STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS, and AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 48, AFL-CIO, Respondents.	:	Case 197 No. 38708 MP-1967 Decision No. 24674-A

ORDER TO MAKE COMPLAINT MORE DEFINITE AND CERTAIN, DENYING MOTIONS TO DISMISS, AND INDEFINITELY POSTPONING HEARING

On April 27, 1987 Milwaukee Teachers' Education Association filed a complaint with the Wisconsin Employment Relations Commission alleging that Milwaukee Board of School Directors and American Federation of State, County and Municipal Employees, District Council 48, AFL-CIO had committed prohibited practices within the meaning of the Municipal Employment Relations Act. On July 15, 1987 the Commission appointed Christopher Honeyman, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in this matter. On June 19 and July 23, 1987, respectively, Respondent Board filed motions and a supplemental motion to dismiss the complaint on various grounds. Complainant and Respondent Board, by August 4, 1987, filed arguments in support of and opposition to the motions; and the Examiner, being advised in the premises, makes and issues the following

ORDER

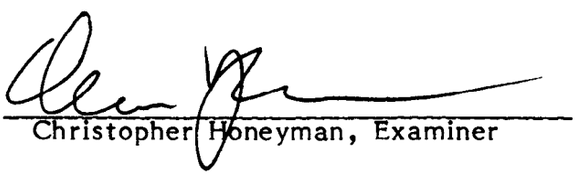
1. That Complainant make its complaint more definite and certain with respect to allegations made in paragraphs five and six of said complaint, either by conforming the heading to the complaint to state that, as alleged in paragraphs five and six, employes Charles Zinser and Dennis Lepak are co-Complainants as individuals in this matter; or by removing allegations contained in paragraphs five and six that these employes are Complainants in this matter.

2. That Respondent Board's Motions to Dismiss be, and the same hereby are, denied.

3. That the hearing previously scheduled in this matter for September 15 and 18, 1987 is hereby postponed indefinitely pending disposition by the Commission of the related cases No. 181, ME-0085; No. 177, MP-1816; and No. 175, DR(M)-0389 involving the same parties.

Dated at Madison, Wisconsin this 20th day of August, 1987.

WISONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

MILWAUKEE PUBLIC SCHOOLS

MEMORANDUM ACCOMPANYING
ORDER TO MAKE COMPLAINT MORE DEFINITE
AND CERTAIN, DENYING MOTIONS TO DISMISS,
AND INDEFINITELY POSTPONING HEARING

The Complaint alleges that Respondent Union attempted from 1974 to 1976 to obtain from the Commission an expansion by unit clarification of a bargaining unit of recreation employes, and that the Commission denied the petition involved. The complaint alleges that thereafter, in 1979, Respondent Board agreed voluntarily to expand that bargaining unit as originally sought by Respondent Union, and that Respondent Union did not and does not possess a majority of support within that unit. The complaint alleges that since 1979 all contracts negotiated in that unit have represented a form of unlawful assistance by Respondent Board to Respondent Union, that the unit is illegitimate, that employes represented by Complainant are affected in their recreation work by this arrangement, and that a new contract was negotiated less than 12 months prior to the filing of the complaint. The relief sought includes a proposed order that the Board terminate its alleged unlawful recognition of Respondent Union, among other elements.

Neither Respondent has yet filed an answer in this proceeding; Respondent Union has not commented, but Respondent Board filed a series of motions to dismiss, predicated on various grounds, and it and Complainant have filed arguments concerning these motions. They are, in essence, as follows:

1. Respondent Board argues that this proceeding involves a question concerning representation, a matter properly resolved through an election proceeding rather than a prohibited practice complaint; Complainant contends that the unlawful-assistance aspect of this proceeding cannot be resolved through an election case, which bears no remedy powers other than replacement of the incumbent union. I agree with Complainant: It is clear that while a union lacking majority status can effectively be replaced either by a petition filed by employes to decertify the union, or by a challenging union which enjoys majority support, the purpose of the statutory section barring preferential treatment of one union over another is to establish some sanction beyond the rights of employes to pursue an election, and indeed serves to protect the integrity of such elections. The availability of the representation proceeding, therefore, does not forestall the right to file a complaint.

2. Respondent Board argues that Complainant is in effect raiding Respondent Union, and does not possess standing to bring the present complaint because it has no interest in the relationship between Respondent Board and Respondent Union other than as a challenging union; Complainant contends that it has standing as "a person" is broadly defined in the act, and as it represents two teachers who serve as Recreation Department employes for part of the year and are being paid less than their alleged proper rate pursuant to the contract between Respondent Board and Respondent Union. I find that the question of whether MTEA has standing to bring a complaint in this matter is a complex one, and involves determinations as to MTEA's role which can only be made definitively once the outcome of other related proceedings is known. Complainant here is also the complainant in Case 177, MP-1816, filed on February 3, 1986, in which it seeks an order compelling Respondent Board to arbitrate the wage rates of certain teachers performing work which is arguably within the jurisdiction of the contract between Respondent Board and Respondent Union. Complainant here is the respondent in two other proceedings initiated by Respondent Board. Case 175, DR(M)-0389, is a declaratory ruling petition filed on January 23, 1986 in which the Board seeks a declaratory ruling by the Commission as to whether teachers who also perform work generally performed by employes in the bargaining unit represented by Respondent Union are members of <u>both</u> bargaining units, for purposes of establishment of separate wage rates and conditions of employment, or whether they are members solely of MTEA's teacher bargaining unit. Case 181, ME-85, is a unit clarification proceeding in which the Board seeks a clarification of the bargaining units involved to declare that such teachers are members of both units, for purposes of their separate work types respectively. These cases have been heard, by Examiner Richard McLaughlin, and have generated a lengthy and complex record which has not yet been decided by the Commission. It is apparent that

issues raised in the other three proceeedings are closely interrelated with the present case, as discussed under motion No. 5 below, and it is also apparent that the question of standing of MTEA to make such a complaint as this relates closely to the outcome of its pending involvement in the unit clarification, declaratory ruling and complaint proceedings, in which it essentially asserts the right to exclusive representation of the teachers involved in this matter for all purposes related to any employment by the District in Recreation Department work. I find, therefore, that the motion with respect to standing must be deferred pending the Commission's decision in the related cases, and I reserve ruling on the motion in that respect. But because Complainant has identified in paragraphs five and six of the complaint two individual teachers whom it cites there as Complainants in their own right, but have not named those teachers as Complainants in the heading of the complaint, I have ordered the Complainant to make the complaint more definite and certain by identifying clearly whether or not these individuals wish to serve as co-Complainants in this matter, or are being used as examples of individuals affected by a complaint brought solely by MTEA.

3. Respondent Board contends that Complainant has not provided the showing of interest of 30 percent required for any attempt on its part to supplant Respondent Union; Complainant contends that a showing of interest requirement is irrelevant to the present proceeding. I agree with Complainant for the same reason identified in ruling on Respondent Board's motion No. 1 above.

4. Respondent Board argues that the complaint must be dismissed due to the existence of a negotiated collective bargaining agreement in effect between Respondent Board and Respondent Union, which allegedly resolves during its term all questions related to representation rights; Complainant contends that this is a spurious issue which seeks to convert a complaint proceeding into an election proceeding. I find this motion to be without merit for the same reasons identified in ruling on Respondent Board's motion No. 1 above.

5. Respondent Board contends that all issues relevant to this matter have been heard by Examiner McLaughlin in the other cases already identified, and that the Commission's determination in those proceedings will be dispositive of any issue properly raised in this proceeding; Complainant contends that this proceeding brings an allegation of unlawful assistance, which clearly enters areas not litigated in the prior proceedings. I find that the unlawful-assistance aspect of the present case is nowhere reflected in the pleadings before Examiner McLaughlin in the various other cases. But it is apparent that some aspects of this case have already been litigated, as noted above. I therefore find the Motion for Dismissal on this ground to be without merit; see below, however, with respect to related matters.

6. Respondent Board argues that the acts allegedly constituting prohibited practices in this matter occurred more than one year prior to the date of the filing of the prohibited practice complaint, and further that Complainant had actual notice more than one year prior to filing its complaint. Respondent Board argues that the expansion of the bargaining unit referred to in the complaint, alleged to be unlawful, occurred in 1979 or 1980, and that several contracts have been negotiated and administered by Respondent Board and Respondent Union for the allegedly unlawfully expanded unit since then without complaint by anyone. Respondent Board further alleges that at least from the January 21, 1986 filing of the Board's declaratory ruling petition, Complainant was clearly on notice as to the existence of this unit and of the potential issue which it now raises, but did not file its complaint for more than a year after that date. Respondent Board notes that the filing of the unit clarification proceeding also occurred more than a year before the filing of the complaint in this matter. Complainant alleges June 1986 and contends both that the violation here is of a "continuing" nature

City of Madison, 1/ where the Commission determined that a complaint filed 366 days after the acts complained of was out of time. It is clear on the face of the complaint that the initial expansion of the bargaining unit involved is out of time pursuant to that standard. Any unlawful act of assistance to Respondent Union by Respondent Board which can be said to have occurred prior to the statutory period must, therefore, be dismissed as grounds for a complaint even if its effects automatically continue.

There exists, however, a class of cases in which the violation is found to be a continuing one, justifying a tolling of the statute of limitations. 2/ In these cases, in effect, a continuous or intermittent series of new acts is committed which gives fresh grounds for finding a violation, although the original act may be considered solely as background and is not itself evidence of a violation. 3/ The relationship between a union representing employes and the employer involved is by definition a continuing one. If that relationship is tainted by unlawful assistance to the union, any repetition of the original act of assistance would justify a fresh period for filing of a complaint, even if the mere carrying out of the results of a prior act of assistance might not. Two things are clear from the pleadings here: that it is alleged that a fresh act of assistance was created by the negotiation and signing of a new contract within the one-year period, and that the circumstances of the original expansion of the bargaining unit and of the negotiation of the most recent collective bargaining agreement are relevant to any determination of whether unlawful assistance exists. It is apparent, therefore, that the merits of the timeliness argument are intimately related to the merits of the case in general, and that this argument cannot be determined without a factual record developed by a hearing. Respondent Board's motion is therefore denied.

Even a cursory review of the record already developed by the parties in the other three proceedings now under way reveals that the claims made and the facts introduced there are many and varied, and that these impinge to a substantial extent upon the various issues already identified in this proceeding. Complainant contends that it is entitled to an immediate hearing on its complaint; but I find that this complaint, in which Complainant sat silent for a considerable time after it clearly had the opportunity to make its allegation, can be more effectively and economically processed by delaying hearing until the Commission has determined the merits of the three proceedings which have already been heard. This course of action promises to avoid both relitigation of lengthy factual material, and possible conflicting interpretations, and therefore justifies the delay which may be encountered.

Dated at Madison, Wisconsin this 20th day of August, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

1/ Dec. No. 15725-B, WERC, 6/80, affirmed Dane County Circuit Court, 6/80.

2/ See NLRB v. Anchor Rome Mills, 228 Fed.2d. 775, 37 LRRM, 2367 (CA5, 1966); also NLRB v. Kohler Co., 35 LRRM, 2606 (CA7, 1955); Al Bryant, Inc., 260 NLRB 10, 109 LRRM, 1284 (1982); Harry Viner, Inc, Dec. No. 13828-A, E (WERC, 6/76); and Reimer Sausage Company, Dec. No. 10965-A, B (WERC, 10/72).

3/ Local Lodge 1424 v. NLRB, (Bryan Manufacturing Co.), 362 U.S. 411, 45 LRRM 3212 (1960).