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-C

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". The District stated these motions thus:

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 Stats.

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, admini-stratively 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 initiating 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. On March 7, 1989, I issued Decision No. 25747-B, which dismissed certain allegations of Anderson's September 12, 1988, complaint, and ordered Anderson to make certain allegations of that complaint more definite and certain. Anderson filed an amended complaint with the Commission on March 30, 1989. In a letter to the parties dated April 10, 1989, I set forth the following procedure to complete the pleading process:

> I have spoken with each of you by phone regarding the procedures to complete the pleading process in the above noted matter. I write to advise you of the procedure I have concluded will best serve this end.

> The District and the Federation should file their answers to the amended complaint with the Commission on or before May 15, 1989. The answers should include any relevant motions. I will set a pre-hearing conference (see Sec. 227.44 (4)(a), Stats.), as soon as possible after May 15, 1989.
>
> As I have discussed with you, the answer date has been set after April 24, 1989, so that the impact, if any, of the proceeding before the Commission now set for that date can be brought into the pleading process in the above noted case. Hopefully, some clarity regarding what issues are before the Commission and what issues are before me can emerge.
>
> I have discussed the possibility of adopting this procedure with each of you, and it is my understanding that the procedure, if not ideal, is acceptable to you.
>
> If you have any concerns regarding this matter, please let me know.

The District filed its answer on May 15, 1989. In that answer, the District reasserted the motions contained in its original answer, and added a motion that "(a)ll claims which the Amended Complaint may state, with the exception of any claims based upon the Federation's alleged refusal to file for arbitration pursuant to Anderson's April 19, 1988 request, are barred by the statute of limitations. Sec. 111.07(14), Stats". In a letter filed with the Commission on May 17, 1989, the District stated:

> . . . the sole issue before Examiner Davis, Case 26 No. 38586 MP-1953 is whether the Federation breached the stipulation which the parties entered into in connection with the dismissal of Anderson's prohibited practice complaint in that case. This case deals with allegations of misconduct on the part of the District with regard to the maintenance of Anderson's personnel file and alleged effects upon the outcome of the Kessler arbitration.
>
> I therefore urge the Examiner to proceed toward the swift resolution of all issues in this case.

On May 18, 1989, the Federation filed a "MOTION TO ADJOURN CASE INDEFINITELY PENDING RESOLUTION OF W.E.R.C. CASE NO. 26 No. 38586 MP-1953 NOW PENDING BEFORE EXAMINER PETER DAVIS". That motion reads thus:

> . . . the respondent union . . . moves to adjourn indefinitely the case pending before you, until the final resolution of the matter now before Examiner Davis, to avoid unnecessary duplication, expense and waste of resources of all concerned.
>
> It is also my understanding based on our telephone conversation yesterday that this letter-motion is sufficient for purposes of meeting the May 15, 1989 filing deadline set forth in your April 10, 1989 letter . . .

I have required no further answer of the Federation. Anderson filed a letter with the Commission on May 22, 1989, which reads thus:

> Case 29, No. 41085, MP-2138 deals with the misconduct of the Union in refusing to proceed to arbitration my grievance dated July 2, 1984 and the Employer's violations of the Bargaining Agreement in regard to my personnel file. It is not the same as the breach of agreement hearing before Examiner Peter G. Davis, Case 26, No. 38586, MP 1953.
>
> I am enclosing a copy of my PETITION FOR RULE, now before the Commission. I believe, to insure my due process rights, the Commission must appoint counsel.
>
> Due process requires that the government utilize a reasonably reliable method to ascertain truth before it makes decisions based on adjudicative facts. Layton School of Art and Design v. Wisconsin Employment Relations Commission (1978) 262 N.W.2d 218, 82 Wis.2d 324.
>
> Mr. St. Peter's ANSWER dated May 12, 1989 is conflicting testimony. A hearing needs to be scheduled to

ascertain the truth.

Mr. Brostoff's ANSWER is based upon "unnecessary duplication, expense and waste of resources of all concerned." My response to that is, if the Union had fairly and adequately represented me when I was suspended and subsequently terminated, and before Arbitrator Kessler, there would not be the "unnecessary expense." Mr. Brostoff forgets what this action has cost me not to mention the emotional distress. Mr. Brostoff forgets that I do not have a job.

I will be looking forward to hearing from you concerning my motions.

In Dec. No. 26033, issued on May 30, 1989, the Commission denied Anderson's petition for administrative rule and request for the appointment of counsel. On July 10, 1989, a pre-hearing conference was conducted to clarify the status of the pleadings and to inventory the pending pre-hearing motions. That conference was transcribed and the transcript was submitted to the Commission on July 14, 1989. At the pre-hearing conference, the District reasserted the motions entered by its answers to the complaint and the amended complaint. The District also asserted, with the support of the Federation, that the amended complaint did not comply with the March 7, 1989, Order. The Federation asserted, at the pre-hearing conference, that any allegations in the complaint and amended complaint against the Federation for its representation of Anderson in the arbitration hearing before Arbitrator Kessler are barred by the doctrines of res judicata and collateral estoppel, and are duplicative of the allegations in Case 26, No. 38585, MP-1953. In addition, the Federation asserted that neither the complaint nor the amended complaint stated any claim against the Federation upon which relief can be granted. Anderson noted, at the pre-hearing conference, that the material she alleges the District has wrongfully included in her personnel file should include certain documentation in addition to that noted in her amended complaint. The parties agreed at the close of the July 10, 1989, pre-hearing conference that further argument was unnecessary. The Federation filed written argument with the Commission on July 14, 1989, noting their understanding "that you will afford interested parties an opportunity to respond if they deem it appropriate". In a letter to the parties dated July 17, 1989, I offered each party the opportunity to file written argument in the matter by August 11, 1989, and also noted a correction to the transcript. The parties filed briefs in the matter by August 9, 1989.

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, Wisconsin 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, Wisconsin 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 fifteen (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 Commission deems just and proper under the circumstances.

2. Exhibit 1, which is referred to in Paragraph 4 of Anderson's September 12, 1988, complaint is a letter from Anderson to Mr. Rodney Pasch, dated August 26, 1988, which reads 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. Peters'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

(d)Material derogatory to a teacher's conduct, service, character, or personality, other than material supplied in confidence as a part of the teacher's credentials, shall not be placed in the teacher's personnel

file unless the teacher has had an opportunity to review such material. <u>The teacher's signature shall be affixed and date of such signature</u> does in no way indicate agreement with contents. The teacher will also have the <u>right to submit a written answer</u> to such material and the answer will be reviewed by the Manager-Personnel and attached to the file copy.

Article V - Teacher Supervision

Section I - Teacher Observation

(b)This section reads in part:

Such reports or evaluations shall not be submitted to the District Instructional Services Department, placed in the District's teachers' file, or otherwise acted upon unless an opportunity for a conference has been provided <u>and the teacher has signed the evaluation or report</u>.

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.

I believe the items that do not comply with the above provisions of the bargaining-agreement have injured me in my applications for employment with Mid-State Technical College and Northern Michigan Tech.

Please inform me when the items have been removed from my file and I will again review my file.

Exhibit 2, which is referred to in Paragraph 8 of Anderson's September 12, 1988, complaint, consists of a two page grievance form, dated July 2, 1984, and a single page headed "AGREEMENT" which bears the signatures of Anderson, a District representative and a Federation representative. The "AGREEMENT" reads thus:

Sandi Anderson and Moraine Park Federation of Teachers hereby agree to postpone her grievance regarding an evaluation by Jean Fleming, Ms. Anderson's immediate supervisor, that was dated June 15, 1984, until resolution of the grievance filed on February 3, 1984, that is currently to be processed by WERC and/or an arbitrator.

This understanding between the parties is made on a one-time only basis, and is without precedential value and/or prejudice to either party's position on any future similar matters.

Exhibit 5, which is referred to in Paragraph 15 of Anderson's September 12, 1988, complaint, is a letter from Anderson to the "Chairperson, Grievance Committee Moraine Park Federation of Teachers" and dated April 19, 1988. That letter is headed "In Re: Grievance filed July 2, 1984 by Sandra Anderson", and reads thus:

I am requesting that my July 2, 1984 Grievance be submitted to arbitration. The Agreement was to postpone the July 2, 1984 grievance until the resolution of the

grievance filed by myself on February 3, 1984. Since the Federation and District did not proceed to arbitration as ordered by the Wisconsin Employment Relations Commission concerning the February 3, 1984 Grievance, I am requesting that my July 2, 1984 Grievance be submitted to arbitration. Resolution of this grievance will answer the question if my rights to fair and reasonable treatment when issued absentee warnings were violated under the provisions of the collective bargaining agreement.

Arbitrator Kessler could not make a just decision in my dismissal arbitration without resolution of my July 2, 1984 Grievance. Kessler used the written absentee warning in my 1984 evaluation to uphold my dismissal. The District did not initiate the policy on use of income protection days until after I was discharged and after the Support Staff Local won a grievance on behalf of those employees who were reprimanded by their supervisors for absence.

It is my understanding the July 1, 1983 to June 30, 1984 collective bargaining agreement includes language that enables me to continue on the payroll when I file a grievance. (Article IV-Grievance Procedure, Section 3 (a) - General Procedures, "If such Grievance arises, there shall be no stoppage or suspension of work because of such Grievance; but such Grievance shall be submitted to the grievance and arbitration procedures hereinafter set forth.")

Also, State law mandates that compensation continue only when charges are filed. Under that procedure, I would not be paid during the grievance process, but would receive back pay if I won the grievance.

Since it is important that Grievances be processed as rapidly as possible, and since the Federation and District did not proceed to arbitration as ordered by the Wisconsin Employment Relations Commission on my February 3, 1984 Grievance, I am requesting the Federation and District to no longer postpone my July 2, 1984 Grievance. (Article IV - Grievance Procedures, "The time limits specified may, however, be extended by mutual agreement." I am enclosing a copy of the Agreement to postpone my July 2, 1984 Grievance that was signed by Jim Dillon, Federation Representative; Rodney Pasch, District Representative; and myself, the grievant.

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

I am requesting the Grievance Committee to closely review my request and conclude that my July 2, 1984 Grievance is meritorious and that submitting it to arbitration is in the best interests of the school system. I expect the Committee to make that decision

because the arbitration can be won because it is the same issue that was won by the Support Staff Local when the District was ordered to remove all references to oral absenteeism warnings and all written absenteeism warnings from the employee files of those reprimanded. The "unknown" policy on use of income protection days was not "known" until after my discharge. In addition, my Constitutional Rights were violated when I was not insured due process when I was suspended for twenty (20) days without pay. Arbitrator Kessler used the suspension to uphold my discharge. I did request the Federation to proceed to arbitration concerning my suspension.

To not to proceed to arbitration on my July 2, 1984 Grievance, could possibly indicate retaliation against me for my use of the grievance procedure to resolve differences arising from interpretation and/or administration of the Agreement.

I will be waiting to hear from you concerning my request.

3. Anderson filed an Amended Complaint with the Commission on March 30, 1989. The body of that Amended Complaint reads as follows:

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.

Paragraph 7 reads as follows:

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.

Section 111.70(3)(a)(5) violated. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, . . .

Agreement violated at:

Article III-Rights Clause

Section 3 - Individual Teacher's Rights
(a) (b) (c) (d) (e)

The District has not supplied me with the contents of my personnel file nor have I had the opportunity to review the contents.

The district kept two separate personnel files on me. I was able to view the contents of the personnel file that was kept at the District Office, however, I was not able to view the contents of the personnel file that Jean Fleming kept in her office.

The items in Fleming's personal personnel file on Sandra Anderson do not comply with the bargaining agreement. To be specific, the teacher's signature and date must be affixed to the document, the teacher has had a right to submit a written answer to the material, and the answer will be reviewed by the Manager-Personnel and attached to the file copy.

At the time of Anderson's discharge, the following District Arbitration Exhibits were not in Anderson's personnel file at the District Office:

1. District Exhibit 5

Correspondence dated September 12, 1983.
To: Cosmetology Staff
From: Jean Fleming

Anderson's signature and date are not affixed nor was she given the opportunity to submit a written answer. Anderson was not informed the September 12, 1983 correspondence was a form of discipline. This document was not in Anderson's personnel file at the time of her discharge.

2. District Exhibit 6 - Dated February 5, 1985

Memo To: B. Otis, M. Lau, S. Anderson, M. Eiring, M. Jazdzewski, D. Weber, R. Speich, E. Loest, M. Neevel, J. Mirkes

Anderson's signature and date are not affixed nor was she given the opportunity to submit a written answer. Anderson was not informed the memo of February 5, 1985 was a form of discipline. This document was not in Anderson's personnel file at the time of her discharge.

3. District Exhibit 7 - Dated February 5, 1985
Memo To: Sandi Anderson
From: Jean Fleming

Anderson's signature and date are not affixed. Anderson did submit a written answer. The answer is dated February 11, 1985. The answer was not attached to the February 5, 1985 document. This document was not in Anderson's personnel file at the time of her discharge.

4. District Exhibit 10 - Dated September 19, 1985
To: Sandi Anderson
From: Jean Fleming

Anderson's signature and date are not affixed nor was she given the opportunity to submit a written answer. Anderson was not informed the correspondence of September 19, 1985 was a form of discipline. This document was not in Anderson's personnel file at the time of her discharge.

5. District Exhibit 11 - Dated May 31, 1985
Correspondence dated May 31, 1985
To: Sandra Anderson
From: Jean Fleming

Anderson's signature and date are not affixed. Anderson was not informed she had a right to submit a written answer and it would be attached to the file copy. This document was placed in the personnel file at the District Office.

6. District Exhibit 12
Correspondence dated June 6, 1985
To: Sandra Anderson
From: Jean Fleming

Anderson's signature and date are not affixed. Anderson was not informed she had a right to submit a written answer and it would be attached to the file copy. Please note cc: File.

7. District Exhibit 13
Correspondence Dated June 21, 1983
To: Sandi Anderson
From: Jean Fleming

Anderson's signature and date are not affixed. Anderson did precede this correspondence with a written memo dated June 17, 1983. The memo was not attached to the file copy. This document was not in Anderson's personnel file at the time of her discharge.

8. District Exhibit 20 - Dated July 12, 1985
Correspondence to Sandra Anderson from Rodney G. Pasch

Anderson's signature and date are not affixed. Anderson did file a grievance dated August 26, 1985 concerning the alleged absence and the formal reprimand. The grievance was not attached to the file copy of the July 12, 1985 correspondence, nor was it entered in the record before Arbitrator Kessler.

The grievance was never resolved as the Federation failed to represent Anderson in regard to the alleged absence, formal reprimand and grievance.

The grievance was filed prior to the Notice of Contemplated Suspension of September 6, 1985.

The Federation failed to file for arbitration when Anderson was suspended for twenty days without pay.

Article IV - Grievance Procedure, Section 3 - General Procedures, (a) was violated.

If such Grievance arises, there shall, be no stoppage or suspension of work because of such Grievance; but such Grievance shall be submitted to the grievance and arbitration procedures hereinafter set forth.

Anderson was suspended without pay prior to Step 4 of the Grievance Procedure, which is the meeting with the District Board. It was never determined if the District violated the bargaining agreement by suspending

Anderson without pay prior to the resolution of the August 26, 1985 Grievance. The alleged absence of June 28, 1985 contributed to Anderson's suspension and subsequent discharge. Please note the dates of the Grievance (August 26, 1985) and the Notice of Contemplated Suspension (September 6, 1985).

I believe both the District and the Federation retaliated against me because I filed the August 26, 1985 Grievance.

9. District Exhibit 21 - Dated September 6, 1985
Notice of Contemplated Suspension

Anderson's signature and date are not affixed. Anderson was not informed she had a right to submit a written answer and it would be attached to the file copy. Anderson did present a written statement to the District Board prepared by Dorothy McCrory concerning the alleged profanity. McCrory's statement was not attached to the file copy of District Exhibit 21.

10. District Exhibit 23
Correspondence dated August 30, 1985
To: Sandra Anderson
From: Rodney G. Pasch

Anderson's signature and date are not affixed. Anderson was not informed the correspondence was a form of discipline. Anderson was not informed she had a right to submit a written answer and it would be attached to the file copy.

Article X - Employee Benefits,
Section 2 - Income Protection for Absence, (a) was also violated.

Rodney Pasch stated:

"In an effort to assist you in eliminating your excessive absenteeism problem, . . ."

All of Anderson's absences were approved absences provided for by the bargaining agreement. Anderson was absent from work for twelve weeks due to a broken ankle which required surgery (plate, four pins and a screw). Anderson provided a doctor's statement as required by the bargaining agreement.

District Exhibit 23 was not in Anderson's personnel file at the time of her discharge.

11. District Exhibit 24
Correspondence dated September 9, 1985
To: Sandra Anderson
From: Rodney G. Pasch

Anderson's signature and date are not affixed. Anderson was not informed the correspondence was a form of discipline. Anderson was not informed she had a right to submit a written answer and it would be attached to the file copy.

District Exhibit 24 was not in Anderson's personnel file at the time of her discharge.

I was not able to review the above stated documents in my personnel file prior to my discharge nor in August of 1988 because they were kept in a private file in Fleming's office.

Attorney John St. Peter entered in the record before Arbitrator Kessler documents that were considered discipline that were not in my personnel file at the District Office. I was not given the opportunity to review the personnel file that was kept in Fleming's office at the time of my discharge nor in August of 1988.

I believe it is a prohibited practice to have two separate personnel files, especially if the employee does not have access to the "private" file. Items from the "private" file were entered in the record before Arbitrator Kessler.

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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.

Paragraph 8 reads as follows:

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.

The Federation failed to file for arbitration upon Anderson's request of April 19, 1988. See Exhibit 5 of Anderson's original complaint.

The document that constitutes that the grievance was still pending is an AGREEMENT signed by Jim Dillon, Federation Representative, and Rodney Pasch, District Representative, on September 11, 1984 and by Sandi Anderson on September 26, 1984. See Exhibit 2 of Anderson's original complaint.

The agreement was to postpone Anderson's July 2, 1984 Grievance until the resolution of the February 3, 1984 Grievance.

The Federation refused to arbitrate the February 3, 1984 Grievance upon the Order of the Wisconsin Employment Relations Commission on November 26, 1985. See Case 21, No. 33324, MP-1599, Decision No. 22009-B.

Therefore, on April 19, 1988, Anderson requested the Federation to file for arbitration the July 2, 1984 Grievance.

The Federation's refusal to file for arbitration the July 2, 1984 Grievance constitutes a prohibited practice under 111.70 (3) (b), 1 and 4. Stats.

The earlier event that sheds light on the true character of matters is the Federation's refusal to file for arbitration when Anderson was suspended for twenty days without pay.

The Federation's refusal to file for arbitration upon Anderson's request of April 19, 1988 exhibits continuing retaliation against her and a prohibited practice.

If the July 2, 1984 Grievance had been arbitrated and Anderson won, the Evaluation Report would then be removed from Anderson's personnel file.

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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 collective 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.

The paragraphs read as follows:

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.

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.

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.

It is a prohibited practice to release information from a personnel file when the information contained within does not comply with the bargaining agreement.

Section 11.70 (3) (a) 5. Violated.

Bargaining Agreement violated at:

Article III - Rights Clause

Section 3 - Individual Teacher's Rights (a) (b) (c) (d) (e).

The contents of both personnel files was released to Mid-State Technical College. The information was released in April of 1988.

The documents which do not comply with the bargaining agrement are listed in section (a) of this amendment to my complaint.

It is a prohibited practice on the part of the Federation to refuse to file for arbitration my July 2, 1984 Grievance; which if I was successful, the Evaluation Report by Fleming dated May 10, 1984 and the Addendum dated June 13, 1984 would have been removed from my personnel file. 11.70 (3) (b) 1 and 4 Stats. violated.

Upon the removal of the Evaluation Report, I believe it would be under the jurisdiction of the Commission to inform Judge Kessler of the removal indicating that the Evaluation Report was entered in the record at Anderson's Discharge Arbitration Hearing as District Exhibit 8.

Judge Kessler used the Evaluation Report, to uphold the termination of Anderson's employment.

Without the Evaluation Report in the record, I believe Judge Kessler would have determined that the District did not have "just cause" to terminate my employment.

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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.

Paragraphs 12 through 15 read as follows:

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.

I believe the July 2, 1984 Grievance is not pending due to the Federation's refusal to file for arbitration.

The bargaining agreement at Article IV - Grievance Procedure, Section 4, (e) reads:

If the Grievance Committee determines that the Grievance is meritorious and that submitting it to arbitration is in the best interests of the school system, it shall notify the Board President in writing of such decision no later than fifteen (15) days after receipt of the request for arbitration by the Aggrieved Person.

Due to the Federation's refusal to file for arbitration upon my April 19, 1988 request, the time limit has expired. The refusal is a violation of 111.70 (3) (b), 1 and 4 Stats.

The earlier events that shed light on the true character of matters is the Federation's refusal to file for arbitration the following grievances:

1. August 26, 1985 Grievance.
2. Anderson's suspension of twenty (20) days without pay.
3. February 3, 1984 Grievance.

See Clayton v. Automobile Workers 451 U.S. 679 (1981). Held: Where the internal union appeals procedure could not reactivate the employee's grievance or grant him the complete relief he sought under S 301 (a), he should not have been required to exhaust such procedure prior to bringing suit against the Union and the employer under S 301 (a).

I believe the Commission has jurisdiction over the April 1988 events and the earlier events shed the true character of matters.

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.

Paragraphs 20 and 21 read as follows:

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.

The "exhibits" that Anderson is referring to in these paragraphs are the exhibits referenced to in this amendment to my complaint in section (a).

The Federation's refusal to file for arbitration upon my April 19, 1988 request to remove the Evaluation Report by Fleming dated May 10, 1984 and the Addendum dated June 13, 1984 is a prohibited practice under 111.70 (3), (b), 1 and 4 Stats.

Upon the removal of the Evaluation Report, I believe it would be under the jurisdiction of the Commission to inform Judge Kessler of the removal indicating that the Evaluation Report was entered in the record at Anderson's Discharge Arbitration Hearing as District Exhibit 8.

Upon the removal of the "exhibits" that did not comply with the bargaining agreement, I believe Judge Kessler would have determined that the District did not have "just cause" to terminate my employment.

The Union did not object to the "exhibits" being entered into the record before Arbitrator Kessler. The Union did not enter in the record the pending July 2, 1984 Grievance. At the time of the arbitration hearing, the grievance was still pending.

I believe I was not fairly nor adequately represented by the Union before Arbitrator Kessler.

It is not as if Anderson were merely complaining that the result reached at her hearing was erroneous. The interest of finality " . . . has sufficient force to surmount occasional instances of mistake" Hines v. Anchor Motor Freight Co., 424 U.S. 554, 571 (1975).

"But it is quite another matter to suggest erroneous arbitration decisions must stand even though the employee's representation . . . has been dishonest, in bad faith, or discriminatory; for in that event, error and injustice of the grossest sort would result." Hines v. Anchor Motor Freight, supra.

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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.

Paragraphs 22 and 23 read as follows:

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.

It is a prohibited practice by the District to refuse to remove the documents referenced to in Section (a) of this amendment to my complaint. I requested that the documents be removed through my correspondence dated August 26, 1988. See Exhibit 1 in my original complaint. Section 111.70 (3) (a) (5) violated.

It is a prohibited practice by the Federation to refuse to file for arbitration my July 2, 1984 Grievance upon my request of April 19, 1988. See Exhibit 5 of my original complaint. Section 111.70 (3) (b), 1 and 4 Stats. violated.

The earlier events that shed light on the true character of matters is at the time of Anderson's twenty day suspension without pay, the following grievances were pending:

1. August 26, 1985 Grievance
2. February 3, 1984 Grievance
3. July 2, 1984 Grievance

The Bargaining Agreement at Article IV - Grievance Procedure, Section 3, (a) reads:

If such Grievance arises, there shall be no stoppage or suspension of work because of such Grievance; but such Grievance shall be submitted to the grievance and arbitration procedures hereinafter set forth.

The Federation refused to file for arbitration upon Anderson's request when she was suspended for twenty days without pay.

Please note the dates the Grievances were filed and that the Notice of Contemplated Suspension was issued after the August 26, 1 1985 Grievance. The Notice of Contemplated Suspension was issued on September 6, 1985.

District Court had jurisdiction of Union member's claim that Union violated its duty of fair representation in conspiring with employer and refusing to process his grievance. Plant v. Local Union 199, Laborer's Intern. Union of North America, D.C. Del. 1971, 324 F. Supp. 1021.

Where libellant union member requested union, his authorized bargaining agent, to represent him, in arbitration proceedings involving his discharge but union refused to press claim, court was proper forum to hear the claim. Simmons v. States Marine Lines, Inc., D.C. Pa. 1967, 267 F. Supp. 384.

The conspiracy of the District and Union in regard to the documents in "both" personnel files and the documents that were entered in the record before Arbitrator Kessler, resulted in Anderson's rights being violated when she was terminated. Without the documents that violated the bargaining agreement, Anderson believes Kessler would not have found "just cause" to terminate her.

Kessler used the Evaluation Report (July 2, 1984 Grievance was still pending) to uphold the discharge of Anderson.

To quote the local newspaper, the Fond du Lac Reporter, the following statements appeared on November 22, 1985:

The reason she was late for work was "because she was under job stress." Anderson, in statements to the board during the open conference, said she felt the dismissal was recommended because of her participation in several grievances against the MPTI District. The grievances, she noted, related to mandatory extended contracts and job performance evaluation.

The recommended dismissal according to Shanahan, was not the result of Anderson's teaching competence but rather her violation of terms of the collective bargaining agreement.

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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, States., she alleges the Federation to have violated.

Paragraph 1 reads as follows:

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.

Anderson believes the District violated Sec. 111.70 (3) (a) 5, Stats.

Anderson believes the Federation violated Sec. 111.70 (3) (b) 1.

In addition, Anderson believes Sec. 111.70 (3) (b) 2 was violated.

Anderson believes the Federation Representatives (Marjorie Lau, President and Tom Burns, Grievance Representative) coerced the District into suspending and then terminating Anderson because they did not want to press her grievances.

Anderson was suspended for one absence and two alleged tardinesses of not more than twenty minutes.

The Federation refused to file for arbitration upon Anderson's request when she was suspended.

Anderson was tardy on November 8, 1985 (25 minutes) and she was terminated. Anderson was tardy due to stress caused by the conspiracy.

In addition, Anderson believes the Federation violated Sec. 111.70 (3) (b) 4.

The Federation's refusal to arbitrate my grievances an the refusal to file for arbitration when I was suspended constitutes a prohibited practice under this section.

In addition, Anderson believes the Federation violated Sec. 111.70 (3) (b) 5 (c).

Anderson believes the Federation influenced the outcome of the arbitration hearing before Kessler. The Federation Attorney did not object to the District Exhibits that did not comply with the bargaining agreement. The Federation Attorney did not enter in the record the July 2, 1984 Grievance nor the August 26, 1985 Grievance. Anderson was not fairly nor adequately represented before Arbitrator Kessler.

4. The specific acts Anderson alleges constitute prohibited practices by the District are distilled in Anderson's August 26, 1988, letter to Pasch. Those acts involve the District's creation, maintenance and use of correspondence and documents generated through an evaluation/discipline process which culminated in a January 16, 1987, arbitration award sustaining Anderson's discharge. None of those acts, which can be considered in and of themselves to constitute, as a substantive matter, a prohibited practice, occurred within the one year period preceding Anderson's filing of the September 12, 1988, complaint. The specific acts Anderson alleges constitute prohibited practices by the Federation are distilled in Anderson's April 19, 1988, letter to the Federation's Grievance Chairperson. Those acts involve a course of Federation representation of Anderson during the evaluation/discipline process which culminated in the January 16, 1987, arbitration award sustaining Anderson's discharge. None of those acts, which can be considered in and of themselves to constitute, as a substantive matter, a prohibited practice, occurred within the one year period preceding Anderson's filing of the September 12, 1988, complaint.

CONCLUSIONS OF LAW

1. While employed by the District, Sandra Anderson was a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

2. The District is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. The Federation is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

4. None of the allegations contained in Anderson's September 12, 1988, complaint or her March 30, 1989, amended complaint are timely within the

meaning of Secs. 111.70(4)(a) and 111.07(14), Stats.

ORDER 1/

The complaint filed by Anderson with the Commission on September 12, 1988, and the amended complaint filed by Anderson with the Commission on March 30, 1989, are dismissed.

Dated at Madison, Wisconsin this 11th day of September, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By ______________________________
Richard B. McLaughlin, 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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The procedural background to this matter is set forth in detail above, but an inventory of the pending motions will be set forth here. By the close of the pre-hearing conference, Anderson had alleged a District violation of Sec. 111.70(3)(a)5, Stats., and a Federation violation of Secs. 111.70(3)(b)1, 4, 5 and (3)(c), Stats. By the close of the pre-hearing conference, the District had moved to dismiss the complaint and the amended complaint because: both documents pose allegations which are duplicative of the allegations and motions posed by another complaint pending before the Commission; neither document states any claim against the District arising under Sec. 111.70(3), Stats.; the conclusion portion of the complaint includes remedies not within the Commission's jurisdiction; neither the complaint nor the amended complaint states any claim against the District which is timely under Sec. 111.07(14), Stats.; and the amended complaint has failed to comply with the March 7, 1989, Order. By the close of the pre-hearing conference, the Federation had moved to dismiss the complaint and the amended complaint because: neither document states any claim against the Federation arising under Sec. 111.70(3), Stats.; neither the complaint nor the amended complaint state any claim against the Federation which is timely under Sec. 111.07(14), Stats.; and the complaint and the amended complaint are barred by the doctrines of collateral estoppel and res judicata. In the alternative, the Federation moved that any hearing on the complaint and amended complaint at issue here be postponed indefinitely pending a final decision on the complaint pending before the Commission. Anderson's arguments essentially state a motion to schedule evidentiary hearing on the complaint and amended complaint.

THE PARTIES' POSITIONS

In the letter brief which prompted the briefing schedule on the remaining pre-hearing motions, the Federation asserts that "more is required to establish the applicability" of "the rule of the Bryan 2/ case . . . than its mere incantation . . ." More specifically, the Federation states the "more" that is required thus:

> (W)ith respect to each and every discrete Bryan claim, it is essential to, at a minimum, (1) identify the object on which light assertedly needs to be thrown, noting in particular whether or not that object involves a question of motive; (2) require of the Complainant a particularized showing of (a) what light could conceivably be thrown on the matter by the specified background evidence sought, and (b) how such evidence could cast the asserted light; and (3) require, as a condition precedent to Ms. Anderson being allowed to go forward on her "background" evidence --- i.e., as a condition precedent to any ruling that her allegations survive any statute of limitations defense --- a threshold determination by the Examiner that, as a matter of law, the matters alleged by the Complainant in (1) and (2), supra, are capable of throwing the light claimed onto the matter which falls within the twelve month period, and which is complained of.

This analysis, according to the Federation, must be applied to properly apply the rule of the Bryan case.

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

In a letter filed with the Commission on July 24, 1989, the District stated that it concurred with the Federation's analysis of the Bryan case.

In a letter brief filed with the Commission on August 9, 1989, Anderson argued that: "To insure my right of due process, the Commission needs to ascertain truth and the background evidence is necessary to make the record complete". She concludes that "the Bryan case applies in my case", and that a hearing must be scheduled for the taking of evidence on her complaint.

DISCUSSION

The motions inventoried above can be grouped into four levels of issues. The first, and most fundamental, is whether the complaint and the amended complaint state claims which are timely under the provisions of Sec. 111.07(14), Stats. The second level is whether the complaint and amended complaint state a claim governed by Sec. 111.70(3)(a), (b) or (c), Stats. This level states less fundamental issues because it assumes the complaint poses arguably timely claims. As argued by the District and the Federation, this level of motions asserts that the complaint and amended complaint state allegations so imprecise that no plausible claim under Sec. 111.70(3)(a), (b) or (c), Stats., can be discerned; that the complaint and amended complaint, however read, fail to state any claim cognizable under Sec. 111.70(3)(a), (b) or (c), Stats.; and that the complaint and amended complaint state no claim that falls within the Commission's remedial authority. The third level of motions is whether the complaint and amended complaint should be considered barred by prior litigation, or should be held in abeyance pending the outcome of other litigation. This level is less fundamental than the prior two levels for it assumes both that arguably timely contentions have been stated and that those contentions are governed by Sec. 111.70(3)(a), (b) or (c), Stats. The final level of motions is posed by the provisions of Sec. 227.44(4)(a), Stats., and focuses on what, if any, issues are posed for an evidentiary hearing. This final level assumes that arguably timely issues are stated in the complaint and amended complaint which are governed by Sec. 111.70(3)(a), (b) or (c), Stats., are not barred by prior litigation, and should not be held in abeyance pending the outcome of other litigation.

Discussion of the pending motions starts, then, with the issue of timeliness. The timeliness of complaints of prohibited practice under the Municipal Employment Relations Act is governed by Secs. 111.70(4)(a)and Sec. 111.07(14), Stats., which, read together, provide:

> 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.

Because the complaint and the amended complaint refer to events outside of the one year limitations period, the timeliness of the complaint and the amended complaint is governed by the principles of Bryan Mfg. Co.. 3/ In that case, the United States Supreme Court posited two situations which pose the relevant considerations here:

> . . . 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 Sec. 10(b) 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

3/ See footnote 11/ and accompanying text of Moraine Park Technical College, Dec. No. 25747-B (McLaughlin, 3/89).

> 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. 4/

The Bryan analysis, read in light of the provisions of Secs. 111.70(4)(a) and 111.07(14), Stats., requires two determinations. The first is to isolate the "specific act alleged" to constitute the prohibited practice. The second is to determine whether that act "in and of (itself) may constitute, as a substantive matter" a prohibited practice. Because granting the motion to dismiss would deny an evidentiary hearing, the second determination can be made against the complainant only if under no interpretation of the facts alleged could the specific act complained of be found to constitute in and of itself a prohibited practice. 5/

The essence of Anderson's allegations against the District are stated in her August 26, 1988, letter. The specific acts complained of in that letter concern the District's failure to supply her with a copy of information the District supplied a potential employer, and the District's placement of certain material in her personnel file. The first paragraph of the letter requests the material under the "State Open Records Law". That allegation has been dismissed, but aspects of that allegation will be further discussed below. The focus of the complaint and the amended complaint is the expungement of certain material from Anderson's personnel file, as detailed in the balance of the August 26, 1988, letter.

Anderson seeks to expunge from her personnel file correspondence and other documentation from the process which culminated in her discharge from District employment. Because the material she seeks to expunge was not apparent in her original complaint an Order was entered requiring her to clarify the complaint. In the amended complaint filed in response to that Order, Anderson specified eleven documents she wished expunged from her file. In the pre-hearing conference, she specified four more. The earliest of those documents is dated September 12, 1983. None of the documents is dated any more currently than January 16, 1987. The complaint and amended complaint allege that the presence of each document in Anderson's personnel file violates the collective bargaining agreement.

It is apparent that none of the documents, nor the events underlying those documents, fall within the one year limitations period. Anderson seeks to address this difficulty by noting that the District supplied this documentation to a potential employer in April of 1988, and refused her request of August 26, 1988, to expunge the material from her personnel file. Under her view, the September 12, 1988, complaint was timely filed given the District's actions of April and August, 1988.

Her contention can not withstand scrutiny under the Bryan standards. Anderson does not offer, nor can I perceive, how the District's submission of the above noted material to a potential employer can, in and of itself, constitute the prohibited practice alleged. This act, as the District's refusal to expunge the material from her file, can become a prohibited practice only by accepting Anderson's assertion that the material, as created and as used in the period of time culminating in her discharge, violated the then-existing collective bargaining agreement. Under this theory, the District's acts would be the most recent recurrence of a continuing wrong. This theory ignores, however, that the wrong has yet to be established, and can not be established in this case without an independent review of the earlier, pre-limitations period events. Her contention, then, does not constitute an "evidentiary" use

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4/ Ibid., at 3214-3215.

5/ See Footnote 3/ and accompanying text of Moraine Park Technical College, Dec. No. 25747-B (McLaughlin, 3/89).

of the pre-limitations period conduct, within the meaning of Bryan. Rather, the contention is used "to cloak with illegality that which was otherwise lawful". In sum, Anderson's complaint and amended complaint, as distilled in her August 26, 1988, letter, seek not to challenge the validity of the District's actions of April and August, 1988, but to use those actions as a vehicle to reexamine the events preceding the January 16, 1987, arbitration award which confirmed her discharge. Thus, her allegations against the District can not be considered timely under the provisions of Secs. 111.70(4)(a) and 111.07(14), Stats.

The essence of Anderson's allegations against the Federation are distilled in her April 19, 1988, letter. That letter seeks to submit a July 2, 1984, grievance to arbitration. Here too, Anderson seeks to examine events falling outside of the one year limitations period. She seeks to overcome this problem by asserting that the July 2, 1984, grievance remains pending because of a September, 1984, agreement between Anderson, the Federation and the District to postpone action on the July 2, 1984, grievance until the Commission or an Arbitrator finished the processing of a February 3, 1984, grievance. Because that matter has yet to be processed, Anderson asserts the July 2, 1984, grievance is still pending. That grievance challenges an evaluation which, according to Anderson, was crucial to the January 16, 1987, arbitration award which sustained her discharge. The complaint and amended complaint embellish this core of facts and call into question the Federation's handling of the arbitration hearing on her discharge, but her allegations against the Federation all focus on the quality of the representation it afforded her, culminating with the January 16, 1987, arbitration award. The Federation's refusal to respond to her April 19, 1988, letter brings this course of conduct into the one year limitations period, according to Anderson.

Anderson's contentions have aspects which implicate Bryan and aspects which do not. None of the contentions, however, persuasively establish any timely claim against the Federation. As preface to addressing the non-Bryan aspects of her contentions, it must be noted that her April 19, 1988, letter seeks to reopen the representation process which culminated in a January 16, 1987, arbitration sustaining her discharge. The Commission, in Local 950, International Union of Operating Engineers, stated the standard governing the one year limitations period in complaints challenging union conduct and union conduct in conjunction with an alleged employer violation of a collective bargaining agreement. 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. 6/

Thus, the one year limitations period for challenging the Federation's conduct in processing the grievances culminating in the January 16, 1987, award commenced in January of 1987. Anderson's complaint was not filed until September of 1988, and thus can not be considered timely. Nor can Anderson's assertion that the absence of an expiration date on the September, 1984, agreement postponing the processing of the July 2, 1984, grievance make the September, 12, 1988, complaint timely. Anderson has acknowledged that the processing of those grievances is an essential part of the alleged impropriety

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6/ Dec. No. 21050-C (WERC, 7/84) at 8-9, citations omitted. The Harley-Davidson Motor Company case is Dec. No. 7166 (WERC, 6/65).

underlying the January 16, 1987, award. Against this background, it is impossible to set the limitations period for challenging the grievances at a date subsequent to the arbitration award. If the absence of a clear expiration date for the September, 1984, agreement was taken to mean the July 2, 1984, grievance remained pending forever, the timelines of Secs. 111.70(4)(a) and 111.07(14), Stats., would be rendered meaningless.

Anderson attempts to bring her contentions within the one-year limitations period under Bryan by asserting that the April 19, 1988, letter and the Federation's refusal to respond is the most recent manifestation of a continuing pattern of improper representation. As preface to this contention, it must be noted that the Federation is under no legal to duty to arbitrate every grievance request it receives. 7/ Thus, the issue posed here is whether the April 19, 1988, letter and the Federation's refusal to respond can, under any view of the facts, be considered in and of themselves a prohibited practice.

The acts asserted to be timely challenged by Anderson will not withstand scrutiny under the Bryan standards. As of April 19, 1988, Anderson was not a unit employe. Her April 19, 1988, request to arbitrate the July 2, 1984, grievance was, then, a request by a non-unit employe to reopen the process by which she had been discharged from the unit. As noted above, the general issue of whether or not her discharge was proper can not be considered presented here, for it is an untimely claim. Beyond this, however, it is apparent that her April 19, 1988, request for the arbitration of the July 2, 1984, grievance can be considered a prohibited practice only by accepting her contention that she was denied fair representation in the period from September of 1983 through January of 1987. The April 19, 1988, request for arbitration becomes meaningful only with reliance events well outside of the one year limitations period. Here too, her use of the earlier events is not "evidentiary" within the meaning of Bryan, but seeks to "cloak with illegality that which was otherwise lawful".

One final point remains to be addressed. It was not apparent from Anderson's complaint whether she sought to independently challenge any action by the District in maintaining more than one personnel file, in refusing to grant her access to her personnel records, or in disclosing those records to a potential employer. The first paragraph of her August 26, 1988, letter as well as the allegations of the complaint link such a concern with the "State Open Records Law". The Order requiring her to make her complaint more definite and certain dismissed her allegations regarding the public records law, and Paragraph 2.a. of that Order required Anderson to clarify if she was alleging the District had improperly limited or denied her access to her personnel records, and, if so, to state the statutory basis for the allegation. She responded in her amended complaint thus:

> I believe it is a prohibited practice to have two separate personnel files, especially if the employee does not have access to the "private" file. Items from the "private" file were entered in the record before Arbitrator Kessler.

The first sentence of this response, if read alone, may indicate a concern with the procedures the District employs to maintain personnel records apart from any concern with the substance of those records. The final sentence, however, links the substance of her own personnel records with the procedures by which the District maintains its records. Her responses at the pre-hearing conference underscored the link between the District's maintenance of her personnel file with the circumstances of the processing of the grievances which culminated in the January 16, 1987, award. This link is conclusively established by her letter of April 19, 1988, which does not contain any indication that she wished the Federation to assist her in gaining access to her

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7/ See Mahnke vs. WERC, 66 Wis.2d 524, 531 (1975), in which the Wisconsin Supreme Court stated: "Thus a union has considerable latitude in deciding whether to pursue a grievance through arbitration".

personnel records or in challenging how they were maintained. Because her allegations regarding the District's maintenance and use of her personnel files are inextricably linked with her allegations regarding the expungement of certain records and the reexamination of the process by which those documents were generated, her allegations in the complaint and the amended complaint regarding the District's maintenance of her personnel records pose no issues separable from those discussed above.

Thus, the complaint and amended complaint can not be read to independently challenge the District's maintenance and use of her active personnel records except in the context of her desire to expunge from those records certain material from the process leading to the January 16, 1987, award. No claim by Anderson that the District's maintenance of her personnel records, standing alone, constitutes a prohibited practice has been asserted, or can be addressed, here without fundamentally altering her allegations. If she wished to challenge the District's maintenance or use of her active personnel records without regard to the substance of those records, then she would have to have said so to both the District and the Federation before asserting the claim as the prohibited practice asserted here.

In sum, neither the complaint nor the amended complaint can be read to state any claim against either the District or the Federation which is timely under the provisions of Secs. 111.70(4)(a)and 111.07(14), Stats. The complaint has, therefore, been dismissed.

Dated at Madison, Wisconsin this 11th day of September, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By ____
Richard B. McLaughlin, Examiner