STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

Mr. P.V.N. Acharya, 729 Liberty Drive, Deforest, Wisconsin 53532, appearing on his own behalf and on behalf of Complainant Prema Acharya.

Lawton & Cates, S.C., Attorneys at Law, 214 W. Mifflin Street, Madison, Wisconsin 53703-2594, by Mr. Richard V. Graylow, appearing on behalf of Respondent.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND ORDER AND MODIFYING IN PART AND AFFIRMING IN PART EXAMINER'S CONCLUSIONS OF LAW

Examiner Richard B. McLaughlin having on December 18, 1985, issued Findings of Fact, Conclusions of Law and Order in the above matter wherein he concluded that Respondent AFSCME had not breached its duty of fair representation toward Complainant Prema Acharya and thus had not committed an unfair labor practice within the meaning of Sec. 111.84(2)(a), Stats., and wherein he further concluded that he would not exercise the Commission's jurisdiction over Complainants' Sec. 111.84(2)(d), Stats., breach of contract claim and therefore dismissed the complaint in its entirety; and Complainants having timely filed a petition and supporting argument with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.84(4), Stats; and the Commission having been advised by January 16, 1986, that the parties did not wish to submit additional written argument; and the Commission having considered the record, the Examiner's decision, and the positions of the parties and being satisfied that the Examiner's Findings of Fact and Order should be affirmed and that the Examiner's Conclusions of Law should be modified in part and affirmed in part;

NOW, THEREFORE, it is

ORDERED 1/

A. That the Examiner's Findings of Fact are hereby affirmed.

B. That the Examiner's Conclusions of Law 1 through 3 are hereby affirmed.

C. That the Examiner's Conclusion of Law 4 is hereby modified as follows:

4. American Federation of State, County and Municipal Employees, Council 24, Wisconsin State Employees Union, (WSEU), AFL-CIO, Local No. 1 did not violate the 1979-1981

1/ See Footnote 1 on Page 2.

collective bargaining agreement between it and the State of Wisconsin by untimely filing the Acharya grievance and therefore did not commit an unfair labor practice within the meaning of Sec. 111.84(2)(d), Stats.

D. That the Examiner's Order is hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 11th day of July, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By
Herman Torosian, Chairman

Marshall L. Gratz, Commissioner

Danae Davis Gordon, Commissioner

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

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

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

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by
(Footnote 1 Continued on Page 3)

1/ Continued.

the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

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

. . .

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

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

WISCONSIN STATE EMPLOYEES UNION, COUNCIL 24, AFSCME, AFL-CIO

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND ORDER AND MODIFYING IN PART AND AFFIRMING IN PART EXAMINER'S CONCLUSIONS OF LAW

BACKGROUND

The Complaint

On April 30, 1984, Complainants brought suit against Respondent AFSCME in Dane County Circuit Court alleging *inter alia* that Respondent breached its duty to fairly represent Complainant Prema Acharya by *inter alia* failing to timely process her layoff grievance which was, as a result, ultimately dismissed by a grievance arbitrator as being untimely filed. Complainants sought a judgment against Respondent AFSCME of damages for lost wages and benefits (past and future) and for the mental anguish and emotional distress allegedly suffered by Complainants. On December 21, 1984, Dane County Circuit Court Judge Richard W. Bardwell issued an Order referring the matter to the Wisconsin Employment Relations Commission pursuant to a Motion by Respondent AFSCME.

The Examiner's Decision

In the preface to his decision, the Examiner noted that the parties, with his concurrence, agreed at the February 25, 1985 hearing that the proceeding would be divided into two parts with the first part being directed solely to the issue of the unfair labor practices allegedly committed by AFSCME and the second part directed solely to the issue of remedy if any unfair labor practices were found to have been committed.

The Examiner initially determined that the complaint challenged the propriety of Respondent AFSCME's conduct under Sec. 111.84(2)(d), Stats. (union breach of contract for failure to abide by the contractual time limits for processing Complainant Prema Acharya's grievance) and Sec. 111.84(2)(a), Stats. (union breach of the duty of fair representation by the manner in which it processed the grievance. 2/

The Examiner then rejected Respondent AFSCME's assertion that the April 30, 1984 complaint was untimely filed noting *inter alia* Complainants' claim that it was the April 2, 1984 arbitration award which established AFSCME's breach of contract in violation of Sec. 111.84(2)(d), Stats. The Examiner further noted that even though the Complainants had not joined the employer as a party and no potentially relevant event other than the issuance of the award had occurred during the one year prior to the complaint, it was inappropriate on the facts and

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2/ Secs. 111.84(2)(a) and (d) Stats., provide:

> It is an unfair labor practice for an employe individually or in concert with others:
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> (a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed under s. 111.82.
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> . . .
>
> (d) To violate the provisions of any written agreement with respect to terms and conditions of employment affecting employes, . . .

arguments of this proceeding to find the complaint untimely under Local 950, International Union of Operating Engineers, Dec. No. 21050-C, (WERC, 7/84). 3/

Turning to the merits of the complaint, the Examiner declined to exercise Commission jurisdiction to determine the merits of Complainants' assertion that the arbitrator's decision finding the grievance untimely establishes, by its own terms, a violation of Sec. 111.84(2)(d), Stats. The Examiner reasoned:

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

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3/ In Local 950, the Commission concluded:

> Ordinarily, a complaint naming only the union as respondent and alleging only a Sec. 111.70(3)(a)1, Stats., violation 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 the contractual grievance procedures have been exhausted concerning the contract dispute involved. (footnotes omitted) However, the justification for such tolling is to permit/require the parties to settle the subject matter of the complaint in the procedure they agreed upon for that purpose. That justification would not exist where the complaint concerns the quality of the union's grievance procedure representation complainant is pursuing rather than the merits of the grievance itself.
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> . . . 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.

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. (footnote omitted) 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. (footnote omitted) 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. 11.84(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. The case law applies to the present case, and the Complainant, . . . 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.

Having concluded that in order to prevail under either Sec. 111.84(2)(a) or (d) Stats., the Complainants must prove that Respondent AFSCME's conduct when processing the grievance breached the duty of fair representation, the Examiner proceeded with a detailed examination of the record to evaluate Respondent's conduct. Finding that Complainants failed to prove that Respondent AFSCME's conduct was "arbitrary, discriminatory or bad faith", the Examiner concluded that no breach of the duty of fair representation had occurred and therefore dismissed the complaint.

POSITIONS OF THE PARTIES

The Complainant

Complainants argue the Examiner's analysis is based upon certain erroneous assumptions about the function of the Commission and the statutes it administers. Complainants assert that Sec. 111.84(2)(d), Stats., exists as a mechanism by which parties seek enforcement of the policies expressed in Sec. 111.80(2), Stats., regarding "Orderly and constructive employment relations" and the "availability of suitable machinery for fair and peaceful adjustment of whatever controversies may arise." Complainants allege that the machinery referred to in Sec. 111.80(2), Stats., is the contractual grievance procedure, the violation of which is actionable under Sec. 111.84(2)(d), Stats. Complainants contend that under the Examiner's analysis Sec. 111.84(2)(d), Stats., is rendered inoperative and Sec. 111.80(2), Stats., becomes empty rhetoric. Complainants further argue that the Examiner improperly rejected their theory that a violation of contract also establishes a violation of the otherwise amorphous duty of fair representation. Complainants contend that there can be no fair representation if contractual terms are violated.

Complainants next assert that the Examiner's public policy discussion regarding the relationship between the rights of the majority representative and the interests of individual employes erroneously assumes that the Commission can make policy choices independent of and inconsistent with those of the courts. Complainants contend that the courts of Wisconsin have never allowed the union to sacrifice the interests of individual members.

Complainants also dispute the Examiner's rationale for rejecting the Complainants' theory that the arbitrator's award establishes the Respondent's breach of contract. Complainants argue that Respondent AFSCME voluntarily agreed to both the time limits for processing grievances as well as the final and binding nature of an arbitrator's award. Complainants assert that when an arbitrator interprets a contract and finds that the union failed to abide by the time limitations, the Commission has no authority to reject the per se liability under Sec. 111.84(2)(d), Stats., which flows from the arbitrator's determination. Complainants allege that the Examiner seems to accept the finality of the arbitrator's award insofar as it dismissed the grievance but not as to the basis for that dismissal. Complainants argue that if the Examiner was unwilling to accept the finality of the arbitrator's ruling, he could have but failed to examine the award in the context of statutory bases for overturning same. Thus the award and the absolute union liability which flows therefrom stand.

Complainants further assert that there is no valid basis for requiring that they establish additional liability by proving that the Respondent engaged in "arbitrary, discriminatory or bad faith" conduct. The arbitrator's award should suffice.

Complainants additionally allege that the Examiner improperly failed to analyze the applicable law from the Ninth Circuit Court of Appeals cited by Judge Bardwell, Dente v. Local 90, 492 F.2d 10 (CA 9, 1973), as well as applicable Wisconsin law regarding the actionable nature of a negligence claim.

Looking at the Examiner's determination that Respondent AFSCME's conduct was not arbitrary, Complainants characterize the Examiner's determination as "bewildering" and argue that if this record does not warrant a finding of arbitrary union conduct, it is anybody's guess as to what must be established to meet this standard. Complainants also take strenuous exception to the Examiner's speculation about whether Complainant Prema Acharya shared some responsibility for Respondent AFSCME's negligence. Complainant argues that once Respondent elected to process the grievance, it was obligated to do it right.

Turning to the Examiner's Findings of Fact, Complainants assert he erred in his finding regarding the circumstances surrounding co-worker Hookham's employment. Complainants further allege that the Examiner erroneously found that Complainant Prema Acharya pursued before the Personnel Commission the same grievance which the arbitrator dismissed.

By way of conclusion, Complainants ask that the Examiner's decision be overturned and that the second stage of the hearing process proceed with the State of Wisconsin and the arbitrator becoming parties, if needed, for the determination of an equitable remedy.

The Respondent

The Respondent urges the Commission to affirm the Examiner's decision.

DISCUSSION

As we understand it, Complainants' basic theory is that Respondent violated the contract between Respondent and the State of Wisconsin when Respondent untimely filed a grievance over Complainant Prema Acharya's layoff. Complainants argue that this violation of contract and the resultant violation of Sec. 111.84(2)(d), Stats., was established by the Kerkman award. Complainants further argue that by breaching the contract, Respondent also breached the duty of fair representation and thus violated Sec. 111.84(2)(a), Stats. Complainants have also independently alleged that Respondent failed to fairly represent Prema Acharya and violated Sec. 111.84(2)(a), Stats., by arbitrary, discriminatory and bad faith conduct including the untimely filing of the grievance.

Initially, we note our concurrence with the Examiner's conclusion that the complaint was timely filed, albeit under a somewhat different rationale. Although Complainants have only filed a complaint against the union, the complaint contains both failure to fairly represent and breach of contract components. In such circumstances, where, as here, the contractual grievance procedure can potentially resolve the dispute (i.e. through a determination that the grievance was timely filed and meritorious) we conclude that a tolling of the statute of limitations pending exhaustion of the contractual procedure is appropriate. In our view, such a determination is especially appropriate where the charging parties' theory is grounded in the arbitration award produced by the contractual process. Thus, as the instant complaint was filed within one year of the April 2, 1984 Kerkman award, it was timely filed.

Turning to the merits of the complaint, the Examiner determined that it was inappropriate to assert jurisdiction over the breach of contract claim unless a breach of the duty of fair representation was established. While we empathize with the difficult task which confronted the Examiner when he was attempting to ascertain the precise theory being pursued by Complainants, we believe Complainants need not establish a breach of the duty of fair representation to obtain a ruling on the merits of this claim of union violation of collective bargaining agreement.

The Examiner based his refusal to assert jurisdiction over the breach of contract claim upon a recitation of the Commission's policy against asserting jurisdiction over an employe's claim of employer breach of contract where grievance arbitration is available or has been invoked, unless the union which either processed or failed to process the grievance to arbitration did not fairly represent the employe. We conclude that this policy is inapplicable herein for several reasons. First, we note that there are two basic underlying components in the Examiner's recitation of policy. The first is that the Commission honors the presumed exclusivity of a contractual mechanism available for resolving the merits of breach of contract claims by not asserting its statutory breach of contract jurisdiction. 4/ This policy is applicable to breach of contract claims against either a union or an employer. 5/ The second policy component is that the exclusivity of the contractual grievance arbitration procedure will not be honored where an employe's effort to use the exclusive procedure to obtain contractual relief is obstructed by the union's failure to fairly represent the employe. This exception developed from and, in our judgement, is limited to instances in which the employe is pursuing breach of contract claims against the employer. The duty of fair representation doctrine simply has no role to play where an employe is pursuing a breach of contract claim against the union since the union would obviously not be legally charged with representing the employe's interests as it is as to breach of contract claims against the employer. Indeed, it is clear that the interests of the employe and the union are adversarial in nature in employe

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4/ See generally, Monona Grove School District, Dec. No. 22414 (WERC, 3/85).

5/ See, AFSCME, Council 24, Dec. No. 15759-A (5/79), aff'd Dec. No. 15759-B (WERC, 3/80); aff'd AFSCME Council 24 v. WERC, CtApp 1982), Dec. No. 81-1877 unpublished.

breach of contract claims against the union. Applying the foregoing to the case at hand, we conclude that the Complainants need not establish a breach of the duty of fair representation before we will assert jurisdiction over the employe's breach of contract claim against the union. Furthermore, our review of the contractual grievance arbitration procedure in the 1979-1981 contract between Respondent and the State satisfies us that said procedure is not available for employes to obtain resolution of breach of contract claims against Respondent Union. Thus assertion of jurisdiction over the Complainants' breach of contract claim also does not run afoul of our desire to honor the exclusivity of contractual grievance/arbitration procedures. Therefore, we turn to the merits of Complainants' claim that the Respondent union violated the contract because the layoff grievance was found to have been untimely filed.

As Complainants argue, the Kerkman award established that the grievance was untimely. However, we do not agree with Complainants' assertion that the untimely filing of a grievance violates the contract. The consequence of a failure to comply with the time limits is that the dispute will not be resolved on its merits. 6/ The record contains nothing which persuades us that the Respondent Union and the State intended the time limits to be independent contractual obligations such that an untimely grievance has the consequence of not only rendering unavailable a decision on the merits but also establishing a breach of contract by the union. Therefore, we conclude that the Respondent did not violate the 1979-1981 contract by untimely filing the layoff grievance and thus Respondent did not violate Sec. 111.84(2)(d), Stats. 7/

Turning to the Complainants' contention that the Examiner erred when he rejected Complainants' alternative theory that Respondent violated Sec. 111.84(2)(a), Stats. through arbitrary, discriminatory or bad faith conduct, we have reviewed the Examiner's decision and the record and concluded that his thorough Findings of Fact 8/ and analysis (esp. Exn. Dec. pp. 16-19) adequately and accurately sets forth the appropriate basis for rejection of this portion of Complainants' theory. 9/

Given the foregoing, we have affirmed the Examiner's dismissal of the complaint.

Dated at Madison, Wisconsin this 11th day of July, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By
Herman Torosian, Chairman

Marshall L. Gratz, Commissioner

Danae Davis Gordon, Commissioner

6/ Untimely filing may also generate a breach of the duty of fair representation claim as it did here under Complainants' alternative theory.

7/ As we have not found the Sec. 111.84(2)(d), Stats. violation which was the premise for a derivative Sec. 111.84(2)(a), Stats. violation under this portion of Complainants' theory of the case, we need not determine whether a finding of the derivative (2)(a) violation would be appropriate.

8/ We hereby reject Complainants' claim that the Examiner's Findings were erroneous as to the circumstances surrounding Hookham's employment and as to the Personnel Commission complaint.

9/ While Complainants contend that the Examiner improperly ignored <u>Dente v. Masters, Mates and Pilots</u>, 492 F.2d 10 (CA 9, 1973) in his analysis, our review of that decision finds it to be supportive of the Examiner's conclusion that mere negligence does not constitute a breach of the statutory duty of fair representation. It should be emphasized that our jurisdiction in this matter is limited to the relevant statutory unfair labor practices and thus Complainants' contention that there is Wisconsin law regarding the actionable nature of a negligence claim has no bearing on this proceeding.