

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| RACINE EDUCATION ASSOCIATION, | : | |
| | : | |
| Complainant, | : | |
| | : | Case 90 |
| vs. | : | No. 34699 MP-1685 |
| | : | Decision No. 22557-A |
| RACINE UNIFIED SCHOOL DISTRICT, | : | |
| | : | |
| Respondent. | : | |
| | : | |

Appearances:

Schwartz, Weber, Tofte and Nielsen, Attorneys at Law, 704 Park Avenue, Racine, Wisconsin 54403, by Mr. Robert K. Weber, appearing on behalf of the Complainant.

Melli, Walker, Pease and Ruhly, S.C., Attorneys at Law, 119 Monona Avenue, Suite 600, Madison, Wisconsin 53701, by Mr. Jack D. Walker, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER GRANTING MOTION TO DISMISS

On March 4, 1985, Racine Education Association filed a complaint with the Wisconsin Employment Relations Commission alleging that Racine Unified School District had violated Secs. 111.70(2) and (3)(a)1, 3, 4 and 5, Wis. Stats., by engaging in individual bargaining with teachers. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter, and a hearing was scheduled for May 22, 1985. On May 8, 1985, Respondent filed its answer, accompanied by a Motion to Dismiss the complaint, based on failure to set forth facts stating a claim and on untimeliness. A brief was filed in support of the Motion to Dismiss on the same date. The parties agreed to postpone the hearing pending resolution of the Respondent's motion, and on June 3, 1985, Complainant filed an amended complaint and a brief in opposition to the motion. On June 7, 1985, Respondent filed a reply brief in support of its motion. The Examiner, having considered the pleadings and arguments of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order Granting Motion to Dismiss.

FINDINGS OF FACT

1. Complainant Racine Education Association is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., and maintains its principal offices at 701 Grand Avenue, Racine, Wisconsin 53403. Complainant is the exclusive representative of a bargaining unit of certain teachers and related employes employed by Racine Unified School District.
2. Racine Unified School District is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., and has its principal offices at 2220 Northwestern Avenue, Racine, Wisconsin 53404.
3. On February 21, 1984, Complainant filed a grievance with Respondent alleging that at Park High School, Principal Thompson engaged in individual bargaining with teachers concerning supervision assignments and study halls. The grievance was processed through the steps of the parties' grievance procedure, and was submitted to arbitration before Arbitrator Byron Yaffe, who conducted a hearing in the matter on December 3, 1984. On February 22, 1985, Arbitrator Yaffe issued his award in the matter, in which he found certain violations of the Respondent's "implemented final offer" then pending in mediation-arbitration, by Principal Thompson's negotiations with individual teachers to exempt certain teachers from study center/resource center assignments based on said teachers' other special assignments. The arbitrator determined that he did not have jurisdiction to determine whether the District had violated its duty to bargain

with the Association regarding procedures and policies used at Park High School in the assignment of teachers to the study center/resource center, finding that the alleged violation was statutory in nature rather than contractual and was not arbitrable. On March 4, 1985, Complainant filed the original complaint in this proceeding, alleging that the Respondent had engaged in the statutory violations which the arbitrator had declined to address in the course of the arbitration proceeding.

5. The specific act alleged by Complainant to be unlawful is the individual bargaining with teachers at Park High School, identified in the grievance filed on February 21, 1984 and attached to the amended complaint filed by Complainant on June 3, 1985. On its face the amended complaint therefore identifies that the acts complained of occurred on or before February 21, 1984, more than one year prior to the filing of the original complaint in this matter on March 4, 1985.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSION OF LAW

That because the complaint is filed out of time within the meaning of Secs. 111.70(4)(a) and 111.07(14), Wis. Stats., the Commission is without jurisdiction to determine the merits of the complaint.

Upon the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and renders the following

ORDER GRANTING MOTION TO DISMISS 1/

The Motion filed by Respondent that the complaint in this matter be dismissed is hereby granted, and the complaint is hereby dismissed.

Dated at Madison, Wisconsin this 13th day of June, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

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

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.

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER
GRANTING MOTION TO DISMISS

The complaint alleges that the Employer violated various sections of the Municipal Employment Relations Act by engaging in individual bargaining with teachers at Park High School over "supervisory/resource center study assignments" and that the Complainant had attempted to raise the statutory issue as well as the alleged contractual violations in a grievance arbitration proceeding. The complaint incorporated a copy of the arbitrator's award denying that the alleged statutory violations were arbitrable and suggesting that they should have been filed with the WERC.

Respondent filed an answer denying that it had engaged in any prohibited practices, accompanied by a motion to dismiss alleging that the complaint as filed failed to state a claim and that it was barred by the statute of limitations. On June 3, 1985, Complainant filed an amended complaint in an effort to cure the alleged failure to state a claim, and in that amended complaint incorporated a copy of the original grievance filed in the related contractual violation claim. Briefs were filed by both parties.

I find it unnecessary to address whether the complaint on its face alleges facts sufficient to constitute a prohibited practice, because I find that the complaint is barred because of untimeliness. Complainant argues that the prohibited practice engaged in by the Employer did not occur until finally endorsed by the Board of Education at a meeting on April 19, 1984. It is apparent on the face of the grievance submitted as part of the amended complaint that this argument is without merit: The grievance alleges that the act of individual bargaining had already occurred by February 21, 1984, and it is apparent from the sequence of events identified in the pleadings that the Board's decision was in fact a decision to deny the grievance at the Board level, rather than a substantive decision to engage in the conduct complained of.

Complainant also argues, in effect, that processing of the grievance alleging a related contractual violation should toll the time limitations for filing of the complaint. Complainant notes that refusing to allow such tolling could result in duplicate proceedings, and argues that the most appropriate forum for disputes which arguably could be resolved through grievance and arbitration procedures has repeatedly been found to be the parties' contractual grievance process. For this reason, Complainant argues, public policy is served by treating an alleged statutory violation which could also be a contractual violation as susceptible to the grievance procedure until it is demonstrated to be otherwise, and therefore that tolling the statute of limitations is proper.

Under certain circumstances, the Commission has previously considered the statute of limitations to be tolled (in effect) pending completion of a grievance process. 2/ The cases standing for this proposition, however, exclusively allege violation of contract pursuant to Secs. 111.06(1)(f) or 111.70(3)(a)5, Wis. Stats. The Commission has made a careful distinction between such contract-violation allegations, which warrant a policy holding that the violation for statutory purposes occurs only with the end of the grievance procedure, and other allegations concerning "purely" statutory violations. 3/ Section 111.07(14), Wis. Stats., as amended by Sec. 111.70(4)(a), specifies that "The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or prohibited practice alleged". Under this statute of limitations, the Commission is without jurisdiction to determine the merits of a

2/ Harley-Davidson Motor Company, Dec. No. 7166 (WERC 6/65); Prairie Farm Joint School District, Dec. No. 121740-A, B (WERC, 6/75).

3/ Local 950, International Union of Operating Engineers, Dec. No. 21050-A, (11/83), 21050-F, WERC (11/84); City of Madison, Dec. No. 15725-B (WERC, 6/79).

complaint filed more than one year after the act or prohibited practice alleged. This section is construed strictly; in the City of Madison case cited above, the Commission determined that a complaint filed 366 days after the act complained of was out of time. 4/ Only in respect to allegations of contract violation has the Commission, pursuant to Harley-Davidson, considered the statutory time period to run from the date of completion of the grievance process; for all other purposes, the date on which the original act occurred starts the time period to run. 5/

In this case, the distinction between the Harley-Davidson rule applicable to contractual allegations and the general rule derived from the facial meaning of the statute could not be more clear, because the complaint and amended complaint explicitly identify the statutory violations alleged as being those aspects of the original acts of the Employer which were not found arbitrable by the arbitrator. The Complainant prevailed in the arbitration proceeding on the other aspects of its grievance, and it is therefore apparent that no residual contractual claim is raised here. Consequently, there is no basis for application to this case of the Harley-Davidson rule. I find, therefore, that the operative date on which the statute of limitations began to run was, at the latest, February 21, 1984. 6/ As the original complaint in this matter was not filed until more than one year after the latest date the record will bear as the date of the act or acts alleged to constitute the violation here, the complaint must be found to be out of time. For these reasons, the complaint is dismissed.

Dated at Madison, Wisconsin this 13th day of June, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Christopher Honeyman
Christopher Honeyman, Examiner

4/ This decision was affirmed, Dane County Circuit Court, 6/80.

5/ Local 950, supra. A limited exception exists in situations characterized as "continuing" violations, but nothing in the original complaint, the amended complaint or Complainant's brief would indicate any basis for a claim that such a "continuing" allegation is involved here.

6/ The grievance and other parts of the pleadings fail to identify the exact dates on which the individual bargaining allegedly occurred, but it is self-evident that this was on or prior to the date the grievance was filed.