STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL W. HOPKINS, Complainant,

vs.

CITY OF KENOSHA (FIRE DEPARTMENT) and KENOSHA FIREFIGHTERS, LOCAL 414, IAFF, AFL-CIO, Respondents.

Case 187
No. 57812
MP-3538

Decision No. 29715-B

Appearances:

Mr. Michael W. Hopkins, 33326 118th Street, Twin Lakes, Wisconsin 53181, appearing on his own behalf.

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by **Attorney Timothy E. Hawks**, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Kenosha Fire Fighters, Local 414, IAFF, AFL-CIO.

Davis & Kuelthau, S.C., by **Attorney Roger E. Walsh**, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202-6613, appearing on behalf of the City of Kenosha.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

Daniel J. Nielsen, Examiner: On July 26, 1999, Michael W. Hopkins (hereinafter referred to as either Hopkins or the Complainant) filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, alleging that the City of Kenosha (hereinafter referred to as the City) had violated the Municipal Employment Relations Act (MERA) by discriminating against him, and by violating the collective bargaining agreement. The complaint also alleged that Local 414, IAFF (hereinafter referred to as the Union) had violated MERA by failing to represent Mr. Hopkins at a Police and Fire Commission hearing

considering disciplinary charges against Mr. Hopkins. The Commission appointed Daniel Nielsen of its staff to act as Examiner and to make and issue appropriate Findings of Fact, Conclusions of Law and Order. A hearing was scheduled in this matter for October 15, 1999. That hearing was postponed to allow consideration of the Complainant's Motion to Disqualify Counsel for the Respondent Union, based on allegations of conflicts of interest. The parties submitted stipulations and arguments, and on January 24, 2000, the Examiner denied the Motion.

The hearings were rescheduled for June 26 and 27, 2000. On March 11, the Respondent Union submitted its Answer to the complaint, denying the allegations, together with a Motion to Dismiss the Complaint and a brief in support of the Motion. On March 29, the Respondent City submitted a Motion to Dismiss and a brief in support of its Motion. The Complainant submitted arguments in opposition to the Motions on April 28, 2000.

Now having considered the evidence, the arguments of the parties, the statutes and the record as a whole, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT

1. The City of Kenosha, hereinafter referred to as the City, is a municipality providing general governmental services to the people of Kenosha in southeastern Wisconsin. Among the services provided are emergency medical care, fire prevention and fire suppression through the Kenosha Fire Department. The Fire Department is managed by a Fire Chief, overseen by a Board of Police and Fire Commissioners. The City is a municipal employer within the meaning of Section 111.70, MERA.

2. Michael Hopkins, hereinafter referred to as either Hopkins or the Complainant, is employed as a firefighter by the City of Kenosha Fire Department and is a municipal employe.

3. Kenosha Firefighters, Local 414, IAFF, AFL-CIO, hereinafter referred to as the Union, is a labor organization and is the exclusive bargaining representative for the firefighters employed by the City of Kenosha Fire Department. Mr. Hopkins is a member of the bargaining unit represented by the Union.

4. The Kenosha Fire Department promulgates and enforces rules and regulations governing the conduct of officers on the Department. These rules are set forth in Article XII – General Rules of the collective bargaining agreement between the City and the Union and include, *inter alia*:

> All officers shall promptly report in writing to the Chief any incompetency, unfitness for duty, neglect of duty, disobedience of orders, insubordination or the violation of any rule, regulation or order of the Chief coming to their knowledge. In their report, they shall state the name of the offender, time and place of the offense, its nature, the names of persons by whom such facts can be proven and any other essential information. This requirement is mandatory and a report must be made even though another report may have been made by another officer. However, before any action is taken relative to the above, both the complainant and the complained against and witnesses shall be interviewed together by the Chief and/or the Assistant Chief.
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> . . .
>
> In matters of general conduct, not within the scope of department rules, personnel shall be governed by the ordinary rules of good behavior observed by law abiding citizens.

5. The law firm of Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer (hereinafter referred to as the Shneidman Firm) represents IAFF Local 414. A member of the Shneidman Firm, Mr. John Kiel, is also a firefighter on the Kenosha Fire Department and is acquainted with Mr. Hopkins.

6. Members of the Shneidman Firm have represented Mr. Hopkins individually in two matters in the past. One was a probate matter. The parties concede that the probate matter has no bearing on this case. The second was a criminal investigation into a 1993 traffic accident. Mr. Hopkins was alleged to be the driver of a vehicle involved in the accident, an allegation that he denied.

7. In the course of the Kenosha Police Department's investigation into the traffic accident during 1993, a police detective named Bob Queen spoke with Kip Keckler, who is a dispatcher for the City-County Joint Services Board. Queen asked Mr. Keckler to elicit an admission from Mr. Hopkins that he was the driver of the automobile at the time of the accident. Detective Queen represented to Mr. Keckler that the police had sufficient evidence against Mr. Hopkins to charge him with being the driver. Mr. Keckler is not a member of the bargaining unit represented by Local 414.

8. Mr. Keckler spoke with Mr. Hopkins, and Mr. Hopkins denied being the driver. Mr. Keckler relayed this information to Detective Queen.

9. The accident investigation was ultimately resolved with the dismissal of felony criminal charges against Mr. Hopkins.

10. The Shneidman Firm closed its file in the criminal matter and terminated its representation of Mr. Hopkins in 1997.

11. On December 24, 1997, Mr. Hopkins is alleged to have telephoned Mr. Keckler's residence and to have had a conversation with Mr. Keckler's son, Kristopher Keckler. In the course of the conversation, Mr. Hopkins is alleged to have made "harassing, sarcastic and disparaging statements" about Mr. Keckler to his son. The call is alleged to have been connected to the 1993 traffic accident and Mr. Keckler's role in questioning Mr. Hopkins about whether he was the driver.

12. The alleged phone conversation was brought to the attention of Fire Chief Thomas. In the course of investigating the allegations, Chief Thomas interviewed Khristopher Keckler and Kip Keckler some time prior to January 14, 1998. These interviews were conducted outside of the presence of the Complainant.

13. On January 7 and January 13, 1998, Mr. Hopkins met with Chief Thomas and denied making a call to Keckler's home. At the January 13th meeting, Mr. Hopkins was represented by Local 414 Vice-President Alan Horgen. Mr. Hopkins tape recorded these meetings. Chief Thomas, at the January 13th meeting, offered Mr. Hopkins the option of accepting a one-day suspension or a written reprimand with counseling.

14. On February 27, 1998, Chief Thomas wrote to Irene Kraemer, Chairman of the Board of Police and Fire Commissioners, alleging that he had independent confirmation of the December 24th telephone call. Chief Thomas asserted that Mr. Hopkins' conduct in making the telephone call and then denying having made the call violated Departmental rules governing "general conduct" of Fire Department personnel. He recommended that Mr. Hopkins be suspended without pay for ten work days.

15. On March 4, 1998, Mr. Hopkins submitted an appeal to Ms. Kraemer, with a copy to the Mayor:

> On January 13, 1998, Thomas is not being truthful as he has charged. On this date there wasn't a denial of any kind. Thomas at that time said "through further investigation I've concluded you haven't been honest in denying the phone call . . . Therefore here are the options I'm giving you . . . If no answer within 24 hours . . . recommended discipline to the . . . commission will be one day suspension." I'll be able to provide a truthful transcription to above.
>
> On January 8, 1998, Thomas violated Labor Contract: XII General Rules: However, before any action is taken relative to the above, both the complainant and the complained against and witnesses shall be interviewed together by . . . Also other individuals were questioned with contrary answers to Thomas's goal. Although I'm looking foreward [sic] to cross-examination.

On January 7, 1998, I have denied "personally making the call." Hindsight, I find it ironic that Thomas privately at that time spoke with Captain Bloxdorf expressing that "this has gotten out of hand and Keckler now is unable to accept drinking the water he has pissed in." The exact same I now find out he charges is harassing, sarcastic and disparaging. Also initially at that time, Thomas said there was a complaint filed against. When asked to see or hear what complaint is about, he refuses to produce. Upon his "demand an answer!", that's when he was told "me personally no" to his insistence of a "blank-check" admittance.

On December 24, 1997, I personally deny speaking with anyone of Kecklers family. Recently I've heard the alleged harassing, sarcastic and disparaging claimed charge. Through litigation I'm sure we'll conclude if there's merit opposing Rule XII: . . . observed by law abiding citizens.

There were three other claims investigated by Thomas's staff: Hopkins'

- Conduct at scene
- Patient care
- Patient confidentiality

By Thomas's own admittion [sic] "those claims were found unsubstantiated."

Please be aware that this all generates from Kip Kecklers stalking of my home, threaten phone call and DWI.

Respectfully,

/s/ Mike Hopkins

p.s. Is the commission willing to police - i.e. non-tax payments and illegal gambling. Rule XII General Rules: In matters of general conduct not within the scope of dept. rules, personnel shall be governed by the ordinary rules of good behavior observed by law abiding citizens.

16. A hearing on the recommended discipline was scheduled before the Police and Fire Commission for July 30, 1998.

17. Local 414 scheduled a meeting concerning the recommended discipline with Mr. Hopkins, two members of the Local's Executive Board and the Union's attorney, Mr. Hawks. The purpose of the meeting was to determine what steps, if any, Local 414 would take to further represent Mr. Hopkins in his appeal. The meeting was held at the offices of the Shneidman Firm on March 13, 1998.

18. While waiting for the meeting to begin, Mr. Hopkins spoke with Attorney Charles Blumenfield, a partner of Mr. Hawks, and the two discussed the proposed discipline.

19. Mr. Hawks met with Mr. Hopkins, Union President Matthew Loewen and Union Vice-President Al Horgen. Mr. Hawks interviewed Mr. Hopkins about the alleged telephone call and his meetings with Chief Thomas. Mr. Hawks also interviewed Messrs. Horgen and Loewen about the Local's efforts on behalf of Mr. Hopkins. Mr. Hopkins advised Mr. Hawks that he had not personally placed the call to Mr. Keckler's residence, but that he wrote out a script to be read by a relative, and was present when the relative made the call and read the script to the person who answered Mr. Keckler's phone. Mr. Hawks reviewed the procedures for appealing the Chief's recommended discipline, and provided his assessment of the chances of prevailing before the Police and Fire Commission, the likely costs of the proceeding, and the probable outcome of the Police and Fire Commission's deliberations.

20. After hearing Mr. Hawks' assessment of the case, Mr. Loewen and Mr. Horgen both suggested to Mr. Hopkins that the Local Union be allowed to continue negotiations with Chief Thomas over a reduction in the penalty. Mr. Hopkins declined, insisting instead that the case be tried on the merits, as he had not actually made the call as claimed by the Chief and, thus, could not agree to something short of rescission of the discipline.

21. Mr. Hopkins also generally discussed the matter with Firefighter Kiel. Mr. Kiel was not a participant in the meetings between Mr. Hopkins, members of the Local 414 Executive Board and members of the Shneidman Firm. Instead, Mr. Hopkins' conversations with Mr. Kiel were conversations between co-workers. Mr. Kiel did not discuss the matter in detail with Mr. Hopkins.

22. The Executive Board of Local 414 met on March 20, 1998, and voted not to provide further assistance to Mr. Hopkins if he chose to pursue an appeal. The Local's position was spelled out in a memo sent to Mr. Hopkins by Mr. Horgen:

> The executive board met on March 20, 1998 and considered the following facts regarding the matter you have appealed to the Police and Fire Commission:
>
> 1. That you were aware of the context of the phone conversation made on 12/24/97 at approximately 12:20 P.M.
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> 2. That although you didn't "personally" make the phone call, you were not totally forthcoming to the Fire Chief when questioned on Jan. 7, Jan. 13 and Feb. 27.
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> 3. That the Fire Chief produced phone records on Feb. 27 showing a phone call was made from your residence to Kip Keckler's residence on 12/24/97 at 12:10 P.M.
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> 4. That you withheld from the Union until Feb. 27 the fact that you were aware of the context of the phone conversation of 12/24/97.

5. That you were offered a one day suspension on Jan. 13 as discipline in this matter and refused to accept it.

6. That the Union's labor attorney predicts a 90% failure rate based on the merits of your case.

7. That the Union's labor attorney predicts a reduction in discipline to at most 8 days off, based on past precedent, if this case proceeds to a Police and Fire Commission hearing.

8. That you have, on two separate occasions (Feb. 27 and March 13) refused to allow the Union to approach the Fire Chief with intent of reducing discipline.

Based upon our attorney's belief that this case will lose on its merits, the Executive Board has unanimously decided to not offer the further services of the Union if you should choose to proceed to the Police and Fire Commission. The Executive Board is desirous of bringing this situation to a resolution through further negotiations with the Fire Chief if so authorized by you.

If you have any questions or concerns regarding this matter, feel free to contact either myself or Matt Loewen.

23. The Police and Fire Commission hearing proceeded on July 30, 1998. Local 414 did not provide legal representation for Mr. Hopkins at the hearing. On August 3, 1998, the Commission issued its Findings of Fact and Conclusions. The Commission found that Mr. Hopkins was guilty of making the telephone calls as alleged by the Fire Chief. The Commission determined that the proposed penalty of a ten duty day suspension was reasonably related to the seriousness of the offense and was not discriminatory. However, in light of his clean disciplinary record, the Commission reduced the penalty to a five duty day suspension, with a strong recommendation that Mr. Hopkins avail himself of the services of the Employee Assistance Program.

24. The Police and Fire Commission's decision was not appealed to Circuit Court.

25. On July 26, 1999, Mr. Hopkins filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, alleging that the City of Kenosha had violated the Municipal Employment Relations Act (MERA) by discriminating against him, and by violating the collective bargaining agreement. The complaint also alleged that Local 414 had violated MERA by failing to represent Mr. Hopkins at the Police and Fire Commission hearing.

26. On August 18, 1999, Mr. Hawks advised Mr. Hopkins that Local 414 had engaged the Shneidman Firm to represent it in defense of the prohibited practice charge brought by Mr. Hopkins. Mr. Hawks further advised Mr. Hopkins that the firm had reviewed its files concerning prior representation of Mr. Hopkins and had determined that there was no relationship between the prior matters and the complaint case, and that the Shneidman Firm had accepted the defense of Local 414 in the complaint case. Mr. Hawks invited Mr. Hopkins or his counsel to contact him if there was any objection to the Shneidman Firm's representation of Local 414. On that same date, Mr. Hawks sent a letter to the Examiner, entering the Shneidman Firm's Notice of Appearance.

27. On September 2, 1999, Mr. Hopkins submitted a Motion to the Examiner, alleging that the Shneidman Firm had a conflict of interests in representing Local 414, and requesting that the Examiner order the Shneidman Firm to withdraw as counsel for Local 414. Mr. Hopkins represented that, if the Shneidman Firm did not withdraw, he would file a complaint with the Board of Attorneys' Professional Responsibilities.

28. On November 22, 1999, Mr. Hawks submitted a Motion, denying that there was any material connection between this litigation and the Shneidman Firm's prior representation of Mr. Hopkins, and requesting that the Examiner issue a written determination as to whether the Shneidman Firm's representation of Local 414 would violate SCR 20:1.9.

29. On January 24, 2000, the Examiner issued his Order denying the Complainant's Motion to Disqualify Counsel for the Respondent Union (DEC. NO. 29715-A, (NIELSEN, 1-24-00)).

30. There is no past attorney-client relationship between Hopkins and the Shneidman Firm that is relevant to the instant dispute. There is no current attorney-client relationship between Hopkins and the Shneidman Firm. There was no revelation of privileged information by Hopkins to members of the Shneidman Firm during the Union's investigation of his grievance. The Shneidman Firm has neither a real nor an apparent conflict of interest in defending the Respondent Union against the instant charges by Hopkins.

31. The right to appeal a Chief's disciplinary suspension before the Board of Police and Fire Commissioners is an individual statutory right. It is the product of neither a collective bargaining agreement nor a collective bargaining relationship.

32. Neither the Union nor the Complainant has the right to proceed to grievance arbitration over the disciplinary decision of the Board of Police and Fire Commissioners. The exclusive venue for challenging that decision is an appeal by the individual employe to the Circuit Court.

33. On July 8, 1999, the Complainant received a copy of the City's response to a pending complaint before the Equal Employment Opportunities Commission. The response

made reference to a verbal discipline contained in his personnel file. On August 26, 1999, the Union filed a grievance on his behalf, protesting the inclusion of that information. The grievance over the contents of the Complainant's personnel file is pending in arbitration, and was heard by Arbitrator Karen Mawhinney on January 18, 2000. Briefing was concluded on March 17, 2000, and as of the date of this decision no award had been issued. The Complainant has, as of this time, failed to exhaust his contractual remedies with respect to that grievance.

34. No timely grievance was filed over the Chief's having interviewed the Keckler's outside of the presence of the Complainant in January of 1998.

Based upon the above and foregoing Findings of Fact, the Examiners makes the following

CONCLUSIONS OF LAW

1. That the Wisconsin Employment Relations Commission lacks subject matter jurisdiction over allegations of a breach of a collective bargaining agreement under Sec. 111.70(3)(a)5, MERA, with respect to the disciplinary decisions of a Board of Police and Fire Commissioners constituted under Chapter 62, Stats.

2. That the Wisconsin Employment Relations Commission lacks subject matter jurisdiction over allegations of violations of Sec. 111.325, the Wisconsin Fair Employment Act.

3. That the provision of legal counsel to a firefighter in a disciplinary proceeding before a Board of Police and Fire Commissioners is not a duty required by a Union's status as the exclusive bargaining representative of fire fighters.

4. That the Complainant has failed to exhaust his contractual remedies with respect to the allegation that the City violated the collective bargaining agreement by including improper and/or stale information in his personnel file, and that that matter should be deferred to arbitration.

5. That the Complainant has failed to exhaust his contractual remedies with respect to the allegation that the Fire Chief violated departmental rules by interviewing witnesses outside of his presence, and that the events complained of occurred more than one year prior to the filing of this complaint and are, therefore, barred by the statute of limitations set forth in Sec. 111.07(14), WEPA.

6. That the events complained of in the Complainant's April 28, 2000 attempt to amend his complaint to allege that the Union acted in concert with the City to violate the

collective bargaining agreement in connection with the Fire Chief's interview with the Keckler's outside of his presence, took place more than one year prior to the filing of the amendment and are, therefore, barred by the statute of limitations set forth in Sec. 111.07(14), WEPA.

7. That the events complained of in the Complainant's April 28, 2000, attempt to amend his complaint to allege that the Union acted in concert with the City to violate the collective bargaining agreement in connection with the inclusion of improper and/or stale information in his personnel file are pending in arbitration. The Complainant's contractual remedies have not been exhausted and this allegation is not ripe for a charge of prohibited practices.

8. The complaint fails to state any claim upon which relief can be granted.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The instant complaint is hereby dismissed in its entirety.

Dated at Racine, Wisconsin, this 15th day of May, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

CITY OF KENOSHA (FIRE DEPARTMENT)

**MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DISMISSING COMPLAINT**

The Complaint

The complaint alleges that the City of Kenosha violated MERA by discriminating against the Complainant based upon his race in disciplining him while others who were guilty of illegal conduct were not disciplined, and by imposing an improper degree of discipline. It further alleges that the City violated the collective bargaining agreement by (1) disciplining him improperly for conduct that was not illegal; (2) failing to expunge untrue and slanderous material from his personnel file; and (3) failing to allow the Complainant and a witness against him to be interviewed together before allowing them both to testify before the Board of Police and Fire Commissioners. The complaint alleges that the Union violated MERA by failing to represent him at the hearing before the Board of Police and Fire Commissioners.

As detailed in the Findings of Fact, the Complainant was suspended for allegedly making harassing phone calls to the home of a non-Department employe and speaking with that person's son, and for misrepresenting the matter to the Fire Chief when he was asked about the incident. The call took place on Christmas Eve in 1997, and the meetings with the Chief took place in January of 1998. He was offered the option of accepting a lesser measure of discipline, but he declined as he felt he was not guilty, since a relative reading from a script prepared by the Complainant had actually made the telephone call. The Union investigated the matter, consulted with its legal counsel and decided that it would not provide legal counsel for the Complainant at the hearing before the Commissioners. The Complainant was represented by private counsel at the hearing in August of 1998, and the Commissioners allowed a suspension, although not as lengthy a suspension as the Chief had recommended. The Complainant did not appeal the Commissioners decision to circuit court. Instead, on July 26, 1999, he filed the instant complaint of prohibited practices.

The Motion to Disqualify Counsel for the Respondent Union

The Complainant moved to disqualify counsel for the Union contending that the firm had a conflict of interests in defending the Union, since it had represented him in the past and lawyers from the firm had interviewed him in connection with the discipline. The Findings of Fact relevant to that Motion have been incorporated into the Findings in this decision, and the Examiner's analysis of the Motion is set forth below:

JURISDICTION OF THE EXAMINER

Both Hopkins and the Union have requested a ruling on the Shneidman Firm's alleged conflict of interests. On November 26, 1999, the Examiner advised the parties that he would receive submissions on the issues of "(1) what authority the Examiner has to address an alleged conflict of interests by counsel; and (2) assuming the Examiner has such authority, whether the Shneidman Firm has a conflict of interests in representing Local 414." The threshold question here is whether the Examiner has authority to rule on the conflict question. The Examiner concludes that he does have such authority, not as a matter of interpreting and enforcing the Supreme Court's Rules, but as a matter of insuring that the parties receive basic due process of law.

MERA expressly requires that the provisions of Sec. 111.70 are intended to provide, *inter alia*, "a fair . . . procedure" for the resolution of labor disputes:

> **(6) Declaration of policy.** The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.

In administering a fair procedure for the resolution of prohibited practice claims, §ERC 20.17 of the Administrative Code provides that "It shall be the duty of the individual conducting the hearing to inquire fully into all matters in issue, to obtain a full and complete record upon which the duties of the commission . . . under subch. V, ch. 111, Stats., may be properly discharged." ERC 20.18 empowers the examiner to "regulate the . . . course of the hearing," "dispose of procedural requests or other similar matters," and to "take any other action necessary under the foregoing or authorized under these rules."

The fundamental obligation of the Examiner is to insure that parties appearing before the Commission receive due process of law. Due process requires that the parties to a dispute be afforded the opportunity for a "full, fair and public hearing" before any final decision is made. KROPIWKA V. DEPARTMENT OF LABOR, INDUSTRY AND HUMAN RELATIONS, 87 WIS.2D 709 (1979), 275 N.W.2D 881, CERTIORARI DENIED 100 SUPCT 105, 444 U.S. 852, 62 L.ED.2D 68. The cardinal test of the presence or absence of due process of law in administrative proceedings is the presence or absence of the rudiments of fair play long known to the law. STATE EX. REL. MADISON AIRPORT CO. V. WRABETZ, 231 WIS. 147 (1939), 285 N.W. 504; SEE ALSO BITUMINOUS CAS. CO. V. DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, 97 WIS.2D 730 (CTAPP 1980) 295 N.W.2D 183.

One of the "rudiments of fair play" in a legal proceeding is the right of a party to a hearing in which his or her substantial rights are unaffected by conflicts of interest or other professional misconduct by counsel. ENNIS v. ENNIS, 88 WIS.2D, 276 N.W.2D 341 (CTAPP 1979); CITY OF WHITEWATER v. BAKER, 99 WIS.2D 449, 299 N.W.2D 584 (CTAPP 1980). The courts in ENNIS and BAKER found that when such a conflict becomes apparent to a trial court, the court has an affirmative duty to intervene on its own motion. Likewise, in WERC proceedings, one circuit court found that examiners have the duty to intervene and ensure that conflict is abated. JEAN ELLIOT v. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, CASE NO. 93-CV-1217 (BROWN CO. CIRCUIT COURT, 5/16/94). In another WERC proceeding, a reviewing court found it necessary to determine whether the Commission erred in allowing a violation of SCR 20:3.7 when counsel for one of the parties was allowed to testify. CHRISTIAN THOMSEN v. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, CASE NO. 98-CV-1437 (DANE CO. CIRCUIT COURT, 5/20/99); DEC. NO. 28647-D. Thus, in some circumstances, the Commission is obliged to consider and regulate the role of counsel.

The allegation here is that the Union's law firm possesses confidential and privileged information about the case by virtue of its former representation of him in the traffic accident investigation and by virtue of having interviewed him about this case at a time when he was consulting with Attorney Hawks about representing him before the Police and Fire Commission. Allowing a law firm to switch sides and use confidential information to the detriment of a former client would pose a clear threat to the Complainant's opportunity for a fair hearing. Accordingly, the Examiner concludes that resolution of this Motion is a necessary predicate to conducting a hearing in which all parties are afforded due process of law.

THE MERITS OF THE ALLEGATIONS

As noted in Point No. 4 of the Summary, above, it is conceded that the Shneidman Firm's representation of Mr. Hopkins in the probate matter has no bearing on this case. The two interactions that are alleged to give rise to the conflict here are the Shneidman Firm's representation of Hopkins in the 1993 traffic accident investigation and the March, 1999 interview of Hopkins by Hawks. In analyzing the claim of conflict, the Examiner looks for guidance to the provisions of SCR 20:1.9, which regulates the conduct of attorneys in, cases involving the interests of former clients. 1/ The rule provides:

> A lawyer who has formerly represented a client in a matter shall not:
>
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing after consultation;

> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.
>
> Applying this rule to the facts of this case, I find that there is no violation of SCR 20:1.9 nor is there any impairment of the Complainant's due process rights in allowing the Shneidman firm to defend the Union against his claim that he was not fairly represented.

1/ In using SCR 20:1.9 as the template for this analysis, the Examiner does not suggest that the lack of strict, point by point adherence to the Code of Professional Responsibilities will always raise questions of due process in an administrative proceeding, nor does he purport to sit in the place of the Board of Attorneys' Professional Responsibility in this matter.

SCR 20:1.9 requires that the disputed representation involve "the same or a substantially related matter." The Shneidman Firm's representation of Mr. Hopkins in the 1993 traffic accident investigation is not substantially related to the alleged telephone conversation between Mr. Keckler's son and Mr. Hopkins or his relative. The alleged motive for the conversation — retaliation for Keckler's cooperation with Detective Queen — was tangentially related to the accident investigation, but the facts surrounding the traffic accident are entirely separate and distinct from the facts surrounding the disciplinary matter. It is the fact of the telephone call and the Complainant's allegedly disingenuous response to the Chief's inquiries that triggered discipline, not his involvement in the traffic accident. The facts related to the traffic accident itself are irrelevant in this proceeding.

An even clearer conflict would exist if the Shneidman Firm was engaged as counsel for Hopkins in the disciplinary proceeding and abandoned him in favor of the Union when he brought this action. However, the Shneidman Firm was not engaged as counsel for Mr. Hopkins in the disciplinary matter, nor would Mr. Hopkins have reasonably understood that the firm was being engaged as his personal counsel. He sought representation through his Union, and the Union arranged for a meeting with Hopkins, Attorney Hawks and members of the Union's Executive Board. Attorney Hawks provided his assessment of the case to the officers of the Union, and the ultimate decision not to provide legal counsel for the Police and Fire Commission hearing was announced by the Union's Executive Board. A reasonable person in Mr. Hopkins' position would have understood that the Shneidman Firm was engaged as counsel for Local 414 in the disciplinary matter. Thus, aside from the unrelated 1993 traffic accident investigation, there was no attorney-client relationship between Mr. Hopkins and the Shneidman Firm, and the firm owed no duty of loyalty to Hopkins.

The final possible objection to the Shneidman Firm's representation of the Union in defense of the duty of fair representation claims is that it has access to confidential or privileged information that would be used to Hopkins' disadvantage. Mr. Hopkins did convey information to Attorney Hawks in the March 13, 1999, interview. However the contents of that interview cannot be treated as privileged or confidential information which could not be disclosed to the Union for use in its defense in this complaint case. As noted, there was no attorney-client relationship between Mr. Hopkins and Attorney Hawks or his firm. The purpose of the interview was to brief and advise the officers of the Local, and there would be no expectation of confidentiality as to them. Moreover, it appears that members of the Union's Executive Board were present during the interview and the information disclosed in their presence cannot plausibly be termed a confidential communication between Mr. Hopkins and Attorney Hawks.

In conclusion, the Examiner finds that there is no substantial relationship between the Shneidman Firm's representation of Mr. Hopkins in the traffic accident investigation and its representation of the Union in this case. Nor has there been any attorney-client relationship between Mr. Hopkins and the Shneidman firm in the disciplinary matter. The law firm was engaged as counsel to the Union, and a reasonable person in Mr. Hopkins' position would have understood that. Finally, the information gathered in the March, 1999 interview was not privileged or confidential, either as a matter of law or as a matter of fact, as to the Union. For these reasons, the Examiner concludes that there is no violation of SCR 20:1.9 in the Shneidman Firm's defense of Local 414 against Mr. Hopkins' charges, and that there is no impairment of Mr. Hopkins' right to due process of law. Accordingly his Motion to Disqualify Counsel is denied.

The Order Denying Complainant's Motion to Disqualify Counsel is incorporated herein and is reaffirmed.

The Respondent Union's Motion to Dismiss

The Union moves to dismiss the complaint against it, noting that the sole charge is that it failed to represent the grievant at his hearing before the Police and Fire Commission. The Union denies that any request for legal representation was ever made. However, even assuming that a request was made and refused, the right to appear before the PFC is an individual right, not one that is controlled by the labor contract or collective bargaining. The Union has no right to arbitrate over the results of a PFC hearing, and in some Wisconsin jurisdictions has been found to have no standing to appear before the PFC. The duty of fair representation derives from the Union's role as the exclusive bargaining representative of an employe. WERC examiners have consistently held that Unions do not have a duty of fair representation in connection with matters where the Union lacks the exclusive right to represent the employe. Since the Union does not have any right to represent employes in PFC proceedings, it cannot have violated its duty of fair representation. Accordingly the complaint should be dismissed.

The Position of the Complainant as to the Union's Motion to Dismiss

The Complainant distinguishes his case from those relied upon by the Union and the City, noting that his situation is unique. He alleges that the members of the Union Executive Board have conceded that the off duty misconduct alleged against him should not have resulted in discipline until such time as he was convicted of a crime, and that there has been no such conviction. He also asserts that Union Vice-President Al Horgen conceded that the Union had reached an agreement for a written reprimand or a one-day suspension on these charges before he even knew charges were pending. The Complainant notes that the Union's by-laws define as the objectives of the Union "The protection of its members" and argues that they have failed in that duty in his case. He observes that the Local has, in the past, represented employes before the PFC, but it refused to do so in his case.

The Complainant seeks to amend his complaint against the Union, alleging that it violated Sec, 111.70(3)(a)5 by acting in concert with the City to violate his rights in the discipline before the PFC, the inclusion of derogatory material in his personnel file, and in allowing the interviews with the Keckler's. Further, he asserts that the Union failed to listen to recordings of meetings he had with the Chief, to interview witnesses who would have supported him and generally acted with a lack of diligence in employing counsel who was not committed to the interests of the members and who did not competently represent them.

The Complainant alleges that no one has, prior to the Motions to Dismiss, claimed that the WERC lacked jurisdiction over these matters. If allowed to proceed, he represents that he will subpoena all of the PFC members, and have them explain how they viewed the term "just cause" as applied to his case. For these and other reasons, the Motion should be denied and a hearing should be held on these charges.

The Respondent City's Motion to Dismiss

The City moves to dismiss the various claims against it. The City notes that the WERC lacks jurisdiction to review the major claims brought by the Complainant. He alleges that the City discriminated against him in violation of Sec. 111.325, the Wisconsin Fair Employment Act. That chapter of the statutes is administered by the Wisconsin Department of Workforce Development, not the Wisconsin Employment Relations Commission. In fact, the City asserts that the same allegations are currently pending before an administrative law judge employed by the Department of Workforce Development, and it urges the Examiner to dismiss this portion of the complaint as being outside of his jurisdiction. To the extent that the complaint asserts that the suspension imposed on the Complainant is a contract violation, it is likewise outside the examiner's jurisdiction. Well established case law in Wisconsin holds that appeals of PFC decisions on discipline matters are the exclusive province of the circuit courts.

The remaining allegations should also be dismissed. The Complainant asserts a violation of the labor agreement because his personnel file contained materials that he felt were

inappropriate. This matter has been grieved by the Union and is pending before an arbitrator. The contractual grievance procedure is presumed to be the exclusive venue for pursuing alleged contract violations, and the Examiner should defer to that procedure. As to the claim that the Chief violated the contract by interviewing the Keckler's outside of the Complainant's presence, the City argues that this is not a plausible reading of the contract provision. By its terms, the requirement of joint interviews applies only to interviews with officers of the Fire Department, not to civilians. In any event, the Complainant should have filed a grievance if he wished to protest this perceived violation of the contract. Even if the provision did apply, and even if there was some reasons not to defer to the grievance procedure, this interview took place sometime prior to January 14, 1998. MERA contains a one year statute of limitations, and this complaint was not filed until July of 1999, well beyond the one year period.

The Position of the Complainant as to the City's Motion to Dismiss

In response to the City's Motion to Dismiss, the Complainant states that he assumes that the WERC has jurisdiction to hear discrimination claims, even if those same claims are pending before another body. As to the claim that the PFC decision cannot be appealed to any forum other than the Circuit Courts, the Complainant notes that he is protesting not only the substance of the decision, but also the flawed procedures used by the PFC. He alleges that the hearing was not held in a timely fashion, and that the Chair of the PFC did not even attend the hearing. He asserts that the hearing was sham, and did not actually constitute a Sec. 62.13 hearing. Thus, there should be no bar to the WERC reviewing these issues.

Responding to the claim that the grievance over his personnel file is pending in arbitration and that the Examiner should defer to that process, the Complainant asserts that he was not made aware of that grievance until shortly before the arbitration hearing, and that the City and the Local are conspiring to violate his legal rights in that proceeding. As for the claim that his complaint over the separate interviews with the Keckler's was untimely, he observes that the City could have changed its mind at any point in time prior to the PFC hearing, and that the statute of limitations should be measured from that date, in August of 1998.

DISCUSSION 2/

2/ The Complainant's unusual writing style makes it difficult, in some cases, to be sure exactly what it is that he means to convey. Throughout this decision, the Examiner has interpreted his statements as broadly as possible, so as to read the pleadings in the light most favorable to the Complainant's causes of action.

Discrimination – Section 111.70(3)(a)3

The Complainant alleges that the City has discriminated against him in violation of Section 111.70(3)(a)3 and has violated the collective bargaining agreement in violation of Section 111.70(3)(a)5, MERA. With respect to the first claim, it reflects a basic misunderstanding of the scope of Section 111.70(3)(a)3. Under the Commission's long-standing MUSKEGO-NORWAY line of cases, 3/ the test of whether an employer's actions constitute discrimination in violation of Section 111.70(3)(a) 3 has four prongs:

1. The employee was engaged in protected activity;

2. The employer was aware of the activity;

3. The employer was hostile to the activity;

4. The employer's conduct was motivated, in whole or in part, by hostility to the protected activity.

3/ MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540, 151 N.W.2D 617 (1967).

Although he nowhere alleges membership in a protected racial class, the Complainant alleges that the City engaged in racial discrimination when it disciplined him, and cites Section 111.325, Stats. 4/ The Commission does not have jurisdiction over claims of racial discrimination by employers. The discrimination that MERA prohibits is discrimination based upon protected concerted activity. The Complainant does not allege that the discipline imposed upon him was motivated by hostility to any protected concerted activity, and there is nothing in the pleadings or stipulations that suggests any involvement in protected activity. Indeed, viewing all of the pleadings and stipulations in the light most favorable to the Complainant, there is nothing in this case that would show even one of the four elements of a Section 3(a)3 violation. As his complaint of discrimination does not implicate MERA, no relief could be granted to him even if he could prove his charges. Accordingly, that portion of the complaint is dismissed in its entirety.

4/ It appears from the ERD Discrimination Complaint, attached as Exhibit 1 to the City's Motion to Dismiss, that the Complainant is Hispanic.

Contract Violations – Section 111.70(3)(a)5

Section 111.70 (3)(a)5 makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. Section 111.70 (3)(b)4 is a parallel provision, making it a violation of MERA for a labor organization to violate the contract. However, where the parties have negotiated a contract which includes grievance arbitration as the mechanism for enforcing

contractual rights and the grievance procedure has not been exhausted, the Commission will not exercise its discretion to hear claims of 3(a)5 and 3(b)4 violations. Instead, the Commission will honor the parties' contract and the grievance procedure will be presumed to be the exclusive venue for these claims. This is a rebuttable presumption, and the Commission will assert its jurisdiction to hear contract claims where the parties waive reliance on the grievance procedure, 5/ or where there is clear and satisfactory evidence that the grievance and arbitration machinery cannot be relied upon to dispose of employee grievances. 6/ Thus, as a general rule, the merits of a contractual claim can only be reached if the Complainant first proves a violation of Section 111.70(3)(b).

5/ ALLIS CHALMERS MFG. CO., DEC. NO. 8227 (WERB, 10/67); JT. SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY, ET. AL., DEC. NO. 16753-A (WERC, 12/79); MILWAUKEE COUNTY SHERIFF'S DEPT., DEC. NO. 27664-A (CROWLEY, 10/93).

6/ Typically this occurs where the party alleged to have violated the contract rejects the arbitration provision (MEWS READY-MIX, 29 WIS.2D 44 (1965)), or where an employee does not have meaningful access to the grievance procedure because the labor organization has violated its duty to fairly represent the employee (MAHNKE V. WERC, 66 WIS.2D 524 (1975).

The Suspension Imposed by the Police and Fire Commission

In the case of the discipline approved by the Board of Police and Fire Commissioners arbitration is not an option. Thus, a violation of the duty of fair representation by the exclusive bargaining representative is not a pre-condition to filing a complaint under MERA. This does not, however, lead to the conclusion that the complaint procedures of MERA are a viable option. The reason that arbitration is not an option is that the courts have determined that the exclusive venue for challenging decisions of a Board of Police and Fire Commissioners is through an appeal to Circuit Court under Sec. 62.15(5)(i), Stats. In JANESVILLE V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 193 WIS. 2D 492, 535 N.W.2D 34 (CT.APP. 1995), the Court of Appeals determined that an appeal to arbitration would be inconsistent with the statutory authority of the commissioners to hear and decide disciplinary matters, and that a proposal to include arbitration of discipline in a collective bargaining agreement would be illegal. Given the Court's finding that the Circuit Court is the exclusive venue for reviewing the merits of PFC decision, it is not plausible to suppose that the Examiner may insert himself in the process under the auspices of Section 111.70(3)(a)5. That provision is a means of enforcing collective bargaining agreements, just as arbitration is a means of enforcing agreements. If the labor agreement itself cannot legally permit extra-judicial review of PFC decisions, such a review cannot be available through the process of enforcing the agreement. Accordingly, the Examiner lacks jurisdiction over this aspect of the complaint, and it must be dismissed. 7/

7/ In determining that a PFC decision may not be reviewed under Section 111.70(3)(a)5, the Examiner does not express any opinion as to the availability of WERC review under Sec. 111.70(3)(a)3.

The Inclusion of Derogatory Information in Complainant's Personnel File

The complaint alleges that the City violated the contract by including derogatory information about the Complainant in his personnel file. A grievance was filed over this matter, and that grievance is currently pending decision by an arbitrator. While the Complainant expresses some skepticism over the Association's sincerity in representing him in this grievance, principally because he believes they did not give him adequate advance notice of the hearing, there is no evidence that the grievance machinery is not functioning properly, nor anything to suggest that he cannot or will not receive a fair disposition of the case. On the record as it exists, there is no reason to assert Sec. 111.70(3)(a)5 jurisdiction over a case that is already before a grievance arbitrator. Accordingly, this portion of the complaint is dismissed.

The Interview of the Keckler's Outside of the Complainant's Presence

In January of 1998, Chief Thomas interviewed the Keckler's outside the presence of the Complainant. The Complainant alleges that this interview violated a portion of the Department's Rules, Article XII of the contract:

> All officers shall promptly report in writing to the Chief any incompetency, unfitness for duty, neglect of duty, disobedience of orders, insubordination or the violation of any rule, regulation or order of the Chief coming to their knowledge. In their report, they shall state the name of the offender, time and place of the offense, its nature, the names of persons by whom such facts can be proven and any other essential information. This requirement is mandatory and a report must be made even though another report may have been made by another officer. However, before any action is taken relative to the above, both the complainant and the complained against and witnesses shall be interviewed together by the Chief and/or the Assistant Chief. (Emphasis added.)

Assuming solely for the sake of analysis that this provision applies to reports by persons who are not officers of the Fire Department, the complaint must, nonetheless, fail for two reasons. First, no grievance was filed and the Complainant therefore failed to exhaust his remedies under the collective bargaining agreement. The Complainant alleges that the Union refused to file a grievance. Assuming that the right to grieve is exclusive to the Union, the allegation must still be dismissed, as it is untimely. The instant complaint was not filed until July of 1999, some 18 months after these interviews, and 17 months after charges were filed with the PFC. Proceedings under MERA are governed by the provisions of Section 111.07, WEPA. Section 111.07(14), WEPA establishes a one year statute of limitations for complaints of prohibited practices. While the Complainant asserts that he was waiting to give the City an opportunity remedy this violation – presumably by not presenting the Keckler's as witnesses at the PFC hearing – the alleged contract violation took place when "action" was taken on the report based on witness interviews that excluded the Complainant. The action taken was the filing of charges. Allowing the statute of limitations to be tolled when the Employer might do something to remedy a contract violation would effectively write the one year limitation out of the law. An

Employer could possibly change its mind at any point. Here, there is nothing to indicate that the City somehow misled the Complainant into thinking that it was not going to use the Kecklers' testimony, nor is there any other basis for excusing the passage of 17 months before the filing of the charge. Accordingly, this aspect of the complaint is barred.

The Association's Duty of Fair Representation

The Association is the exclusive representative of the employes. This exclusive status confers certain legal rights on the Association and carries with it corresponding responsibilities, chief among them the duty to provide fair representation to each of its members. Fair representation is not, however, perfect representation, nor is it a guarantee that every individual member will be satisfied with each act or decision taken by the labor organization. The Commission and the courts have recognized that:

> The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. . . 8/

8/ HUMPHREY V. MOORE, 375 U.S. 335 (1964); See also, MILWAUKEE COUNTY, DEC. NO. 28754-B (MCGILLIGAN, 1/97).

The duty is satisfied so long as a labor organization represents its members' interests without hostility or discrimination, exercises its discretion with good faith and honesty, and acts without arbitrariness in its decision making. Thus, the legal formulation for a breach of the duty of fair representation is whether the Union's actions are arbitrary, discriminatory or taken in bad faith. 9/

9/ VACA V. SIPES, 386 U.S. 171 (1967); MAHNKE V. WERC, 66 WIS.2D 524 (1975); GRAY V. MARINETTE COUNTY, 200 WIS.2D 426 (CT.APP. 1996); MILWAUKEE COUNTY, DEC. NO. 28754-B (MCGILLIGAN, 1/97).

The complaint asserts that the Association violated its duty of fair representation by refusing to provide legal counsel to the Complainant at the hearing before the PFC. As discussed above, the roots of the duty of fair representation lie with the Union's responsibilities as the exclusive bargaining representative for employes. It is with respect to those responsibilities that the Union must provide fair representation. There are other areas where a Union might

appropriately provide services to members, but is not obligated to by the labor laws. As I observed in a case involving a request for representation in an unemployment compensation hearing:

> The Complainant asked the Association to be present at the unemployment compensation hearing, and now asserts that this was a request by him for legal representation, a request which was denied. It does not appear that a clear request was made, but whether it was or not, the Complainant has failed to explain why the Association had any duty to represent him in such a forum. Certainly it would be appropriate for a labor organization to assist a member in an unemployment compensation hearing, but such representation is not a duty associated with being the exclusive bargaining representative, as is representation in a grievance procedure. BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 28448-B (NIELSEN, 7/24/97), AT PAGE 39.

The right to appeal a disciplinary action to the Board of Police and Fire Commissioners is an individual right, conferred by the statutes of the State of Wisconsin. 10/ Such appeals are not governed by the grievance procedure negotiated and administered by the Union and, under the reasoning of JANESVILLE, supra, cannot be made subject to that procedure. An officer may appeal or not, and the Union has no authority to compel an appeal or prevent an appeal. Given that the Association cannot legally negotiate over the substance or procedure of the PFC hearing, cannot exercise any control over an officer's use or non-use of the appeal procedure, and cannot trigger an appeal in its own name to protect any general interests of the bargaining unit may have in issues related to the discipline, 11/ it is difficult to identify any basis on which the Association can be compelled to provide legal counsel to an officer before the PFC. More than difficult, it is impossible. Nothing about the PFC hearing implicates the Association's rights and responsibilities as the exclusive bargaining representative. It follows that the decision not to provide legal counsel at such a hearing cannot form the basis of a duty of fair representation suit. Accordingly, this aspect of the complaint is dismissed.

10/ Sec. 62.13(5)(c) provides in part: "A subordinate may be suspended for just cause, as described in par. (em), by the chief or the board as a penalty. The chief shall file a report of such suspension with the commission immediately upon issuing the suspension. No hearing on such suspension shall be held unless requested by the suspended subordinate. . ." (Emphasis supplied.)

11/ Ibid.

The Amendments to the Complaint in the Complainant's April 2000 Brief

In his brief opposing the Motions to Dismiss, the Complainant seeks to amend his complaint to allege that the Association violated Sec. 111.70(3)(a)5 by acting in concert with the

City in the alleged violations of Sec. 111.70(3)(a)5. He also seeks to add a charge of discrimination, in violation of Sec. 111.325 of the Fair Employment Act. As previously noted, the WERC does not have jurisdiction over the Fair Employment Act, and the latter amendment must, on its face, be denied.

With respect to the allegations that the Association has violated Sec. 111.70(3)(a)5 by acting in concert with the City in its alleged violations, there are a number of problems with this theory. First, Sec. 111.70(3)(a)5 does not apply to labor organizations. Presumably, the Complainant means to invoke either Sec. 111.70(3)(b)4, which renders a prohibited practice the violation of a collective bargaining agreement by a labor organization, or Sec. 111.70(c), which makes it a prohibited practice for "any person to do or cause to be done on behalf of 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)." Assuming for the sake of argument that these sections have some application, the problems with the amendments are the same as the problems with the underlying charges against the City. As to the interviews with the Keckler's, the charge comes 27 months after the alleged violation and is untimely. The grievance over the content of the personnel file has been taken to arbitration and is pending decision. The grievance procedure has not yet been exhausted as to that claim. The sole complaint made against the Union with respect to the presentation of that grievance is that they gave him little advance notice of the arbitration hearing. That, without more, does not raise a question about the regularity of those proceedings. Thus, this charge is, at the least, premature. With respect to the PFC hearing, as a matter of law the contract does not govern that and, therefore, the labor organization cannot have acted in concert with the City to cause a contract violation.

CONCLUSION

In summary, the Complainant has many points of dissatisfaction with his employer and his representative, but he has proceeded in the wrong forum on each of them. His remedy if he was dissatisfied with the decision of the PFC was to proceed to Circuit Court. He did not do so, and he cannot resurrect his claim by styling it as a charge against the City or the Union under the collective bargaining laws. If he felt that the separate interviews with the Keckler's violated the labor agreement, he should have filed a grievance or, if he felt there was some excuse for not filing a grievance, he should at a minimum have brought a prohibited practice charge within the one year statute of limitations. He did not do either, and he cannot resurrect that stale claim as part of this case. If he felt that the inclusion of derogatory material in his personnel file violated the labor agreement, his remedy was to file a grievance. That was done by the Union on his behalf, and the grievance is pending before a neutral arbitrator. There is no basis, other than his generalized suspicion of the Union, for the Commission to assert jurisdiction over that grievance at this point in time. There is no element of the complaint on which the Complainant would be entitled to relief at this point in time, and I have, therefore, dismissed the complaint in its entirety.

The Respondents' Requests for Attorneys Fees

Each Respondent seeks an award of attorney's fees and costs. That remedy is not available to respondents in complaint proceedings. See, MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 29502-A (BURNS, 7/9/99); CITY OF LACROSSE, DEC. NO. 29613-A (CROWLEY, 5/27/99); WISCONSIN STATE EMPLOYEES UNION, DEC. NO. 29177-C (WERC, 5/25/99).

Dated at Racine, Wisconsin, this 15th day of May, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

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