STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SANDRA A. ANDERSON, Complainant, vs. MORAINE PARK TECHNICAL COLLEGE and MORAINE PARK FEDERATION OF TEACHERS, LOCAL 3338, Respondents.	Case 29 No. 41085 MP-2138 Decision No. 25747-B

Appearances:

Ms. Sandra Anderson, 816 Neufeld Street, Green Bay, Wisconsin 54304, appearing on her own behalf.

Mr. John A. St. Peter, Edgarton, Ondrasek, St. Peter, Petak & Massey, Attorneys at Law, 10 Forest Avenue, P.O. Box 1276, Fond du Lac, Wisconsin 54936-1276, appearing on behalf of Moraine Park Technical College.

Mr. Alan S. Brostoff, Attorney at Law, 330 East Kilbourn Avenue, Suite 1275, Milwaukee, Wisconsin 53202, appearing on behalf of Moraine Park Federation of Teachers, Local 3338.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Sandra A. Anderson, who is referred to below as Anderson, filed a complaint with the Wisconsin Employment Relations Commission on September 12, 1988, alleging that Moraine Park Technical College, which is referred to below as the District, and Moraine Park Federation of Teachers, Local 3338, which is referred to below as the Federation, had committed prohibited practices within the meaning of "Chapter 111.70 and 111.07 of the Wisconsin Statutes." Anderson filed with that complaint a Motion For The Commission To Appoint Counsel. Anderson captioned that motion to apply to "Case No. 26 No. 38586 MP-1953 and Case A/PM 86-179". In a letter to the parties dated September 26, 1988, the Commission's General Counsel asked Anderson to "advise Mr. St. Peter, Mr. Brostoff and myself as to whether your Motion was intended to apply to the cases referenced in the caption of the Motion or whether you intended it to apply to the complaint you just filed (MP-2138)." On September 29, 1988, the District filed an answer to Anderson's September 12, 1988, complaint. Included in that answer were various motions requesting "that the Complaint be dismissed and that the respondent be awarded its costs and attorney's fees necessitated by the defense of this frivolous complaint." On October 5, 1988, Anderson filed a letter with the Commission stating that "I intended the Motion to apply to all Cases and Motions that I have filed to date with the Commission." The Commission sought and obtained the positions of the parties on Anderson's Motion For The Commission To Appoint Counsel, and issued an Order Denying Motion To Appoint Attorney on November 21, 1988. In footnote 1 of the Commission's decision, the Commission stated: "The complaint will now be assigned to an Examiner who will be contacting all parties in the near future as to further proceedings." The Commission, on November 29, 1988, administratively assigned the complaint to Richard B. McLaughlin, a member of its staff. In a letter to the parties dated December 14, 1988, I stated:

> I have briefly discussed the above noted matter with each of you by phone. The discussions have been hampered by the fact that this matter represents one part of a number of items of litigation involving each of you.

To clarify the matter which has been assigned to me, I enclose for each of you copies of the relevant pleadings and orders which have been received or issued to this point. The items enclosed are: (1) the complaint inititating this matter together with a Motion for the Commission to Appoint Counsel; (2) the answer of Moraine Park Technical College; and (3) the Commission's Order Denying Motion to Appoint Attorney. You will note footnote 1 of the Commission's Order references my contacting you.

I will be contacting each of you to schedule a hearing on this matter. If any of you believes motions have been, or will be, filed which must be addressed prior to hearing, please advise me.

In a letter to the parties dated December 29, 1988, I stated:

I have not received a response to my letter of December 14, 1988. Please advise me of your position on which, if any, of the motions raised in the District's September 29, 1988 answer require resolution prior to hearing.

Please respond by January 13, 1989. I will interpret a failure to respond by that date as a statement that hearing must be scheduled without regard to any pre-hearing motions.

The District responded in a letter dated January 4, 1989, which was received by the Commission on January 9, 1989. In a letter to the parties dated January 12, 1989, I stated:

It is apparent from Mr. St. Peter's letter of January 4, 1989, that the District believes the complaint should be dismissed without a hearing.

To present a record upon which this position can be determined, I ask each of you to submit whatever written argument you deem appropriate by February 3, 1989. Mr. St. Peter has already submitted certain argument in his January 4, 1989, letter. This schedule would permit him to supplement that argument if he so desires.

I would ask Ms. Anderson to include in her argument a statement of what issues are raised by her September 12, 1988 complaint, which have not been addressed in other litigation. I would appreciate it if the argument was as specific as possible.

To the extent the files developed in other matters before the Commission are relevant, I can and will consult those files. Thus, you need not send me copies of Commission decisions, etc., so long as you cite whatever such decisions you feel are relevant.

I should emphasize the issue you submit argument on is whether the pleadings in the matter (Case #29, No. 41085, MP-2138) raise any issue of fact requiring hearing, and, if not, whether the complaint should be granted/dismissed without an evidentiary hearing.

I will note I have enclosed a copy of the Order Appointing Examiner issued by the Commission in this matter.

If you have any questions, please let me know.

On January 12, 1989, the Commission formally appointed me Examiner to make and issue Findings of Fact, Conclusions of Law And Order, as provided in Sec. 111.70(4)(a), and Sec. 111.07, Stats. In a supplement to the January 12, 1989, letter I asked the Federation to file an answer in the matter, and stated

that if the answer posed additional issues beyond those posed by the District's motion to dismiss, I would consider extending the February 3, 1989, briefing deadline. The District filed argument in response to my January 12, 1989, letter on January 27, 1989. Anderson filed argument in response to my January 12, 1989, letter on February 2, 1989. In a letter to the parties dated February 8, 1989, I stated:

> I enclose a copy of Ms. Anderson's brief for Mr. St. Peter and Mr. Brostoff. Mr. St. Peter's letter-briefs of January 4 and 26, 1989, indicate Ms. Anderson and Mr. Brostoff have already received copies of them. Mr. St. Peter's letters of those dates included various exhibits and affidavits. If any of you have not received a copy of these attachments, please let me know.
>
> I have received neither an answer nor a brief from Mr. Brostoff.

In a letter received by the Commission on February 17, 1989, the District filed its concern with certain portions of Anderson's brief and with certain portions of her September 12, 1988, complaint. No evidentiary hearing has yet been conducted in this matter.

FINDINGS OF FACT

1. Sandra A. Anderson filed a complaint of prohibited practice with the Commission on September 12, 1988. The body of that complaint reads as follows:

> 1. That the Complainant is Sandra Ann Anderson, a cosmetology instructor formerly employed by Moraine Park Technical College. The address of the Complainant is 816 Neufeld Street, Green Bay, WI 54304.
>
> 2. Respondent, Moraine Park Technical College is a vocational technical and adult education district, organized and operating under the terms and provisions of Chapter 38 of the Wisconsin Statutes. The business address of the Respondent is 235 N. National Avenue, Fond du Lac, Wisconsin 54935.
>
> 3. Respondent, Moraine Park Federation of Teachers, Local 3338 ("Union"), is the exclusive bargaining representative of the Bargaining Unit to which the Complainant, Ms. Anderson, was a member. The business address of the Local is 235 N. National Avenue, Fond du Lac, Wisconsin 54935. The State office address of the Wisconsin Federation of Teachers is 2021 Atwood Avenue, Madison, WI 53704.
>
> 4. That on August 26, 1988, through correspondence, Ms. Anderson requested a copy of the information that was released to Mid-State Technical College regarding her application for employment. Refer to Exhibit 1.
>
> 5. That to this date, Ms. Anderson has not received the above mentioned information.
>
> 6. That this information is available to Ms. Anderson under the State Open Records Law.
>
> 7. That on August 26, 1988, through the above mentioned correspondence, Ms. Anderson requested that all items that do not comply with certain provisions of the bargaining-agreement be removed from her file. Refer to Exhibit 1.
>
> 8. That on August 26, 1988, through the above mentioned correspondence, Ms. Anderson requested that her 1984 evaluation be removed from her Personnel File because there is a pending grievance which will determine if Ms. Anderson was evaluated fairly without prejudice. Refer to Exhibits 1 and 2.

9. That the information released to Mid-State Technical College did not comply with certain provisions of the bargaining agreement in Ms. Anderson's Personnel File.

10. That the information released to Mid-State Technical College injured Ms. Anderson in her application for employment.

11. That on August 29, 1988, through correspondence, Attorney St. Peter, stated that "The evaluations and other items mentioned by you are properly included in your file." Refer to Exhibit 3.

12. That on August 29, 1988, through the above mentioned correspondence, Attorney St. Peter stated that "The District specifically denies that there is a pending grievance and that it has done anything to injure you in your applications for employment." Refer to Exhibit 3.

13. That on August 22, 1988, Attorney St. Peter in his Affidavit In Support Of Additional Motions To Dismiss, filed in the United States District Court, being first duly sworn on oath, stated that:

    i.) Pending at the time of Anderson's suspension was a grievance dated August 26, 1985, alleging she was wrongfully charged with a tardiness which provided grounds for her September 23, 1985 suspension.

    j.) Also pending on that date was a grievance filed by Ms. Anderson on July 2, 1984, alleging that a 1984 absence reprimand noted in her evaluation was issued in retaliation for yet another grievance she had filed on February 3, 1984.

    k.) On November 26, 1985, the Wisconsin Employment Relations Commission ("WERC") ordered MPTC and the Union to proceed to arbitration of the February 3, 1984 grievance.

    Refer to Exhibit 4.

14. That the above statements by Attorney St. Peter confirms "there is a pending grievance."

15. That on April 19, 1988, through Certified Mail, Ms. Anderson requested the Union to file for arbitration her July 2, 1984 Grievance. Refer to Exhibit 5.

16. That the collective bargaining agreement requires the Union to notify the District Board President in writing of their decision to submit her July 2, 1984 Grievance to arbitration, no later than fifteeen (15) days after her request for arbitration. (Article IV-Grievance Procedure, Section 4 (e) - Initiation and Processing).

17. That the Union did not respond to Ms. Anderson's request and did not file for arbitration her July 2, 1984 Grievance.

18. That the Union's lack of response indicates retaliation against Ms. Anderson for her use of the grievance procedure to resolve differences arising from interpretation and/or administration of the Agreement.

19. That the resolution of the July 2, 1984 Grievance will probably change Kessler's Decision and Award of January 16, 1987, concerning Ms. Anderson's discharge. (Case A/P M 86-179).

20. That the removal of the items referenced to in Ms. Anderson's correspondence of August 26, 1988 from her Personnel File and the arbitration exhibits (Case A/P M 86-179) will probably change Kessler's Decision and Award of January 16, 1987.

21. That Ms. Anderson's rights were violated when MPTC introduced exhibits that did not comply with the bargaining agreement requirements for Ms. Anderson's Personnel File and the Union did not object to the introduction of said exhibits.

22. That Moraine Park Technical College violated Ms. Anderson's rights in the disciplinary process when she was suspended without pay for one absence and two tardinesses when she did not call in timely because the reprimands did not comply with the bargain agreement and she had a pending grievance.

23. That Moraine Park Technical College violated Ms. Anderson's rights when she was terminated for a tardiness without notice because the reprimands did not comply with the bargain agreement and she had a pending grievance.

Conclusion

All written reprimands, including those used in the disciplinary process of suspension and termination, should comply with the bargaining agreement.

Article III - Rights Clause
Section 3 - Individual Teacher's Rights (d) This section states that,

> material derogatory to a teacher's conduct, service, character, or personality, shall have the teacher's signature affixed and date of such signature; and
>
> the teacher will also have the right to submit a written answer and that answer is to be attached to the file copy.

WHEREFORE, the Complainant, Sandra Ann Anderson, requests the following relief:

1. A finding that the activities alleged above in this Complaint constitute prohibited practices within the meaning of Chapter 111.70 and 111.07 of the Wisconsin Statutes.

2. M.P.T.C. complies with the bargaining agreement and removes all items referenced to in Ms. Anderson's correspondence of August 26, 1988 from her Personnel File.

3. M.P.T.C. requests that Judge Kessler reviews his arbitration award of January 16, 1987 with the removal of all exhibits and all testimony related to the exhibits that do not comply with the bargaining agreements requirements for Ms. Anderson's Personnel File.

4. That Judge Kessler review Moraine Park Technical Institute (Written and Verbal Warnings) A/P M-86-39, Arbitration Award of August 29, 1986 by Richard Ulric Miller.

5. That Judge Kessler review Dr. Ralph K. Baker's independent psychiatric evaluation dated May 26, 1988, stating: "It's my opinion after examining

Ms. Anderson and reviewing her records that she was not ever temporarily disabled and unable to work."

6. That Rodney Pasch, Manager of Personnel, provide Ms. Anderson a copy of the information released to Mid-State Technical College.

7. That the Wisconsin Employment Relations Commission order M.P.T.C. and the Union to arbitrate Ms. Anderson's grievances of August 26, 1985, February 3, 1984 and July 2, 1984.

8. That the Wisconsin Employment Relations Commission appoints counsel in the matter of her complaints and motions; she is indigent and not represented by a Union or counsel and does not have the ability or knowledge to insure her rights provided by law.

9. That the Wisconsin Employment Relations Commission orders a new arbitration hearing based upon the removal of all items that did not comply with the bargaining agreement, that were placed in Ms. Anderson's Personnel File, and introduced as exhibits in the prior arbitration hearing.

10. Such other and further relief as the Wisconsin Employment Relations Commision deems just and proper under the circumstances.

2. That Exhibit 1, which is referred to in Paragraph 4 of the factual allegations of Anderson's September 12, 1988, complaint reads, in relevant part, as follows:

> On April 21, 1988, I telephoned you and asked you what information was released to Mid-State Technical College regarding my application for employment. You said that information was confidential. It is my understanding that that information is available to me under the State Open Records Law. Please send me a copy of the information released to Mid-State.
>
> I recently reviewed my personnel file in Attorney St. Peter's office. I am requesting that all items that do not comply with the following provisions of the bargaining-agreement be removed from my file:
>
> Article III - Rights Clause
>
> Section 3 - Individual Teacher's Rights
>
> . . .
>
> Also, my 1984 evaluation should be removed from my file because there is a pending grievance which will determine if I was evaluated fairly without prejudice. Until that is determined, the evaluation should be removed from my file.
>
> . . .

CONCLUSIONS OF LAW

1. The Commission does not have independent jurisdiction to determine violations of Wisconsin's Public Records Law, which is not contained in Subchapters I, III, IV or V of Chapter 111, Stats.

2. It cannot be concluded, on the pleadings presently filed in this matter, that no interpretation of the facts alleged in Anderson's September 12, 1988, complaint would entitle her to relief.

3. It cannot be concluded, on the pleadings presently filed in this matter, that Anderson's September 12, 1988, complaint alleges the existence of any act of prohibited practice by the Federation or the District which falls within the timelines established by Secs. 111.07(14) and 111.70(4)(a), Stats., and which has not been fully adjudicated in other litigation.

ORDER

1. The allegations stated in Paragraph 6 of Sandra A. Anderson's September 12, 1988, complaint are dismissed.

2. Sandra A. Anderson shall make her September 12, 1988, complaint more definite and certain by filing, on or before March 31, 1989, an amended complaint which clarifies the following portions of her September 12, 1988, complaint in the following respects:

a. Anderson shall clarify Paragraph 7 of the factual allegations of her complaint to specify whether the District has either supplied her with, or permitted her to review, the contents of the personnel file referred to in that paragraph. If Anderson claims any act by the District in providing her access to that personnel file, or in refusing to provide her access to that file, violates Sec. 111.70(3)(a), Stats., then she shall expressly say so, and shall specify the specific subsection of Sec. 111.70(3)(a), Stats., she alleges to have been violated.

b. Anderson shall clarify Paragraph 8 of the factual allegations of her complaint to specify what specific acts or documents constitute the "pending grievance" referred to in that paragraph. Anderson shall supply a date of occurrence for any such act or document, and if any such date is not within the one year period preceding September 12, 1988, she shall specify any related conduct within that one year period which, in and of itself, may constitute a prohibited practice.

c. Anderson shall clarify Paragraphs 7, 9 and 20 of the factual allegations of her complaint to specify the documents which she believes constitute "information released to Mid-State Technical College (which) did not comply with certain provisions of the bargaining agreement". For any such documents which bear a date not within the one year period preceding September 12, 1988, she shall specify any related conduct within that one year period which, in and of itself, may constitute a prohibited practice.

d. Anderson shall clarify Paragraphs 14 and 15 of the factual allegations of her complaint to specify which, if any, of the grievances referred to in Paragraphs 12 through 15 of the factual allegations of her complaint remain, in her opinion, still pending. For each grievance identified as still pending and which was not filed within the one year period preceding September 12, 1988, Anderson shall either specify any related conduct within that one year period which, in and of itself, may constitute a prohibited practice, or she shall specify the basis upon which she believes each grievance remains still pending.

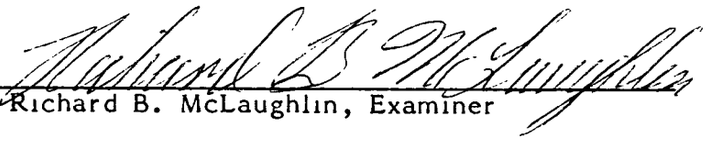
e. Anderson shall clarify Paragraphs 20 and 21 of the factual allegations of her complaint to specify which "exhibits" she is referring to; to specify the date such exhibits were so submitted; and, if that date is not within the one year period preceding September 12, 1988, to specify any related conduct within that one year period which, in and of itself, may constitute a prohibited practice.

f. Anderson shall clarify Paragraphs 22 and 23 of the factual allegations of her complaint to specify the date of occurrence for each act alleged in those paragraphs, and, if any such date is not within the one year period preceding September 12, 1988, to specify any related conduct within that one year period which, in and of itself, may constitute a prohibited practice.

g. Anderson shall clarify Paragraph 1 of the remedial requests of her complaint to specify what, if any, sections beyond Sec. 111.70(3)(a)5, Stats., she alleges the District to have violated, and to specify what, if any, sections beyond Sec. 111.70(3)(b)1, Stats., she alleges the Federation to have violated.

Dated at Madison, Wisconsin this 7th day of March, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

MORAINE PARK VOCATIONAL, TECHNICAL
AND ADULT EDUCATION DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF
FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The prefatory paragraph to this decision lays out the procedural background to the present matter. The District's motion to dismiss was originally stated at the close of its September 29, 1988, answer. The motion to dismiss reads as follows:

> 1. The subject Complaint is a duplication and reiteration of the allegations contained in Case 26 No. 38585 MP-1953, Decision No. 24474-C which was dismissed on September 21, 1987.
>
> 2. The Complainant has filed with the Commission numerous motions raising the same allegations or seeking the same relief as are set forth in the instant Complaint. The respondent has filed responses to the pending motions. The respondent should not be obligated to defend multiple actions arising out of the same set of facts and circumstances. See Case 26 No. 38585 MP 1953.
>
> 3. The Complaint fails to allege a prohibited practice against respondent, Moraine Park Technical College as defined under sec. 111.70(3) Stats.
>
> 4. The Complaint's prayer for relief includes remedies which are not within the jurisdiction of the Commission under sec. 111.70 (3) Stats.
>
> WHEREFORE, respondent, Moraine Park Technical College, respectfully requests that the Complaint be dismissed and that the respondent be awarded its costs and attorney's fees necessitated by the defense of this frivolous complaint.

The District filed written argument on its motion on January 9 and 27, 1989.

The District starts its January 9, 1989, argument by asserting that "the pleadings leave no issues of fact requiring a hearing" and that Anderson's complaint "simply fails to state any claims upon which the Commission has jurisdiction to grant relief." Beyond this, the District claims that paragraphs 22 and 23 of the complaint have been fully resolved in Commission Case 26, No. 38585, MP-1953, in which Anderson "stipulated to dismissal of that case with prejudice on September 21, 1987." Noting that the Commission denied Anderson's motion to reopen that case in Dec. No. 24474-D (WERC, 11/88), the District concludes that "(t)o allow Anderson to relitigate these allegations in a new proceeding would be to elevate form over substance in order to avoid the effect of an Order of the Commission." In addition, the District contends that paragraphs 14, 19 and 21 seek to reopen the Kessler arbitration. Since the Fond du Lac County Circuit Court has affirmed that award, and since the Commission has, in Dec. No. 24474-E (WERC, 11/88), denied Anderson's motion to set that award aside, it follows, according to the District, that the Commission lacks jurisdiction to grant the relief sought in the present complaint, and that "the Judgement of the Circuit Court and the Order of this Commission are final, subject only to reversal on appeal." Beyond this, the District argues that paragraph 9 raises issues of contract interpretation which can not be put before the Commission under Sec. 111.70(3)(a)5, Stats., since the agreement makes her personnel file the property of the District, and in any event, expressly excludes Commission jurisdiction over the matter. The District concludes that the complaint must be dismissed. If the complaint is not dismissed, the District advances the following alternative request for relief:

> (T)he District moves for dismissal of the complaint except with respect to paragraphs 4 through 11, and further moves the Commission to order Anderson to amend said paragraphs to make more definite and certain identification of documents in her personnel file referenced therein and the wrongs alleged with respect to those documents.

In its argument filed on January 27, 1989, the District reasserts its position that the complaint must be dismissed without a hearing. Paragraphs 14 through 19 of the complaint have been fully addressed by decisions of the Fond du Lac County Circuit Court and by the District II Court of Appeals, according to the District. Upholding Anderson's allegations that Arbitrator Kessler erred in considering certain evidence would, in the District's view, "permit a party to subvert the arbitration process merely by filing a grievance pertaining to damaging material" in violation of established law and fundamental social policy. Beyond this, the District contends that by Anderson's own admission, she has been allowed to view her personnel file. The District concludes by noting that "(t)he allegations of the Complaint are completely unfounded in fact and law and present no issues of fact requiring a hearing on the merits."

Anderson prefaces her argument by stating the issues "before the Wisconsin Employment Relations Commission" thus:

1. Did the District violate the Bargaining Agreement by including certain documents that do not comply with the requirements of the Bargaining Agreement regarding items to be placed in personnel files?

2. Have these documents injured Ms. Anderson in her applications for employment with Mid-State Technical College and Northern Michigan School of Technology and Applied Sciences?

3. Is the information that was released to the above stated schools available to Ms. Anderson under the State Open Records Law?

4. Did the District attach Ms. Anderson's written responses to the documents that were wrongly included in her personnel file? Refer to Motion for A New Arbitration Hearing - Misconduct of Parties, dated 9-19-88.

5. Did the Union violate Ms. Anderson's rights when they did not file for arbitration her July 2, 1984 grievance? Ms. Anderson requested that her grievance be submitted to arbitration on April 19, 1988.

6. Upon resolution of the July 2, 1984 grievance, it will be determined if Ms. Anderson's 1984 Evaluation Report should be properly included in her personnel file and if it should have been allowed to be entered into the record at the Discharge Arbitration Hearing before Frederick P. Kessler.

7. Does Ms. Anderson's 1985 Evaluation Report properly belong in her personnel file and should have it been allowed to be entered into the record at the Discharge Arbitration Hearing before Frederick P. Kessler?

In response to the District's position that the present complaint reiterates allegations made in another complaint, Anderson contends:

> . . . I am stating it is not. It is a prohibited practice to release information that does not comply with the Bargaining Agreement's requirements of items to be placed in personnel files.

Regarding "the Union's failure to file for arbitration," Anderson contends "it is a prohibited practice to retaliate against an individual for his/her use of the

grievance procedure to resolve differences arising from interpretation and/or administration of the Agreement." Anderson concludes by requesting "the Wisconsin Employment Relations Commission" to hear her complaint.

In its February 17, 1989, argument, the District asserts that issue 4 of Anderson's brief "raises an issue not found in her complaint." Beyond this, the District questions whether the Commission can have any jurisdiction over Anderson's speculation regarding the potential impact of her July 2, 1984, grievance on the Kessler arbitration. The District concludes by asking for the dismissal of the complaint "with prejudice."

DISCUSSION

The Commission, 1/ with judicial approval, 2/ has authorized examiners to determine pre-hearing motions to dismiss. Such a motion can be granted only if a complaint fails to raise a genuine issue of fact or law. The standard appropriate to determining the merit of a pre-hearing motion to dismiss has been stated thus:

> Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. 3/

Because it can not be said that no interpretation of the facts alleged would entitle Anderson to relief, the District's motion to dismiss can not be fully granted. Difficulties within the complaint, however, preclude fully denying the motion. The result of this tension is the Order entered above, which strikes certain allegations from the complaint and requires Anderson to make the balance of the complaint more definite and certain.

Discussion of the basis for the Order demands an overview of the allegations of the complaint. The complaint fundamentally questions three broad areas of conduct. The first concerns the District, and focuses on an alleged violation of Wisconsin's Public Records Law. The second potentially concerns both the District and the Federation and focuses on an alleged violation of a collective bargaining agreement by the District's placement of certain derogatory material in Anderson's personnel file, and the District's use of that material in disciplining her and in responding to prospective employers. The final area concerns the Federation and focuses on the Federation's refusal to process meritorious grievances filed by her.

Anderson's allegations concerning District violations of the Public Records Law are stated in paragraphs 4, 5 and 6 of the factual allegations of the complaint and in issue 3 of Anderson's brief. It is apparent from Anderson's statement of issue 3 that she contends the Commission has the independent authority to enforce the Public Records Law. This contention has no basis in the statutes enforced by the Commission. To be enforceable by the Commission, the right asserted by Anderson must have a demonstrated basis in the Municipal Employment Relations Act. 4/ The right asserted by Anderson in paragraph 6 of the

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1/ See County of Waukesha, Dec. No. 24110-A (Honeyman, 10/87), aff'd Dec. No. 24110-B (WERC, 3/88).

2/ See Village of River Hills, Dec. No. 24570 (WERC, 6/87), aff'd Dec. No. 87-CV-3897 (CirCt Dane County, 9/87), aff'd Dec. No. 87-1812 (CtApp, 3/88). The procedural history of the case is summarized in Village of River Hills, Dec. No. 24750-B (Greco, 4/88).

3/ Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3.

4/ Milwaukee Public Schools, Dec. No. 20005-B (WERC, 2/84); See also Racine Policemen's Professional and Benevolent Corporation, Dec. No. 12637 (Fleischli, 4/74), aff'd by operation of law, Dec. No. 12637-A (WERC, 5/74).

complaint and issue 3 of her brief is not independently enforceable by the Commission. 5/ Accordingly, the Order stated above dismisses the allegations stated in paragraph 6 of the complaint. Because paragraphs 4 and 5 of the factual allegations of the complaint are applicable to allegations beyond those concerning Wisconsin's Public Records Law, those provisions have not been dismissed.

The second broad area of conduct questioned by the complaint concerns potentially both the District and the Federation, and focuses on alleged violations of a contract between those parties. This broad area encompasses two distinguishable concerns, one of which is better focused than the other. Anderson states the more focused concern thus: "(i)t is a prohibited practice to release information that does not comply with the Bargaining Agreement's requirements of items to be placed in personnel files." This concern is reflected by paragraphs 4, 5 and 7 through 14 of the factual allegations of Anderson's complaint, as well as by issues 1 and 2 of Anderson's brief. The less focused concern alleged by Anderson is stated in paragraphs 19 through 23 of the factual allegations of her complaint and by issues 4, 6 and 7 of her brief. These allegations indicate Anderson asserts a contract violation, but does so by questioning the integrity of the grievance procedure as reflected in a series of grievances and, presumably, in the Kessler award.

The final broad area alleged by Anderson focuses on the Federation's failure to process at least one grievance for Anderson. Paragraphs 15 through 18 of the factual allegations of her complaint and issue 5 of her brief state this concern.

The second and third broad areas of conduct questioned by Anderson focus essentially on a violation of contract, and thus are, under established Commission case law, inextricably intertwined. Before viewing those areas of conduct, it is necessary to review that case law, and the statutes underlying that case law.

Secs. 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer to "violate any collective bargaining agreement previously agreed upon by the parties . . . " Presumably, the collective bargaining agreement Anderson asserts has been violated contains a procedure for final and binding grievance arbitration, since she challenges an arbitration award issued under that procedure. The Commission has stated:

> (W)here (a) labor organization has bargained an agreement with the employer which <u>contains</u> a procedure for final impartial resolution of disputes over contractual compliance, the Commission generally will not assert its statutory complaint jurisdiction over breach of contract claims . . . because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. 6/

The Commission has, however, also stated that this rule has the following exceptions:

> Exceptions to this policy include instances where (1) the employe alleges denial of fair representation; (2) the parties have waived the arbitration provision, and (3) a party ignores and rejects the arbitration provisions in the contract. 7/

In addition, for the Commission to assert its jurisdiction to determine contract violations, it is necessary that the complaint be filed within one year from the alleged wrongful act or omission. 8/

5/ See Sec. 19.37(1)(a) and (b), Stats.

6/ <u>Waupun School District</u>, Dec. No. 22409 (WERC, 3/85), at 9-10.

7/ <u>Ibid.</u>, at 9, citations omitted.

8/ Sec. 111.07(14), Stats., which is made applicable to prohibited practice allegations by Sec. 111.70(4)(a), Stats., provides: "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."

Applied to the present matter, this case law requires that to survive the motion to dismiss, Anderson's complaint must allege a breach of contract occurring within one year of the complaint's filing which she can not address due to the District's rejection of the arbitration provisions of the contract or due to the Federation's failure to fairly represent her.

As noted above, Anderson's allegations state two distinguishable concerns regarding the alleged contract violations by the District. The allegations of the "first concern" noted above are sufficient to allege a District violation of the collective bargaining agreement. Viewed in the light most favorable to Anderson, the allegations of paragraphs 4, 5 and 7 through 14 are sufficient to establish that Anderson believes that the District has included material in her personnel file which is proscribed by the collective bargaining agreement. Viewed in the light most favorable to Anderson, her knowledge of this material and the District's refusal to expunge such material dates from August of 1988, which falls within the limitations period. Paragraph 1 of the complaint indicates she is no longer employed by the District, but viewing the complaint in the light most favorable to Anderson, it can be concluded that she asserts her own or the Federation's right to police contract provisions which accrue during the active employment relationship, but provide a benefit which succeeds that relationship.

If this concern stood alone, the District's Motion to Dismiss could be denied, and hearing could be ordered. The concern does not, however, stand alone, and is accompanied by the vaguely stated allegations of Paragraphs 19 through 23. What dates appear in these paragraphs are beyond one year from the filing of her complaint in this matter, with the exception of a reference to her correspondence of August 26, 1988. Two concerns emerge from the allegations of these paragraphs. The first is that of timeliness, since it is not apparent that any of the conduct challenged occurred within one year from the filing of her complaint on September 12, 1988. The second focuses on her August 26, 1988, letter. The allegations of that letter do not clearly identify what material contained in her personnel file is proscribed by the collective bargaining agreement, with the exception of a 1984 evaluation. It is not apparent how that evaluation can be challenged in this proceeding. Beyond this, it is not apparent if Anderson's August 26, 1988, letter is anything other than an attempt to reopen matters already addressed in prior litigation. The Order entered above seeks to address these concerns by requiring Anderson to specify the material she believes has been improperly placed in her personnel file, and to specify the relevant dates for the conduct challenged in Paragraphs 21 through 23. The Order also seeks greater clarity from Anderson regarding whether she is asserting that the District has wrongfully prevented her from reviewing her personnel file.

Anderson's allegations against the Federation similarly state distinguishable concerns. If Paragraphs 15 and 18 of her complaint are taken to mean either that the July 2, 1984, grievance is somehow still pending or that the Federation has refused an April, 1988, request to help Anderson police her personnel file based on a desire to retaliate against her for her use of the grievance procedure, then her April, 1988, arbitration request and the Federation's refusal to respond to it would state a timely claim that the Federation has failed to fairly represent her, in violation of Sec. 111.70(3)(b)1, Stats. 9/ As with Anderson's allegations against the District, however, her allegations against the Federation may well seek to open issues which can not be timely challenged or which have been addressed in other forums. Her reference to the July 2, 1984, grievance may well assert not a presently pending matter, but a matter long since closed which Anderson would prefer to reopen. The Order entered above seeks to clarify whether Anderson is making a present claim that the Federation has breached its duty to fairly represent her by refusing to help her expunge contractually proscribed material from her file or whether she is using the requested expungement as a vehicle to reopen matters already addressed by, or pending before other tribunals.

9/ The Commission has construed a complaint against a labor organization for violations of Chapter 111 to fall under Sec. 111.70(3)(b)1, Stats. Local 950, International Union of Operating Engineers, Dec. No. 21050-C (WERC, 7/84).

The Order does so by requiring Anderson to clarify how the July 2, 1984, grievance remains pending or by alleging the occurrence of conduct falling within one year of the filing of her complaint which in and of itself would constitute a prohibited practice by the Federation.

Before closing, it is necessary to state a series of considerations relevant to this matter. Initially, it should be noted that the discussion above has assumed Anderson is alleging that the District has committed a violation of Sec. 111.70(3)(a)5, Stats., and that the Federation has committed a violation of Sec. 111.70(3)(b)1, Stats. The Order requires that she clarify if her complaint alleges any other violations, and if so, to specify the sections alleged to have been violated. Beyond this, it should be noted that the Findings of Fact entered above simply reiterate the allegations of the complaint, which for the purposes of deciding the present motion have been assumed to be true. The entry of those findings does not mean those allegations have been proven, or that different findings may not be entered in the future. Ultimately, the Order entered above can be viewed as requiring Anderson to demonstrate cause why the complaint should not be dismissed as untimely, 10/ or as failing to state any claim upon which relief can be granted. After Anderson has complied with the Order, the District and the Federation will be allowed to enter any necessary responsive pleadings.

The final consideration concerns the fact that much of the Order entered above concerns issues of timeliness. Because of this, it is appropriate to touch on the law governing such concerns. Much of Anderson's complaint concerns events ostensibly falling outside of the one year limitations period stated in Sec. 111.07(14), Stats. The Commission has adopted the principles of Bryan Mfg. Co., to address the significance of events falling outside of a statutory limitations period. 11/ In that case, the United States Supreme Court addressed two situations which pose the relevant considerations. The Court addressed those situations thus:

> . . . The first is one where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose (the statute of limitations) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. 12/

The Order follows this rule by requiring Anderson to specify conduct occurring within the one year limitations period which in itself can constitute a prohibited practice regarding those allegations which seem to turn on events falling outside the one year limitations period.

Commission standards regarding the timeliness of complaints challenging union conduct and union conduct in conjunction with an alleged employer violation of a

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10/ Cf. with Marathon County, Dec. No. 16346 (WERC, 5/78).

11/ See CESA No. 4, Dec. No. 13100-E (Yaffe, 12/77), aff'd Dec. No. 13100-G (WERC, 5/79), aff'd Dec. No. 79CV316 (CirCt Barron County, 3/81); See also School District of Clayton, Dec. No. 20477-B (McLaughlin, 10/83), aff'd by operation of law, Dec. No. 20477-C (WERC, 11/83).

12/ Local Lodge No. 1424 v. National Labor Relations Board (Bryan Mfg. Co.), 362 US 411 (1960), 45 LRRM 3212, at 3214-3215.

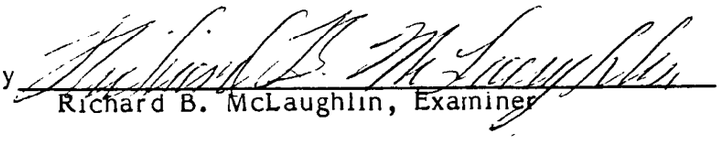
collective bargaining argreement are set forth in Local 950, International Union of Operating Engineers, Dec. No. 21050-C (WERC, 7/84). The Commission stated the relevant standards thus:

> . . . (A) complaint naming only the union as respondent and alleging only a (Sec. 111.70(3)(b)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 filing . . . The Harley-Davidson decision provides for tolling the statutory limitation against a claim of violation of contract only once contractual grievance procedures have been exhausted concerning the contract dispute involved . . . 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. 13/

Hopefully, the citation of these decisions will offer the parties some guidance in the pleading process which remains to be completed.

Dated at Madison, Wisconsin this 7th day of March, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

13/ Dec. No. 21050-C at 8-9, citations omitted. The Harley-Davidson Motor Company case is Dec. No. 7166 (WERC,6/65).