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, Respondent.	Case 3 No. 41394 PP(S)-150 Decision No. 22320-C

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 West Mifflin Street, Madison, Wisconsin 53703-2594, by Mr. Richard V. Graylow, appearing on behalf of Respondent.

Mr. David C. Whitcomb, Legal Counsel, Department of Employment Relations, State of Wisconsin, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7955

ORDER

The Complainants originally filed an action against Respondent AFSCME 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. Following hearing and receipt of written argument, Examiner Richard B. McLaughlin, a member of the Commission's staff, issued Findings of Fact, Conclusions of Law and Order on December 18, 1995 (Dec. No. 22320-A) wherein he concluded that Respondent AFSCME had not committed any unfair labor practices within the meaning of the State Employment Labor Relations Act by the manner in which it had represented Complainant Prema Acharya as to her layoff by the State of Wisconsin. Thereafter, Complainants sought review of the Examiner's decision before the Commission. On July 11, 1986, the Commission issued an Order Affirming Examiner's Findings of Fact and Order and Modifying in part and Affirming in part Examiner's Conclusions of Law. (Dec. No. 22320-B) Thereafter, Complainants sought judicial review of the Commission's decision. The Commission's decision was affirmed in Dane County Circuit Court on April 30, 1987. Complainants did not appeal the Circuit Court's decision. Complainants then sought to revive the lawsuit they had originally filed against Respondent AFSCME in 1984 in Dane County Circuit Court. That effort was rejected by Dane County Circuit Court Judge Robert DeChambeau. The Court of Appeals affirmed DeChambeau in Acharya v. AFSCME, Council 24, 146 Wis.2d 693 (1988). Complainants then sought to obtain review of the Court of Appeals decision by the Wisconsin Supreme Court. The Court rejected that request. Thereafter, on November 22, 1988, Complainants asked that the Commission conduct hearing to determine whether the State of Wisconsin had violated a collective bargaining agreement when it laid off Complainant Prema Acharya. Respondent AFSCME and the State of Wisconsin thereafter filed written argument in opposition to Complainants' request. Having considered the matter, the Commission concludes that Complainants' request must be denied.

NOW, THEREFORE, it is

ORDERED 3/

That Complainants' request for hearing and decision as to a breach of contract claim against the State of Wisconsin is denied.

Given under our hands and seal at the City of Madison, Wisconsin this 5th day of July, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION 2/

By Herman Torosian /s/
Herman Torosian, Commissioner

S. H. Schoenfeld /s/
S. H. Schoenfeld, Commissioner

3/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.
(a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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

(Footnote 1/ continued on Page 3 and See Footnote 2/)

1/ Continued

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. 77.59(6)(b), 192.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties . If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 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 mall (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.

2/ Chairman A. Henry Hempe did not participate in this decision.

WISCONSIN STATE EMPLOYEES UNION

MEMORANDUM ACCOMPANYING ORDER

DISCUSSION

As our prior recitation of the procedural history of this case indicates, the State was not a party to the complaint before Examiner McLaughlin. Complainants sought redress only from AFSCME. Complainants now ask that the Commission conduct a hearing and issue a decision on the merits of Complainant Prema Acharya's layoff grievance against the State. Complainants assert that such a hearing is appropriate in the context of the complaint filed originally against AFSCME because: (1) the Court of Appeals held in Acharya v. AFSCME, Council 24, 146 Wis.2d 693 (1988) that the Commission has jurisdiction over the contractual claim; and (2) neither the Examiner nor the Commission ever responded to AFSCME's motion that the State be made a party to this case, a motion as to which Complainants advised the Commission they did not object by a document filed with the Commission during the pendency of the Complainants' appeal of the Examiner's decision.

As to Complainants' reading of Acharya v. AFSCME, Council 2, the portion of that decision upon which Complainants rely states:

> We note, too, that disputes between a union member and his/her union which arise out of that union/member relationship, and which relate to union or work-related activities, are within the primary jurisdiction of the WERC under Ch. 111, Stats., at 699.

Complainants reason from the above quote that because Complainant Prema Acharya's grievance was never resolved on the merits and because the grievance regarded "work-related" activity, the Commission has jurisdiction to decide whether the State violated the contract when it laid off Complainant Prema Acharya. Initially, we would note that the above-quoted portion of the Court's opinion references only disputes between the union and the employe and makes no mention of the employer. Thus, Complainants' interpretation of this portion of the Court's opinion seems somewhat strained. Furthermore, the following portion of the Court's opinion clearly demonstrates to us that the Court did not hold that the Complainants have a right to return to the Commission for a ruling on the merits of the grievance:

> Finally, Acharya contends that the circuit court's decision, and now our own, leaves her "remediless," in that her grievance has never been heard because it was not timely processed by the union. In so arguing, she refers to a statement in Mahnke, 66 Wis.2d at 531, 225 N.W.2d at 621-622, that "it is inequitable to allow an employee's claim to go without a remedy. . ." The quotation is not only taken out of context, it is incomplete. First, the Mahnke court was not making a statement of general application; it was simply explaining the rationale of a rule which allows a member to sue his or her union to enforce the terms of the collective bargaining agreement in situations where the union has "wrongful(ly) refus(ed) to process (a) grievance." Id. at 5309 225 N.W.2nd at 621, quoting Vaca, 386 U.S. at 185 (emphasis in original). Second, the complete quotation is: "it is inequitable to allow an employee's claim to go without a remedy because of the union's wrongful refusal to process his (or her) claim" --- that is, in cases where the union has breached its duty of fair representation. Mahnke,

> 66 Wis.2d at 531, 225 N.W.2d at 621-622 (emphasis added). Here, the proceedings before the WERC established that the union's processing of Acharya's grievance was not wrongful, and that there was no breach of the duty of fair representation. As we have said, that determination is binding on Acharya and compels affirmance of the trial court's judgment and order.
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> As for being left "remediless," Article I, sec. 9 of the Wisconsin Constitution does provide every person "a certain remedy in the laws for all injuries or wrongs which he (or she) may receive in his (or her) person, property, or character. . ." These provisions, however, do not entitle litigants to the precise remedy they may desire, but merely to their day in court. Metzger v. Department of Taxation, 35 Wis.2d 119, 129, 150 N.W.2nd 431, 436 (1967). Acharya has had her opportunity to litigate the issues she advances in this action, and she is bound by their resolution in the proceedings before the WERC and on review to the circuit court. at 699-700.

We now turn to Complainants' argument over the impact of what Complainants view as AFSCME's unresolved motion to make the State a party to this dispute.

Initially, we note that the AFSCME motion to which Complainants refer was filed by AFSCME when the dispute between Complainants and AFSCME was before Dane County Circuit Judge Bardwell. Complainants opposed the AFSCME motion at that time. After the dispute was referred to the Commission by Judge Bardwell, the parties agreed before Examiner McLaughlin to divide the evidentiary hearing into two parts with the first part being directed solely to the issue of alleged AFSCME unfair labor practices and the second part to occur only if unfair labor practices were found to have occurred and thus issues of remedy existed. (Dec. No. 22320-B at p. 1) AFSCME advised Examiner McLaughlin at the commencement of the first phase of the case (Tr. 6) that its motion to make the State an indispensable party related only to issues of remedy should AFSCME be found to have committed unfair labor practices. As Examiner McLaughlin and ultimately the Commission found that AFSCME had not committed any unfair labor practices, no issues of remedy needed to be resolved and thus there was no need to rule upon AFSCME's motion.

However, even if we were to conclude that AFSCME's motion had not been rendered moot by the manner in which the proceedings unfolded before the Examiner and Commission as to Respondent AFSCME, it would still be inappropriate to allow Complainants to proceed against the State.

As the above-quoted portion of the Court's AFSCME, Council 24 decision reflects, where a contractual grievance arbitration procedure exists, the right of an employe to receive a determination from the Commission of his or her contractual claim is limited to situations in which a union breach of the duty of fair representation has been established. 4/ Here, no breach has been found. Thus, even assuming it would otherwise be appropriate to make the State a party to this dispute pursuant to an AFSCME motion as to which Complainants

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4/ As we noted in our decision on review of Examiner McLaughlin's opinion, we thereby honor the presumed exclusivity of the mechanism which the parties have established to resolve contractual disputes. The parties to a labor agreement can of course elect to voluntarily waive this exclusivity and have the Commission decide the merits of a contractual claim. See City of Racine, Dec. Nos. 24949-A, B. Obviously, the State and AFSCME have not waived the exclusivity of the contractual procedure in this case.

belatedly concurred after the Examiner issued his decision, we would not exercise jurisdiction over any contract claim against the State.

Therefore, we have denied Complainant's request that we proceed as to the merits of Complainant Prema Acharya's contractual dispute with the State.

Dated at Madison, Wisconsin this 5th day of July, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION 2/

By Herman Torosian /s/
Herman Torosian, Commissioner

Stephen Schoenfeld /s/
Stephen Schoenfeld, Commissioner