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-B

Appearances:
Mr. Paul F.X. Schwartz, 2118 Lakeland Avenue, Madison, Wisconsin 53704, appear
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 REVERSING EXAMINER'S DISMISSAL OF COMPLAINT

On February 5, 1993, Examiner Christopher Honeyman issued an Order Granting Motion to Dismiss with Accompanying Memorandum in the above matter wherein he dismissed the complaint filed by Paul F.X. Schwartz as untimely filed.

Complainant Schwartz filed a petition with the Wisconsin Employment Relations Commission on February 19, 1993 seeking review of the Examiner's decision pursuant to Sec. 111.70(4)(a) and 111.07(5). The parties thereafter filed written argument, the last of which was received on April 2, 1993.

Having considered the Examiner's decision, the record, and the parties' positions, the Commission makes and issues the following

ORDER

1. The Examiner's Order Granting Motion to Dismiss is reversed.

2. The complaint is remanded to the Examiner for further proceedings.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of August, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

Commissioner William K. Strycker did not participate.

MEMORANDUM ACCOMPANYING ORDER REVERSING
EXAMINER'S DISMISSAL OF COMPLAINT

The complaint, as amended, alleges:

(1) I taught at Premontre High School from 1981-88, was a member of the Premontre Education Association (PEA) from 1981-88, and served as President, chief negotiator, and its chief investigator of grievances and arbitrations.
(2) Fr. Dane Radecki served as Principal at Premontre during the 1987-88 school year.
(3) Fr. Radecki currently serves as Principal at Notre Dame de la Baie Academy.
(4) Premontre High School discontinued operating under that name after the 1989-90 school year.
(5) Notre Dame de la Baie Academy opened up on the premises of Premontre High School as the alter ego or in the alternative as the successor to Premontre High School.
(6) The Premonstratensian Fathers own the land and buildings of Notre Dame de la Baie Academy (as they did when it was called Premontre High School); the Premonstratensian Fathers controlled Premontre High School; and the Premonstratensian Fathers effectively controlled Notre Dame de la Baie Academy.
(7) Fr. Radecki wrote a strong letter of recommendation for my open credentials file on February 1, 1988.
(8) On March 28, 1988, the PEA filed for arbitration on behalf of Karen Hayward who was denied unemployment benefits after being fired without cause in violation of the 1987-88 Master Contract by Fr. Radecki.
(9) During the spring of the 1987-88 school year, Fr. Radecki gave a strong recommendation over the phone to Father Peter Connolly, the Principal at Holy Name Seminary in Madison, Wisconsin, about me. After this recommendation, I was hired to teach at Holy Name for the 1988-89 school year.
(10) On June 27, 1988, a WERC arbitrator conducted a hearing regarding the Karen Hayward situation. Fr. Radecki was not present at this hearing.
(11) I applied for the Assistant Principal's position at Beloit Catholic High School for the 1991-92 school year.
(12) In early August 1991 Sr. Pat Bogenschuetz, the Principal at Beloit Catholic indicated to me that she hired another individual for the Assistant Principal's position because that person had stronger recommendations/references.
(13) On August 17, 1991, I phoned Fr. Radecki and asked if he could give me any insight into Sr. Pat's remark. Fr. Radecki related to me that he felt that the fact that I had no administrative experience was a minus in my situation. Beyond that, he said nothing else about his recommendation to Sr. Pat about me.

(14) On January 10, 1992, I contacted Sr. Pat and informed her that I was contemplating applying for another administrative position. I asked her how I could prepare prospective employers in talking to my references. At this point, Sr. Pat told me, "Drop Fr. Radecki from your resume."

(15) On information and belief, I allege that Fr. Radecki gave me a bad recommendation when talking to Sr. Pat in retaliation for my union activity, particularly my spearheading the Karen Hayward grievance and arbitration.

(16) In light of the previous information, I allege that Fr. Radecki violated Article III, Article V section 1, Article VI section 1 and Article VI section 2 of the 1987-88 Premontre Master Contract were violated as well as the sections cited in subsection 2 of this complaint of the Wisconsin Employment Peace Act.

Prior to hearing, Respondents filed a motion to dismiss with the Examiner asserting inter alia that the complaint was untimely filed. The parties filed briefs as to the timeliness issue and on February 5, 1993, the Examiner dismissed the complaint as untimely filed.

In his decision, the Examiner reasoned:

> 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".
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> 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.
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> 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."
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> Johnson, however, was a case in which the

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

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

> 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.
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> 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.
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> 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.
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> 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.
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> 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.

Complainant Schwartz asserts the Examiner erred by concluding the statute of limitations began to run no later than August 17, 1991, when Schwartz knew he had received an unfavorable reference from Radecki. He contends that when reaching this conclusion, the Examiner improperly failed to assume the facts alleged by Complainant were true and instead made assumptions which were unwarranted in light of: (1) the Catholic Church's support of workers' right to unionize; (2) Schwartz's prior positive relationship with Radecki and Radecki's prior favorable recommendations; and (3) Radecki's comment about lack of experience.

Complainant Schwartz further contends that the Examiner should have given Schwartz the opportunity to establish that he did not know of Radecki's prior recommendation until January 10, 1992.

Lastly, Schwartz argues that because Radecki concealed his wrongful conduct, Respondents should be precluded from asserting the statute of limitations as a defense. He cites Peters v. Kell, 12 Wis. 2d 32 (1960) and Judge Randa's holding in Milwaukee Board of School Directors, Dec. No. 21050-D, (CirCt Milw., 10/84), in this regard.

Given the foregoing, Schwartz asks the Commission to reverse the Examiner.

Respondents urge the Commission to affirm the Examiner. They contend that the Examiner properly rejected Complainant's attempt to avoid the impact of the one-year statute of limitations applicable to this case. Respondents argue Complainant has not presented any persuasive basis for concluding that the one year statute had not expired when the instant complaint was filed.

DISCUSSION

We have reversed the Examiner because we do not share his opinion that Complainant knew or reasonably should have known 4/ of Father Radecki's alleged unfavorable verbal reference prior to Complainant's January 10, 1992 conversation with Sister Bogenschuetz.

As quoted earlier herein, the Examiner determined that:

> 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.
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> 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.
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> 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

4/ See AFSCME Council 24, Dec. No. 21980-C (WERC, 2/90), aff'd Dec. No. 21980-E, Case No. 90-CV-D16842 (CirCt Milw. 6/91), aff'd Case No. 91-2324 (CtApp 6/93 unpublished), petition for review Wis. Sup.Ct., and State of Wisconsin, Dec. No. 26676-B (WERC, 4/91).

> 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.

We do not agree that by August 17, 1991, the facts alleged provided Complainant with a reasonable basis for knowing about Radecki's allegedly unfavorable reference. In our view, in August, 1991, Complainant knew he had not received the job for which he had applied but had no reasonable basis for knowing about an unfavorable verbal reference. It is the alleged unfavorable reference which allegedly violated the Peace Act. In August, 1991, Complainant could reasonably have assumed that Radecki had provided him with a strong recommendation but that the successful applicant had received a stronger recommendation and had administrative experience. Absent Sister Bogenschuetz's January, 1992 advice to Complainant that he not list Father Radecki as a reference on future job applications, Complainant had no reasonable basis to conclude that Father Radecki's recommendation was allegedly less than positive.

We regard the facts of this case as unique. They do not, for instance, involve the alleged discriminatory termination of an employment relationship in which the complainant is clearly aware of the negative act taken by respondent. Nor do they involve a union refusal to arbitrate a grievance where, as in AFSCME Council 24, the employe is aware of the negative act although not necessarily the motivation. In the instant case, there is no record basis for us to impute knowledge of the act to the Complainant. Complainant here had no suspicion that Father Radecki had allegedly provided him with a less than satisfactory recommendation.

Whether or not Father Radecki in fact gave Complainant a negative reference, and, if so, whether that reference was based on Complainant's union activity has yet to be determined. The Complainant still has the burden of demonstrating these contentions at an evidentiary hearing, should the Examiner conclude that the remaining defenses posed by Respondents in their Answer lack merit.

Dated at Madison, Wisconsin this 17th day of August, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

Commissioner William K. Strycker did not participate.