STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREEN BAY EDUCATION ASSOCIATION

Complainant,

vs.

GREEN BAY AREA PUBLIC SCHOOL DISTRICT, THE BOARD OF EDUCATION OF THE GREEN BAY AREA PUBLIC SCHOOL DISTRICT, and its Members, DONALD VANDERKELEN, HENRY ATKINSON, JR., JUDY CRAIN, BARBARA EVERSOLE, SHARON LUTSEY, JAMES METZLER and BONNIE PETERSON, in their Official and Individual Capacities,

Respondents.

Case 171
No. 52487 MP-3019
Decision No. 28425-B

Appearances:

Kelly and Haus, Attorneys at Law, 148 East Wilson Street, Madison, WI 53703-3478, by Mr. William Haus, for the Complainant.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, Suite 600, Insurance Building, 119 Martin Luther King Jr. Boulevard, P.O. Box 1664, Madison, WI 53701-1664, by Mr. Jack D. Walker, for the Respondents.

ORDER DENYING, IN PART, AND GRANTING, IN PART, RESPONDENTS' PRE-HEARING MOTIONS

On August 31, 1994, Complainant filed a Complaint of prohibited practices alleging that Respondents had committed prohibited practices contrary to Chapter 111 of the Wisconsin Statutes. On February 13, 1995, the Complaint, which had been filed in Brown County Circuit Court, was deferred to the Wisconsin Employment Relations Commission. A hearing before an Examiner appointed by the Wisconsin Employment Relations Commission was scheduled for June 29, 1995. On June 14, 1995, pursuant to an Order Substituting Examiner, the Wisconsin Employment

Relations Commission appointed Coleen A. Burns as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter. On June 26, 1995, Respondents filed a Notice of Motions and a Motion In Limine Restricting Testimony to Matters Not Barred By The Principles of Res Judicata and/or the Statute of Limitations, a Motion To Dismiss School Board Members In Their Individual Capacities, and a Motion In Limine That School Board Members Are Privileged From Testifying As To Legislative Discussions of Collective Bargaining. Pursuant to the agreement of the Complainant and Respondents, the hearing of June 29, 1995 was rescheduled to September 12, 1995, to provide the Examiner with the opportunity to consider and rule on the Motions prior to hearing. On July 25, 1995, Complainant filed a Response to Respondents' Motions. On August 2, 1995, Respondents filed a Reply.

The Examiner, having considered the arguments of the parties and being fully advised in the premises issues the following

ORDER

1. Testimony is Restricted to Matters Not Barred By the Principle of Res Judicata and/or the Statute of Limitations.

2. During the time period in which the parties are engaged in bargaining the successor agreement to the parties 1991-94 collective bargaining agreement, Respondent School Board members and their aides are privileged from testifying about discussions on collective bargaining strategy involving this successor agreement which occurred during School Board meetings closed to the public under Sec. 19.85 (1)(e), Stats.

3. Respondents' Motion to Dismiss School Board Members In Their Individual Capacities is denied.

Dated at Madison, Wisconsin, this 5th day of September, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner

GREEN BAY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER

I. MOTION IN LIMINE RESTRICTING TESTIMONY TO MATTERS NOT BARRED BY THE PRINCIPLE OF RES JUDICATA AND/OR THE STATUTE OF LIMITATIONS

Background

The Affidavit of John Wilson, Assistant to the Superintendent for Human Resources for the Green Bay Area School District, and the attached Exhibits A through I, 1/ establish that, on March 31, 1993, the Green Bay Area Public School District (District) filed a complaint (Case 138, No. 49018, MP-2712) with the Commission alleging that the Green Bay Area Education Association (Association) had committed prohibited practices in violation of Sec. 111.70(3)(b) 1,2,3, and 4, Stats.,; the District's complaint was amended on May 6, 1993; on April 21, 1993, the Association filed a Counter-Complaint (Case 142, No. 49122, MP-2722) with the Commission in which the Association alleged that the Green Bay Area Public School District and its Board of Education had committed prohibited practices in violation of Sec. 111.70(3)(a) 1, 4 and 5, Stats.; a hearing on the complaints filed in Case 138 and 142 was held on July 26, 1993, before Examiner Lionel Crowley; during the course of this hearing, the District and the Association entered into the following signed agreement:

> In the spirit of fostering good labor relations through the collective bargaining process, both parties agree to ask the examiner to dismiss their respective complaints.

on August 5, 1993, Examiner Lionel Crowley issued Dec. No. 27650-B, an Order Dismissing Complaint in Case 142, No. 49122, MP-2722; on August 5, 1993, Examiner Lionel Crowley issued Dec. No. 27649-B, an Order Dismissing Complaint in Case 138, No. 49018, MP-2712; and, in each of these decisions, the Examiner indicated that the Complainant withdrew its complaint during the course of the hearing of July 26, 1993.

Position of the Parties

Respondents argue that the Complainant has made a number of allegations which were

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1/ The Association has not raised an issue as to the authenticity of Exhibits A through I.

made in a prior prohibited practice complaint. Relying upon the principle of res judicata, Respondents argue that, inasmuch as the prior complaint was dismissed by Commission order,

those allegations cannot again be the subject of a prohibited practice complaint. Respondents further argue that most of those allegations are also barred by the one year statute of limitations found in Sec. 111.07(14), Stats.

Complainant replies that one must distinguish the conduct being complained of from the factual allegations that provide context to the alleged prohibited practices. Complainant asserts that, during 1993, Respondent VanderKelen, engaged in conduct that evinced anti-union animus; that in September, 1993 Respondent VanderKelen stated that he would "get even" during bargaining in retaliation for employes having engaged in protected concerted activities; and that, on May 17, 1994, Respondents effectuated the threats articulated by Respondent VanderKelen, by making bargaining proposals and taking bargaining positions that evinced bad faith and which were made without any intent of reaching agreement, but rather, with the intent to frustrate collective bargaining between the parties.

Complainant asserts that it is this bad faith bargaining that (1) constitutes retaliation by the Respondents against its employees for their exercise of rights protected by MERA, the allegation in Paragraph Twenty-one of the complaint, and (2) constitutes an unlawful interference and restraint by the Respondents with respect to the right of the District's employees to engage in lawful concerted activities for the purpose of collective bargaining in violation of Sec. 111.70(3)(a)1, Stats., the prohibited practices alleged in Paragraph Twenty-two and Twenty-three of the complaint. Complainant further asserts that bad faith bargaining motivated by the intent to retaliate constitutes a refusal and failure to bargain in violation of Sec. 111.70(3)(a)4, Stats., the prohibited practice alleged in Paragraph Twenty-four of the complaint.

Complainant argues that the prohibited practice claims raised in the complaint were not litigated or settled in any prior proceeding and, thus, are not barred by the principle of res judicata. Complainant further argues that the statute of limitations relied upon by the Respondents is employed to determine the timeliness of complaints; that the standard employed in evaluating a bad faith bargaining charge is "the totality of circumstances" and; that, Respondents cite no authority for the notion that "the totality of circumstances" standard precludes consideration of evidence concerning conduct that preceded the complaint by more than one year.

Standards for Determining Res Judicata

The Commission has recognized that a prohibited practice claim may be barred by the principle of res judicata. 2/ In Northern States Power Co. v. Bugher, 189 Wis.2d 541 (1995), a case

2/ See: City of Wisconsin Rapids, Dec. No. 27466-A (Shaw, 5/93), in which the principle of res judicata was applied to an arbitration award and City of Onalaska, Dec. No. 23483-A (Shaw, 6/86), in which the principle of res judicata was applied to a declaratory judgment.

relied upon by the Complainant, the Supreme Court of the State of Wisconsin, using the term "claim preclusion" to replace the term res judicata, stated as follows: 3/

> As this court recently explained, under claim preclusion " 'a final judgment is conclusive in all subsequent actions between the same parties {or their privies} as to all matters which were litigated or which might have been litigated in the former proceedings.'" Lindas v. Cady, 183 Wis.2d 547, 558, 515 N.W.2d 458, 463 (1994)(quoting DePratt v. West Bend Mutual Ins. Co., 113 Wis.2d 306, 310, 334 N.W.2d 883, 885 (1983). Further, claim preclusion is "designed to draw a line between the meritorious claim on the one hand and the vexatious, repetitious and needless claim on the other hand". Purter v. Heckler, 771 F.2d 682, 689-90(3rd Cir. 1985).

3/ At 550.

Relying upon prior cases, this Court stated that, in order for the earlier proceeding to act as a claim-preclusive bar, there must be an (1) an identity between their parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction. 4/

Identity of Parties or Their Privies

The Green Bay Education Association is the complainant in this proceeding, as well as in Case 142, the counter-claim filed in Case 138. Case 138 names the Green Bay Area Public School District as Complainant and the Green Bay Education Association as Respondent. Although Case 142 names the Green Bay Area School District as Respondent, conduct of the Board of Education of the Green Bay Area School District was at issue in Case 142. The Examiner is satisfied that there is an identity between the parties, or their privies, in the present complaint proceeding and Case 142, as well as in Case 138. 5/

Identity Between the Causes of Action

In Northern States Power Co., the Court noted that Wisconsin had adopted the transactional approach to determining whether or not two suits involve the same cause of action and stated that

> ...the number of substantive theories that may be available to the plaintiff is immaterial-if they all arise from the same factual underpinnings they must all be brought in the same action or be barred from future consideration. 6/

4/ Id. at 551.

5/ In Northern States Power Co., the prior suits named the Department of Revenue as defendant and the present suit named the current and several past secretaries of the Department of Revenue in their official and individual capacities, as well as all others acting in concert or cooperation with the current secretary, as defendants. The Court found this difference in named defendants to be a "distinction without consequence". At 552.

6/ Id. at 555.

The complaint filed by the Association in Case 142, contains, inter alia, the following Paragraphs:

> 5. On or about March 31, 1993, the Board of Education filed a baseless and frivolous Complaint against the Respondent with the Wisconsin Employment Relations Commission for the following purposes: (1) to interfere with, restrain, or coerce its municipal employes in the exercise of their rights guaranteed in Sec. 111.70(2), Wis. Stats., and (2) to retaliate against said employees for their engaging in self-organization and concerted activities for the purpose of collective bargaining and mutual aid or protection by speaking their minds with regard to current matters of common interest related to pending employment relations matters.
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> 6. On or about March 30, 1993, the Green Bay Area Public School District, at the direction of members of the Board of Education, demanded that the current collective bargaining agreement of the parties, which has for its term July 1, 1991 through June 30, 194, be reopened and totally renegotiated. Indeed the Green Bay Area Public School District alleged that twenty-seven (27) of said contract's thirty-four (34) Articles were invalid by operation of law and demanded that these be renegotiated with the ultimate aim of gutting the contract in order to solve the District's alleged budgetary problems. (A copy of the letter by the District making such demand is attached hereto as Ex. A-1) 7/
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> 7. On March 31, 1993, the Green Bay Area Public School District, at the direction of its Board of Education, filed a baseless and frivolous prohibited practice complaint against the Green Bay

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7/ Ex. A-1 is a March 30, 1993 letter to Richard Feldhausen, Executive Director of the Green Bay Education Association, which in relevant part, states as follows:

> The Board of Education has directed the Administration, pursuant to Article XXXIII of the current Collective Bargaining Agreement to demand to open on said Collective Bargaining Agreement as they relate to the Board's Statutory responsibilities and operations under the law:

This letter then identified various provisions of the Agreeement.

> Education Association and its bargaining unit members to reopen the current collective bargaining agreement of the parties. On or about March 31, 1993, Board of Education President Henry Atkinson said that the prohibited practice complaint filed by the Green Bay Area Public School District is part of the Board's effort to reopen the contract. He stated: "I don't know if 'force' is the word, but it would help." (A copy of a Green Bay Press-Gazette article quoting the Board members Henry Atkinson and Donald VanderKelen is attached hereto as Ex. B-1 and is incorporated herein by reference.)
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> 8. By the above described conduct and other actions the Green Bay Area Public School District and its Board of Education have engaged in or are engaging in prohibited practices in violation of Sec. 111.70(3)(a)1, 4, and 5, Wis. Stats., and are abusing the statutory process provided in those sections.

Respondents argue that the principle of res judicata is applicable to all conduct of the Respondents which occurred prior to August 5, 1993, the date of the Order Dismissing Complaint in Case 142. However, Respondents' arguments focus on conduct described in Paragraph Fourteen, Paragraph Fifteen and Paragraph Eighteen of the present complaint. 8/

Paragraph Fourteen and Fifteen of the Present Complaint

Paragraph Fourteen alleges that the Association filed a grievance in 1992 on an employe discharge; that the Association processed the grievance through arbitration; that an Arbitration award was issued on July 23, 1993 which reinstated the employe without loss of any wage or benefit. Paragraph Fourteen also contains a quote which is alleged to be from the Arbitration Award of July 23, 1993.

Paragraph Fifteen states: 9/

8/ Respondent does not argue that the conduct described in Paragraphs Sixteen or Seventeen is barred by the statute of limitations or res judicata.

9/ This complaint was originally filed in Circuit Court and, thus, the Plaintiff and the Defendant(s) are the Complainant and the Respondent(s), respectively.

> 15. Defendant Donald VanderKelen had primary responsibility and leadership in developing the strategy and position with regard to the above matter, on behalf of the School District, as evidence by transcripts of the school board's deliberations regarding said matter.

The conduct described in Paragraphs Fourteen and Fifteen does not share "factual underpinnings" with any conduct described in the complaint filed in Case 142. Thus, under the transactional analysis, there is not an identity between the causes of action.

As Respondents argue, Paragraph 8 of the complaint filed in Case 142 does claim that the alleged prohibited practices are based upon "the above described conduct and other actions of the Green Bay Area Public School District and its Board of Education". (emphasis supplied) It not being evident that the courts have extended the transactional analysis to unspecified conduct, the Examiner does not consider the use of the catch-all phrase "other actions" to incorporate the conduct described in Paragraphs Fourteen and Fifteen into the complaint filed in Case 142.

Paragraph Eighteen of the Present Complaint

Paragraph Eighteen states:

> 18. During the pendency of the above described grievance, the Defendants, under the direction and leadership of Defendant Donald VanderKelen, engaged in a course of conduct evincing anti-union animus for the purpose of retaliating against the Complainant and its membership for having exercised their rights as guaranteed to them under Sec. 111.70(2), Stats, including the following:
>
> (a) On or about March 30, 1993, the Defendants, under the direction and leadership of Defendant Donald VanderKelen, demanded that the current collective bargaining agreement of the parties, which had for its term July 1, 1991 through June 30, 1994, be reopened and totally renegotiated. Indeed the Defendants alleged that twenty-seven (27) of said contract's thirty-four (34) Articles were invalid by operation of law and demanded that these be renegotiated with the ultimate aim of gutting the contract.
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> (b) On or about March 31, 1993, the Defendants filed a baseless and frivolous prohibited practice complaint with the Wisconsin Employment Relations Commission, against the Plaintiff. Board of Education President Henry Atkinson admitted that the prohibited practice complaint filed by the Green Bay Area Public School

District was part of the Board's effort to pressure the Association to reopen the contract. When asked the reason for filing the complaint, Atkinson stated: "I don't know if 'force' is the word, but it would help." The Plaintiff herein denied the Defendant's allegations in the prohibited practice complaint herein and filed a Counter claim, alleging that the District's complaint was frivolous.

(c) The Defendants, under the leadership and direction of Defendant VanderKelen, thereafter took action to unilaterally implement a number of changes in wages, hours and working conditions in violation of the collective bargaining agreement. The Plaintiff filed a grievance and attempted to submit the dispute to arbitration. The Defendants then engaged in a course of conduct to frustrate and prevent timely hearings in both the prohibited practice complaints pending before the Wisconsin Employment Relations Commission and the Arbitration proceedings pending before an arbitrator by engaging in delay tactics that evinced bad faith, asserting that the Prohibited Practice cases could not go forward until the Arbitration matter was resolved and the Arbitration matter could not go forward until the Prohibited Practice cases pending before the Wisconsin Employment Relations Commission were resolved.

(d) The Green Bay Education Association pressed for hearings in the above described actions. As a hearing before the Wisconsin Employment Relations Commission approached, and the Defendants' bad faith conduct and frivolous prohibited practice filings became obvious, the Defendants herein, and through VanderKelen personally, pressed for a settlement in order to avoid a hearing.

(e) On July 26, 1993, immediately prior to the commencement of proceedings before Wisconsin Employment Relations Commission Examiner Lionel Crowley, the District continued to press for a settlement to its frivolous complaint. The Association stated that it would not agree to any terms for settlement that contained any substantive suggestion that the District's complaint had any merit whatsoever and that the Association was prepared to proceed to hearing. After much effort at avoiding any verbiage that could imply substantive concession to the District and with the District continuing to press for settlement of its frivolous complaint, the parties ultimately agreed to the following statement as a basis for settlement of the pending complaints:

> In the spirit of fostering good labor relations through the collective bargaining process, both parties agree to ask the examiner to dismiss their respective complaints.

(f) As the parties were engaged in signing the above statement in the presence of Wisconsin Employment Relations Commission Examiner Crowley, Board President Henry Atkinson and several other persons, Defendant Donald VanderKelen attempted to orally "supplement" the agreement for the apparent benefit of the President of the Defendant School Board by saying words to the effect:

> This time I let you get away easy. Now that the Association has agreed to not engage in such conduct in the future and we have that straight, we can move forward...

(g) The Association representative responded that the Association had not agreed to anything other than what was on the paper and that the Association would engage in whatever free speech conduct it and its members deemed appropriate and that if this was not acceptable to the District and/or Mr. VanderKelen, the agreement could be ripped up and the parties could proceed to hearing.

Paragraph 18(h) alleges that Mr. VanderKelen then responded by screaming profanities at the Association representative and then continues as follows:

Mr. VanderKelen then rose from his chair and moved in a threatening manner towards the Association Representative, uttering threats and more expletives such that Mr. VanderKelen had to be physically restrained by the attorney representing the Green Bay Area Public School District and then had to be physically led away as he continued to scream expletives and flail.

(i) Defendant Board President Henry Atkinson, Jr., witnessed the above described conduct of Donald VanderKelen, but neither said, nor did anything, thus demonstrating his assent to Mr. VanderKelen's conduct. Since July 26, 1993, Defendant VanderKelen has maintained a very aggressively hostile attitude towards the Association and its membership.

> (j) The other Defendants herein have permitted Mr. VanderKelen's hostility to go unchecked and to illegally influence the Board's subsequent decision making.

As Respondents argue, the conduct described in Paragraphs 5, 6 and 7 of the complaint filed in Case 142 is essentially the same conduct which is described in Paragraph 18(a) and (b) of the present complaint. Under the transactional analysis, such shared "factual underpinnings" establish that there is the same cause of action.

Paragraph 18(c) contains several allegations. The first allegation, regarding the unilateral implementation of a number of changes in wages, hours and working conditions, does not have the same "factual underpinnings" as the conduct described in the complaint filed in Case 142. Thus, there is no identity of cause of action between these allegations and the prior complaint.

Paragraph 18(c) also alleges that the Complainant filed a grievance, attempted to submit the grievance to arbitration, and that the Defendants then engaged in a course of conduct to frustrate and prevent timely hearings in the arbitration proceeding. These allegations do not have the same "factual underpinnings" as the conduct described in the complaint filed in Case 142. Thus, there is no identity of cause of action between these allegations and the prior complaint.

Paragraph 18(c) contains an allegation that Respondents engaged in a course of conduct to frustrate and prevent timely hearings in prohibited practice proceedings. Paragraph 18(d) and 18(e) also contain allegations concerning the Respondents' and the Complainant's conduct in these prohibited practice proceedings. The referenced prohibited practice proceedings involved the complaints filed in Case 138 and 142. The complaint filed in Case 142 alleges that the District's conduct in filing the complaint in Case 138 violates MERA and abuses the statutory process provided for in MERA. Respondent's conduct in the litigation of these prior complaints could have been litigated in the prior complaints. The Examiner considers these allegations of Paragraph 18(c), as well as the allegations in Paragraph 18(d) and (e), to have the same "factual underpinnings" as the prior complaint and, thus, the same cause of action.

The conduct described in Paragraph 18(f), (g), (h), (i), and (j) is alleged to have occurred either at the complaint hearing in Case 138 and 142, as the parties were signing a statement which was the basis for the settlement of the complaints filed in Case 138 and 142, or after the this complaint hearing. Conduct occurring after the parties had reached a settlement of the complaints could not involve the same "factual underpinnings" as the settled complaint. Thus, these allegations of the present complaint do not have the same cause of action as the prior complaint.

Final Judgment

Relying upon Great Lakes Trucking Co., Inc. v. Black, 165 Wis. 2d. 162, 168-169, 477 N.W.2d 65 (Ct. App. 1991), Respondents argue that the Order Dismissing Complaint in Case 142 constitutes a final judgment for the purposes of res judicata. In Great Lakes Trucking, the Court

recognized that a judgment on the merits could be had without a trial and found that a "stipulation approved by the court" was a final judgment on the merits.

The Order Dismissing Complaint in Case 138 and in Case 142 was in response to a signed agreement between the District and the Association in which the Association and the District agreed that each party would request the Examiner to dismiss their respective complaints. Given the fact that this agreement was made "in the spirit of fostering good labor relations through the collective bargaining process", the undersigned is persuaded that the parties intended the agreement to be the vehicle by which the parties resolved the prohibited practice claims raised in their complaints. To give effect to this intent, the Order Dismissing Complaint in Case 138 and the Order Dismissing Complaint in Case 142 must be considered to be "with prejudice" and, thus, "conclusive in all subsequent actions between the same parties {or their privies} as to all matters which were litigated or which might have been litigated in the former proceedings." The Order Dismissing Complaint in Case 142, as well as the Order Dismissing Complaint in Case 138, is a final judgment on the merits in a court of competent jurisdiction.

Summary on Res Judicata

As the Complainant argues, in determining whether or not there has been a violation of Sec. 111.70(3)(a)4, Stats., the Commission looks at the "totality of the conduct of the party involved". 10/ As the Association further argues, animus toward the Association and its membership may be relevant to the determination of the "totality" of the Respondents' conduct in bargaining the successor agreement.

Animus toward the Association and its membership, per se, does not constitute a prohibited practice. Thus, at first blush, evidence of such animus would not appear to be barred by the principle of res judicata, or claim preclusion. However, the Association's claim of animus is predicated upon the argument that the conduct complained upon in Paragraph 18(a) through (j) of the instant complaint was "for the purpose of retaliating against the Plaintiff and its membership for having exercised their rights as guaranteed to them under Sec. 111.70(2), Stats." To retaliate against the Complainant and its membership for having exercised their rights as guaranteed to them under Sec. 111.70(2), Stats., is a prohibited practice. Thus, to use the evidence of the conduct described in Paragraph 18(a) through (i) for the purpose argued by the Association, the Examiner would be required to determine the merits of an underlying prohibited practice.

The principle of res judicata, or claim preclusion, bars the determination of the merits of a prohibited practice claim arising from the same cause of action as the complaint filed in case 142. Thus, the Association may not use this complaint proceeding to litigate the allegation that the conduct described in Paragraph 18(a),(b),(d), and (e), or the conduct relating to the prohibited

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10/ Milwaukee Board of School Directors, Dec. No. 23223-C (Honeyman, 7/88).

practice complaints described in Paragraph (c), was for the purpose of retaliating against the Complainant and its membership for having exercised their rights as guaranteed to them under Sec. 111.70(2), Stats.

Statute of Limitations

The timeliness of complaints of prohibited practice is governed by Secs. 111.70(4)(a) and Sec. 111.07(14), Stats., which, read together, provide:

> The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or prohibited practice alleged.

Where, as here, a complaint contains allegations which occur within and without the statute of limitations period, 11/ the Commission has relied upon Local Lodge 1424 v. NLRB (Bryan Mfg. Co.), 362 US 411 (1960), 45 LRRM 3212, 3214-15, in which the United States Supreme Court stated as follows: 12/

> It is doubtless true that Sec. 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of Sec. 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Sec. 10(b) ordinarily does not bar such evidentiary use of anterior events. 6/ The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely

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11/ For the purposes of the pre-hearing Motion, it must be presumed that the actions asserted occurred on the dates alleged in the complaint. Moraine Park Technical College, Dec. No. 25747-D (WERC, 1/90) Respondents acknowledge that the allegations of Paragraph Sixteen and Seventeen describe conduct which falls within the one year limitations period, as does conduct described in Paragraph Nineteen.

12/ The holding in Bryan Mfg. Co. was adopted by the Commission in CESA No. 4, Dec. No. 13100-E (Yaffe, 12/77).

> "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. (footnote omitted) 13/

As Examiner McLaughlin stated in School District of Clayton, Dec. No. 20477-B (10/83):

> The Bryan decision is an appropriate guide for applying Sec. 111.07(14), Wis. Stats., because both the federal and state acts serve the same underlying purposes. Both acts involve a legislatively enacted limitation on legislatively created employe rights. Each act limits the time for asserting those rights to preclude the resolution of labor disputes on stale evidence, and to foster the stability of employer/employe relations by demanding that disputes be promptly asserted and not be left to fester indefinitely. 6/ (footnote omitted)

As Examiner McLaughlin stated in Moraine Park Technical College, Dec. No. 25747-C (9/89):

> 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.

The Complainant specifically alleges that Respondents have violated Sec. 111.70(3)(a)1 and 4, Stats., and relies upon conduct alleged to have occurred within the one year limitations period, inter alia: (1) In the September 3, 1993 issue of its regular weekly school year newsletter, the Association published a portion of an Arbitration Award in which an Arbitrator remarked upon the conduct of the Board of Education and that, thereafter, School Board Member Donald VanderKelen told Association Representative Richard Feldhausen that "he was enraged by the Arbitrator's Statement and more particularly the Plaintiff's publication of that Statement and that he '...would get even during bargaining'"; (2) Since July 26, 1993, Respondent VanderKelen has maintained a very aggressively hostile attitude towards the Association and its membership; 14/ (3) that the other

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13/ Ibid., at 3214-3215.

14/ Since the Complaint was filed on August 31, 1994, it is evident that not all conduct occurring since July 26, 1994 falls within the one year statute of limitations. For these

Respondents have permitted Mr. VanderKelen's hostility to go unchecked and to illegally influence the Board's subsequent decision making; (4) on May 17, 1994, the Respondents provided the Association with collective bargaining proposals on the successor Agreement to the 1991-94 Agreement which, consistent with Mr. VanderKelen's overt threat that he "...would get even during bargaining", were regressive and sought the elimination of numerous long standing contract provisions and (5) Respondents collective bargaining proposals were made in bad faith without any intent to reach agreement.

The conduct alleged to have occurred within the one year statute of limitations may constitute, as a substantive matter, a prohibited practice in violation of MERA. Having reached this determination, under the Bryan analysis, the Examiner may consider evidence of events occurring outside the one year statute of limitations which will "shed light" on the alleged prohibited practices occurring within the one year statute of limitations. 15/

Conclusion

Neither the statute of limitations, nor res judicata, bars the Complainant from offering evidence on the allegations contained in Paragraphs Fourteen, Fifteen, Sixteen, Seventeen, or Nineteen, Eighteen (f) through (j), or the following allegations contained in Paragraph Eighteen

> (c) The Defendants, under the leadership and direction of Defendant VanderKelen, thereafter took action to unilaterally implement a number of changes in wages, hours and working conditions in violation of the collective bargaining agreement. The Plaintiff filed a grievance and attempted to submit the dispute to arbitration. The Defendants then engaged in a course of conduct to frustrate and prevent timely hearings in ... the Arbitration proceedings pending before an arbitrator by engaging in delay tactics that evinced bad faith, asserting that the ... Arbitration matter could not go forward until the Prohibited Practice cases pending before the Wisconsin Employment Relations Commission were resolved.

II. MOTION TO DISMISS SCHOOL BOARD MEMBERS IN THEIR INDIVIDUAL CAPACITIES

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purposes, it is sufficient that the complaint may be read to allege that some conduct occurred within the one year statute of limitations.

15/ The fact that evidence may be admissible under the Bryan analysis does not mean that it cannot be barred by res judicata, or claim preclusion.

Respondents argue that individuals, when acting as individuals, do not meet the definition of a "municipal employer" within the meaning of Sec. 111.70(1)(j), Stats. and, thus, requests that Respondent members of the school board be dismissed as acting in their individual capacity.

Complainant responds that the Wisconsin Statutes plainly proscribe the commission of "prohibited practices" by school board members and they are accountable under the law in their individual, as well as their official, capacities.

Sec. 111.70(3)(c), Stats., provides as follows:

> It is a prohibited practice for any person to do or cause to be done on behalf or in the interest of municipal employers or municipal employes, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b).

One may reasonably conclude that a member of the School Board is a "person", regardless of whether or not Complainant has specifically alleged that the members of the School Board are "persons". It is possible for a School Board member, acting as an individual, to commit a prohibited practice in violation of Sec. 111.70(3)(c), Stats., even if, as Respondents argue, the Commission has never found a person acting in their individual capacity to have violated MERA.

The introductory paragraph to the complaint states as follows:

> NOW COMES THE PLAINTIFF, Green Bay Education Association, by its attorneys, Kelly and Haus, alleging as its complaint against the above-named Defendants, or prohibited practices contrary to the provisions of Chapter 111 of the Wisconsin Statutes, as follows:

A violation of Sec. 111.70(3)(c), Stats., is contrary to the provisions of Chapter 111. Thus, the complaint, may be construed to include an allegation that the conduct of Board Members, complained of in the complaint, violates Sec. 111.70(3)(c), Stats.

In State of Wisconsin, Dec. No. 27708-A (1/95), Examiner McLaughlin stated as follows:

> Throughout the processing of the complaint the State has moved to dismiss Sargeant as a Respondent. The motion was denied, as a matter of pleading, because identifying him as a party meant only that he acquired individual rights of participation in the litigation 4/ and that the Union viewed him to have, potentially, independent liability for his conduct. Permitting the Union to name him a Respondent recognized the liberal joinder of parties anticipated by the SELRA, 5/ and set the evidentiary stage for whether independent liability could be proven. (footnotes omitted)

MERA, like SELRA, anticipates the liberal joinder of parties. Following the rationale of Examiner McLaughlin, the Examiner is persuaded that, at this juncture, identifying the Board Members in their individual capacities means only that they acquire individual rights of participation and that Complainant views them as having independent liability.

Ultimately, it may be found that the named School Board Members have not acted in their capacity as individuals. However, no such determination can be made on the basis of the pleadings alone. At the close of the evidentiary hearing, Respondents may renew their Motion to Dismiss the Respondent School Board Members in Their Individual Capacity.

III. MOTION IN LIMINE THAT LEGISLATIVE DISCUSSIONS OF COLLECTIVE BARGAINING STRATEGY ARE PRIVILEGED MATTERS

Respondents argue that the Examiner should not permit the Complainant to question Green Bay School District school board members and their aides regarding discussions of collective bargaining strategy which occurred during school board meetings closed pursuant to Sec. 19.85(1)(e), Stats., because such material is privileged under the Wisconsin Open Meetings Act and the Wisconsin Constitution. Complainant denies that there is any such privilege.

ERC 10.16 (2) provides as follows:

> Hearings, so far as is practical, shall be conducted in accordance with the rules of evidence and official notice as provided in s. 227.45, Stats.

Sec. 227.45, Stats.,in relevant part, provides:

> (1) Except as provided in ss. 19.52(3) and 901.05, an agency or hearing examiner shall not be bound by common law or statutory rules of evidence. The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony or evidence that is inadmissible under s. 901.05. The agency or hearing examiner shall give effect to the rules of privilege recognized by law. Basic principles of relevancy, materiality and probative force shall govern the proof of all questions of fact. Objections to evidentiary offers and offers of proof of evidence not admitted may be made and shall be noted in the record.

Sec. 905.01, Stats., provides as follows:

> **Privileges recognized only as provided.**
> Except as provided by or inherent or implicit in statute or in rules adopted by the supreme court or required by the constitution of United States or Wisconsin, no person has a privilege to:
>
> (1) Refuse to be a witness;or

(2) Refuse to disclose any matter;or
(3) Refuse to produce any object or writing;or
(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

The Examiner is satisfied that she has authority to recognize an evidentiary privilege which is "inherent or implicit" in a statute. Sec. 19.85(1)(e), Stats., provides that a closed session of a governmental body, such as the Respondent School Board, may be held for the purpose of "Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session."

The parties have not cited, and the Examiner has not found, any case which addresses a claim of testimonial privilege for discussions occurring in such a closed session. The Examiner considers the Opinion of the Attorney General, issued on June 10, 1994, to be instructive. In this Opinion, the Attorney General stated, inter alia,:

> I interpret sec. 19.85(1)(e) to permit a governmental body to convene in closed session to formulate strategy while engaged in negotiations with a collective bargaining unit.
>
> * * *
>
> Section 19.85(1)(e) only permits a closed session when "competitive or bargaining" reasons require closure. The obvious purpose of section 19.85(1)(e) is to permit a governmental body to meet in closed session where to do otherwise would compromise the governmental body's bargaining position by revealing its negotiating strategy. The exemption has therefore been interpreted to authorize a governmental body to convene in closed session to formulate negotiating strategy while engaged in collective bargaining. 66 Op. Att'y Gen. at 96-97. Once a governmental body and bargaining unit have reached a tentative agreement, however, bargaining ceases. The question before the governmental body is no longer what strategy the body should adopt in order to obtain an agreement with favorable terms. . . .

The conduct giving rise to the allegation that Respondents have violated their statutory duty to bargain is conduct involving the negotiation of an agreement to succeed the 1991-94 collective bargaining agreement. The Examiner is persuaded that, implicit in the Wisconsin Open Meetings Act, is a privilege against testifying concerning discussions of bargaining strategy which occur in

closed session during the time period in which the parties are engaged in bargaining. To hold otherwise, would require the District to reveal its negotiating strategy, contrary to the "obvious purpose of Sec. 19.85(1)(e), Stats."

To be sure, Sec. 19.81(1), Stats., states that a policy of the Wisconsin Open Meetings Act is "that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." However, by adopting Sec. 19.85(1)(e), the legislature has demonstrated that providing access to Respondents' bargaining strategy while the parties are engaged in collective bargaining is not compatible with the conduct of governmental business.

It may be, as the Complainant argues, that discussions on bargaining strategy held in closed session may shed light on the totality of Respondents' bargaining conduct. However, testimonial privilege is not determined on the basis of whether or not the testimony is relevant to the determination of a legal claim. Indeed, the invocation of a testimonial privilege necessarily involves the loss of evidence which one party, at least, considers to be relevant.

Contrary to the argument of the Complainant, the finding of testimonial privilege does not render Respondents' immune from a prohibited practice charge alleging bad faith bargaining. As the Respondents argue, the Complainant is free to introduce evidence on other aspects of bargaining conduct such as a failure to meet at reasonable times and conduct at the bargaining table.

Respondents also argue that discussions in closed sessions under Sec. 19.85(1)(e) concerning bargaining strategy are protected by Article IV, Sec. 16 of the Wisconsin State Constitution, which provides:

> **Privilege in debate.** Section 16. No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate.

Unlike the Open Meetings Act discussed above, the constitutional provision relied upon by the Respondents does not "inherently or implicitly" give rise to the legislative privilege claimed by the Respondents. While cases cited by the Respondents do demonstrate that courts have extended legislative privilege to legislative acts of municipal corporations, such as school districts, these cases do not establish that the determination of collective bargaining strategy is a legislative act. The Examiner is not persuaded that the law recognizes a rule of legislative privilege which bars inquiry into discussions of collective bargaining strategy which occur during closed session school board meetings.

Dated at Madison, Wisconsin, this 5th day of September, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner