

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**MARK J. BENZING**, Complainant,

vs.

**PARAPROFESSIONAL TECHNICAL COUNCIL  
WISCONSIN EDUCATION ASSOCIATION COUNCIL  
BLACKHAWK TECHNICAL COLLEGE**, Respondents

Case 70  
No. 59162  
MP-3674

**Decision No. 30023-B**

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Appearances:

**Mr. Mark J. Benzing**, 2022 Dewey Avenue, Beloit, Wisconsin 53511, for the complainant.

**Ms. Mary E. Pitassi**, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003 for the respondents Paraprofessional Technical Council and Wisconsin Education Association Council.

**Mr. Peter Albrecht**, LaFollette, Godfrey & Kahn, Attorneys at Law, One East Main Street, P.O. Box 2719, Madison, Wisconsin 53701-2719, for the respondent Blackhawk Technical College.

**ORDER GRANTING IN PART AND DENYING IN PART  
MOTION TO DISMISS COMPLAINT  
AND AMENDED COMPLAINT AND ORDER TO SHOW CAUSE**

On August 10, 2000, Mark Benzing filed a complaint with the Wisconsin Employment Relations Commission alleging that the Paraprofessional Technical Council at Blackhawk Technical College (BTC/PTC), the Wisconsin Education Association Council (WEAC) and Blackhawk Technical College had committed a variety of prohibited practices in their treatment of him. After efforts at conciliation failed, the complaint was assigned to Hearing Examiner Stuart D. Levitan, a member of the Commission's staff.

No. 30023-B

On December 18, 2000, respondents WEAC and BTC/PTC (collectively, “the association”) petitioned the examiner for an order directing the complainant to provide sufficient identifying details to allow it to prepare an adequate defense at hearing. On December 20, 2000 the undersigned issued an Order directing the complainant to submit an amended complaint which provided a “*clear and concise statement of the facts constituting the alleged prohibited practice, including the time and place of occurrence of particular acts and the sections of the statute alleged to have been violated thereby.*” (emphasis in original). On March 14, 2001, the complainant submitted a Motion to Amend Complaint and Amended Complaint. In its caption, the Motion identified Mr. Benzing and Mr. Charles Stokes as “Complainants,” although the text identified only Mr. Benzing as the complainant and only he signed the Motion. The text of the Motion alleged that the respondents took certain actions on March 13, 2000 that constituted prohibited practices, in that they were allegedly undertaken for retaliatory and/or discriminatory reasons. The Amended Complaint did not otherwise address the Order’s requirement for a clear and concise statement of the facts.

On March 30, 2001, WEAC and BTC/PTC legal counsel Mary E. Pitassi submitted a letter in which she raised questions about whether Mr. Stokes was truly a complainant in this matter; noted that sec. 111.07(14), Stats., provides that the right of any person to bring an action extends for only one year from the date of the specific act or practice alleged, and informed the examiner that Mr. Benzing had charges based on the same facts currently pending before the federal Equal Employment Opportunities Commission and the state Equal Rights Division. By her letter, Atty. Pitassi sought to have Mr. Stokes held to not be a complainant; dismissal of the portion of the amended complaint concerning the association, and the rest of the proceeding held in abeyance at least until an initial determination has been issued by the EEOC. By letter of that same date, the college’s attorney joined in Atty. Pitassi’s motions.

On April 16, 2001, Mr. Benzing submitted further correspondence purporting to address the issues which Atty. Pitassi raised. Atty. Pitassi replied by correspondence received by the undersigned on May 2, 2001.

On May 22, 2001, the undersigned wrote to Mr. Benzing, in part, as follows:

Accordingly, I request that you submit to me, and serve on the Respondents, the following:

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

2. A explanation of why you feel your Amended Complaint was filed within the one-year time limit;
3. A notarized statement from Mr. Charles Stokes if he wishes to be formally added as a Complainant in this proceeding.
4. A statement as to why this proceeding should not be held in abeyance pending the issuance of an initial determination by the federal EEOC.

Thank you for your attention to this matter. If you have any questions, please feel free to contact me.

On October 2, 2001, Atty. Pitassi wrote to the undersigned, in part, as follows:

It is now October 1, 2001, and Respondents have received no response from Mr. Benzing complying with your request. In addition, on May 23, 2001, the EEOC made a determination of no cause in Charge No. 260A10094, filed by Mr. Benzing and referred to in your fourth request, above. A copy of the charge, EEOC determination and the Respondent's position statement is enclosed. While Mr. Benzing has requested ERD review of the EEOC determination, he declined to file suit in federal court within the required 90 days. Finally, on April 16, 2001, Arbitrator James Stern upheld the College's discharge of Mr. Benzing in April, 2000. A copy of that decision is enclosed for your reference.

In light of these developments, Respondents WEAC and BTC/PTC request that Mr. Benzing's Complaint and Amended Complaint be dismissed in their entirety. First, and most importantly, as a result of Arbitrator Stern's decision upholding the discharge for just cause, Mr. Benzing has no conceivable remedy for any of his claims before the Commission. Second, as a result of the EEOC's determination, which Mr. Benzing failed to challenge by filing a federal suit, Mr. Benzing's purported amendment dated March 14, 2001 should not be heard by the Commission, based on theories of claim preclusion and/or issue preclusion. Both his EEOC and WERC claims dealt with the same underlying facts, the same parties, and essentially, the same complaints. This is true even if, for purposes of argument, the Amended Complaint is considered timely filed. Finally, as of October 1, Mr. Benzing has never responded to either the Examiner's Order to Make Complaint More Definite and Certain of

December 22, 2000, or to the questions he was directed to answer in the Examiner's May 22, 2001 letter. Respondents WEAC and BTC/PTC move that, by his consistent failure to comply with the Examiner's clear requests stretching over a period of nearly a year, Mr. Benzing be found to have abandoned the Complaint and its Amendent.

On October 3, 2001, counsel for respondent Blackhawk Technical College joined in the association's Motion to Dismiss. On October 9, 2001, the undersigned sent, by certified mail, the following letter to Mr. Benzing:

Enclosed please find a copy of a letter from Attorney Mary E. Pitassi, legal counsel for respondents WEAC and BTC/PTC in the above-cited matter. In her letter, Attorney Pitassi moves for a dismissal of your complaint based on your failure to comply with my Order of December 20, 2000 and my request of May 22, 2001.

I will keep the record open until Wednesday, October 31, 2001 for any response you wish to make on Attorney Pitassi's motion. Please understand that any response you wish me to consider prior to ruling on Attorney Pitassi's motion *must* be received in my office by that date. (emphasis in original).

As of the date of this Order, Mr. Benzing has not replied to the undersigned's letter of October 9, 2001.

The examiner, being fully advised in the premises, now and hereby issues the following

**ORDER GRANTING IN PART AND DENYING IN PART**  
**MOTION TO DISMISS COMPLAINT**  
**AND AMENDED COMPLAINT AND ORDER TO SHOW CAUSE**

1. The Motion to Dismiss the Amended Complaint filed on March 14, 2001 is hereby GRANTED as applies to Respondents WEAC and BTC/PTC and DENIED as applies to Respondent Blackhawk Technical College;

2. The Motion to Dismiss the Complaint filed August 10, 2000 is hereby DENIED as pertains to those allegations relating grievance 99-05, and GRANTED as pertains to all other allegations which may be incorporated in the complaint;

3. The Complainant is hereby Ordered to Show Cause in writing, postmarked no later than February 4, 2002, why the Complaint and Amended Complaint should not be dismissed for abandonment and lack of prosecution by the Complainant.

Dated at Madison, Wisconsin, this 17th day of January, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/

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Stuart Levitan, Examiner

**BLACKHAWK VOCATIONAL, TECHNICAL  
AND ADULT EDUCATION DISTRICT**

**MEMORANDUM ACCOMPANYING ORDER GRANTING IN PART  
AND DENYING IN PART MOTION TO DISMISS COMPLAINT AND AMENDED  
COMPLAINT AND ORDER TO SHOW CAUSE**

**DISCUSSION**

The Complaint and Amended Complaint allege that the association and college violated Secs. 111.70(3)(a) 1, 2, 3 and 5 and 111.70(3)(b) 1, 2 and (3)(c) of the Municipal Employment Relations Act. Pursuant to Sec. 111.70(4)(a), Stats., Sec. 111.07, Stats., governs the procedures by which prohibited practice complaints are to be heard. Chapter 227 of Wisconsin Statutes states the general framework for administrative agency proceedings.

Sec. 227.01(3), Stats., defines a “Contested case” to mean “an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order.”

The Wisconsin Employment Relations Commission is an “agency” under Sec. 227.01(1), Stats., thus making this proceeding an “agency proceeding.” To be a contested case under Sec. 227.01(3), Stats., the proceeding must involve a controverted, substantial interest which will be determined after a hearing required by law. In this case, the complainant seeks a variety of remedies for what he considers are a series of prohibited practices committed by the association and college, which allegations the respondents deny and which remedies they have refused to provide. The complainant’s interest is, therefore, “substantial” and is “controverted by another party.” As Sec. 111.07(2)(a), Stats., mandates a hearing when there is a complaint of an alleged prohibited practice, this matter constitutes a “contested case” as defined by Sec. 227.01(3), Stats.

Dismissing a contested case prior to hearing is appropriate only in limited circumstances:

Dismissal prior to evidentiary hearing would be proper if based on lack of jurisdiction, lack of timeliness and in certain other cases. . . (I)t would be a rare case where circumstances would permit dismissal of the proceedings prior to the conclusion of a meaningful evidentiary hearing on other than jurisdictional grounds or failure of the complaint to state a cause of action.

Similarly, the Commission has held that:

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 (Hoorstra with final authority for WERC, 12/77), at 3; RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27982-B (WERC, 6/94); WESTON TEACHERS' ASSOCIATION ET AL, DEC. NO. 29341-C (Jones, 6/98); MILWAUKEE COUNTY WAR MEMORIAL CENTER, INC., DEC. NO. 29421-A (McGilligan, 2/99); WAUKESHA COUNTY, DEC. NO. 29477-A (Shaw, 11/98).

In his Amended Complaint, Mr. Benzing alleges that the association voted to accept a collective bargaining agreement with the college for various reasons, including friendship to the members who would benefit from the agreement. The association membership took that vote on March 13, 2000. Mr. Benzing filed the Amended Complaint on March 14, 2001, a year and a day after the association membership ratified the collective bargaining agreement which he alleges constituted a prohibited practice.

Sec. 111.07(14), Stats., provides:

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.

The commission has sometimes been less than precise when discussing whether this statutory provision is or is not a statute of limitations. However, as a general matter, it has historically referred to this provision as a statute of limitations. HARLEY-DAVIDSON MOTOR COMPANY, DEC. NO. 7166 (WERC, 6/65); CITY OF MADISON, DEC. NO. 15725-B (WERC, 6/79); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 21050-F (WERC, 11/84); STATE OF WISCONSIN, DEC. NO. 20909-B (WERC, 7/85); STATE OF WISCONSIN, DEC. NO. 21980-C (WERC, 2/90) AFF'D CT. APP, DIST. 1 No. 91-2324 (UNPUBLISHED, 6/93); STATE OF WISCONSIN, DEC. NO. 6676-B (WERC, 4/91). The commission's reference to Sec. 111.07(14), Stats. as a statute of limitations conforms to the holdings of Wisconsin courts who have also viewed this statutory provision as a statute of limitations. TULLY V. FRED OLSON MOTOR SERVICE CO. 27 WIS. 2D 476 (1965); WHITE V. RUDITYS, 117 WIS. 2D 130 (1983).

Affirmative defenses are to be raised in the answer to the complaint. ERC 22.03(4)(b). Respondent association raised this affirmative defense in its correspondence received in this office on March 30, 2001. By raising this affirmative defense in a timely manner, the association has called to my attention the commission's lack of jurisdiction to entertain this aspect of the complaint. Accordingly, I have granted the motion to dismiss the Amended Complaint as pertains to the respondent association.

This filing was not too late, however, to proceed against the respondent college, because the documentation submitted indicates the college did not ratify the collective bargaining agreement until March 15, 2000. Thus, Mr. Benzing is not time-barred from bringing this complaint.

Mr. Benzing's Amended Complaint alleges that the college sought the particular provisions in the new collective bargaining agreement in order to retaliate against him for filing grievances. This is certainly a cognizable allegation, and one which cannot be dismissed without a full evidentiary hearing. Accordingly, I have denied respondents' motion to dismiss the complaint as pertains to respondent college. 1/

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*1/ It is important to note that the only complainant in this proceeding is Mr. Benzing. Despite the caption in the Amended Complaint listing Mr. Charles Stokes as an additional complainant, Mr. Stokes has never signed any complaint submitted in this proceeding. I called this to Mr. Benzing's attention in my letter of May 22, 2001, one of the several points to which he did not respond.*

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There are also no jurisdictional infirmities in the original complaint. Although it is somewhat inartfully drafted, it appears that Mr. Benzing is alleging that the association failed to meet its duty of fair representation in its handling of a three-day suspension which the college imposed on him in 1999, and that the college violated the collective bargaining agreement by imposing that discipline. The documentation submitted herein establishes that the relevant events transpired within one year of the filing of the complaint on August 10, 2000.

Neither the complaint nor any supporting documentation, however, shed any light on the nature of Mr. Benzing's other allegations in his complaint, particularly the events referenced in the fourth full paragraph on page two of his complaint. Despite my letters of May 22 and October 9, 2001, Mr. Benzing has declined to provide the necessary "clear and concise statement of the facts constituting the alleged prohibited practice, including the time and place of occurrence of particular acts and the sections of the statute alleged to have been violated thereby." Pursuant to ERC 12.02(2)(c), this statement is something each complaint "shall contain." Despite my efforts at obtaining such a statement, Mr. Benzing has failed to



comply with this provision of the administrative code. Accordingly, the only valid parts of the complaint properly before me are the allegations concerning grievance 99-05.

Finally there is the issue of whether Mr. Benzing has abandoned this complaint. At the outset, he proved to be extremely difficult to contact. His response to my letter of May 22, 2001 was in substantial noncompliance. He did not respond at all to my letter of October 9, 2001, sent by certified mail. Accordingly, Mr. Benzing is hereby directed to show cause, in writing postmarked no later than February 4, 2002 as to why this matter should not be dismissed in its entirety. LOCAL 950, INTERNATIONAL UNION OF OPERATING ENGINEERS, DEC. No. 21050-A (Honeyman, 11/83). A complainant, not the commission, must advance complaint litigation. MADISON AREA VTAE DISTRICT, DEC. NO. 29265-B (McLaughlin, 10/99).

Dated at Madison, Wisconsin, this 17th day of January, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/

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Stuart Levitan, Examiner

