STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SANDRA LEE BENEDICT, Complainant,

vs.

EAU CLAIRE ASSOCIATION OF EDUCATORS, Respondent.

Case 1
No. 57345
Cw-3669

Decision No. 29689-C

SANDRA LEE BENEDICT, Complainant,

vs.

WISCONSIN EDUCATION ASSOCIATION COUNCIL (WEAC), Respondent.

Case 18
No. 57284
Cw-3668

Decision No. 29690-C

SANDRA LEE BENEDICT, Complainant,

vs.

EAU CLAIRE AREA SCHOOL DISTRICT, Respondent.

Case 54
No. 57283
MP-3488

Decision No. 29691-C

Appearances:

Ms. Sandra Lee Benedict, 3642 Livingston Lane, Eau Claire, Wisconsin 54701, appearing on his own behalf.

Mr. John D. Finerty, Jr., Kravit, Gass, Hovel & Leitner, Attorneys at Law, 825 North Jefferson Street, Milwaukee, Wisconsin 53202-3737, appearing on behalf of Wisconsin Education Association Council (WEAC), and Eau Claire Area Association of Educators (ECAE).

Mr. James M. Ward, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Eau Claire Area School District (District).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The procedural posture of this matter as of October 7, 1999, is set forth in Dec. Nos. 29689-B, 29690-B and 29691-B (McLaughlin, 10/99). Procedural matters since the issuance of that decision are noted in the following Findings of Fact. By letter to the parties dated December 27, 1999, I noted "the record . . . is closed effective December 21, 1999."

FINDINGS OF FACT

1. The parties to the consolidated complaints are identified under the "Appearances" section set forth above, and incorporated here by reference. Complainant filed the complaint captioned by the Commission as Case #1, No. 57345, Cw-3669 on March 1, 1999. Complainant filed the complaint captioned by the Commission as Case #18, No. 57284, Cw-3668, on February 5, 1999. Complainant filed the complaint captioned by the Commission as Case 54, No. 57283, MP-3488 on February 5, 1999.

2. On October 7, 1999, I issued Dec. Nos. 29689-B, 29690-B and 29691-B. Included in that decision was the following Order:

> Complainant shall make her complaint in the cases noted above more definite and certain by filing with the Commission, on or before November 12, 1999, an amended complaint which complies with ERC 12.02(2)(c) by specifying:

1. A clear and concise statement of the facts constituting the alleged prohibited practice or practices, including the time and place of occurrence of particular acts and the sections of the statute alleged to have been violated.

    a. If Complainant uses the Commission complaint form, the entry at Section C shall state appropriate reference to specific subsections of Sec. 111.70(3)(a), (b) or (c), Stats. Reference to statutes outside of Subchapter IV of Chapter 111, Stats., need not be included.

    b. Factual allegations included in the complaint shall state specific acts by the Respondents which fall within the one year period preceding February 5, 1999, in Cases 18 and 54, or preceding March 1, 1999, in Case 1.

    c. Factual allegations should not include citation to legal authority or argument. After Commission receipt of the amended complaint, all parties will be permitted the opportunity to enter argument.

3. In a letter filed with the Commission on October 14, 1999, the District stated:

Upon reviewing your October 7,1999 Order to Show Cause Why Complaint Should Not Be Dismissed with Accompanying Memorandum in the above-referenced prohibited practice proceeding, my curiosity was piqued by your reference to a packet of documents evidently filed by Ms. Benedict shortly after the consolidation of this proceeding became effective.

At Page 9 of the Order, you make reference to a flurry of correspondence from Ms. Benedict in late August, 1999, including her submission of both a "consolidated complaint" and a "consolidated brief," the former of which must have been intended to serve as an amended complaint in this proceeding. For reasons known only to Ms. Benedict, she did not see fit to furnish copies of any of that documentation to me. Perhaps she similarly did not see fit to forward any of this material to Attorney Finerty.

> *Ex parte* communications of this nature ordinarily would be a matter of grave concern. I would like to assume that this misconduct is attributable either to inadvertence on the part of Ms. Benedict or to her ignorance of the standards expected of all those who practice before the Commission. But in either case, it is only appropriate that she be admonished to refrain from engaging in such *ex parts* communications in the future or risk sanctions.
>
> This serious breach of decorum by Ms. Benedict notwithstanding, I take some solace in your assessment that the "consolidated complaint," while voluminous, "…adds…nothing of substance to the documents filed by Complainant on June 29,1999," such that the Memorandum Accompanying Order to Show Cause is strictly based on the documents filed on June 29 (p. 13). Consequently, since I am hardly in the mood to read yet another rambling, incoherent and irrelevant submission from Ms. Benedict, I have no interest in seeing any of the "consolidated complaint" material at this time.
>
> Kindly let me know if I have misconstrued your intentions with respect to the so-called "consolidated complaint." Hearing nothing to the contrary, I shall simply await receipt of an amended complaint by Ms. Benedict in compliance with the terms of your October 7, 1999 Order to Show Cause.

In a letter to the parties dated October 18, 1999, I stated:

> I write in response to Mr. Ward's letter dated (sic) October 14, 1999. I apologize for not supplying Mr. Ward and Mr. Finerty with the "consolidated complaint" documentation. I include what I believe is the appropriate material with this letter. I would ask Ms. Benedict to make sure she supplies copies of any document she sends me to Mr. Ward and to Mr. Finerty.
>
> Unfortunately, this file has come to me in varying chunks. Often, I am not in the office when material relevant to the files is left there. Unfortunately, apparently because of the bulk of the filings, the agency has not date stamped all of the material. Thus, I cannot be sure I have supplied Mr. Ward and Mr. Finerty with all of the material on file in our office. I have never before handled a matter in which I could (or would have to) make that statement.

> If either Mr. Ward or Mr. Finerty is concerned that they lack material I may have, I can offer you the inspection of our files, or to copy the entire file and mail it to you. However, my recent order should indicate to all of you that the pleading process has yet to meaningfully begin. The material I have received to this point does not, in my opinion, constitute a complaint I can compel an answer to. This may or may not play a role in your decision to seek copies of any or all matter within the files.
>
> If you have any questions, please advise me.

On October 21, 1999, Complainant filed a cover letter and a motion with the Commission. She identified the motion as a "Notice of Motion and Motion of Appellant Sandra Lea Benedict's Objection To Defendant-Appellee's Motion For Rule 38 Sanctions and Additional Bill of Costs." The cover letter was addressed to "Mr. Gino Agnello" as the "Clerk of Courts" for the United States Court of Appeals for the Seventh Circuit in Chicago, Illinois. In a letter to the parties dated October 21, 1999, I stated:

> I enclose for Mr. Finerty documents filed by Ms. Benedict with the Commission on October 21, 1999. Mr. Ward is listed on the final page of these documents as a "cc". Thus, I do not include a copy for him.
>
> I stress again to Ms. Benedict that any document mailed to me in the above-noted matters should also be mailed to Mr. Finerty and to Mr. Ward.

4. On November 12, 1999, Complainant filed a document she identified as "an amended complaint which complies with ERC 12.02(2)(c)". The document includes sections, numbered between 1 and 155. This document is referred to below as the Amended Complaint. Specific allegations will be referred to by Section number where possible. The Amended Complaint is incorporated, by reference, into this finding of fact. Those sections specifying allegations of the Municipal Employment Relations Act (MERA), state:

> 7. By its constructive discharge of Sandra Lea Benedict, the Eau Claire Public School District committed a prohibited practice in violation of Sec. 111.70(3)(a)5 and 1 of the Wisconsin Statutes.

> 12. WEAC Labor Union has unlawfully refused to submit Benedict's previous complaints and grievances to arbitration which is arbitrary, capricious and in bad faith. As such it constitutes interference with Benedict's MERA rights and a prohibited practice violative of Sec. 111.70(3)(b)1 of the Wisconsin Statutes.

The Amended Complaint asserts the applicability of statutes beyond MERA. Those sections that expressly refer to dates falling within "the one year period preceding February 5, 1999. . . or. . . March 1, 1991" state the following:

> 4. That WEAC Labor Union has represented a bargaining unit of teachers at Eau Claire Public School District. The District and Union are parties to a series of collective bargaining agreements including the latest one covering calendar years 1997-1998. The agreement prohibits discharges of bargaining unit employees without just cause and contains a multi-step grievance procedure ending in final and binding grievance arbitration.
>
> 8. That Sandra Lea Benedict filed complaints with ERD (Equal Rights Division Workforce Development for the State of Wisconsin and EE OC (Equal Employment Opportunity Commission) in April of 1997 claiming constructive discharge violated the just cause requirement of the 1996-97 agreement. Attorney Michael Burke was asked to represent Plaintiff Sandra Lea Benedict at April 16, 1998 ERD Hearing of which he refused representation. See letter dated April 2, 1998.
>
> 36. That Plaintiff Sandra Lee Benedict requested representation by ECAE (Eau Claire Association of Educators) through NUE Attorney Michael Burke in telephone conversation on March 30, 1998 for April 16, 1998 ERD (Equal Rights Division) Hearing on Constructive Discharge on March 21, 1997. See Attorney Michael Burke's refusal for representation in letter dated April 2, 1998.
>
> 45. That Plaintiff Sandra Lea Benedict was denied representation by Michael Burke, Attorney for Northwest United Educators, as their grievance representative. See letter dated April 2, 1998 regarding ERD Hearing on Plaintiff Sandra Lea Benedict's claims for discrimination and retaliation by Donna Friedeck for filing previous ERD and EEOC claims as well as filing

complaint to Inspector General's Office, U.S. Department of Education regarding Title I Expenditures. These matters have great public interest and need to be presented to taxpayers.

88. That Plaintiff Beenedict (sic) received letter from NUE Grievance Attorney Michael Burke on April 2, 1998 stating the following refusal for Benedict requested representation in ERD (Equal Rights Division) Hearing against Eau Claire Public School District.

> Dear Ms. Benedict,
>
> This letter will confirm our conversation in which I indicated that ECAE would not represent you in your April 16, 1998 ERD Hearing. The reason for this decision is as follows:
>
> The ERD Complaint is not a matter that arises under the terms of the collective bargaining agreement. As such, ECAE does not have legal duty to represent you in this matter. While it is true that ECAE does, on occasion, represent members in matters outside of the collective bargaining agreement, that is only true when there is a strong organizational interest in such representation. In this case we have concluded that no such organizational interest exists. We considered the following in reaching this conclusion:
>
> 1. ECAE was not involved in the decision to file the April 1997 ERD Complaint. Given that your request for representation was received on March 30, 1998, it would not now be appropriate for ECAE to represent you on appeal given our lack of involvement in the investigatory stage;
> 2. Our review of the October 27, 1997 Initial Determination – No Probable Cause indicates the possibility of success on appeal is minimal; and,
> 3. Your case appears to raise issues that are largely personal and not of substantial organizational benefit.

> If you have questions regarding this matter, please contact me at your convenience. . . .

The Amended Complaint asserts the inapplicability of statutes of limitations in a number of sections, including the following:

> 11. That since the STATUTE OF LIMITATIONS has run on Plaintiff Sandra Lea Benedict's previous claims, Plaintiff will show in an amended complaint that the new claims relate back to the date of the original complaints to the ERD and EEOC.
>
> 13. That Plaintiff Sandra Lea Benedict is alleging that an amendment relates back to the date of the original pleading if "relation back is permitted by the law that provides the statute of limitations applicable to the action."
>
> 21. That the DEFENSE OF LACHES in a suit for specific performance is to be considered wholly independent of the Statute of Limitations.
>
> 22. That LACHES begins to run from the time Plaintiff Sandra Lea Benedict has the knowledge that one of her rights has been infringed upon. There are no precise rules governing its application and each case is determined upon its own circumstances.
>
> 23. That Plaintiff Sandra Lea Benedict has recently become aware that her rights had been infringed upon but was totally unaware of WERC complaint process until her recent filing with WERC since she is not an Attorney but merely a teacher.

The Amended Complaint concludes with the following remedial requests:

> WHEREFORE, in the First Cause of Action, the Plaintiff Sandra Lea Benedict, prays for judgment against Defendants Eau Claire Public School District and their representatives Attorney Joel Aberg and Attorney James Ward as well as any and all defendants who become "third parties" by supplemental jurisdictional request of assertion of claims under 28 U.S.C. (sec.) l331 permitting the court to exercise Supplemental Jurisdiction over Related Claims Pursuant to 28 U.S.C. (sec.) 1367 since the Defense of Laches in a suit of

> Specific performance is to be considered wholly independent of the Statute of Limitations, also including but not limited to Judgment against Wisconsin Education Association Council (WEAC Labor Union) and Eau Claire Association of Educators (ECAE Local Labor Union) as follows:
>
> A. For damages in an amount which will be determined at time of trial;
> B. For the costs and disbursements in bringing this action, together with reasonable attorney's fees and;
> C. For such other and further relief as the Court may deem just and equitable.
>
> Plaintiff Sandra Lea Benedict hereby demands a trial by jury pursuant to 805.0(2) and 756.096(3)(6), Stats.
>
> 5. In a letter to the parties dated November 15, 1999, I stated:
>
> On November 12, 1999, Ms. Benedict filed an amended complaint with the Commission. Paragraph 1 c of my October 7, 1999 letter (sic) states that: "(a)fter Commission receipt of the amended complaint, all parties will be permitted the opportunity to enter argument."
>
> Please advise me if you have received the November 12, 1999 amended complaint, and how you would like to enter your argument on whether or not the complaint should be dismissed.

On November 15, 1999, Complainant filed a series of documents with the Commission. The documents were copies of documents filed with the Circuit Court for Eau Claire County. They include a copy of the Amended Complaint and cover letter filed with the Commission on November 12, 1999; a two page letter from District counsel to Complainant dated October 29, 1999; a three page cover letter dated November 11, 1999, from Complainant to the Eau Claire County Clerk of Court; a five page document headed "Principal Defendant Sandra Lea Benedict's Opposition To Plaintiff Eau Claire Public School District's Garnishment Complaint"; a nineteen page document headed "Defendant Sandra Lea Benedict's Reasons For Granting Petition For Hearing"; and an eight page motion "to certify for hearing issues regarding Sanctions and Tort Liability in pending Case No. 99 TJ 16-A." In a letter dated November 22, 1999, the District noted its intention to file "a letter brief" and its position that

"nothing in Ms. Benedict's Amended Complaint has caused the District to revise its thinking in regard to the pending motion to dismiss on statute of limitations grounds." In a letter dated November 29, 1999, WEAC and ECEA stated:

> This responds to your letter of November 15, 1999.
>
> 1 doubt Ms. Benedict's submission - which amounts to nearly 50 single-spaced pages of argument, citation to various authorities and commentary on issues far beyond the jurisdiction of the Commission, was what you had in mind when you asked for a clear and concise statement of claim from Ms. Benedict. Her response fails to demonstrate why her complaint should not (sic) dismissed because she did not heed ample warning and now expects the Commission and the parties to decipher her claims for her. Her complaint should be dismissed for failure to state a claim within the jurisdiction of the Commission.
>
> Ms. Benedict is not inexperienced at complying with procedural rules or advocating her own case. But her submissions to the Commission are more of an historical account of prior litigation and recapitulation of claims that have long since been dismissed. It should be clear that Ms. Benedict has already had more than her day in court. *See Benedict v. Eau Claire Public Schools, et al.,* Case No. 95-C-0568 (W.D. Wis. 1996), *aff'd* 139 F.3d 901 (7th Cir. 1998) (unpublished), *cert. denied,* 119 S. Ct. 58 (1998); *see also Benedict v. Eau Claire Area School District, et al.,* Case Nos. 98-C-313-S (W.D. Wis. 1998), *Benedict v. Wisconsin Education Association Council,* Case No. 98-C-0877-S (W.D. Wis. 1998) and *aff'd* Case Nos. 98-3437 and 99-1010 (7th Cir. 1999), *cert.* pending*; see also Benedict v. Wisconsin Education Association Council,* ERD Case Nos. 199803285 and 199800825; *see also Benedict v. Eau Claire Area School District,* Case Nos. 99-CV-101, 99-CV-102 and 99-CV-441 (Eau Claire County Circuit Court). The Commission can rest assured it would not be depriving Benedict of her only remedial forum should it dismiss these cases.
>
> Benedict's submissions to the Commission amount to imposing costs on the respondents rather than advocating a legitimate position. We ask the Commission dismiss the cases against the Eau Claire Association of Educators and the Wisconsin Education Association Council without the need for any further submissions.

In a letter to the parties dated December 2, 1999, I stated:

> Mr. Ward and Mr. Finerty have filed responses to my letter of November 15, 1999. I write to advise you that if you wish to file further argument on whether or not the complaint should be dismissed, it should be postmarked not later than December 20, 1999.

In a letter dated December 10, 1999, the District stated:

> Pursuant to your letter of December 2, 1999 in the above-referenced matter, we will take this opportunity to present further argument relative to the question of whether Ms. Benedict's prohibited practice complaint (as amended from time to time, *ad nauseum)* against the Eau Claire School District should be dismissed on statute of limitations grounds or otherwise.
>
> The argument which follows is premised upon the basic assumption that your October 7, 1999 Order to Show Cause Why Complaint Should Not Be Dismissed with Accompanying Memorandum effectively nullified all of the voluminous, often duplicative, documentation previously filed by Ms. Benedict in this prohibited practice proceeding. The following excerpt from the Memorandum Accompanying Order To Show Cause accurately and succinctly summarized the state of the record at the time the Order was issued:
>
> > To this point, Complainant has cited statutes over which the Commission has no apparent jurisdiction, has offered more volume than detail in specifying the facts constituting the alleged statutory violations and has been less than detailed in specifying the time and place of occurrence of particular acts. More significantly, what detail there is regarding dates affords no basis to conclude any of the complained of conduct falls within the one year period preceding the filing of the complaints in Cases 18 and 54 on February 5, 1999. She filed the complaint in Case 1 at a later date, which only compounds the arguable untimeliness. (p. 13-14)

Precisely the same sentiments are reflected in the express terms of the Order to Show Cause itself. Throughout the already lengthy course of this proceeding (ten months and counting), Ms. Benedict has repeatedly been reminded by both the Examiner and opposing counsel that she must comply with Section ERC 12.02(2)(c), Wisconsin Administrative Code, by filing "[a] clear and concise statement of the facts constituting the alleged prohibited practice or practices, including the time and place of occurrence of particular acts and the sections of the statute alleged to have been violated thereby." The Order to Show Cause reiterated that requirement along with related directives to Ms. Benedict as to what she should and should not include in her amended complaint. . . .

Whether she is acting in good faith, or whether she is acting in bad faith, the fact remains that in either case Ms. Benedict has failed to comply with the terms of the Order to Show Cause . . . And she has failed miserably. We fully concur in Attorney Finerty's assessment, per his letter of November 29, 1999, that the most recent documentation filed by Ms. Benedict "…amounts to nearly 50 single-spaced pages of argument, citation to various authorities and commentary on issues far beyond the jurisdiction of the Commission." Indeed, if this latest submission by Ms. Benedict represents even a marginal improvement over her previous submissions, any such improvement, quite frankly, is not discernable to the trained eye of this observer.

Ms. Benedict's flagrant disregard of the terms of the Order to Show Cause cannot be tolerated. No admonitions, no matter how firm or clear, have been heeded by Ms. Benedict to date. Nor is there reason to believe that Ms. Benedict will heed any future admonitions from either the Examiner or anyone else. She is incorrigible in every sense of the word. Rather than enabling Ms. Benedict to perpetuate this debacle any longer, the time has come for this prohibited practice proceeding to be dismissed, with prejudice, as a result of Ms. Benedict's continued noncompliance with Section ERC 12.02(2), Wisconsin Administrative Code. *Wisconsin Rapids School District,* Dec. No. 19084-A (Honeyman, 11/81.)

Ms. Benedict's ill-advised "business as usual" approach also has implications for purposes of the District's pending motion to dismiss the prohibited practice complaint against it as time barred under the applicable statute of limitations.

As initially noted in my letter of March 26, 1999, the fact that "…Ms. Benedict last worked for the District as a teacher on Friday, March 21, 1997" gives rise to considerable doubt as to the viability, in reference to the applicable statute of limitations, "…of any prohibited practices conceivably committed by the District within the one year period preceding the February 5, 1999 filing date in this matter." My July 15, 1999 letter hopefully served to further underscore the fundamental point "…that nothing Ms. Benedict has filed to date has bridged the statute of limitations gap." In the same vein, my letter of August 19, 1999 posited that Ms. Benedict could survive the District's pending dismissal motion "…only upon clearly articulating at least one genuine issue of material fact with respect to any alleged act or omission which, subject to proof, arguably would constitute a prohibited practice committed by the District within one year of the February 5, 1999 filing date in this proceeding." Consistent with that line of thought, the Order to Show Cause directed Ms. Benedict to bring forward factual allegations "…which fall within the one year period preceding February 5, 1999."

No one familiar with Ms. Benedict and her litigious nature would deny that she has a fertile imagination. She has constructed in her own mind a vast and nefarious network where her employer, her coworkers, her union, her former attorneys along with opposing counsel, plus various insurance carriers, are all in complicity in one way or another. Those diverse players, we are told, have formed a conspiracy designed to destroy her teaching career and deprive her of compensation to which she is rightfully entitled. She blithely contends that they have violated a multitude of state and federal laws, including (sec.) 111.70, in furtherance of that conspiracy. Yet, Ms. Benedict still has not managed to fabricate so much as a single allegation citing any act or omission on the part of the District constituting a prohibited practice committed within one year of the pivotal February 5, 1999 filing date. It seems that there are outer boundaries to even an imagination as fertile as Ms. Benedict's.

In closing, it is best to speak in plain and simple terms. Ms. Benedict has had enough chances. Finally, enough is enough. Beyond Ms. Benedict's noncompliance with Section ERC 12.02(2), Wisconsin Administrative Code, this prohibited practice proceeding must now be dismissed as time barred under the applicable one year statute of limitations as well.

On December 17, 1999, Complainant filed a series of documents roughly five inches thick. The documents included the cover letter and Amended Complaint originally filed with the Commission on November 12, 1999; material filed with the Commission on November 15, 1999; and copies of documents ostensibly filed with various state and federal courts.

6. None of the allegations included in the Amended Complaint can be read to allege acts that in and of themselves constitute prohibited practices which fall within the one year period prior to the filing of any of the three consolidated complaints.

CONCLUSIONS OF LAW

1. For the purpose of determining if Complainant, in the three consolidated complaints, states claims that can be heard by the Commission, Complainant is a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

2. For the purpose of determining if Complainant, in the three consolidated complaints, states claims that can be heard by the Commission, the District is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. For the purpose of determining if Complainant, in the three consolidated complaints, states claims that can be heard by the Commission, WEAC and ECEA are a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

4. The Commission lacks jurisdiction to determine those allegations contained in the Amended Complaint that cite law outside of Subchapter IV of Chapter, 111, Stats.

5. Complainant's right to proceed under MERA, concerning those allegations of the Amended Complaint falling within Subchapter IV of Chapter 111, Stats., is barred by Sec. 111.07(14), Stats., and Sec. 111.70(4)(a), Stats.

ORDER

The complaints, as amended, are each dismissed.

Dated at Madison, Wisconsin, this 20th day of January, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

EAU CLAIRE ASSOCIATION OF EDUCATORS
WISCONSIN EDUCATION ASSOCIATION COUNCIL (WEAC)
EAU CLAIRE AREA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDNINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The Commission consolidated the three complaints underlying this matter in Dec. Nos. 29689, 29690, 29691 (WERC, 8/99). In Dec. Nos. 29689-B, 29690-B, 29691-B (McLaughlin, 10/99), I stated the minimum requirements to further proceedings on the consolidated complaints. Broadly speaking, the Order to Show Cause required Complainant to specify allegations that fall within the Commission's jurisdiction. The Order essentially required Complainant to state timely violations falling within MERA. Complainant filed the Amended Complaint on November 12, 1999 to comply with the Order. The Amended Complaint is expansive regarding time and law, but, at Section 7, asserts District violation of Secs. 111.70(3)(a)1 and 5, Stats., and, at Section 12, asserts WEAC/ECEA violation of Sec. 111.70(3)(b)1, Stats.

The Governing Law

The Commission "only has those powers which are expressly or impliedly conferred on it by statute." BROWNE V. MILWAUKEE BD. OF SCHOOL DIRECTORS, 83 WIS.2D 316, 333 (1978). From this, it follows that a complaint, to be enforceable by the Commission, must state rights enforceable through the MERA. MORAINE PARK TECHNICAL COLLEGE ET AL., DEC. NO. 25747-D (WERC, 1/90).

Sec. 111.07(14), Stats., which is applicable to MERA under Sec. 111.70(4)(a), Stats., governs timeliness issues, and states: "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." Because the Amended Complaint refers to events outside of the one year limitations period, its timeliness is governed by the principles of LOCAL LODGE NO. 1424 V. NATIONAL LABOR RELATIONS BOARD (BRYAN MFG. CO.), 362 US 411, 45 LRRM 3212 (1960). In that case, the United States Supreme Court posited two situations that pose the relevant considerations here:

> 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 Sec. 10(b) 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 be an unfair labor practice only through reliance 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. 45 LRRM at 3214-3215.

The Commission approved the BRYAN analysis in CESA NO. 4 ET. AL., DEC. NO. 13100-G (WERC, 5/79), and applied it in DEC. NO. 25747-D (WERC, 1/90). This 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.

Granting the motion to dismiss denies an evidentiary hearing, and this poses issues implicating both MERA and Chapter 227, Stats., which governs contested cases such as this. The Commission has issued a pre-hearing motion to dismiss, See LOCAL UNION NO. 849, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND FOX RIVER VALLEY DISTRICT COUNCIL OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DEC. NO. 5502 (WERC, 6/60), and has, with judicial approval, authorized examiners to determine pre-hearing motions to dismiss, See COUNTY OF WAUKESHA, DEC. NO. 24110-A (HONEYMAN, 10/87), AFF'D DEC. NO. 24110-A (WERC, 3/88); and MORAINE PARK TECHNICAL COLLEGE ET. AL., DEC. NO. 25747-C (MCLAUGHLIN, 9/89), AFF'D DEC. NO. 25747-D (WERC, 1/90). For judicial approval, see VILLAGE OF RIVER HILLS, DEC. NO. 24570 (WERC, 6/87), AFF'D DEC. NO. 87-CV-3897 (DANE COUNTY CIR. CT., 9/87), AFF'D DEC. NO. 87-1812 (CTAPP, 3/88). The procedural history of the case is summarized in VILLAGE OF RIVER HILLS, DEC. NO. 24570-B (GRECO, 4/88). Courts have authorized agency dismissal of contested cases prior to a hearing, where the case poses no genuine issue of fact or law. BALELE V. WIS. PERSONNEL COMMISSION, 223 WIS.2D 739 (CT. APP, 1998).

A pre-hearing motion to dismiss can be granted only if a complaint fails to raise a genuine issue of fact or law. The standard appropriate to determining the merit of a pre-hearing motion to dismiss has been stated thus:

> Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (HOORNSTRA, WITH FINAL AUTHORITY FOR WERC, 12/77) at 3.

This standard was approved in MORAINE PARK, DEC. NO. 25747-D (WERC, 1/90).

In determining when the limitations period begins to run, the Commission has referred to "our general holdings that the statute of limitations begins to run once a complainant has knowledge of the act alleged to violate the Statute." STATE OF WISCONSIN, DEC. NO. 26676-B at 8 (WERC, 4/91). However, the Commission has also rejected a complainant's contentions that she was not obligated to file her complaint within one year of the act alleged to have occurred in March of 1982 because she did not discover the allegedly arbitrary nature of that act until 1984, AFSCME, COUNCIL 24, WSEU, DEC. NO. 21980-C (WERC, 2/90). The Commission's adoption of a "knew or reasonably should have known", PREMONTRE HIGH SCHOOL, ET. AL., DEC. NO. 27550-B (WERC, 8/93) at 7, standard is more favorable to the Complainant here, and must be applied to determine if the complaint can be dismissed prior to formal hearing.

Application Of The Governing Law To The Amended Complaint

Application of governing law to the Amended Complaint demands a determination whether Complainant has alleged violations enforceable by the Commission under MERA. If she has, it is then necessary to determine whether any such allegations can be considered timely under Sec. 111.07(14), Stats.

Complainant's rights flow from her employment as a municipal employe. Thus, under no view of the governing law can the Commission assert jurisdiction over state or federal statutes beyond MERA. Conduct that can violate non-MERA statutes can also violate MERA, but this addresses allegations of fact, not law. For example, Complainant's contention that WEAC/ECEA breached its duty to fairly represent her based on hostility based on her age or

disability could point to fact potentially relevant to MERA. This relevance turns, however, on the existence of fact that can support at least a MERA violation. It fails to grant the Commission independent authority to enforce state or federal legislation proscribing discrimination based on age or disability. Those sections of the complaint alleging violations of non-MERA statutes, but failing to allege specific facts pointing to a MERA violation, must be dismissed on that basis alone. This addresses a significant portion of the Amended Complaint, including the following sections: Sections 24, 136 and 145, which point to various sections of the United States Code; Sections 26, 32 and 41, which concern the liability of insurance companies; Sections 21, 22, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 89, 102, 103, 104, 105, 106, 110, 112, 113, 118, 119, 124, 125, 130, 133, 135, 143, 148, 149, 150 and 155, which concern various common law actions; Sections 90, 91, 92, 93, 94, 95 96, 97, 98, 100, 101, 142 which concern federal antitrust and RICO law; Sections 34 and 35, which allege specific violations of the Fair Employment Act; Sections 37, 38 and 39, which allege District violations of Title I; Sections 141 and 147 which concern Title VII; Section 144, which concerns an amalgam of state and federal law not including MERA; and Sections 19, 20, 28, 29, 30, 31, 45, 140, 142 and 147 which allege violations of federal law proscribing discrimination based on age and handicap.

The listed sections entirely or in significant part allege violations of law not enforceable by the Commission. Some of the sections include factual allegations that could support violations of MERA as well as non-MERA law. The purpose of the conclusion stated above is not to precisely delineate those portions of the Amended Complaint that stray outside MERA. Such an effort is, on the face of the Amended Complaint, doomed to failure. It underscores, however, that those portions of the Amended Complaint that seek to invoke Commission jurisdiction over non-MERA sources of law must be dismissed.

The analysis thus turns to the MERA based violations asserted in the Amended Complaint, and more specifically whether those assertions can be considered timely under Sec. 111.07(14), Stats. The Amended Complaint alleges that the District violated the labor agreement and that WEAC/ECEA violated its duty to fairly represent Complainant by failing to effectively challenge those violations. Complainant filed two of the three complaints on February 5, 1999 and the third on March 1, 1999. To be timely, Complainant must allege a prohibited practice falling within the one-year period preceding these dates.

Isolating the specific prohibited practice alleged by Complainant poses some difficulty. The events woven through the Amended Complaint appear to date from an automobile accident on September 25, 1986 (Section 27). The Amended Complaint traces a series of events

constituting the aftermath of that accident. Those events cover "reasonable accommodations, transfers, inservice education and programs, wrongful discharge and constructive discharge" (Section 25). More specifically, the Amended Complaint alleges Complainant was transferred from a one-story school, then denied the reasonable accommodation of teaching in a one-story school for the 1990-91 school year (Section 42). She was involuntarily transferred to a multi-level building for the 1991-92 school year, and again denied a requested transfer to a one-level building (Section 57). This refusal to reasonably accommodate her continued through the 1992-93 school year (Section 58). The refusal to accommodate also extended to a District refusal to provide an "ergonomic armchair" (Sections 60-65). Involuntary transfers continued through the 1994-95 school year (Sections 67-71; 107-109). At the commencement of the 1995-96 school year, Complainant was embarrassed in front of teaching staff during an inservice session (Sections 116-118), and was again subjected to an involuntary transfer (Section 128). Ultimately, Complainant was "on March 21, 1997 . . . constructively discharged from her employment without just cause and in violation of the 1996-97 agreement" (Section 6).

The constructive discharge is the focal point of the allegations of the Amended Complaint. The failures to accommodate and series of transfers preceding it are inevitably more dated than the discharge. Section 7 of the Amended Complaint underscores that this act is the specific prohibited practice challenged in the complaint. That action, on the face of the Amended Complaint, falls outside of the one-year period preceding either February 5 or March 1, 1999.

The Amended Complaint asserts that the Commission should assert jurisdiction over the complaint without regard to its apparent untimeliness (Sections 11, 13, 21, 22 and 23) and also points to WEAC/ECEA conduct falling after the discharge (Sections 4, 8, 36, 45 and 88). None of these allegations establish conduct that in and of itself constitutes a prohibited practice. Section 4 points out no more than that the District and WEAC/ECEA are parties to a labor agreement covering the 1997-98 school year. This has no meaning as a prohibited practice outside of a continuation of the just cause provision Complainant wishes to apply to the 1997 discharge. The remaining sections point out that WEAC/ECEA expressly declined, in April of 1998, to represent Complainant in an action initiated by her before the Equal Rights Division of the Department of Workforce Development. This denial, however, has no meaning as a prohibited practice outside of the allegedly discriminatory acts that culminated in the discharge of March, 1997. None of these allegations can survive the BRYAN analysis. The April, 1998 denial of representation has no meaning as a prohibited practice independent of the events culminating in Complainant's constructive discharge.

The Complainant's contention that the Commission can ignore this apparent untimeliness cannot be accepted. Sections 11, 13, 21 and 22 may fall within a court's jurisdiction, but afford no guidance here, since the Commission can act only to the extent of its statutory authority. Section 23 asserts that Complainant was unaware of the prohibited practice procedure until after the one-year time limit. This cannot, however, fall within those Commission cases dating the specific prohibited practice alleged from the time a complainant knew or should have known of the violation. On its face, the Amended Complaint notes that Complainant was involved in litigation over the events complained of here, well before 1998 (Sections 8, 11, 13 and 88). Complainant knew of and challenged the conduct at issue here well before the one-year limitations period mandated by Sec. 111.07(14), Stats.

In sum, a significant portion of the Amended Complaint challenges conduct falling outside the scope of MERA. Those portions must be dismissed because the Commission has no jurisdiction to hear them. To the extent the Amended Complaint challenges conduct within the scope of MERA, Commission consideration of the conduct is barred by Sec. 111.07(14), Stats. Accordingly, each of the consolidated complaints, as amended, has been dismissed.

Dated at Madison, Wisconsin, this 20th day of January, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

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