STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PAUL F.X. SCHWARTZ, Complainant, vs. REV. DANE RADECKI; PREMONTRE HIGH SCHOOL, INC.; NOTRE DAME de la BAIE ACADEMY, INC.; and the PREMONSTRATENSIAN FATHERS, Respondents.	Case 15 No. 48169 Ce-2132 Decision No. 27550-A

Appearances:
Mr. Paul F.X. Schwartz, 2118 Lakeland Avenue, Madison, Wisconsin, 53704, appearing on behalf of Complainant.
Liebmann, Conway, Olejniczak & Jerry, S.C., by Mr. Herbert C. Liebmann III and Mr. Donald L. Romundson, 231 South Adams Street, P.O. Box 23200, Green Bay, Wisconsin 54305-3200, appearing on behalf of Respondents.

ORDER GRANTING MOTION TO DISMISS

On October 12, 1992, the above-named Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondents had violated Secs. 111.06, (1)a, b, c, f, h, k and (3) of the Wisconsin Employment Peace Act, by giving Complainant an unfavorable reference for a job he was seeking because of his prior union activity while employed by Premontre High School, and by related acts. On November 3, 1992, Respondents filed a Motion to Dismiss the matter on a number of grounds, including jurisdiction of the Commission and untimeliness. Amended complaints were subsequently filed on November 9, 1992 and January 5, 1993. Answers to the amended complaints were filed on December 3, 1992 and January 25, 1993. In the interim, the parties agreed to sever the Motion to Dismiss into two phases because of the complexity of some of the issues raised, and to file briefs on the untimeliness issue first. Briefs were filed by both parties, and the record on untimeliness was closed on December 14, 1992. The Examiner has carefully considered the parties' arguments and concludes that the complaint is untimely. Accordingly, it is

ORDERED 1/

That the Motion to Dismiss is granted, and the complaint is hereby dismissed.

Dated at Madison, Wisconsin this 5th day of February, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, 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
ORDER GRANTING MOTION TO DISMISS

As is required for purposes of a pre-hearing Motion to Dismiss, all of Complainants' factual allegations relevant to the Motion will be assumed to be true. These are: Complainant was employed as a teacher by Premontre High School from 1981-88. During that time, he served as the President of the Premontre Education Association, as its chief negotiator, and as its chief investigator of grievances and arbitrations from 1982-88. He also served as Chair of the English Department in 1982-88 and in various other administrative capacities. Rev. Dane Radecki, Principal of Premontre High School during 1987-88, wrote a strong letter of recommendation for the Complainant's open credentials file during the 1987-88 school year, and was subsequently listed as a reference on the Complainant's resume. The grievant left Premontre in the Spring of 1987-88 for a job teaching at Holy Name Seminary in Madison, Wisconsin, with a strong letter of recommendation from Rev. Radecki. Several years letter, Complainant applied for the Assistant Principal's position at Beloit Catholic High School. On July 22, 1991, he was interviewed by Sister Pat Bogenscheutz, Principal of Beloit Catholic. Sister Bogenscheutz subsequently contacted Father Radecki for a reference, and on August 12, 1991 she indicated to the Complainant in a phone conversation that she hired another individual for the assistant principal's position "because that individual had stronger references/recommendations". On August 17, 1991, Complainant telephoned Father Radecki and asked him if he could provide any insight into Sister Bogenscheutz's remark. Father Radecki indicated to Complainant that he felt Complainant's "lack of administrative experience was a minus". On January 10, 1992, Complainant phoned Sister Bogenscheutz and told her he was considering applying for a different administrative position. He asked her how he could prepare prospective employers to talk to his references. Sister Bogenscheutz told Complainant at that time "drop Father Radecki from your resume".

The central issue regarding timeliness is when the one-year period for filing the complaint began to run. Section 111.07(14), Wis. Stats., provides that "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".

Respondent contends simply that the complaint entirely concerns acts which occurred prior to one year before the October 12, 1992 filing of the complaint. Respondent argues that Complainant's dating of the alleged act from January 10, 1992 is erroneous, because there is nothing about that date which justifies running the time limit from it.

Complainant contends that under Guzniczak vs. State of Wisconsin 2/ the Commission's standard for interpreting the timeliness of a complaint is whether the complainant knew or had a reasonable basis for knowing of the conduct alleged to violate the act prior to one year before the complaint was filed. Complainant cites a number of other cases referred to in Guzniczak, for the same principle. In Guzniczak itself, Complainant points out, the Commission stated inter alia that "our decision in Johnson 3/ 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."

2/ Decision No. 26676-B, (WERC 4/91).

3/ Johnson vs. AFSCME Council 24, Dec. No. 21980-C, WERC, 2/90.

Johnson, however, was a case in which the Commission upheld an examiner's decision to dismiss for untimeliness. The Commission distinguished Guzniczak from Johnson on the ground that in Guzniczak the Complainant could not be expected to have known of the non-payment of pension funds complained of at the time Respondent ceased to make such contributions.

Guzniczak stands for the proposition that concealment of an act tolls the statute of limitations, a widely-accepted principle and the other of Complainant's grounds for claiming an exception here. The untimeliness question therefore turns on two points: Whether Complainant reasonably could have known of the alleged unlawful act in or about August, 1991 or before, and whether a respondent in such a case could toll the statute of limitations by lying about motives for an unfavorable recommendation.

This requires picking apart the nature of the act complained of, to determine what its essence is. Here, the substantive allegation is to the effect that Father Radecki attempted to blacklist Complainant on the basis of his prior union activity, and later lied about it. Complainant admittedly knew that he had received an unfavorable reference from someone, as early as August 12, 1991. By August 17, 1991 he had identified the source of the unfavorable reference as Father Radecki. The sole inference to be drawn from Complainant's January 10, 1992 conversation with Sister Bogenscheutz was that the content of the unfavorable reference may have been more personal than Father Radecki previously admitted to.

For purposes of this discussion I will assume that the statement made by Sister Bogenscheutz in January, 1992 was of the "smoking gun" variety, and amounted to a clear indication of disparate treatment in employment recommendations based on union activity. Even with this assumption, however, Complainant's theory still ignores the fact that the core of the acts complained of were known to him by August 17, 1991.

By that date, Complainant knew or had reason to know that he had been turned down for a job, that the basis for doing so was unfavorable references, and that one specific source of such an unfavorable reference was his former supervisor. For a complainant, in these circumstances, not to be consider the possibility that such an unfavorable reference might be related to his former union activity not only belies the other allegations Complainant has made [including that Father Radecki had previously recommended him for other forms of employment], but also relies on the implied contention that if a respondent lies about its motive for an act, the statute of limitations is tolled until a complainant acquires the necessary evidence to prove that the act was committed for an unlawful motive.

To accept Complainant's reasoning would expose the statute to an extraordinary extension of traditional concepts of timeliness. The fact is that most of the respondents who have been adjudged guilty of unfair labor practices over the years have denied such offenses, and in particular denied that their reasons, for conduct such as the discharge of a union adherent, were motivated by the union activity involved. The "fraud and concealment" upon which Complainant relies as a standard for tolling the statute of limitations surely cannot therefore be so all-inclusive as to incorporate lies about motivation. If the act itself is known to the complainant, that is enough to meet the Guzniczak standard as well as the implications of all of the cases cited therein. To go further than Guzniczak has would arguably allow certain types of case to be brought indefinitely, so long as a given respondent denied that the case had merit.

For these reasons, I conclude that even applying the relatively liberal

Guzniczak standard, Complainant had reason to know of "the act complained of" at least by August 17, 1991. The October 12, 1992 complaint is therefore dismissed as untimely.

Dated at Madison, Wisconsin this 5th day of February, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner