall retain his/her current rate of pay.

. . .

SECTION 6: RECALL
PART 1: RECALL PROCEDURE

. . .

PART 2: LIMITATIONS

8/6/2 The employee's right to recall shall exist for a period of five (5) years.

. . .

SECTION 7: REINSTATEMENT
PART 1: WITHIN THE DEPARTMENT

. . .

PART 2: OTHER DEPARTMENTS

. . .

ARTICLE 11
MISCELLANEOUS
SECTION 1: DISCRIMINATION

11/1/0/A Employees covered under this Agreement shall be covered by Wis. Stats. 111.31 through 111.37 (State Fair Employment Act) as amended by Chapter 31, Laws of 1975.

5. In a letter to Tom King, then Director of Council 24, Nate Harris, then Administrator of the Division of Management Services, stated:

> In accordance with Article VIII, Section 3(A) of the labor agreement, we wish to inform you of an impending layoff due to a loss of funding.
>
> This action will affect one (1) Clerical Assistant 2 position. The employee will be notified individually, per the provisions of the agreement.
>
> The effective date of the layoff will be June 30, 1981.

This letter had been drafted by Andrea Houlihan, then Personnel Manager for the Division of Management Services. As Personnel Manager, Houlihan had the responsibility to initiate all layoff plans and to insure that all necessary procedures were followed. In a letter to the Complainant dated April 7, 1981, Houlihan stated:

> The purpose of this letter is to briefly reiterate the information I gave you at our meeting on April 6, 1981.
>
> Again, I am sorry to have had to inform you that funding for the Clerical Assistant 2 position that you occupy in our Bureau of Fiscal Services will cease at the end of the work day on June 30, 1981.
>
> During our meeting I provided you with a Layoff Referral Information Sheet (DHSS-DMS-PERS-150), and asked you to complete and return it to me so that I could refer you to other job openings within this department. I also suggested that you file a union transfer request. Both the Referral form and the union transfer requests will facilitate your finding alternate employment.
>
> I also told you at our meeting that any transfer or demotion you take would be voluntary for all parties. In such a situation, you would not have mandatory recall/restoration rights into your present classification.
>
> You are the least senior Clerical Assistant 2 in the Division of Management Services, as I explained on Monday. If you are unable to find another suitable position, and in the absence of some change in our current situation, a lay off will become necessary. As the least senior Clerical Assistant 2 in the Division of Management Services, it appears you would be identified for lay off.
>
> If you have any questions about the procedures, please call me at 267-9329. I assure you that the provisions of the collective bargaining agreement will be complied with.

This letter summarized a meeting between Houlihan, the Complainant and her supervisor, Karen Bahr. In a letter to the Complainant dated May 8, 1981, Harris stated:

> As you know, funding for the Clerical Assistant 2 position which you occupy will cease at the end of this fiscal year. Therefore, this letter is your official notice of layoff from the Division of Management Services, with your last working day being, June 30, 1981.
>
> Under the terms of the agreement between the Wisconsin State Employes Union and the State of Wisconsin, you have the right to decide if you wish to transfer or exercise your bumping rights, (See Article VIII, Section 5 for details). You must notify Andrea Houlihan, Personnel Manager, in writing of your decision to exercise your transfer or bumping rights within 5 calendar days or by May 12, 1981.

> If you are not able to exercise your transfer rights or are not eligible to bump, to decide not to exercise these rights, your last day of work will be June 30, 1981 . . .
>
> Under Article VIII, Section 6 of the Labor Agreement, you have mandatory recall rights to the Division of Management Services, in your current classification, for a period of five years. Under Section 7, you also have rights for reinstatement within the Department of Health and Social Services, to fill a vacancy in the same class in an employing unit other than the one from which you were laid off.
>
> In addition, you will be referred to other classifications in the Department on a permissive transfer or demotion basis according to the Layoff Referral Information Sheet (DHSS-DMS-PERS-150), providing you have completed the form and returned it to Andrea Houlihan.
>
> . . .

On May 12, 1981, the Complainant returned the "Layoff Referral Information Sheet" mentioned above. That Sheet contains, as item 6, the following question: "Will You Consider a Lower Classification?". In response to that question, the Complainant checked a line indicating a "No" response. Item 7 of the Sheet asks an employe to identify which of twenty-four geographic areas the employe would accept employment in. The Complainant checked only one entry which was for the "MADISON AREA". The Complainant, during her discussions with Houlihan preceding the layoff, stated that she would not consider any job which could be considered a demotion, and that she believed the layoff constituted a form of harassment. Mary Webb is an individual who is white and female and who was in 1981 employed by the State as a Word Processor 2, and also served as a steward for the Union. Webb discussed with the Complainant the procedures for filing a grievance and indicated to her that, to initiate a grievance, she would have to initiate a meeting between herself and Webb to start the investigation of the potential grievance. Webb also informed the Complainant that she should respond to the State within five days of her notice of layoff on what, if any, alternative she wished to pursue regarding the layoff. The alternatives to layoff that Webb discussed with the Complainant were transfer or bumping. Webb informed the Complainant that a transfer could occur within the employing unit or outside the employing unit to any vacant position. The Complainant informed Webb that she was interested in transfer. Webb also informed and encouraged the Complainant to consider bumping. Webb explained to her that bumping could occur if there was no transfer available within her classification of Clerical Assistant 2, and would demand that she assume the position of an employe with less seniority than her in the classification immediately below her -- Clerical Assistant 1. Webb explained to the Complainant that such a bump would allow the Complainant to retain her current wage rate, permanent status in the classification, and would not require her to undergo a probation period. The Complainant informed Webb that she was not interested in bumping. The meeting between Webb and the Complainant regarding the alternatives to layoff occurred within five days of the Complainant's notification of layoff on May 8, 1981. The Complainant, during her discussions with Webb, stated that she felt she was being harassed. Webb told the Complainant that any concern she had regarding possible discrimination should be brought before the Personnel Commission. Chris Thomas is an individual who is black and female. She was employed by the State's Department of Health and Social Services in its Division of Community Services in 1981. She became a steward for the Union in March of 1981. Thomas first contacted the Complainant about her layoff in April of 1981. The Complainant informed Thomas, prior to the time of her layoff, that she did not wish to exercise her bumping rights, but did wish to retain her job classification of Clerical Assistant 2. Thomas did not, in May of 1981, fully understand the nature of contractual bumping rights. Thomas ultimately discussed the nature of bumping rights with Webb and with Garry Hausen. Hausen is an individual who is white and male, and is a Field Representative for the Union. Thomas did discuss the Complainant's then impending layoff with Houlihan. Thomas questioned Houlihan regarding the basis of the State's conclusion that the Complainant had the least seniority in the affected classification, and indicated to Houlihan that she thought she possessed information which conflicted with the information the State had. Houlihan showed Thomas the documents and reports she

had used to prepare a layoff plan which identified the Complainant as the least senior person in the position to be vacated. Thomas, at that time, thought she knew of two employes within the Division of Community Services who had less seniority than did the Complainant. The Division of Community Services is a separate employing unit from the Division of Management Services, which was the Complainant's employing unit at the time of her lay-off. The State's layoff plan proposed to, and ultimately did, vacate one position in the Clerical Assistant 2 classification effective at the close of the workday of June 30, 1981. That position was the Complainant's. July 1, 1981, was the beginning of the State's fiscal year. The layoff plan, as proposed and as implemented, did not exempt the Complainant from layoff under the provisions of Article 8. The Complainant was not successful in securing a transfer prior to her layoff.

6. Ruth Hookham is an individual who is white and female. Hookham, in June of 1981, was over forty years old. Hookham had been hired by the State a number of years before the Complainant, and had greater seniority than did the Complainant. Hookham, then classified as a Typist, assumed a position in the Division of Mangement Services sometime before the Complainant's layoff on June 30, 1981. The term "classification" refers to a collection of duties and responsibilities of a given position. Typist and Clerical Assistant 2 are separate classifications. During the time between Hookham's first appearance at the Division of Management Services and the Complainant's layoff, Hookham performed some of the same duties the Complainant performed, such as typing and filing. Ruby Markham and Pat Osborn were, in 1981 prior to the Complainant's layoff, each classified as a Typist, and were co-workers of the Complainant and Hookham. Markham and Osborn believed, based on their observation of Hookham's work, that the Complainant was a more competent typist than Hookham, and that the Complainant was an efficient employe.

7. After various discussions between Thomas, Webb and Hausen, Thomas filed a written grievance on behalf of the Complainant with Bahr on June 23, 1981. The Step 1 grievance form states "Article 2, 8, 11, Section 4, 2 & 3, 18 of the labor agreement" had been violated, and contains the following allegations:

> On May 8, 1981 grievant received an official notification of layoff due to a loss of funding effective June 30, 1981. We allege this action is a violation of the contract agreement based upon insufficient notification to the union which was not in accordance with the layoff procedure as described in Article 2, Section 4. We further allege that grievant is a minority and since the requested Affirmative Action information was not provided there is a possibility those objectives have not been complied with as stated in the current agreement between Wisconsin State Employees Union (WSEU) and the State of Wisconsin.

The form requests the following relief:

1. Guaranteed Clerical Assistant 2 position within the Department.
2. Elimination of the requirement for permissive probation.
3. Guarantee that Article 2, Section 4, Par. C., will be provided irregardless of past practices on the subject.
4. Provision of all personnel transactions regarding Affirmative Action.

The State denied the grievance at each step of the grievance procedure, and asserted in its responses that the grievance had not been timely filed. Hausen assumed control over the grievance after the filing of the Step 3 grievance form. The Step 3 grievance form states "Article 8, Section 5 of the labor agreement" had been violated, and contains the following allegations:

> Grievant was denied the right to bump into a position in a lower class within the same employing unit which therefore constitutes a violation of the bumping procedure in accordance with Article 8, Section 5 of the contract agreement between the Wisconsin State Employees Union (WSEU) and the State of Wisconsin.

The form requests the following relief:

1. Grievant be made whole in all areas relative to bumping rights.
2. Grievant be made whole relative to loss of wages and benefits as a result of layoff.

The Union took the grievance to arbitration. After a hearing on the matter, on April 13, 1983, Arbitrator Joseph Kerkman issued a written decision which stated in relevant part:

> THE ISSUES:
>
> ISSUE NO. 1: Is the grievance arbitrable due to the grievant's subsequent resignation from state service?
>
> ISSUE NO. 2: Was the grievance timely filed at Step 1 of the grievance procedure?
>
> ISSUE NO. 3 (Stipulated): Did the Employer violate Article 8 of the Collective Bargaining Agreement by denying the grievant the opportunity to bump? If so, what is the remedy?
>
> . . .
>
> DISCUSSION:
>
> ISSUES NO. 1 AND NO. 2
>
> Issues No. 1 and No. 2 raised by the Employer ask whether the grievance is abandoned upon termination of an employe and whether the grievance in this matter is filed timely. The undersigned will first address the issue of timeliness violation. The record clearly establishes that grievant here was notified of her impending layoff on May 8, 1981, and that the Director of the WSEU received a copy of the notice. The record also clearly establishes that first step grievance in this matter was not filed until June 24, 1981. 1/ The Collective Bargaining Agreement establishes that grievances must be presented promptly and no later than thirty calendar days from the time grievant first became aware of or should have become aware of with the exercise of reasonable diligence the cause of such grievance. Thus, the grievance was clearly filed more than thirty days after the notice of layoff to grievant. Consequently, the undersigned concludes that in so far as layoff is concerned the grievance is untimely. The grievance on its face, however, deals with a question of grievant's denial of a right to bump pursuant to Article VIII, Section 5 of the Agreement. The layoff notice clearly provided to grievant a statement conforming to the terms of the Collective Bargaining Agreement, which read that grievant must notify Employer's Personnel Manager in writing of her decision to exercise transfer or bumping rights within five calendar days or by May 12, 1981. The record establishes to the satisfaction of the undersigned that grievant failed to do so. Since grievant failed to notify the Employer of her intent to bump within the five days required in Article VIII, Section 5, after she was advised of her right to do so in the letter of May 8, 1981, any grievance with respect to her bumping rights must have been filed within thirty days after

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1/ The first step grievance form received into evidence during the hearing on the present complaint was marked as received by Bahr on June 23, 1981. This discrepancy on dates is irrelevant to the issues raised by the complaint.

that five day period elapsed. The five day period elapsed on May 12, 1981, and, consequently, the grievance protesting her right to bump was filed more than thirty days later when it was not filed until June 24, 1981. Consequently, the undersigned concludes for the foregoing reasons that the grievance in this matter was not timely.

Having so concluded, it is not necessary to determine whether a grievant who later terminates her employment has standing to continue her grievance after her termination. Since the undersigned has found that the grievance is not timely filed in this matter, he is unable to proceed to the merits of the dispute raised in the stipulated issue No. 3.

Therefore, based on the record in its entirety, and the discussion set forth above, after considering the arguments of the parties, the undersigned makes the following:

AWARD

The grievance is not timely filed and is, therefore, dismissed.

Dated at Fond du Lac, Wisconsin, This 2nd day of April, 1984.

Hausen presented the Union's case at the arbitration hearing, and argued that the grievance had been timely filed.

8. Hausen changed the focus of the Union's allegations from Step 1 to Step 3. Hausen discussed the change of focus with the Complainant sometime after the submission of the third step grievance by Thomas on July 16, 1981, but before his meeting at Step 3 with State representatives. The Complainant did not specifically authorize the change of focus. Hausen changed the focus of the grievance because of arbitral precedent and contract language which he felt made the allegations of the first step untenable in the arbitration forum. Hausen based this conclusion on an arbitration decision issued by Robert Mueller on July 13, 1977, and on an arbitration decision issued by Howard Bellman on April 10, 1978. The Mueller decision states, in relevant part:

> The contractual provision claimed to have been violated by the Union provides as follows:
>
> > "Employees covered under this Agreement shall be covered by Wis. Stats. ss 111.31-111-37 (State Fair Employment Act) as amended by Chapter 31 Laws of 1975."
>
> In the judgement of the arbitrator, such provision would seem to indicate that employees are referred to the procedures and remedies provided under the specified sections of the statute.

The "contractual provision" cited by Mueller contains language virtually identical to that of Article 11, Section 1 set forth above. The Bellman decision states, in relevant part:

> It is the Arbitrator's conclusion that Article XI,

Bellman addressed the same "contractual provision" cited by Mueller. Hausen also based his decision to change the thrust of the third step grievance on the provisions of Article 8, which Hausen felt made the exemption of an employe for affirmative action reasons discretionary with the State. Hausen felt the State's exercise of that discretion could not be successfully challenged in arbitration. Although Hausen had consulted with Webb and Thomas before Thomas filed the first step grievance, Hausen did not agree with Thomas' expressed view that affirmative action based considerations formed the best basis to protect the Complainant's job. Hausen did not receive a copy of the first step grievance until his preparation for the meeting at the third step. Hausen concluded that the bumping issue had been placed at issue by Thomas' citation, on the first step form, of Article 8, Sections 2 and 3. Thomas focused the grievance on affirmative action considerations in significant part because she felt the State had exempted minority employes in the past when the funding for their positions had been exhausted. Thomas discussed with the Complainant each grievance form she filed. Thomas, Webb, and Hausen each felt the grievance should have been considered timely filed. The Complainant did not testify during hearing on the complaint.

9. The Complainant filed a charge of discrimination with the Personnel Commission of the State of Wisconsin on May 25, 1982. The Complainant filed an action with the Circuit Court of Dane County on April 30, 1984. That court referred the matter to the Wisconsin Employment Relations Commission by an Order dated December 21, 1984. The Union did not, during the processing of the grievance discussed above, behave toward the Complainant in an arbitrary, discriminatory or bad faith fashion.

CONCLUSIONS OF LAW

1. Prema Archarya, during her employment with the State of Wisconsin from October 23, 1978, until at least June 30, 1981, was an "Employe" within the meaning of Sec. 111.81(7), Stats.

2. American Federation of State, County and Municipal Employees, Council 24, Wisconsin State Employees Union (WSEU), AFL-CIO, Local No. 1, is a "Labor organization" within the meaning of Sec. 111.81(12), Stats.

3. American Federation of State, County and Municipal Employees, Council 24, Wisconsin State Employees Union (WSEU), AFL-CIO, Local No. 1 did not, during the processing of the grievance discussed above, behave toward Prema Acharya in an arbitrary, discriminatory or bad faith fashion, and thus did not commit an Unfair Labor Practice within the meaning of Sec. 111.84(2)(a), Stats.

4. Because the American Federation of State, County and Municipal Employees, Council 24, Wisconsin State Employees Union (WSEU), AFL-CIO, Local No. 1 did not violate its duty of fair representation in processing Prema Acharya's grievance, the Examiner can not exercise the Commission's jurisdiction to determine whether the Union violated Sec. 111.84(2)(d), Stats.

ORDER 2/

The complaint and amended complaint are dismissed.

Dated at Madison, Wisconsin, this 18th day of December, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

(Footnote 2 continued on Page 11)

(Footnote 2 continued from Page 10)

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Parties' Positions

The Complainant's brief begins with a review of witness testimony and, with that as background, the Complainant asserts that the present matter poses two fundamental issues of law. The first centers on Wisconsin law, specifically Sec. 111.84(2)(d), Stats. The second centers on federal law, specifically on the "Labor Management Relations Act of 1947" and on "29 U.S.C.A.S 1985, 1985(a)." The Complainant asserts that the issue of Wisconsin law focuses solely on the Union's violation of its collective bargaining agreement with the State, and that the Union's motivation is irrelevant to a resolution of this issue. As background to this assertion, the Complainant urges that the severity of the contract violation represents an issue solely for an arbitrator, and is irrelevant to the present matter. Noting that the SELRA makes it an Unfair Labor Practice for a Union to ignore the terms of an arbitration award, the Complainant urges that the Union's position on the correctness of the Kerkman award is irrelevant to the present matter. Since that award determined that the Union failed to file the Complainant's grievance in a timely fashion, it follows, according to the Complainant, that: "The liability of the union in this suit is thus clearly established by the Arbitrator himself . . ." Because the untimely filing of the Complainant's grievance precluded the arbitrator from determining the merits of the grievance, and because the Union's action caused the untimely filing, it follows, according to the Complainant, that the Union's conduct must be considered actionable negligence. The Complainant asserts that the issue of federal law, contrary to that involving State law, focuses on motivation and specifically on whether the Union behaved toward the Complainant in an arbitrary, discriminatory or bad faith fashion. That the Union behaved in an arbitrary fashion is, according to the Complainant, demonstrated by the Union's filing of a "false charge" at the third step of the grievance procedure. After a review of witness testimony, the Complainant asserts that the Union knew that the Complainant did not wish to bump to a lower classification and that there were employes with less seniority than the Complainant in the Complainant's classification, yet chose to assert the Complainant's bumping rights at Step 3. The same testimony establishes, according to the Complainant, the Union's bad faith. The Union's discriminatory intent is, according to the Complainant, demonstrated by the conduct of Webb and Hausen, two white employes who, according to the Complainant, conspired to save the job of a white co-worker, through their authority over the processing of the Complainant's grievance. The Complainant summarizes thus: "Arbitrariness, bad faith and discrimination, the three essential elements needed to demonstrate unfair representation by the union are there, all wrapped up in falsehood presented in the third step of the grievance procedure." To underscore this conclusion, the Complainant asserts that the facts of the present matter would constitute a meritorious action under either the "National Labor Relations Act" or under "Title VII".

Citing federal precedent, the Union argues initially that it did not breach its duty of fair representation to the Complainant since its conduct was not arbitrary, discriminatory, or bad faith. Specifically, the Union asserts that a showing of "mere negligence" alleged by the Complainant is not sufficient to meet the standard, and even if it was, the Complainant has not been able to show the Union was, in fact, negligent in this case. A review of the record demonstrates, according to the Union, that: "The Union exercised due care and considered judgement in processing Complainant's grievance." Specifically, the Union asserts that it conducted an investigation which revealed that there was no position available in the Complainant's classification, and that the Complainant was not willing to bump to a lower classification. The sole available alternative, according to the Union, given prior arbitration decisions concerning the availability of arbitral remedies in discrimination cases, was the grievance asserted at Step 3 of the grievance procedure. A review of the record also discloses, according to the Union, that: "Complainant's allegations of discrimination are unsubstantiated and relate solely to employer conduct." Characterizing the testimony of witnesses called by the Complainant as either "unreliable" or in "support of the Union's position", the Union concludes the Complainant has failed to demonstrate a Union violation of its duty of fair representation to the Complainant. The Union concludes its analysis by asserting

that three reasons demand that its Motion to Dismiss be granted. First, the Union asserts that the Complainant's layoff was proper, and thus that any inadequate processing of the grievance challenging that layoff can not be considered a violation of the duty of fair representation. Second, the Union asserts that if the State's conduct is relevant to the present matter, then the Complainant has failed to join an indispensable party. Finally, the Union asserts that the complaint is untimely, since "even if Complaiant's (sic) cause of action accrued when she was notified that her grievance was deemed untimely, she did not file the present action until almost three years later."

In reply to the Union's brief, the Complainant, after an analysis of the case law cited by the Union, concludes that each of the cases cited by the Union is distinguishable from the present matter. In addition, the Complainant asserts that the following facts clearly establish that the Union's conduct in the present matter was actionable:

> (i) the plaintiff, a colored woman was doing her job conscienciously (sic), working hard and honestly (ii) was replaced by a white woman to take over her work (iii) was laid off on the pretext that funding for her position ran out (iv) was not given transfer in the same classification (v) the defendant Union's steward, Mary Web (sic), lied to the plaintiff that the plaintiff could bump only in lower classification even though the State representative, Andrea Houlian (sic) never told her so but said on the contrary that she could bump people with less seniority to plaintiff in the same classification (vi) another steward, of the defendant union, Christine Thomas knew there were people in the same classsification (sic) as plaintiff with less seniority to the plaintiff (vii) where plaintiff refused to go to lower classification (viii) where the Defendant Union, filed the first step grievance ten days late but refused to plead excusable neglect before the Arbitrator (ix) where the defendant, union, acting through the field representative, Hary (sic) Hausen, made a completely false accusation against the State of Wisconsin in the third step of the grievance procedure that the State denied the plaintiff the right to bump in lower classification (x) where the arbitrator dismissed plaintiff's grievance without even getting into the merits of the grievance, precisely on the ground that the defendant Union filed the first step grievance ten days late.

The Complainant argues that the Union's violation of Wisconsin law is clear since the untimely filing of the grievance violated the labor agreement between the Union and the State. The Complainant further argues that the Union, in its brief, has attempted to obscure its violation of Wisconsin law by focusing on the ambiguity of the federal cases defining the duty of fair representation. The Complainant acknowledges that the mere late filing of the initial grievance would not necessarily constitute arbitrary, discriminatory or bad faith conduct, but asserts that in this case Webb misinformed the Complainant of her bumping rights, and that Hausen misrepresented the Complainant's position in the third step of the grievance procedure, and failed to plead excusable neglect in the fourth step of the procedure.

The Union, after a point by point analysis of the facts alleged in the Complainant's brief, concludes that the Complainant's allegations are either irrelevant or inaccurate. The Union then asserts that "Complainant's theories of

Discussion

Resolution of the issues presented in the present matter requires that the specific statutory provisions at issue be isolated. This point demands some preliminary discussion. The Complainant has asserted that the amended complaint dated July 11, 1984, focuses on Sec. 111.84(2)(d), Stats. The amended complaint 3/, as well as the parties' oral and written argument establish that the parties have a fundamental dispute over whether or not the Union, in processing the Complainant's grievance, met its duty to fairly represent the Complainant. The Commission has determined that disputes concerning a union's duty of fair representation arise under Sec. 111.84(2)(a), Stats. 4/ Thus, the complaint challenges the Union's conduct under Sec. 111.84(2)(a) and (d), Stats.

The Union has advanced a Motion to Dismiss based on three separately stated grounds. The Union's challenge of the timeliness of the complaint will be addressed first, and discussion of the remaining two grounds will be subsumed in the discussion which follows.

The complaint is timely under the provisions of Sec. 111.07(14), Stats., which is made applicable to the present matter by Sec. 111.84(4), Stats., and which 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.

In this case, the Complainant challenges the Union's conduct in filing and processing a grievance. The Complainant claims the award itself rendered this conduct actionable under Sec. 111.84(2)(d), Stats. The Union filed the grievance on June 23, 1981. The third step grievance was filed on July 16, 1981. An arbitration hearing on the grievance occurred on April 13, 1983, and a decision was issued on April 2, 1984. The Complainant filed an action with the Circuit Court of Dane County on April 30, 1984. The filing of the court action defines one endpoint of the one year limitations period, and a review of the dates noted above establishes that unless the issuance of the arbitration award defines the "specific act or unfair labor practice alleged", the complaint can not be considered timely filed since no act constituting an unfair labor practice would have occurred within the one year period. 5/

Whether an arbitration decision can be considered a specific act defining an unfair labor practice has been addressed by the Commission in Local 950 where the Commission stated:

> 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 procedure have been exhausted concerning the contract dispute involved. However, the justification for such tolling is to permit/require the parties to settle the

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3/ Paragraph 23 of the amended complaint states: " . . . if the defendant had properly and fairly represented the plaintiff Prema Acharya in her employment relationship with the Employer, she would not have suffered . . . "

4/ Local 950, International Union Of Operating Engineers, Dec. 21050-C, (WERC, 7/84); See also Local 82, Council 24, AFSCME, AFL-CIO, and University of Wisconsin - Milwaukee, Housing Department, Dec. No. 11457 - H (WERC, 5/84).

5/ See School District of Clayton and Clayton Professional Educators, Dec. No. 20477-B (McLaughlin, 10/83), aff'd by operation of law, Dec. No. 20477-C (WERC, 11/83).

> 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.
>
> . . . 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 (sic) 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. 6/

Thus, the issuance of an arbitration award can define the endpoint of the limitations period where the complaint alleges a contract violation which constitutes a violation of Wisconsin law. Arguably, the Local 950 case establishes the untimeliness of the present complaint since the Complainant has not joined the State as a party. I do not, however, believe this conclusion is appropriate on the present facts. First, as will be discussed below, the contract violation alleged by the Complainant can not be addressed unless the Union has violated its duty to fairly represent the Complainant. Since the present matter has been divided into two parts, the State is arguably not an indispensable party until the second half of the proceeding, when the nature of any contract violation would arguably be relevant to the Union's liability to the Complainant. Second, the Complainant did plead a contract violation and did argue that the Union's contract violation was not decisively established until the issuance of the arbitration decision. Without regard to the merits of this assertion, the assertion is sufficient to come within the pleading requirements of Local 950. In addition, I am not persuaded the pleading rules of that decision can be strictly adhered to. It is difficult to reconcile the elaborate pleading requirements of Local 950 with the Commission's liberal standing rules, which allow an individual litigant to assert a complaint alleging a violation of contract. 7/ In addition, the development of the shifting and ambiguous doctrine of the duty of fair representation may by itself preclude the distinction made by the Commission between the representation afforded by a Union in processing a grievance and the merits of the grievance itself. As the Union points out, at least one court has concluded that the inadequate processing of a grievance ultimately found meritless does not in itself constitute a violation of the duty of fair representation. 8/ Thus, it is necessary to address the merits of the complaint.

As noted above, the complaint focuses on Sec. 111.84(2)(a) and (d), Stats. These two provisions are inextricably intertwined in the present matter, which focuses ultimately on whether or not the Union met its duty to fairly represent the Complainant. Because the duty of fair representation is, at root, a construct of the federal courts, the federal precedent cited by both parties is relevant to this matter. However, no attempt can be made to determine the application of the federal statutes cited by the Complainant.

6/ Dec. No. 21050-C at 8-9, footnotes omitted. The reference to Harley-Davidson is to Dec. No. 7166 (WERC, 6/65), which arose under the Wisconsin Employment Peace Act. The Local 950 matter arose under the Municipal Employment Relations Act. Each case is applicable to the present matter because the provisions of Sec. 111.07 (14), Stats., apply to the WEPA, the MERA and the SELRA.

7/ See Weyawega Jt. School District No. 2: Board of Education of Weyauwega Jt. School District No. 2, 14373-B (Henningsen, 6/77) aff'd Dec. No. 14373-D (WERC, 7/78).

8/ Self v. Teamsters Local 61, 620 F2d 1324, 104 LRRM 2125 (4th Cir., 1980). That court did, however, require the union to pay a "reasonable amount to cover their expenses, including attorney's fees and costs . . ."

The reason that the Complainant's allegation of a Union violation of Sec. 111.84(2)(d), Stats., turns on the duty of fair representation is that the Commission will not exercise its jurisdiction to determine an individual's breach of contract claim in cases in which grievance arbitration is available, or has been invoked, unless the individual can show the union which either processed or failed to process the grievance to arbitration did not fairly represent the individual. 9/ Thus, for the Complainant to prevail on either of the alleged violations of the SELRA, the Complainant must demonstrate that the Union did not meet its duty of fair representation in processing her grievance. In order to do this, the Complainant must prove that the Union's conduct in processing the grievance constitutes "arbitrary, discriminatory, or bad faith" conduct. 10/

As the Complainant points out, this standard is easier to state in the abstract than to apply to a specific case, but is, in any event, a standard which turns on the facts of each case. The Complainant has advanced a number of assertions to establish that the Union processed the grievance with discriminatory animus toward the Complainant. According to the Complainant, the layoff itself was discriminatory; Webb lied to the Complainant regarding her bumping rights; the Union failed to timely file the first step grievance; and Hausen failed to adequately represent the Complainant at steps 3 and 4 by changing the focus of the first step grievance and by refusing to plead excusable neglect before the arbitrator. All of these elements coalesce, according to the Complainant, into a conspiracy by which the Union preserved the job of a white woman, Hookham, by sacrificing the job of a non-white woman of Asian heritage.

There are insurmountable difficulties with the Complainant's factual assertions, and it is impossible to conclude the Union processed the grievance with discriminatory intent. The layoff itself, as initiated, was State action. There is no persuasive evidence to link the Union to the State on the initiation of the layoff, and thus the initiation of the layoff is irrelevant to the alleged Union discrimination against the Complainant. Even if the point could be considered relevant, there is no persuasive evidence to indicate the layoff was anything but a decision based on the loss of funding in the program which had prompted the Complainant's hire. As argued by the Complainant, the layoff was an action directed specifically at her for racial reasons. This assertion has no foundation. The record does not offer a basis to question the Complainant's performance as a Clerical Assistant 2. However, the Complainant has not shown what right she could assert to claim any available position to replace the position she lost on June 30, 1981. Hookham was a Typist, and it is unclear what, besides the Complainant's desire, would support her claim to that position. The process which led to Hookham's hire is at best sketchy, but will not under any view of the record support the assertion that Hookham was brought in solely to displace the Complainant. The Complainant accurately points out that Hookham is white, while she is not. It is, perhaps, a sad commentary on the times that this fact, standing alone, does give rise to a need to examine the facts of the matter to determine if she was adequately represented by her majority representative. The need for further facts can not, however, be overlooked or underestimated. In this case, those further facts are lacking. Speaking broadly, Hookham, though a white, is also a member of a class protected by the Fair Employment Act. 11/ In addition, the Complainant's questioning of the race of her Union representatives ignores that Thomas is a non-white. It cannot, then, be said that any racially motivated conspiracy is somehow inherent on the surface of the present matter.

Nor will a closer view of the facts support the Complainant's assertion of a conspiracy. The record will not support the conclusion that Webb lied to the Complainant regarding her rights. Webb was a credible witness, and testified that she informed the Complainant of her bumping and transfer rights within five days of May 8, 1981. The Complainant has not demonstrated what reason Webb would have to lie to the Complainant. Webb's testimony is, in any event, unrebutted since the Complainant chose not to testify.

9/ Local 82, Council 24, AFSCME, AFL-CIO, and University of Wisconsin-Milwaukee, Housing Department, Dec. No. 11457-H (WERC, 5/84)

10/ Ibid. See also Mahnke v. WERC, 66 Wis.2d 524(1975).

11/ See Sec. 111.321 and 111.33(1), Stats.

The Union's late filing of the first step grievance presents the most troublesome aspect of the present matter, yet the record developed on this point will not support the conclusion that the Union held discriminatory animus toward the grievant. Contrary to the allegations of paragraph 13 of the amended complaint, there is no persuasive testimony that the Union was either advised, or repeatedly told to assert a grievance on the Complainant's behalf in any more timely a fashion than the Union did. The absence of testimony from the Complainant is noteworthy. What evidence there is on the point establishes that, although afforded a transfer request in early April, the Complainant did not file the request until May 12. In addition, the testimony establishes that Webb informed the Complainant on how to initiate a grievance sometime within five days of May 8, 1981. What, if anything, the Complainant did in response is simply not apparent on the record. It cannot be said that the untimely filing of the first step grievance, standing alone, constitutes proof that the Union held discriminatory animus to the Complainant.

Nor does the change of focus at the third step of the grievance procedure present any basis to conclude that the Union had discriminatory animus to the Complainant. It is unclear, as the Complainant asserts, why the Union chose to allege a ground in the first step which the Union ultimately decided held no merit, especially since Thomas did consult with two people (Webb and Hausen) who felt the first step allegations were questionable. The lack of clarity does not, however, translate into discriminatory intent, and the Complainant has not shown that any more plausible basis of challenge was available to the Union. Contrary to the Complainant's assertion, Thomas' testimony does not establish the existence of two employes in the Clerical Assistant 2 classification with less seniority than the Complainant. Thomas' testimony refers only to two employes from a separate employing unit whose classification Thomas did not relate. In addition, Hausen's conclusion that the basis of the first step grievance could not be successfully pursued in arbitration is plausible, unrebutted, and well rooted in the text of Article 8, and in the Mueller and Bellman decisions. The Union's conclusion that the grievance was timely filed, and its choice to argue the grievance on that basis was reasoned, and cannot be characterized as evincing discriminatory animus to the Complainant. In sum, there is no factual basis to ground the Complainant's assertion that the Union processed the grievance in a manner which indicates the Union held discriminatory animus toward the Complainant.

The record will not support the conclusion that the Union processed the grievance in a bad faith fashion. The Complainant points to the same facts to establish the Union's bad faith as to establish the Union's discriminatory intent, and the rejection of those asserted facts undermines the Complainant's assertion of the Union's bad faith. There is no persuasive evidence to undermine the Union's assertion that Thomas, Webb and Hausen did all they could to preserve the Complainant's job. As noted above, Webb did inform the Complainant of her bumping and transfer rights, as well as of her rights under the grievance procedure, in a timely fashion. The Union did process the grievance through all four steps of the grievance procedure. The Union's failure to timely file the first step grievance is, as noted above, the most troublesome point to be considered here. Without the Complainant's testimony, there is no basis to reject the Union's assertion that the grievance was filed within thirty days of the date the Union became aware of the Complainant's desire to pursue her rights through the grievance procedure. Nor does the change in focus in the third step grievance offer a basis to question the Union's good faith. Hausen's assessment of the grievance was reasoned and turned on his opinion of the ground most likely to prevail in arbitration. The Complainant has characterized the third step grievance as a "false charge", but this characterization assumes the charge was false because the Complainant had informed the Union she did not wish to exercise her bumping rights. The

could have no finality, since any argument not brought by an advocate could result in a collateral challenge to the ultimate result of arbitration. The Union's choice of argument was reasoned, and does not indicate bad faith.

Nor can the Union's behavior in the present matter be characterized as arbitrary. What constitutes arbitrary behavior in violation of the duty of fair representation is not clear at the present state of the law. I have previously expressed my opinion on this subject in Wisconsin Council 40, American Federation of State, County, and Municipal Employees, AFL-CIO. Nothing in the authority cited by the parties in this case convinces me to change the rule that I stated in that case thus:

> . . . Arbitrary behavior must be characterized as something more than mere negligence. What constitutes the something more cannot be precisely defined in the abstract in light of current case law, but depends upon a case by case analysis. That case by case analysis ultimately turns on an evaluation of three basic factors: (1) the nature of the employe interest in the matter including an evaluation of the presence and efficacy of the remedies available to the aggrieved employe; (2) the nature of the action required of the collective bargaining representative to address the employe interest; and (3) the actual exercise of judgment on the collective bargaining representatives's part in addressing that interest. Analysis of the three factors should isolate those cases in which the political processes defining the relationship between collective bargaining representative and bargaining unit member cannot be relied upon to address significant individual or minority interests or to effect any remedy in circumstances in which one is essential. In such cases deference to the behavior of a collective bargaining representative may be minimal and the something more than mere negligence may closely resemble a negligence standard. In cases not of this type, deference to the collective bargaining representative will be greater. 12/

That decision makes it necessary to define the facts relevant to the three factors noted above, and to evaluate those facts. The interest the Complainant sought to assert was to preserve a job within the Clerical Assistant 2 classification in the Madison area. The remedies available to the Complainant were to follow voluntary transfer or bumping procedures, challenge the layoff or the implementation of the layoff through the grievance procedure or through the Personnel Commission. The action required of the Union was to define her interest, determine if that interest had a contractual basis, and if so, to assert that interest through the grievance procedure. Webb exercised her judgement by informing the Complainant of her rights and by attempting to determine if those rights needed to be further asserted. Thomas also consulted with the Complainant, and with certain State personnel regarding the implementation of the layoff. Thomas was unclear on the nature of the Complainant's bumping rights, but eventually determined that the loss of funding for the Complainant's position should not necessarily mean the loss of a job. She did file a grievance, and Union representatives did pursue the grievance through all four steps of the grievance procedure. Hausen did decide to change the thrust of the grievance at steps 3 and 4, in order to place the grievance on what he felt was a more tenable position for arbitration. The Complainant was informed of these actions, although she was not allowed to control the decisions on how to advocate the grievance.

An evaluation of these facts establishes that the Union's behavior can not be considered arbitrary. The Complainant did not, at the time the layoff was initiated, face the loss of permanent status as an employe. Voluntary transfer presented a viable option, yet for reasons not immediately apparent on the record, the Complainant waited one month after receiving the transfer forms to file them. While the grievance procedure did present a means to challenge certain procedures incidental to the layoff, it did not necessarily present a basis to challenge what

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12/ Dec. No. 22051-A, at 13, (McLaughlin, 3/85), aff'd by operation of law, Dec. No. 22051-B (WERC, 4/85).

the Complainant felt was the discriminatory nature of the layoff, in light of the Mueller and Bellman decisions. That challenge was more suited to the procedures and remedies of the Fair Employment Act, as enforced by the Personnel Commission. The Complainant ultimately did invoke their procedures. 13/ While it is clear the Union failed to timely file the first step grievance, it is also clear that the Union consulted the Complainant, informed her of her rights, and sought to define what she wanted and how to address her wishes. Thomas did not necessarily choose the best means to assert the Complainant's wishes, but it is clear she made a considered choice, and pursued it. While the delay in asserting the grievance ultimately proved fatal, the Complainant has by no means proven that the Union was solely responsible for that delay. The Union's contention that it filed the grievance within thirty days of the time it became aware the Complainant wished to pursue the grievance stands unrebutted. The record is unclear on why Thomas chose to argue the grievance in a manner Hausen felt was untenable, but Hausen's change of the basic thrust of the grievance represents a considered judgement rooted in the language of the contractual provisions at issue, and of arbitration decisions interpreting those provisions. That Hausen did not choose to advance a line of argument the Complainant thought appropriate can not detract from the fact that Hausen exercised his judgement as an advocate in arguing the matter as he did.

In sum, the Complainant's concerns regarding her perceived discrimination are concerns directly addressed by the Fair Employment Act and remedial through the Personnel Commission. In light of the Mueller and Bellman decisions, that remedy was more efficacious than the grievance procedure could be. Her concerns regarding her transfer and bumping rights were addressable through voluntary procedures or through the grievance procedure. The Complainant herself delayed the invocation of the voluntary procedures and the record does not clearly demonstrate who was responsible for the delay in starting the grievance procedure. The record does, however, establish that the Union did consult with the Complainant, did inform her of her rights in a timely fashion, did investigate her concerns, and did ultimately initiate and process a grievance through all four steps of the grievance procedure. There is, then, no persuasive reason to believe the Union's conduct denied the Complainant of a necessary remedy, or can be characterized as demonstrating a failure to exercise judgement. That behavior can not, then, be characterized as something more than mere negligence, and thus can not be characterized as arbitrary. Because the Union did not behave toward the Complainant in an arbitrary, discriminatory or bad faith fashion, the Union did not violate its duty to fairly represent the Complainant.

As noted above, the conclusion that the Union did not violate its duty to fairly represent the Complainant precludes a finding that the Union violated either Sec. 111.84(2)(a) or (d), Stats. The reason that the Complainant's failure to prove a violation of the duty of fair representation precludes a finding of Sec. 111.84(2)(d), Stats., violation is a complex point, and one which, in light of the Complainant's forceful and persistent argument on the point, deserves some further discussion.

The Complainant has argued that the Kerkman decision establishes, by its own terms, a violation of Sec. 111.84(2)(d), Stats. This violation, according to the Complainant, establishes an independent basis of the Union's liability to the Complainant and necessitates further hearing on the extent of that liability. This line of argument has some support in the language of Sec. 111.84(2)(d), Stats., but can not be accepted under the case law of the Commission, and the policy considerations that underlie that case law. The Commission has an established policy of not exercising its jurisdiction to interpret contract language under Sec. 111.84(2)(d), Stats., where the contract provides for grievance arbitration. This policy is intended to encourage parties to a labor agreement to utilize that process, and has a statutory basis in Sec. 111.80(2), Stats. 14/ which provides:

> Orderly and constructive employment relations for state employes and the efficient administration of state government are promotive of all these interests. They are largely dependent upon the maintenance of fair, friendly and mutually

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13/ The result of her action before the Personnel Commission is irrelevant to this matter.

14/ For a more detailed examination of similar policy considerations, see Hines v. Anchor Motor Freight, Inc. 424 US 554 (1976).

satisfactory employe management relations in state employment, and the availability of suitable machinery for fair and peaceful adjustment of whatever controversies may arise.

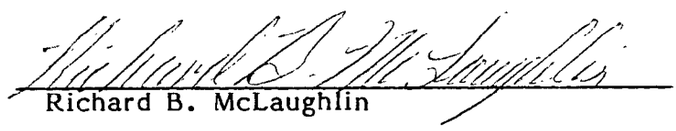
This policy also avoids the waste of resources involved in the litigation of the same claim in a number of forums. The policy relies, however, on the action of majority representatives, such as the Union in this case, to assert the rights of individuals. The courts have raised a concern that the interests of the majority representative and an individual may not be the same, and may lead to unjust results where an individual has no effective recourse against the majority representative, but has been denied a remedy due to the conduct of that representative. This concern has produced the duty of fair representation, which is a judicially created duty of care owed by a majority representative to its individual members. The Commission has located this duty at Sec. 111.84(2)(a), Stats., and has attempted to reconcile this concern for individual rights with the policies underlying the operation of Sec. 111.84(2)(d), Stats., by refusing to assert their jurisdiction to interpret contracts in cases brought by individuals against their majority representative unless the individual can establish that the majority representative violated its duty of fair representation.

The Complainant in this case does not seek to invoke the Commission's jurisdiction to interpret contracts since that interpretation, according to the Complainant, has already been made by Kerkman. What the Complainant seeks is to establish Sec. 111.84(2)(d), Stats., as an independent basis of the Union's duty to individuals. The Complainant asserts this liability became absolute once the arbitrator interpreted the contract in a manner adverse to the Union. This independent liability can not be accepted. 15/ Such a view would destroy the finality of the arbitration procedure, and would make it virtually impossible for a union to exercise its obligation to screen matters asserted for processing through the grievance procedure. 16/ Any grievance not filed by a union is arguably untimely since it would not have been filed within contractual time limits. To adopt the Complainant's theory of liability would make it impossible for a union to refuse to bring a grievance without facing later attack by an action brought under Sec. 111.84(2)(d), Stats. Even restricting the Complainant's theory of liability to cases such as the present matter, where a grievance has been asserted but found untimely, does not produce a more defensible result. In this case, under such a theory, the Union would have been treated under a less absolute theory of liability if it had dropped the grievance at Step 3, than it would be for taking the matter through Step 4.

The theory of liability asserted by the Complainant under Sec. 111.84(2)(d), Stats., would create individual rights which could threaten the effective operation of a grievance procedure. The Commission's case law attempts to balance the rights of the individual and the authority of the majority representative by restricting the use of its jurisdiction to interpret contracts under Sec. 111.84(2)(d), Stats. to cases where the individual shows the majority representative violated its duty of fair representation. This case law applies to the present case, and the Complainant, having failed to demonstrate that the Union violated its duty to fairly represent her during the processing of her grievance, can not invoke the Commission's jurisdiction under Sec. 111.84(2)(d), Stats., to create a greater duty under that provision than the Union has to bargaining unit members under Sec. 111.84(2)(a), Stats. There being no violation of the duty of fair representation in this case, there can be no violation of either subsection, and the complaint and amended complaint have been dismissed.

Dated at Madison, Wisconsin, this 18th day of December, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By: 
Richard B. McLaughlin

15/ In the Council 40 case cited in note 12 above, I rejected the use of a negligence standard, which is a less stringent standard than that advocated by the Complainant. The discussion in that decision is relevant here.

16/ For a more detailed discussion of the policy considerations here, see Vaca v. Sipes, 386 US 171, (1967).