STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RIB LAKE EDUCATION ASSOCIATION, Complainant, vs. RIB LAKE SCHOOL DISTRICT, BOARD OF EDUCATION, Respondent.	Case 15 No. 45115 MP-2434 Decision No. 26797-A

Appearances:
Mr. Gene Degner, Director, WEAC UniServ Council #18, P.O. Box 1400, 719 West Kemp
Mr. Barry Forbes, Staff Counsel, Wisconsin Association of School Boards, Inc., Room 500, 122 West Washington Avenue, Madison, Wisconsin 53703, appearing of behalf of the Rib Lake School District, Board of Education.

FINDINGS OF FACT , CONCLUSIONS OF LAW AND ORDER

The Rib Lake Education Association filed a complaint of prohibited practice with the Wisconsin Employment Relations Commission on January 10, 1991, alleging that the Rib Lake School District, Board of Education, had committed prohibited practices within the meaning of Sec. 111.70(3)(a)1 and 5, Stats. by placing two teachers on the salary schedule in violation of the collective bargaining agreement between the parties. On February 28, 1991, the Commission appointed James W. Engmann, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in this matter as provided in Secs. 111.70(4)(a) and 111.07, Stats. The District filed an answer to the complaint on April 2, 1991, in which it denied that it had violated the collective bargaining agreement or Secs. 111.70(3)(a)1 and 5, Stats., and in which it requested that the complaint be denied. A hearing on the complaint was held on April 15, 1991, in Rib Lake, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. Said hearing was transcribed, and a copy of said transcript was received on April 24, 1991. The parties filed briefs in this matter, the last of which was received on May 13, 1991. The Association's reply brief was received on October 2, 1991, and the District waived the filing of a reply brief. The Examiner, having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Rib Lake Education Association (hereinafter Association) is a labor organization within the meaning of Sec. 111.70(1)(h), Stats. The Association is the exclusive bargaining representative for purposes of collective bargaining in a unit composed of all employes of the District engaged in teaching, excluding administrators, supervisors, guidance personnel and non-instructional personnel. The Association maintains its office at P.O. Box 1400, 719 West Kemp Street, Rhinelander, Wisconsin 54501.

2. The Rib Lake School District (hereinafter District) is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats. The Board of Education (hereinafter Board) is an agent of the District. The District maintains it office at Rib Lake High School, Rib Lake, Wisconsin 54470.

3. On or after January 7, 1991, the Association and the District entered into a collective bargaining agreement for the 1990-91 and 1991-92 school years. Said agreement included a new grievance procedure which culminates in final and binding arbitration. Prior to entering into said agreement, the parties agreed on December 21, 1990, to accept the procedure of initiating a prohibited practice in lieu of using the new grievance procedure to resolve these disputes. On January 10, 1991, the Association filed the complaint in this matter

4. The 1990-92 collective bargaining agreement between the parties includes the following provisions:

> Article X. Salary Schedule
>
> 1.This schedule is based on a school year of 187 days. The 187 days will be made up of 180 teaching days, 1.5 Parent/Teacher conference days, 4 record keeping days, and 9 hours of inservice time. . . .
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> 2.Salaries of all teachers covered by this agreement are determined by the salary set forth in this agreement.
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> . . .
>
> 6.Credit on schedule for outside experience shall be eight years full for the first eight years and one half credit for the next four years for a maximum of ten years. No outside credit will be granted if the teacher has not been actively engaged in teaching for a period of five years. Active substitute teaching during that five year period may be accepted by the board if recommended by the administrator.

5. At hearing the parties entered into the following stipulated facts:

1. Collective bargaining agreements were in effect for the following yearly cycles: 1984-84; 1985-86; 1986-87/1987-88; 1988-89/1989-90; and 1990-91/1991-92.

2. Pat Gilge was rehired in the Rib Lake School District starting with the 1987-88 school year. During this time, she was placed on the salary schedule as follows: 1987-88 Step F; 1988-89 Step G; 1989-90 Step H+6; 1990-91 Step H/I+6; 1991-92 Step I/J+6 anticipated.

3. Pat Gilge previously worked for the Rib Lake School District during the following years: 1971-72; 1972-73; 1973-74; 1974-75; and 1975-76.

4. Pat Gilge worked only the first semester of the 1989-90 school year for which she received compensation from the District.

5. Pat Gilge's sick leave expired on the last day of the first semester of the 1989-90 school year.

6. The District's health insurance policy carries a waiver of premium after 60 days. Pat Gilge paid for her own health insurance for the month of February. The waiver kicked in for the remaining months of that year.

7. Pat Gilge paid for her own dental policy for February through August.

8. Pat Gilge went on long term disability insurance starting March 4, 1990.

9. Pat Gilge's last working day for the 1989-90 school year was December 1, 1989.

10. Pat Gilge is employed as a full-time elementary teacher in the Rib Lake School District for 1990-91.

11. Steve Mayer previously worked as a full-time elementary teacher at Holy Rosary Parochial School in Medford during the following school years: 1982-83; 1983-84; 1984-85; 1985-86; and 1986-87.

12. Previous to that, Steve Mayer substituted in the Green Bay system February 1982 through June 1982.

13. During the above mentioned times, Steve Mayer was licensed by the DPI as an elementary teacher.

14. Steve Mayer graduated from the University of Green Bay with a Bachelor's degree in teacher education at the elementary level.

15. Steve Mayer was hired in the Rib Lake School District in the fall of 1987 and was placed on the salary

schedule as follows: 1987-88 Step C+6; 1988-89 Step D+6; 1989-90 Step E+6; 1990-91 Step F+12; 1991-92 Step G+12 anticipated.

6. In the fall of 1989, Gilge was told she would need hip surgery as soon as possible and that she would require nine months of recovery time. She counted back nine months from the beginning of the next school year and decided on a surgery date in December. She used this process so as not to interrupt two school years. She had surgery in December 1989 and was on crutches until mid-August 1990. When she discovered that she had received a half-step increment, she and a Association representative met with District Administrator Ramon Parks. The District Administrator told them that because Gilge's sick leave had run out at semester, the school district's financial responsibility ended at the semester. The District Administrator also said that the District had no policy in a case such as this and no previous incident upon which to base a decision. The District Administrator also indicated that if Gilge had been on leave over two school years, such as from March to November, she would probably been given credit for both years. The Board indicated to her that there was no language in effect and therefore they felt that they were not going to give her a full step.

7. Barb Gelhaus teaches home economics in the District. She works half-time throughout the school year and she receives a full-step increment. Marla Hemke is a teacher in the District. When she was hired in 1982, she had one-half year teaching experience for which she was given credit. She has been on the half step since 1982.

8. The complaint in this matter was filed within one year of the exhaustion of the grievance procedure.

9. The District did not violate the collective bargaining agreement by granting Pat Gilge a half-step on the salary schedule following the 1989-90 school year.

10. The District did violate the collective bargaining agreement by not granting Steve Mayer credit for five years of experience on the salary schedule when it hired him in 1987.

Based upon the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That the complaint is timely filed under Secs. 111.70(4)(a) and 111.07(14), Stats.

2. That by granting Pat Gilge a half-step on the salary schedule following the 1989-90 school year, the District did not violate Secs. 111.70(3)(a)1 and 5, Stats.

3. That by granting Mayer only two years credit on the salary schedule for his five years of experience, the District violated the collective bargaining agreement and, thereby, Sec. 111.70(3)(a)5, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

1. As to Pat Gilge, the complaint is dismissed.

2. As to Steve Mayer, the Rib Lake School District, its officers and agents, shall:

(a) Immediately cease and desist from violating the collective bargaining greement.

(b) Within 20 days of the date of this Award, place Mayer on the salary schedule where he would have been had he been given credit for five years experience when hired.

(c) Within 20 days of the date of this Award, pay Mayer the additional salary he would have received had he been given credit for five years experience when hired, including interest at the rate of 12% per year, from October 15, 1990, to the date he is properly placed on the salary schedule.

(d) Within 20 days of the date of this Award, make Mayer whole for any other loss he experienced from October 15, 1990, to the date he is properly placed on the salary schedule, as a result of his improper placement on the salary schedule.

Dated at Madison, Wisconsin, this 29th day of November, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James W. Engmann /s/
James W. Engmann, Examiner

(Footnote 1/ appears on the next page.)

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 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.

RIB LAKE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant

On brief, the Association argues that the Rib Lake School District incorrectly placed Pat Gilge and Steve Mayer on the salary schedule for the 1990-91 school year.

As to Gilge, the Association argues that she should have received a full increment for the 1989-90 school year and been placed on Step I+6, instead of Step H/I+6 where the District placed her, inasmuch as she completed her contractual obligations for the 1989-90 school year, she was not placed on extended leave by the District, she would have received her full income for two years if she had placed her nine-month recovery period to affect two school years, there is no past practice to suggest otherwise and long term disability

is just an extension of the sick leave provision. The Association is seeking that Gilge be given a full increment for the 1989-90 school year.

As to Mayer, the Association argues that the contract language under Article X, Section 6, does not exclude parochial school experience in placing teachers on the salary schedule; that by the very fact that the District placed Mayer, the District had full knowledge of Mayer's experience when it placed him on the salary schedule; that, in fact, it recognized the parochial school experience when giving him two of the five years; that the contract does not distinguish between parochial education and public education; that all of Mayer's experience was as a fully licensed DPI teacher; and that there is no past practice to the contrary to indicate that parochial school experience should not count. Although Mayer has been inappropriately placed on the salary schedule since 1987, the Association is seeking that placement be corrected starting with the year the error was found, the 1990-91 school year.

On reply brief, the Association argues that in regard to Gilge, the agreements tells how a teacher is placed on the salary schedule and receives credit for a year experience and credits obtained after various degrees, that the agreement allows a teacher, through other provisions, to be absent from duties due to sickness or other extenuating circumstances, that Gilge exercised that option during the 1989-90 school year and that the individual contract is not nullified when the employe exercises the rights of these other provisions.

In regard to Mayer, the Association argues that the District raised a new issue in its brief which it had never raised during the grievance proceedings; that raising the issue of timeliness is wholly inappropriate in these final proceedings for three reasons; that, first, the District had an opportunity if it believed the grievance was untimely filed to file a motion to dismiss; that, second, the District had the right to object to timeliness at each step of the grievance procedure; that, third, the District never argued the issue of timeliness at the hearing; that these reasons put the Association at a disadvantage at this date in three ways; that, first, the District and the Association agreed to waive the rights to an arbitration proceeding and proceed to a prohibited practice as a final resolution to this grievance; that this agreement was a procedural gesture designed to have third party review similar to the procedure agreed to in the 1990-92 collective bargaining agreement; that had the District raised the issue of timeliness, the Association would probably not have agreed to a prohibited practice proceeding; that therefore, by the late raising of the issue of timeliness, the Association may be precluded from exercising its choice of the grievance machinery contained in the 1990-92 contract; that, second, if the District had raised the issue of timeliness in earlier proceedings, the Association would have had the opportunity to address it in a more persuasive manner; that, third, the Association is at a complete disadvantage as it must argue the timeliness issue from the established record; and that in this case the issue of timeliness must be tempered with the parties' agreement that the prohibited practice was a substitute forum for a newly agreed upon arbitration proceeding contained in the 1990-92 collective bargaining agreement.

In addition, the Association argues that each contract given to Mayer presents a new grievance inasmuch as he is inappropriately placed, according to Article X, paragraph 6; that the language does not state "for initial placement this criteria shall be used"; that this language does not state "at initial placement the Board shall have the option and from that time forward the employe waives any rights"; that the language clearly states that outside experience shall be granted, not only the first year but every year thereafter; and that since experience credit is granted every year thereafter, each new contract that Mayer received was a violation of the agreement.

Respondent

As to Pat Gilge, the District argues that its decision to give her one-half increment for the 1989-90 school year does not violate the parties' 1990-92 collective bargaining agreement; that the Association failed to prove the existence of a contractual standard requiring the District to give a full increment to a teacher who works one-half year or less; that there is nothing in the contract addressing this situation; and that there is no evidence of a consistent past practice which would obligate the District to give teachers who only work one-half year a full increment. The District states that this part of the complaint should be dismissed.

As to Steve Mayer, the District argues that the Association's claim regarding Mayer's placement on the salary schedule is untimely; that actions under Secs. 111.07(14) and 111.70(4)(a), Stats., must be started within one year of the event giving rise to the allegation of an prohibited practice; that the complained of act occurred over one year ago; and that, therefore, the complaint should be dismissed. The District also argues that the complained of act is not the issuing of an individual contract in March of 1990 because the Association clearly recognizes the basis of this complaint is the placement of Mayer in the fall of 1987; that Mayer did not object at the time of placement granting him two years experience; that Mayer received a copy of the agreement and had ample opportunities to raise this issue earlier and failed to do so; that the District does not look at a teacher's experience each year in placing a teacher on the salary schedule; and that, as the Association and District have agreed to delete two steps from the salary schedule in the bargain for the 1986-88 contract, placement of most teachers on the schedule does not represent their actual years of experience. As all the District did in March 1990 is advance Mayer one step beyond his 1989-90 placement, the District argues that there is no contract violation.

In addition, the District argues that its decision to give Mayer two years of experience for his five years of parochial school teaching does not violate the parties' 1990-92 collective bargaining agreement; that the District has a rational basis for its distinction between public and private school experience; that the contract language does not indicate whether it applies to only public school experience or to public and private school experience; that given the rational basis for such a distinction, this makes this contract language ambiguous; that when the District hired another teacher with parochial experience, it evaluated her experience and placed her on the schedule; that Mayer received the same treatment; and that, therefore, there is no contract violation.

DISCUSSION

Section 111.70(3)(a)1, Stats.

The complaint alleges violations of Secs. 111.70(3)(a)1 and 5, Stats. As to the allegation regarding Sec. 111.70(3)(a)1, Stats., the complaint is unclear as to whether it is alleging an independent violation of said section or a derivative violation based on the violation of Sec. 111.70(3)(a)5, Stats. 2/

2/ A violation of Sec. 111.70(3)(a)5, Stats., is a derivative violation of Sec. 111.70(3)(a)1, Stats. See, i.e., Turtle Lake School District, Dec. No. 22219-B (McLaughlin, 6/85), aff'd by operation of law, Dec. No. 22219-C (WERC, 7/85); Waupaca County (Highway Department), Dec. No. 24764-A (McLaughlin, 7/88), aff'd, Dec. 24764-B (WERC, 1/91).

As to an independent violation, Sec. 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer:

> To interfere with, restrain or coerce employes in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Stats., the subsection referenced above, provides:

> . . .Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining, or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities except that employes may be required to pay dues in the manner provided in a fair-share agreement. . . .

An employer may be found to have committed a prohibited practice either by taking an adverse employment action, or by threatening to take such an adverse action, in retaliation for an employe's exercise of a right protected by MERA. 3/ As Examiner Buffett stated:

> Such a threat is unlawful if it is reasonably likely to inhibit the employe's assertion of these rights, regardless of whether the employer was motivated by anti-union hostility. Additionally, the standard is objective; it is not necessary to find that the employe felt threatened, but rather that a reasonable person in similar circumstances would be likely to feel threatened. 4/

If the Complainant alleged an independent violation of Sec. 111.70(3)(a)1, Stats., in its complaint, it appears that the Complainant has abandoned this allegation of prohibited practice. The Complainant offered no direct evidence on an independent violation of Sec. 111.70(3)(a)1, Stats., nor does the Complainant argue an independent violation of Sec. 111.70(3)(a)1, Stats., in either its brief or its reply brief. If the Complainant alleged an independent violation of Sec. 111.70(3)(a)1, Stats., and if the Complainant has not abandoned the allegation of an independent of Sec. 111.70(3)(a)1, Stats., then it has not shown by a clear and satisfactory preponderance of the evidence that the Respondent committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats. For this reason, no independent violation of Sec. 111.70(3)(a)1, Stats., is found.

Pat Gilge

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer:

3/ West Allis-West Milwaukee School District, Dec. No. 23805-B (Buffett, 6/87); aff'd, Dec. No. 23805-C (WERC, 11/87); City of Evansville, Dec. No. 9440-C (WERC, 1/85); Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84).

4/ West Allis, Dec. No. 23805-B at 6.

> To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes. . . .

The Association argues that the District violated the collective bargaining agreement when it advanced Gilge only one half-step on the salary schedule following the 1989-90 school year. According to the Association, Gilge completed her contractual obligations for the 1989-90 school year, she was not placed on extended leave by the District, she would have received a full step if her recovery had affected two years, no past practice suggests otherwise, long term disability is an extension of the sick leave provision, and her individual contract was not nullified by her being on leave. For these reasons, the Association contends that the District violated the agreement by not granting Gilge a full-step increase in 1990-91.

But the Association is unable to point to any specific contract language that the District is supposed to have violated. While it is true that Gilge was under contract for the 1989-90 school year, the Association is unable to point to anything in the contract that requires the District to grant Gilge a full-step in these circumstances. While it may be true that the District did not place her on extended leave, it is unclear from the record what kind of leave Gilge was on for the contract does not seem to cover this situation. The fact that the District would have given her a full-step increase if she had been absent part of both years does not prove anything as this is not unreasonable. In that situation, she would have worked the majority of both years, whereas in this case, she worked less that one semester, although her sick leave continued through the end of the first semester. While no past practice suggests otherwise, more important is that no past practice shows that the District was required to grant her a full-step in this case. While long term disability may be an extension of the sick leave provision, this in and of itself does not guarantee that a full-step increase should be given. And while it may be true that her individual contract was not voided by her being on leave, nothing in the individual contract guarantees her a full-step increase under these circumstances.

Under the Association's argument, had Gilge been out for two years, the District would have been required to give her two full-steps on the salary schedule. Nothing in the contract requires that. Nothing in the contract states how a person moves on the salary schedule. Had the District not granted Gilge any step increase, said action may have been unreasonable since she had worked one semester. Here, however, the District granted her a half-step increment for she had worked a half year. Nothing on this record shows that the District was required to do more.

In sum, the Complainant has not established the existence of any contractual provision which would support a conclusion that the District was under a duty to grant Gilge a half-step increase in this situation. In the absence of such a provision, the District cannot be considered to have violated Sec. 111.70(3)(a)5, Stats., and, derivatively, Sec. 111.70(3)(a)1, Stats., by granting Gilge only a one-half step increase following the 1989-90 school year. Thus, it is determined that the Association has not shown by a clear and satisfactory preponderance of the evidence that the District violated the collective bargaining agreement when it granted a half-step increase to Gilge and that, therefore, the Complainant has not proven that the District committed a prohibited practice under Sec. 111.70(3)(a)5, Stats., and, derivatively,

Sec. 111.70(3)(a)1, Stats. For these reasons, this allegation is dismissed.

Steve Mayer

1. Timeliness

The District asserts that the Association's allegation that Mayer is inappropriately placed on the salary schedule is ultimately rooted in the District's initial placement of Mayer on the salary schedule in 1987, an event which took place more than one year before the filing of the complaint in this matter. As this is a complaint of prohibited practices and not an arbitration award, the District argues that the complaint is timebarred under Secs. 111.70(4)(a) and 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.

In support thereof, the District cites Local Lodge No. 1424 v. National Labor Relations Board (Bryan Manufacturing Co.). 5/ In that case the United States Supreme Count addressed two situations in which an unfair labor practice complaint concerns an event ostensibly falling outside of the statutory limitations period. The Court stated:

> . . . The first is one where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose (the statute of limitations) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. 6/

The Commission has adopted these principles to address the significance of events falling outside of a statutory limitations period. 7/ In Moraine Park, Examiner McLaughlin summarized the process as follows:

5/ 362 US 411, 45 LRRM 3212 (1960).

6/ Bryan Manufacturing, 45 LRRM at 3214-3215.

7/ CESA No. 4, Dec. No. 13100-E (Yaffe, 12/77), aff'd Dec. No. 13100-G (WERC, 5/79), aff'd Dec. No. 79CV316 (CirCt Barron County, 3/81); School District of Clayton, Dec. No. 20477-B (McLaughlin, 10/83), aff'd by operation of law, Dec. No. 20477-C (WERC, 11/83); Moraine Park Technical College, Dec. No. 25747-C (McLaughlin, 9/89), aff'd Dec. No. 25747-D (WERC, 1/90).

> 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. 8/

The initial placement of Mayer on the salary schedule occurred in 1987, more than one year prior to the Association's filing of the complaint in this action on January 10, 1991. If the initial placement of Mayer on the salary schedule is the "specific act alleged" by the Association to constitute the prohibited practice, the complaint on its face would appear to be time barred under Secs. 111.70(4)(a) and 111.07(14), Stats., without any need to reference the Bryan analysis. In spring of 1990, the District issued a contract to Mayer, advancing him one step on the salary schedule. This action, in and of itself, does not constitute as a substantive matter a prohibited practice. If this is the "specific act alleged" by the Association to constitute the prohibited practice, it can only be so by accepting the Association's assertion that the District's initial placement of Mayer on the salary schedule violated the then-existing contract. This reliance on an earlier and apparently time-barred prohibited practice is, under the Bryan analysis, also time barred under Secs. 111.70(4)(a) and 111.07(14), Stats.

But the prohibited practice before the Court in Bryan did not involve violation of the collective bargaining agreement between the parties. Such an action is not an unfair labor practice under the National Labor Relations Act (NLRA) as there is no section in the NLRA corresponding to Sec. 111.70(3)(a)(5) of MERA, the section under which this matter is before the Commission.

As part of its enforcement of the section of MERA prohibiting violation of collective bargaining agreements, the Commission has long recognized the policy of encouraging parties to settle their differences through the voluntary processes established by them in their agreement. 9/ In support of that policy, the Commission adopted a different timeliness principle in Harley Davidson Motor Co. 10/ to address the complaint alleging a violation of a collective bargaining agreement. The Commission stated:

> In effectuating the policies of the Wisconsin Employment Peace Act, we conclude that where a collective bargaining agreement contains procedures for the voluntary settlement of disputes arising thereunder and where the parties thereto have attempted to resolve such disputes with such procedures, the cause of action before the (Commission) cannot be said to arise until the grievance procedure has been exhausted, and therefore we shall compute the one-year period of limitation for the filing of complaints of unfair labor practices from the date on which the grievance procedures have been exhausted by the parties to the

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8/ Moraine Park, Dec. No. 25747-C at 27.

9/ Columbo Garment Co. (Jack Winter, Inc.), Dec. No 6633 (WERC, 2/64).

10/ Decision No. 7166 (WERC, 6/65).

> agreement, provided that the complaining party has not unduly delayed the grievance procedure. 11/

In other words, the "specific act alleged" which triggers the one-year period of limitations for complaints alleging a violation of the collective bargaining agreement is the exhaustion of the grievance procedure.

The Commission has applied this principle under MERA as well. 12/ In Prairie Farm, Examiner Yaeger explained that said policy was based, in part, on then Sec. 893.48, Stats., which stated:

> The period of limitation, unless otherwise specifically prescribed by law, must be computed from the time of the accruing of the right to relief by action, special proceedings, defense or otherwise, as the case requires, to the time when the claim to that relief is actually interposed by the party as a plaintiff. . . . 13/

In Local 950, the complaint alleged that a union had breached its duty of fair representation in violation of Sec. 111.70(3)(b)1, Stats. The Commission said:

> . . .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. . . .However, the justification for such tolling is to permit/require the parties to settle the subject matter of the complaint in the procedure they agreed upon for that purpose. That justification would not exist where the complaint concerns the quality of the union's grievance procedure representation complainant is pursuing rather than the merits of the grievance itself.
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> Had the instant complaint named (the employer) as respondent and charged (the employer) with a violation of Sec. 111.70(3)(a)5, Stats., then the complaint against (the employer) would have been timely under the Harley-Davidson principle.
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> Moreover, it is our view that, had the instant complaint asserted both a (3)(a)5 against (the

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11/ Harley Davidson at 8.

12/ Prairie Farm Joint School District No. 5, Dec. No. 12740-A (Yaeger, 5/75), aff'd by operation of law, Dec. No 12740-B (WERC, 6/75); Local 950, International Union of Operating Engineers, Dec. No. 21050-C (WERC, 7/84); Jt. School Dist. No 9, Towns of Salem & Randall (Wilmot School), Dec. No. 21092-A (WERC, 10/84).

13/ Prairie Farm, Dec. No. 12740-A at 8-9. Then Sec. 893.48, Stats., was repealed in 1979 and Secs. 893.04 and 893.14, Stats., were created for the purpose of clarity. The analysis remains unchanged.

> employer) and a (3)(b)1 prohibited practice against the Union, the latter claim would also have been timely filed in the context of its filing as a companion charge to the related violation of contract claim against the employer. . . .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 a violation of collective bargaining agreement. 14/

In Moraine Park, Examiner McLaughlin analyzed the allegations before him in terms of Local 950, applying the principle of Bryan to all allegations of prohibited practice other than violation of the collective bargaining agreement and the duty of fair representation, to which allegations he applied the principle of Harley-Davidson, as extended by Local 950. 15/

As the allegation here present is a violation of Sec. 111.70(3)(a)5, Stats., the analysis which needs to be applied in this case is that found in Harley-Davidson. The record is clear that the collective bargaining agreement involved herein contains procedures for the voluntary settlement of disputes arising under it. The record is also clear that the parties attempted to resolve this dispute through the grievance procedure contained in the collective bargaining agreement. On December 21, 1990, the parties entered into an agreement that they would resolve this matter through the complaint forum, instead of proceeding to arbitration under a new grievance procedure. By this action, the parties exhausted the grievance procedure. On January 10, 1991, the Association filed the complaint in this matter. The Association filed said complaint within one month of exhausting the grievance procedure, well within the one year required by Harley Davidson. Therefore, this Examiner concludes that the allegations of the complaint involving Mayer are not time barred by Secs. 111.70(4)(a) and 111.07(14), Stats.

2. Section 111.70(3)(a)5, Stats.

As to the merits, the contract is clear on its face: "Credit on schedule for outside experience shall be eight years for the first eight years." Article X, Section 6. The District argues that public and private school teaching can be substantially different and that the District did not give Mayer credit for more years of experience because the District did not believe his experience in the parochial school system had the same value as experience in the public school system. The record in this case is insufficient to evaluate the District's claim that parochial school experience does not have the same value as public school experience. But even if it is true, it is clear that the contract does not give the District the right to make that determination.

The District argues that the contract is ambiguous on this point in that it does not state whether private experience is included. The District is

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14/ Local 950 at 8-9.

15/ Moraine Park, Dec. No. 25757-C at 28. Even calculating the one year statute of limitations from the exhaustion of the grievance procedure, the Examiner concluded that the allegations were time barred.

wrong. The contract is clear that outside experience shall be given credit up to eight years. If the parties had wanted to limit that language, they certainly could have. And, indeed, they did. Section 6 also states, "No outside experience will be granted if the teacher has not been actively engaged in teaching for a period of five years prior to the time for contracting with this district." This language clearly shows that the parties considered the type of experience they would not accept for credit on the schedule and they agreed to exclude experience followed by five years of inactivity in teaching. They did not agree to exclude experience from parochial or private schools.

And if the parties had wanted to give the Administrator discretion to evaluate the type of experience and the Board discretion in granting credit for said experience, they certainly could have. And, again, they did. Section 6 also states, "Active substitute teaching during that five year period may be accepted by the board if recommended by the administrator." This language clearly shows that the parties considered the type of experience that would be evaluated but not necessarily granted credit for on the schedule, and they agreed that active substitute teaching experience would be so evaluated. They did not agree that parochial or private school teaching was subject to such discretion by the Administrator and the Board. 16/

But, the District argues, the ambiguity is evident in the placement of another teacher on the salary schedule who had parochial teaching experience and whose experience was evaluated by the District in placing her on the schedule. According to the District, one must look at the practice of the parties to determine their intent and if the placement of Mayer was done no differently than this other teacher, how can Mayer's placement be a contract violation?

In contract interpretation, past practice is called upon in two occasions: first, in the absence of contract language, in which case the past practice may be binding upon the parties if it is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties; 17/ and, second, with ambiguous language, in which case the past practice is viewed as the binding interpretation the parties themselves have given to the disputed term. 18/ But in contract interpretation, past practice will not be used to interpret language which is clear and unambiguous. 19/

16/ This is not to say that the term "outside experience" is without limitation. For example, Mayer would not have had the experience of being a teacher if he had not been certified by the Department of Public Instruction to teach. Nothing in this Award should be read to require the District to grant credit in such a case.

17/ Celanese Corporation of America, 24 LA 168, 172 (Justin, 1954).

18/ Eastern Stainless Steel Corporation, 12 LA 709, 713 (Killingsworth, 1949).

19/ See, i.e., Phelps Dodge Copper Products Corporation, 16 LA 229, 233 (Justin, 1951), and Tide Water Oil Company, 17 LA 829, 833 (Wyckoff, 1952).

Applied to this case, contract language is present and, as stated above, said language is not ambiguous, so past practice does not play a part in this analysis. In addition, the incident to which the District points, the hiring of another teacher whose parochial experience was evaluated by the District occurred after the hiring of Mayer, a situation which makes it difficult to apply as a past practice to Mayer. (In addition, the record is void as to how the District evaluated this experience so it is unclear whether the District did not give her full credit for her parochial teaching experience.) To answer the District's question above (How can Mayer's placement be a contract violation?), the fact that the District repeated its procedure with another teacher does not obviate the possibility that it did so in violation of the contract the first time.

3. Remedy

Even though it is determined that the complaint is timely filed and that the District violated the collective bargaining agreement by crediting Mayer with less than his five years of experience, and even though the District never raised the issue of timeliness in regard to the filing of the grievance underlying this case and that failure to raise such an objection acts as a waiver thereto, 20/ the Association acknowledged at hearing and in its brief that an issue regarding remedy remains because of the amount of time between Mayer's initial placement on the salary schedule and the filing of the grievance.

When the District hired Mayer in the fall of 1987, it gave him credit for two of his five years experience as a parochial school teacher. The Association argues that the contract required the District to credit Mayer with five years of experience. The Association did not file the grievance in this matter until the fall of 1990. The Association argues that each year Mayer's incorrect placement continues is a new violation of the collective bargaining agreement. This "continuing violation" theory makes the violation of the collective bargaining agreement the issuance of Mayer's 1990-91 contract with Mayer placed on an incorrect step. As the Association did not learn of the alleged incorrect placement until the fall of 1990, the Association argues that the correct placement should start with the 1990-91 school year.

The continuing violation theory is well accepted but somewhat ill defined in arbitral law. In Brockway Co., 21/ Arbitrator Eischen stated:

> The concept of "continuing violation" is an elusive one often misunderstood and misapplied by arbitrators and parties alike. Analysis of the precedents, however, shows that the better reasoned cases consistently view allegations of improper pay as falling in that category. Thus, it was said in an early case that "a continuing grievance is one where the act of the Company complained of may be said to be repeated from day to day, such as the failure to pay an appropriate wage rate or acts of a similar nature." Bethlehem Steel Company, 26 LA 550, 551 (Feinberg, 1955). 22/

Examples of kinds of disputes which have been held to be continuing violations include improper wage rate, 23/ change in commission structure, 24/ failure to pay proper job rate, 25/ and salary increase denial. 26/ According

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20/ See, i.e., Vendo Company, 65 LA 1267, 1269 (Madden, 1976) citing numerous cases and quoting several arbitrators for the proposition that delay in raising such a defense is fatal to its efficacy.

21/ 69 LA 1115 (1977).

22/ Brockway Co., 69 LA at 1121.

23/ Bethlehem Steel Company, 34 LA 896 (1960).

24/ Sear, Roebuck & Company, 39 LA 567 (1962).

25/ Steel Warehouse Company, 45 LA 357 (1965).

26/ San Francisco United School District, 68 LA 767 (1977).

to Arbitrator Eischen:

> (These) cases establish the general principle that in a continuing or recurring type of grievance the grievance may be filed within the time specified after the first occurrence of the alleged violation "or following any subsequent repetition or recurrence of the action or behavior which is the basis of the grievance." The underlying premise of this position "is simply that a current occurrence of a repeated and continuous violation reasonably and properly can and should be given the same status as if the same current violation were occurring for the first time." See Sears Roebuck & Company, supra. 27/

Indeed, as an Arbitrator, this Examiner has acknowledged the validity of the continuing violation theory in a case involving the initial placement of a teacher on a salary schedule. 28/ The continuing violation view of timeliness has also been applied by the Commission in complaint cases. 29/

Since the concept of continuing violation construes express contractual time limits so as to permit the filing of what would otherwise be an untimely grievance, the remedy is limited to no earlier than the filing of the grievance, as opposed to a total make whole remedy dating back to the time of the initial violation. As Arbitrator Eischen noted:

> This relationship is set forth with clarity and brevity in ACEF Industries, 38 LA 14,17 (Williams, 1962): "It would be this Arbitrator's clear interpretation, in accordance with the overwhelming weight of authority, that when there is a stated time limit in the Agreement and a continuing violation, the grievance cannot refer back beyond the stated time limit as far as remedy is concerned." In the same vein: "The greater weight of authority holds that where there is a continuing violation of an agreement a grievance may be filed at any time during the continuing violation, subject only to recovery limitations provided for in said agreement." (citation omitted). 30/

27/ Brockway Co., supra.

28/ Brodhead School District, Case 10, No. 41260, MA-5343 (1989) at 8.

29/ AFSCME Local 2494, Wisconsin Council of County and Municipal Employees, Dec. No. 20138-B (Houlihan, 5/83), aff'd by operation of law, Dec. No. 20138-C (WERC, 6/83).

30/ Brockway Co., supra.

In terms of the remedy, therefore, I have limited said remedy back to October 15, 1990, the date of the grievance underlying this matter. I have also directed the District to place Mayer on the salary schedule where he would have been had he been given credit for five years of experience in 1987; 31/ to pay Mayer the difference in salary he would have received but for the improper placement, including interest at the statutory rate of 12 percent per year; 32/ and to make Mayer whole in any other way he suffered loss as a result of the improper placement on the salary schedule.

Dated at Madison, Wisconsin, this 29th day of November, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James W. Engmann /s/
James W. Engmann, Examiner

31/ The record shows that at some point in the past the parties agreed to delete steps from the schedule. If this action applies to Mayer, he should be so treated. This award is not meant to place him in any better position than he would have been but for the improper original placement.

32/ Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83).