STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES GUZNICZAK Complainant, vs. STATE OF WISCONSIN (DEPARTMENT OF HEALTH AND SOCIAL SERVICES and DEPARTMENT OF EMPLOYMENT RELATIONS) Respondent.	Case 278 No. 43787 PP(S)-163 Decision No. 26676-B

Appearances:
Ms. Patricia A. Messner, Representative, 419 South 88th Street, Milwaukee, Wisconsin 53214, appearing on behalf of Complainant.
Mr. David J. Vergeront, Legal Counsel, Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, WI 53707-7855, appearing on behalf of Respondent.

ORDER AFFIRMING IN PART AND MODIFYING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Examiner Marshall L. Gratz having on November 9, 1990, issued Findings of Fact, Conclusion of Law and Order in the above-captioned matter wherein he dismissed a complaint filed by James Guzniczak alleging that the State of Wisconsin had committed unfair labor practices within the meaning of Secs. 111.84(1)(a), (c), (d) and (e), Stats. because the Examiner concluded that the complaint was filed more than one year from the date of the alleged unfair labor practices; and Complainant Guzniczak having timely filed a petition for review of the Examiner's decision by the Wisconsin Employment Relations Commission pursuant to Sec. 111.07(5), Stats.; and the parties thereafter having filed written argument, the last of which was received on January 17, 1991; and the Commission having reviewed the record and the parties' argument and being fully advised in the premises, makes and issues the following

ORDER

A. The Examiner's Findings of Fact are affirmed.

B. The following additional Finding of Fact is hereby made:

> 11. Not until November 1989 did Complainant have notice of Respondent's alleged failure to make any retirement contributions.

C. The Examiner's Conclusion of Law is affirmed in part and modified in part through the addition of the following underlined language:

CONCLUSION OF LAW

> Section 111.07(14), Stats., as made applicable to alleged State Employer unfair labor practices by Sec. 111.84(4), Stats., establishes a one year time limit for filing unfair labor practice complaints against the State Employer and its constituent departments. Because the instant complaint was initiated in excess of one year after the date of the specific acts or unfair labor practices alleged in the amended complaint, the instant complaint, as amended, is time barred by Sec. 111.07(14), Stats. except potentially as to Respondent State's alleged failure to make any retirement contributions.

D. The Examiner's Order is affirmed in part and modified in part through the addition of the following underlined language:

ORDER

> 1. The abovenoted complaint, as amended, is hereby dismissed; except potentially as to Respondent State's alleged failure to make any retirement contributions, which matter is remanded to the Examiner for

further proceedings.

Given under our hands and seal at the City of Madison, Wisconsin this 4th day of April, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

_____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner

STATE OF WISCONSIN (DEPARTMENT
OF HEALTH AND SOCIAL SERVICES and
DEPARTMENT OF EMPLOYMENT RELATIONS)

MEMORANDUM ACCOMPANYING ORDER AFFIRMING
IN PART AND MODIFYING IN PART EXAMINER'S
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

BACKGROUND

The initial complaint filed on March 12, 1990 alleged that the Respondent had committed certain unfair labor practices under the Wisconsin Employment Peace Act by failing to fully comply with an order of the Wisconsin Personnel Commission issued on May 13, 1987. Following pre-hearing discussions with the Examiner, an amended complaint was filed on April 24, 1990 alleging that Respondent's conduct constituted unfair labor practices within the meaning of certain sections of the State Employment Labor Relations Act. On April 30, 1990 the Respondent filed an answer and a motion to dismiss. By letter dated May 23, 1990, the Examiner offered Complainant an opportunity to state reasons why his amended complaint ought not be dismissed without hearing inasmuch as the complaint appeared on its face to relate exclusively to matters which were: outside the jurisdiction of the Wisconsin Employment Relations Commission; outside the 60-day time limit set forth in Sec. 230.44(4)(c), Stats.; and outside the one-year time limit for filing complaints with the Commission established by Sec. 111.07(14), Stats. Complainant submitted a written response on July 18, 1990. On November 9, 1990 the Examiner issued his decision based upon the pleadings.

The Examiner's Decision

In his decision, the Examiner made the following pertinent Findings of Fact and Conclusion of Law upon which he based his dismissal of the complaint:

> 5. The amended complaint alleges that the Respondent Departments committed those alleged unfair labor practices by failing and refusing to pay Complainant James Guzniczak certain monies due and owing to him by reason of a State of Wisconsin Personnel Commission decision issued on May 13, 1987 affirmed by the Personnel Commission on rehearing by order dated June 11, 1987, in Case No. 83-0210-PC. The dates of service of those orders were their respective dates of issuance. The amended complaint also alleges, in part, that Respondent Departments' stalling tactics and refusal to fully compensate Complainant was in retaliation for Complainant's other pending unrelated union grievances.
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> 6. Apart from Respondents' alleged continuing failure and refusal to pay Complainant what he believes he is due under the abovenoted Personnel Commission decision, the most recent manifestations of the Respondent Departments' refusal to properly compensate Complainant alleged in the amended Complaint and written arguments of Complainant are two letters from the Respondent Departments' Attorney, Kathryn Anderson. The first letter to Complainant's representative Patricia Messner dated April 12, 1988 identified what additional payments the Respondent Departments would be making to Complainant; explained the Respondent Departments' reasons for limiting its payment in that regard; and stated that DHSS would be taking no further action on the matter. The second letter to Complainant was dated May 19, 1988. It purported to enclose the check referred to in the April 12, 1988 letter and it further requested that Complainant sign an enclosed receipt for the two checks issued by the State Employer in the case. The Examiner infers that Complainant had notice of the contents of those documents on or before May 24, 1988. Complainant has never signed or returned the receipt form.
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> 7. The instant complaint in this matter was filed with the WERC on March 12, 1990.
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> 8. The instant complaint seeks an order that the Respondent Departments fully comply with the Personnel Commission's order in the abovenoted proceeding before that body, plus interest and an

additional penalty.

9. The instant complaint was filed with the WERC more than 60 days after the dates of service of the Personnel Commission's abovenoted orders dated May 13, 1987, June 11, 1987, and more than 60 days after the date of service of a subsequent Personnel Commission decision dated April 6, 1988 in which it held that it lacked subject matter jurisdiction rule on Complainant's letter to it dated September 29, 1987 asserting that the Respondent Departments had not fully complied with the Personnel Commission's earlier decision and order in the matter.

10. The instant complaint was filed with the WERC more than one year after the specific acts or unfair labor practices alleged in the amended complaint.

CONCLUSION OF LAW

Section 111.07(14), Stats., as made applicable to alleged State Employer unfair labor practices by Sec. 111.84(4), Stats., establishes a one year time limit for filing unfair labor practice complaints against the State Employer and its constituent departments. Because the instant complaint was initiated in excess of one year after the date of the specific acts or unfair labor practices alleged in the amended complaint, the instant complaint, as amended, is time barred by Sec. 111.07(14), Stats.

In his Memorandum, the Examiner stated his rationale for his conclusion that the complaint was untimely filed as follows:

Section 111.07(14), Stats., Untimeliness

Section 111.07(14), Stats., as made applicable to alleged State Employer unfair labor practices by Sec. 111.84(4), Stats., establishes a one year time limit for filing unfair labor practice complaints. It 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."

The acts or unfair labor practices alleged in the amended complaint are essentially the Respondent Departments' failure and refusal to pay Complainant what Complainant believes is owed him under the original Personnel Commission decision and order, with interest and a penalty, and the Respondent Departments' stalling and withholding of proper payment allegedly in retaliation for Complainant's other unrelated pending union grievances. Whether motivated as retaliation for pending grievances or otherwise, the Respondent Departments' failure and refusal to pay Complainant any remaining amounts that may have been due and owing under the Personnel Commission's decision and order was unequivocally manifested as of Complainant's receipt of Attorney Anderson's letters of April 12 and May 19, 1988, which the Examiner infers Complainant had knowledge of no later than May 24, 1988. Those letters, taken together, made it clear that the Respondent Departments intended to pay Complainant nothing further as regards his claim of noncompliance with the Personnel Commission decision. Since Complainant received those letters or at least notice of their contents more than one year before the instant complaint was filed with the WERC, the complaint, as amended, is untimely filed under Sec. 111.07(14), Stats.

Neither the fact that the Respondents have not done anything more as regards Complainant's claim since sending those letters, nor the fact that Complainant has never signed the checks receipt tendered to him for signature in May of 1988, nor Complainant's November 1989 discovery of the extent of the Respondent

> Departments' noncompliance as regards retroactive contributions on Complainant's behalf to the Wisconsin Retirement Fund are sufficient to waive or toll the Sec. 111.07(14), Stats., time limitation. The Commission has previously concluded that even repeated demands followed by repeated refusals do not create a continuing or on-going violation. See, City of Milwaukee, Dec. No. 13726 (WERC, 6/75). Hence, the Respondent Departments' prolonged failure to do/pay anything more after May of 1988 did not constitute an on-going unfair labor practice. Furthermore, in AFSCME Council 24, Dec. No. 21980-C (WERC, 2/90) (case remanded to examiner on other grounds), the Commission held that the one year limitations period begins to run from date of the conduct constituting the alleged unfair labor practice, and not from date of the complainant's discovery thereof. In that case the Commission followed the approach taken by a federal district court interpreting federal law in a private sector case in Harris v. Victor Division, Dana Corporation, 121 LRRM 3524 (ND Ill, 1986). Applying that principle here, the one year limitations period began running as regards alleged nonpayment of retirement fund contributions when the Respondent Departments allegedly failed to make the payments to the retirement fund in or before April of 1988 (despite its April 12, 1988 letter reporting to Complainant that it had made such payments). The one year period did not begin running from the much later time (November of 1989) when Complainant discovered that Respondents had allegedly failed to make the appropriate payments.
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> Because under any and all interpretations of the facts the instant complaint was initiated in excess of one year after the date of the specific acts or unfair labor practices alleged in the amended complaint, the instant complaint is time barred by Sec. 111.07(14), Stats. In the Examiner's opinion, that is a sufficient basis on which to dismiss the amended complaint without a hearing. The Examiner has accordingly issued an order to that effect.

The Petition For Review

In his petition, Complainant urges the Commission to reverse the Examiner. Contrary to the Examiner's determination, Complainant argues that because he did not discover Respondent's failure to make contributions to his retirement fund until November 1989, it is appropriate to toll the statute of limitations as to this allegation. Contrary to the Examiner's conclusion, Complainant asserts that under the rationale of Johnson v. AFSCME Council 24, Dec. No. 21980-C (WERC, 2/90) and Harris v. Victor Division, Dana Corp., 121 LRRM 3524 (1986), his complaint is timely.

Complainant argues that to conclude otherwise would be to ratify fraudulent conduct and place an impossible burden upon Complainant and all others similarly situated to discover hidden conduct. In this regard, Complainant notes that in April 1988, Respondent reported to Complainant that it had made retirement payments which Complainant discovered in November 1989 were not made. Given the foregoing, Complainant asks that the Commission reverse the Examiner.

Respondent's Brief In Opposition To The Petition

Respondent urges the Commission to affirm the Examiner. Respondent argues that at the latest, the alleged actions of Respondent which are complained of occurred on May 19, 1988 when Respondent allegedly failed to make appropriate retirement contributions on Complainant's behalf. Thus, Respondent argues that Examiner appropriately found that the March and April 1990 complaint was untimely.

Respondent urges the Commission to conclude the Johnson case cited by Complainant supports the Examiner's decision as it holds that the statute of limitations for an alleged unfair labor practice does not commence from the date of Complainant's discovery of same but rather from the date of the conduct which allegedly constitutes the unfair labor practice.

As to the Harris case cited by Complainant, Respondent acknowledges the holding therein that an equitable tolling of the statute of limitations may be

appropriate when a cause of action remains undiscovered or has been fraudulently concealed. However, Respondent questions the applicability of Harris to the instant case because Harris involved a breach of the duty of fair representation, an allegation not present herein. Respondent also notes that Harris is not a Wisconsin case and does not involve interpretation of Wisconsin law. Nonetheless, Respondent argues that Harris, even if its holding carried precedential value in Wisconsin, does not favor Complainant. Respondent argues that the fraudulent concealment exception does not apply herein because the Complainant only alleges that an act which Respondent represented to Complainant would be done was not done.

As to the Harris exception for discovery, Respondent cites Johnson and City of Milwaukee, Dec. No. 13726 (WERC, 6/75), for the proposition that it is the date of the alleged misconduct, not the date of discovery, which triggers the applicable statute of limitations. Respondent argues that the alleged act of not paying the retirement portion of the Personnel Commission decision was completed and subject to detection at any time after May 1988, at the latest. Respondent contends that any time after May 1988, Complainant could have checked to determine whether Respondent had made the retirement contributions. Respondent argues that Complainant did not exercise due diligence by failing to discover the alleged failure to make contributions until November 1989. Thus, Respondent urges that there is no basis for allowing Complainant to use the November 1989 discovery date as the date on which the statute of limitations as to this allegation commences.

Given the foregoing, the Respondent urges the Commission to affirm the Examiner.

Complainant's Responsive Brief

Complainant contends that it is "absurd" for Respondent to claim that there is no "hint of fraud and/or concealment" in Complainant's allegations. Complainant contends that by letter dated April 12, 1988, Respondent advised Complainant that retirement deductions were made. Complainant alleges that the deductions were not in fact appropriately allocated and that Respondent's conduct in this regard clearly constituted a fraudulent concealment of Respondent's actual action.

Complainant asserts that it is "incomprehensible" for Respondent to assert that Complainant had an obligation to determine whether Respondent had made the retirement contributions it asserted it would make. Such a contention would obligate each and every employe of the State of Wisconsin to confer with all identified beneficiaries of the employe's payroll deductions to determine for each and every pay period if Respondent had done what it asserted would be done, i.e., allocate appropriately the employe's withheld deductions.

Given the foregoing, Complainant requests that the Commission reverse the Examiner.

DISCUSSION

The Examiner based his decision on the premise that where the last affirmative act allegedly taken by Respondent occurred in May, 1988, a complaint filed in March or April 1990 based upon those alleged actions is untimely under Sec. 111.07(14), Stats. With one exception, we concur with the Examiner's analysis and thus have affirmed his dismissal of all of Complainant's allegations save one.

In his April 1990 amended complaint, Complainant made clear that as to the level of retirement contribution owed him, he was arguing that: (1) the amount to be contributed was inaccurate; (2) no amount was ever contributed, a fact Complainant did not discover until November 1989. Complainant argued that he could not reasonably have been expected to monitor Respondent's actual contribution level as he had a reasonable expectation that Respondent would make the contribution it asserted it would make.

In his decision, the Examiner concluded that under Johnson v. AFSCME Council 24, Dec. No. 21980-C (WERC, 2/90) the one year statute of limitation as to this allegation began with the April 1988 alleged non-payment even though Respondent had allegedly advised Complainant that the payments had been made.

In Johnson, it was argued that although a labor organization had advised a grievant in February and March 1982 that it would not pursue a grievance to arbitration, the statute of limitations should not begin to run until 1984 when the grievant discovered the allegedly arbitrary basis for the labor organization's decision. We held:

> Complainant lastly contends that she was not obligated to file her complaint within one year of Respondent Council 24's February and March 1982 action

because she did not discover the allegedly arbitrary nature of the Respondent's decision until 1984. The Examiner rejected this argument citing Harris v. Victor Division - Dana Corp., 121 LRRM 3524 (N.D. 111 1986) which she quoted in pertinent part as follows:

> Even assuming that Harris could prove his allegations of conspiracy, the mere fact that he recently uncovered the alleged motivation underlying the denial of his grievance is insufficient to toll the statute of limitations. The public interest in industrial peace is strong, and cannot be sacrificed each time an individual employee believes he has discovered some new shred of evidence bearing on the disposition of one of his grievances. To allow Harris to resurrect his cause of action at this late date would be to subject final grievance resolutions to attack indefinitely, and would undermine the federal policy of encouraging rapid and final resolution of labor disputes. This we are unwilling to do. (footnote omitted)

We, like the Examiner, find this rationale persuasive and thus, reject this Complainant argument. Given this conclusion, we need not determine whether we concur with the Examiner's belief as expressed in her decision that Complainant "with due diligence" could have uncovered the evidence of alleged arbitrary conduct by Council 24 within one year of March 1982.

Our decision in Johnson was consistent with our general holdings that the statute of limitations begins to run once a complainant has knowledge of the act alleged to violate the statute. CESA #4, Dec. No. 13100-E (Yaffe, 12/77), aff'd in pertinent part Dec. No. 13100-G (WERC, 5/79); Menominee County, Dec. No. 22872-A (Honeyman, 9/85), aff'd in pertinent part, Dec. No. 22872-C (WERC, 3/86); State of Wisconsin, Dec. No. 23486-A (Nielsen, 7/86), aff'd Dec. No. 23486-B (WERC, 12/86); State of Wisconsin, Dec. No. 23885-B (Burns, 9/87), aff'd in pertinent part Dec. No. 23885-D (WERC, 2/88).

Here, reading the allegations in the complaint most favorably to Complainant, it is asserted that prior to November 1989, Complainant did not know and had no reasonable basis for knowing that Respondent had failed to make any retirement contributions. In support of its position in this regard, Complainant alleges that although he disagreed with the level of contribution Respondent asserted it had made on his behalf, he could reasonably have assumed that the disputed contribution had at least been made.

Based upon the foregoing pleadings and argument, it cannot be concluded that Complainant knew or reasonably should have known of the alleged nonpayment prior to November 1989. The facts alleged are thus distinguishable from those in Johnson where the grievant clearly was aware of the act upon which her claim was based. Thus, as to the nonpayment allegation, we have remanded the complaint to the Examiner for further proceedings.

Dated at Madison, Wisconsin this 4th day of April, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner