STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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-C

Appearances:

Mr. Mark J. Benzing, 7843 W. Fiebrantz Avenue, Milwaukee, Wisconsin 53211, appearing on his own behalf.

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.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION TO DISMISS COMPLAINT AND ORDER DENYING MOTION TO DISMISS AMENDED COMPLAINT

On August 10, 2000, Mark Benzing submitted 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,

within the meaning of Sections 111.70(3)(a) and 111.70(3)(b), Wis. Stats., in their treatment of him. Commission administrative staff promptly notified Mr. Benzing that he had failed to include payment of the full filing fee, and that the complaint would not be processed until he had done so. Mr. Benzing thereafter paid the full filing fee, and the complaint was filed on August 29, 2000. After efforts at conciliation failed, the commission on December 20, 2000 authorized Hearing Examiner Stuart D. Levitan, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided for in Secs. 111.70(4)(a) and 111.07, Wis. Stats. The Examiner, having considered the pleadings in the light most favorable to the Complainant, finds it appropriate to issue the following Findings of Fact, Conclusions of Law and Order without convening a hearing in the matter.

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. Mark J. Benzing, the complainant, is an individual residing at 7843 W. Fiebrantz Ave., Milwaukee Wisconsin. From July 1990 to April 2000, Mr. Benzing was a custodial employee of the Blackhawk Technical College, a position represented for collective bargaining by the Paraprofessional Technical Council, an affiliate of the Wisconsin Education Association Council.

2. The Paraprofessional Technical Council/Blackhawk Technical College (PTC/BTC) and the Wisconsin Education Association Council (WEAC) are labor organizations with offices at 33 Nob Hill Drive, Madison, Wisconsin.

3. The Blackhawk Technical College (BTC) is a municipal employer with offices at 6004 Prairie Road, County Trunk "G", Janesville, Wisconsin.

4. In the spring of 1999, the college imposed a three-day disciplinary suspension on Mr. Benzing. The respondents BTC/PTC grieved Mr. Benzing's three-day suspension, in a proceeding designated Grievance #99-05. On August 12, 1999, BTC/PTC President Cheryl Ford wrote Mr. Benzing as follows:

> The Executive Committee of BTC/PTC met on 8/10/99 and based on a review of the minutes of meetings involving yourself, Brian and Jeff, along with evidence of prior verbal and written warnings or disciplines you have received regarding your attendance, we find no basis for this grievance. The three-day suspension was a reasonable next step in progressive discipline.

5. Sometime after February 28, 2000, Mr. Benzing filed a Discrimination Complaint with the Wisconsin Department of Workforce Development, Equal Rights Division, alleging that the BTC had discriminated against him for "past complaints and hearings – retaliation." The complaint further alleged as follows:

> I was retaliated against when during the night of May 21, 1999 I telephoned in after are scheduled shift stated. To inform the respondend that I would be absent. And I was disciplined severelly (3 day suspension/next occurrence termination) while another member of the department was not disciplined (Charles Stokes) for the same infraction and having the same excuse as mine.

On June 21, 2000, a DWD equal rights officer issued an Initial Determination that there was probable cause to believe BTC had violated the Wisconsin Fair Employment Law by discriminating against Mr. Benzing because he had made a complaint under the Act. The officer found that the college had treated Mr. Benzing more harshly than it did Mr. Stokes for the same rule violation, and that there was "reason to believe" it had done so "in retaliation for filing previous discrimination complaints." On November 15 2000, Mr. Benzing requested that the complaint be withdrawn, following a settlement under which the college rescinded the suspension; an order of dismissal based on the settlement was by a DWD administrative law judge on November 17, 2000.

6. On or about April 13, 2000, BTC terminated Mr. Benzing for allegedly sleeping during his third-shift assignment a week prior. The union grieved the matter, and Mr. Benzing's cause was argued in arbitration by an experienced labor lawyer, Atty. Marilyn Townsend. On April 16, 2001, Arbitrator James L. Stern issued an Award wherein he found that Mr. Benzing had indeed been sleeping on the job, and that the college had just cause to terminate him.

7. On August 10, 2000, Mr. Benzing submitted a complaint with the Wisconsin Employment Relations Commission alleging that the BTC/PTC, WEAC and BTC had committed a variety of prohibited practices, within the meaning of Sections 111.70(3)(b) 1, 2, 3, 5 and 111.70(3)(a) 1, 2 and (3)(c), Stats., respectively, in their treatment of him. By return correspondence on that date, commission administrative staff notified Mr. Benzing that he had paid only $25.00 of the $40.00 filing fee, and that the complaint would not be processed until he had made payment in full. Mr. Benzing thereafter paid remaining amount due on August 29, and the complaint was considered filed on that date. The copy of the complaint served on the respondents displayed a date-stamp indicating the complaint was received on August 10 and a typed file label listing the complaint as having been filed on August 29. The document also bore handwritten notation indicating the commission had received payment via two checks, the last received August 29. In his complaint, Mr. Benzing alleged as follows:

For the past ten years I the complainant was employed at Blackhawk Technical College. In the membership of the Paraprofessional Technical College, which belong to the Wisconsin Educational Association Council (hereinafter BTC, PTC, and WEAC). During my employment I the complainant and several others had had problems with the union and the employer when it came to issues regarding better working condition and matters concerning employment etc. At times the union would have meetings of matters that concerns me and would conduct the meetings with me present or under the circumstances, represented.

I and the several members of the department that I previously mentioned. Had engaged in lawful concerted activities. The Respondent PTC and WEAC, who only almost every issue would disagree and make any attempt to initiate any type of settlement with the employer BTC, unless the employer BTC, suggested the settlement and/or near settlement it's self.

The other two members of the department who assisted me and initiated their own grievances and/or complaints against the oppressive and determine to have are department represent the second or third class employees below all others b the Respondent BTC. Had dismissed the two members by 1994 wrongfully. The most active after a major decision handed down to them by a State Department and Commission of which a formal grievance was filed with all the respondents by myself and supported by several members of the department. And looked down with scorn and lies by the administrators involved in the grievance process. Denied and set aside (as most other grievances and complaints) by the Respondents PTC and WEAC regardless of the amount of time we asked for assistance.

In 1999 I was administered a three day suspension for an action that another member of the department had committed more times than myself and received less discipline. On the last step before arbitration I realized that the Respondent BTC, was not investigating all the facts that I informed it of as extenuating circumstances. I took it upon myself to gather the information myself and presented it at the final step before arbitration. I requested the Respondent's representatives from WEAC to assist me as she did in other grievances at this step and she wouldn't. I also expected their to be union representative at the grievance meeting which commenced in mid August or September 1999 (since I had been informed that the union always has representative from the Chief Steward years) and none was present.

> And to my surprise the Respondent's PTC executive committee in a letter dated August 12, 2000 1/ decided (without me being present at the grievance committee meeting and submitting any input of my own which I normally would be allowed to do) not to proceed to arbitration, with the three day suspension grievance #99-05. Prior to the final grievance meeting held by the Respondent BTC, with myself mentioned above. An event which never happened in the past. And was initiated not in accordance with the CBA.
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> ***1/ The actual date was August 12, 1999.***
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> Also the Respondent on one occasion retaliated, harassed and targeted me during an departmental meeting (which caused the majority of the participants at the meeting to conclude that I was being verbally attacked/harassed) and in another matter I was purposely skipped in a voluntary overtime scheduling on several different occasions.
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> After receiving the letter from the union's president I attempted to submit the evidence (on several different occasions) I had gathered which would verify my allegation BTC was targeting, retaliating and discriminating against me for my lawful activities in the hopes that PTC, WEAC, would reconsider their decision. Not to proceed to arbitration. Since the grievance was still well within the contractual time frame. And for more than a month I received no reply. See attached exhibits.
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> By the inactions and actions the Respondents committed unfair and prohibited labor practices. In violations of Wisconsin Statutes 111.70(3)(a) 1, 2, 3, 5 and 111.70(3)(b) 1, 2 and (3)(c).
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> As a remedy I fully believe that appropriate discipline action should be initiated and administered to all persons involved in the prohibited practice complaint. Dismissal of the three-day suspension with compensation of the moneys and benefits forfeit because of the Respondents unlawful actions against me. Along with any legal fees. And any other remedies the Wisconsin Employment Relations Commission believes appropriate. *(Spelling and grammar as in original)*.

7. 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).

8. On January 22, 2001, Mr. Benzing filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission, alleging that BTC/PTC had violated Title VII of the Civil Rights Act of 1964 by denying him union representation on the basis of race and in retaliation for his opposing their discriminatory actions. The crux of Mr. Benzing's charge was that white union representatives had negotiated an agreement with BTC whereby custodians of color were laid off and denied bumping rights in order to secure early retirement and disability benefits for employees, the vast majority of whom were white.

9. On February 5, 2001, Mr. Benzing submitted what he described as "a copy of the original complaint and a detailed nortorized (sic) complaint dated August 8, 2000." The purported "copy of the original complaint" appears to be an incomplete first draft of a complaint, identifying no respondent and leaving blank the area for detailing the facts constituting the alleged unfair labor practices.

10. 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. Mr. Stokes was listed as receiving a copy of the correspondence, as were respondents' counsel. The Motion alleged as follows:

> On March 13, 2000 in the evening a committee of the paraprofessional Technical councle (sic) informed myself and other custodians that since they the (Committee) didn't want to axcept a pay cut that they subsequently tentatively agreed with the employer Black Hawk Technical College that the custodial dept. members would be laid without any opportunity in the future for re-hire or to be called back from lay off. And they couldn't utilize their bumping rights. The majority of the membership (to my knowledge) agreed to this action for varries reasons. The majority as friendship to the members, who would benefit from the agreement. In the process the College was allowed to retaliate against myself, for past grievances. And discriminated against. Subsequent other custodial members with less seniority than myself were discharge. One being the complainant mention with me Mr. Charles Stokes, Losted benefits and pay. By the employer who acted in discriminatory and prejudice manner in its decision as did the union/both respondents. *(Emphasis, spelling and punctuation as in original)*.

11. 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.

12. 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:
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> 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;
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> 2. A explanation of why you feel your Amended Complaint was filed within the one-year time limit;
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> 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.

13. 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.
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> 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 theorites 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.

14. 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).

15. As of January 17, 2002, Mr. Benzing had not replied to this letter. On that date, I issued an order dismissing the amended complaint filed on March 14, 2001 as applied to WEAC and PTC/BTC and dismissing the elements in the initial complaint other than those relating to grievance #99-05, and denying the motions to dismiss all other aspects of this proceeding. I also ordered the complainant to show cause, in writing postmarked no later than February 4, 2002, as to why the complaint should not be dismissed in its entirety for abandonment. BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 30023-B (Levitan, 1/02).

16. On February 4, 2002 complainant Benzing submitted the following written statement:

> On or around November of 2000 I mailed you and the Respondents a detailed amended complaint at your request in regards to my initial complaint that was approximately three pages in length. In March of 2001 I mailed an amended complaint to all parties. With Charles Stokes as a complainant. On April 12th I mailed all parties all letter pointing out Charles Stokes address at your request. And other information concerning a response from Attorney Mary Pitassi.
>
> Sometime after that you replied with a detailed letter to all parties, which mentioned all the communications that had been mailed from all parties except me. After reading this letter I came to the conclusion that I would not be able to secure justice for the past injustices dealt to me by the other parties. To date I have yet to mail you an affidavit from Charles Stokes (Which to my understanding should not be my responsibility to secure it should be Mr. Stokes responsibility). And an amended complaint that Charles Stokes became a party too filed with you office sometime in March of 2001. Of which was concise and in accordance with the State Statutes originally, to my knowledge.
>
> Thank you for your attention.

17. On March 13, 2002, Atty. Pitassi wrote, in part, as follows:

> It is the Association's view that Mr. Benzing's ... response, while apparently timely, falls far short of the mark of establishing cause. The response mentions various actions taken in first year after the Complaint was filed, but fails to deal

substantively with reasons why the Complaint should not be dismissed, or to mention any actions Mr. Benzing took to advance his Complaint after April, 2001. Moreover, Mr. Benzing, in line 3 of paragraph 2, alludes to reaching a "conclusion" that implies that he decided not to proceed further with the matter. That conclusion may have been reached in error, and in fact, the Association believes that to have been the case. However, Complainants may decide to abandon their Complaint for good reasons, for bad reasons, or for no reason. While they are free to do so, they must then live with the consequences of their decisions.

Mr. Benzing's initial complaint was filed with the Commission August 10, 2000. The Complainant has now been given four chances to explain his Complaint, and/or why it should not be dismissed. You extended those opportunities in your Order of January 17, 2002, discussed above; your letter to Mr. Benzing of October 9, 2001, which held the record open until October 31, 2001 to allow him to respond to the Association's Motion to Dismiss; your letter to Mr. Benzing of May 22, 2001, directing that he clarify certain facts and positions as well as submit requested documentation to you, and your December 20, 2000 Order, directing Mr. Benzing to submit an amended complaint providing a "*clear and concise statement of the facts* constituting the alleged prohibited practice, including the *time and place of occurrence of particular facts* and the sections of the statutes alleged to have been violated therby." (emphasis in original). Each time, Mr. Benzing has either failed to answer at all, or answered in a manner inadequate to fulfill your directives to him. He has also proven to be nearly impossible to locate, either by phone or by mail.

A Complainant does not have the luxury of bringing a Respondent before the power of the State but then delaying the hearing until memories have faded, employees have moved on, and the eventual proceedings are crippled by defects caused by the delay. Respondents have the right to defend their interests in a timely and expeditious fashion. That has not been possible here due to Mr. Benzing's consistent inaction.

Mr. Benzing has abandoned his Complaint, which should be dismissed. Please consider this letter an Association Motion to do so.

On March 20, 2002, Atty. Albrecht wrote to join in the union's motion.

18. On July 19, 2002, Mr. Charles Stokes submitted an affidavit to the Wisconsin Employment Relations Commission which read, in part, as follows:

> Mr. Allen Stiegman and Mr. Michael Bennet along with department Supervisor Mr. Jeffrey Amundson later (around 1997 through 2000) targeted me and the only other Afro-American in the custodial and maintenance departments at the time with harassment and discrimination concerning issues surrounding are work duties. After filing several complaints with the union and the employer we were told that union members couldn't file complaints/grievances against other union members. Even though in the past several complaints/grievances were allowed to be pursued against other members of the union. The complaint/grievance was dismissed by both defendants, regardless of the fact that other complaints/grievances of the same substance were not dismissed by either defendant under those circumstances.
>
> The union whose vice president was Mr. A. Stiegman (Mr. M. Bennet was vice president prior) along with the union executive negotiating committees conspired with the employer to lay off me and not allow me any other custodian the opportunity to "bump." Even though the contract reserved me this right and that the department I would have bumped into all ready had three employees who were white males and previous custodians. When it came time to vote on whether to retain the custodian department To my knowledge Mr. Benzing, Mr. Barbary had filed more than eighty percent of the complaints and grievances which were filed by members of the union to both defendants.
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> At the time of the above incident all members of the union were of the white race with exception of Mr. Mark Benzing, Ms. Erma Davis and myself. Also, the amendment to Mr. Benzing's original complaint filed in February or March of 2001 which included me as an Complainant, was filed by Mr. Benzing, on both of are behalf. Which I previously agreed to before Mr.Benzing filed the Complaint with the Wisconsin Employment Relations Commission.

19. On August 15, 2002, Mr. Benzing wrote to the undersigned as follows:

> The following is my written response to the Respondent's Motion to Dismiss letter dated March 13th, 2002. On January 17, 2002 you sent me a letter which had enclosed a copy of an Order Granting In Part and Denying In Part a Motion To Dismiss the Complaint and Amended Complaint and Order to Show Cause with an accompanying Memorandum. I responded to your order prior to the deadline of February 4th 2002. With a letter requesting that you send me any

documents I would need to file an appeal of your Decision No. 30023-B mention above etc.

I also stated in my letter if the time lines for the appeal of you decision wouldn't allow me to receive materials and file a timely appeal to consider my letter as an appeal to your decision. To this date I have not received any correspondence concerning my request for an appeal of your decision 30023-B.

Some time latter around March 6th 2002 you contacted me in order to set a date and time for a hearing which we did and you informed me that you would contact me as soon as you had confirmed with the Respondents and secured a mutually agreed upon date. I immediately sent both Respondents' attorneys a request for answers to Interrogatories of which the Respondents did not recognize me as having the right to request.

After reading the Respondent Wisconsin Education Association Council's and the Paraprofessional Technical Council's attorneys letter dated March 13th 2002 alleged Motion to Dismiss its obvious to me that the attorney has attempted to degrade and discriminate against me in regards to any input I submit. On several occasions she alleges that I alluded details which she could draw conclusions from and the letter doesn't conform to her mold of a proper response by a Complainant.

Also the letter disregards the fact that I replied to your order dated January 17th 2002 with explanations which also obviously showed that I wasn't in any respect attempting to abandoned and/or prosecute. There is also no discussion of the affidavit submitted by Mr. Charles Stokes, which supported my original and amended complaint and again displayed are intentions of following through with this action. In regards to the attorneys depiction of my responses not being adequate is hard for me to believe since on every occasion to my knowledge I submitted the requested information and it was clear and concise.

The Respondent's earlier in this action wanted the luxury of having the Commission hold this matter in abeyance why? For their conveyance? This matter is still being investigated by other government entities. Even though it has been brought out of abeyance by whose request, the Respondents request? It wasn't brought out of abeyance by my request or Mr. Stokes. The record will also show neither Mr. Stokes nor I made any objections to the Respondents request for this matter to be held in abeyance.

It is obvious to me that the Respondents current motion is one sided since the memories haven't faded to Mr. Stokes or me the ones who the discriminatory/illegal actions were taken against. The actions weren't taken against the Respondents. And because of the aforementioned I believe the Respondents have no grounds for this motion and the Motion to Dismiss should be denied.

20. On August 21, 2002, Mr. Benzing wrote as follows:

I am sending this letter and the enclosed documents to give you and the State of Wisconsin a better understanding of the basis for the Complaint and the amended Complaint that I filed with the Commission concerning the above referenced matter.

The documents concern the incidents surrounding the issues raised in the complaint filed with the Commission on August 10th, 2000. Are marked exhibit #1.

The documents that pertain to the amended complaint dated March 12th 2001 are marked exhibit #2. I have sent each Respondents' attorney only the documents that's relative to them.

Also after reading a copy of the complaint dated August 10, 2000 mailed to me several weeks ago by you. I realized that some how I accidentally mailed to the Examiner if not all parties a rough draft of my complaint instead of the final draft. As soon as I am able to locate the final draft I will send a copy to all parties in this matter.

21. On September 9, 2002, Mr. Benzing wrote as follows:

Enclosed please find a final draft of the complaint I filed with the Employment Relations Commission in August 2000. I have sent copies to the Respondents' attorneys.

I apologize for any inconvenience sending the rough draft instead of my final draft may have caused.

The prohibited practice complaint which Mr. Benzing filed on September 9, 2002 reads as follows:

Mark Benzing,

Complainant,

August 9, 2000

Paraprofessional Technical Council,
Wisconsin Education Association Council
And Blackhawk Technical College,

Respondents.

PROHIBITED PRACTICE COMPLAINT

Paraprofessional Technical Council, President Ms. Sandra Hough and the majority of the membership. and Blackhawk Technical College are located at 6004 Prairie Road County Trunk G Janesville, Wisconsin. Director of Human Resources/Board of Directors and President Mr. Erickson and any other representatives involved in the incidents described in this complaint. Telephone number area code 608-757-7603. Wisconsin Education Associate Council, 33 Nob Hill Drive Madison Wisconsin 53708. Telephone number 1-800-362-8034.

For the ten years I was employed at Blackhawk Technical College (hereinafter the College). In the membership of the Paraprofessional Technical Council (hereinafter PTC). Which is Affiliated with the Wisconsin Association Council (hereinafter WEAC). During my employment I and several other Afro-Americans Mr. Charles Stokes and Mr. Jesus Barbary. Had problems with the Respondents concerning issues regarding better working conditions, proper union representation, disciplinary actions, discrimination and retaliation having to do with are sex, color and race. Since in the majority of the aforementioned issues the Respondents would respond to us differently than other employees by imposing harsher hurdles, sanctions and actions upon us because we were male and Afro-Americans even though we were engaged in lawful and concerted activities. For myself these illegal actions started around April of 1993 and continued throughout my employment until April of 2001.

On several occasions throughout my employment I and the other employees mentioned previously would be involved in a grievance and/or dispute in which the executive committee members of PTC and the affiliate WEAC would purposely and intentionally distant their selves from giving any conceivable support for the grievant/grievance and any conceivable remedy (with exclusion of the Colleges preferred remedy which most cases was the PTC's) from us. Even though the other members of PTC and employees at the College enjoyed such remedies.

One example at times would be concerning investigating merits of a grievances that I had filed. I would get constant reprimands from the PTC concerning my handling of the grievance. Such as deadlines for filing, not contacting them before filing, presenting of the grievance and grievance committee meetings State investigations and/or hearings. Throughout my employment.

The PTC executive committee officers would treat all my grievances/concerns Equal Rights Division hearings as troublesome and an inconvenience. The aforementioned became a serious problem from 1995 to April of 2000. When I was not being represented at any of the meetings, etc. Only PTC position was being asserted and conclusive in all meeting that I was not present which concerned issues that I had raised or complained about.

I personal was informed by a PTC, president in around 1995 that she (others outside the employee's I mentioned earlier in this complaint) were enjoying their better working conditions than we were. And asked me to drop a grievance which complained of inequality. Without giving any commitment to secure the same for use. And when considering that confession we always were looked down upon, and opposed, etc. By the Respondents, PTC, the College, and its representatives when we were attempting to better are working conditions etc. Throughout my employment. My employment ended with the Respondent in April of 2000.

In late August or early September I was administered a three day suspension for an action that other employees had committed more than times than myself and were not given a suspension because of their infractions. On the last step of the grievance procedure (prior to the arbitration step) I requested assistance from both Respondents in reviewing the new information and presentation of the grievance to the Board of Directors of the College. Both Respondents WEAC's Leigh Barker and the PTC declined in any way to assist me.

When I attended the grievance meeting no representative of PTC was present which wasn't in line with PTC's past practice of attending all College Board Meetings. And to further condemned my attempt of presenting grievance #99-05. The Respondent PTC's executive committee informed me and the College's Human Resource Director, a Mr. Brian Gohlke the President of the College Mr. Erickson, Ms. Leigh Barker of WEAC and the department I was employed in Supervisor a Mr. Jeffrey Amundson (the Director and the President attended the board meeting and gave support to the Board members to dismiss and/or deny my grievance #99-05). On a letter dated August 12, 1999 that the PTC's executive committee members had decided not to proceed to arbitration with grievance #99-05.

This action was not in accordance with past procedures of the PTC. At no time in the past was a letter sent disclosing the PTC's intentions concerning a grievance before it was necessary, and only to conform with the contractual deadlines.

After an investigation was conducted by the State of Wisconsin's Equal Rights Division in July of 2000. There was documentation to support that the College and possibly PTC were targeting me for illegal discrimination, retaliation and a hostile work environment (Exhibit marked #1 and 2 Wisconsin Equal Rights Determination).

The other two incidents that I mentioned in the last two paragraphs of the (rough draft (sent by mistake)) complaint. Are outside the States of Wisconsin statute of limitations and until I am able to prove otherwise are not an issue.

By the actions and inactions of the Respondents mentioned in this complaint, have committed unfair and prohibited labor practices. In violations of Wisconsin Statutes 111.70(3)(a) 1, 2, 3, 5 and 111.70(3)(B) 1, 2, and (3)(c).

As a remedy I fully believe that appropriate disciplinary action should be initiated and administered to all person found in violation of the Wisconsin statutes. Dismissal of the three-day suspension with compensation of the moneys forfeited. Along with any legal fees. And any other remedies the State of Wisconsin sees appropriate.

Complainant Mark R. Benzing /s/ Date Sept. 5th 2002

22. On October 14, 2002, Atty. Albrecht, on behalf of the respondent Blackhawk Technical College, submitted a Motion to Dismiss the Amended Complaint. On October 17, 2002, Atty. Pitassi, on behalf of the respondent WEAC/PTC, moved to dismiss the proceeding in its entirety.

23. On December 12, 2002 the undersigned wrote to Mr. Benzing as follows:

> On September 9, 2002, you submitted what you termed the "final draft" of a complaint against the Blackhawk Technical College and the Paraprofessional Technical Council/WEAC. On October 14 and 17, respectively, counsel for the respondents moved to dismiss your complaint, in all its forms, in its entirety.
>
> To date, you have not submitted any reply to the respondents' motions to dismiss. Please submit any reply you wish to make by Monday, January 6, 2003, with copies to the opposing counsel.

24. On or about January 6, 2003, Mr. Benzing left a message on the undersigned's telephone voice mail indicating he would not be filing a reply to the Respondents' motions to dismiss.

25. The critical and material facts underlying the complaint filed with the WERC on August 29, 2000 had all occurred and become known to the complaint prior to August 29, 1999.

26. Relative to the union, the critical and material facts underlying the amended complaint filed with the WERC on March 14, 2001 had all occurred and become known to the complainant prior to March 14, 2000. Relative to the employer, the critical and material facts underlying the amended complaint filed with the WERC on March 14, 2001 occurred and become known to the complainant subsequent to March 14, 2000.

On the basis of the above and foregoing Findings of Fact, the undersigned issues the following

CONCLUSIONS OF LAW

1. Sec.111.07(14), Stats., which is made applicable to this proceeding by Sec. 111.07(4)(a), Stats., is a statute of limitations which can be waived when not properly raised by a party as an affirmative defense.

2. Respondents Blackhawk Technical Council/Wisconsin Education Association Council and Blackhawk Technical College have properly raised the statute of limitations as an affirmative defense.

3. Because the complaint filed August 29, 2000 relies on events which occurred more than one year before the complaint was filed, it is untimely pursuant to sec. 111.07(14), Stats., leaving the Wisconsin Employment Relations Commission without jurisdiction to hear the complaint and amended complaint filed herein.

4. Because complainant's allegations that Respondent Blackhawk Techincal College committed prohibited practices within the meaning of Secs. 111.70(3)(a) rely on events which occurred less than one year before the amended complaint was filed, the amended complaint is not untimely pursuant to Sec. 111.07(14), Stats., such that the Wisconsin Employment Relations Commission has jurisdiction to hear the amended complaint filed herein.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the undersigned now makes and issues the following

ORDER GRANTING MOTION TO DISMISS COMPLAINT AND ORDER DENYING MOTION TO DISMISS AMENDED COMPLAINT

1. Respondents' motions to dismiss the complaint filed August 29, 2000 are hereby granted, and that complaint is hereby dismissed.

2. Respondent Blackhawk Technical College's motion to dismiss the amended complaint filed March 14, 2001 is hereby denied.

Dated at Madison, Wisconsin, this 19th day of May, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/
Stuart Levitan, Examiner

BLACKHAWK VOCATIONAL AND TECHNICAL COLLEGE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION TO DISMISS COMPLAINT AND ORDER DENYING MOTION TO DISMISS AMENDED COMPLAINT

This case has had a long and tortuous path, and I regret the extent to which I have contributed to the protracted nature of this proceeding. I now resolve significant aspects of the matter.

Respondents seek dismissal without hearing, an action not favored under Wisconsin statutes or case-law. As I noted in my earlier order:

> 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. 68 OAG 31, 34 (1979).

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 (Hoornstra 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). Cited in BLACKHAWK VTAE, DEC.NO. 30023-B (LEVITAN, 1/01)

As noted above and discussed below, Mr. Benzing has two proceedings before the commission, each raising different and distinct elements. The crux of his complaint against the union centers on its decision not to pursue his grievance over a three-day disciplinary suspension the college imposed in 1999. His complaint against the employer seems to allege that it was retaliating against him for engaging in certain protected activities. Mr. Benzing's amended complaint alleged that both the union and employer entered into a new collective bargaining agreement which retaliated against him (and another purported complainant, Mr. Charles Stokes) for their exercise of their protected rights.

Regarding the initial complaint, the record indicates that the event on which the college based the three-day suspension occurred in May, 1999, and that Mr. Benzing learned that the respondent union PTC would not pursue the resulting grievance (#99-05) via correspondence dated August 12, 1999. Regarding the amended complaint, the record indicates that the union

ratified the collective bargaining agreement on March 13, 2000, with the respondent employer doing likewise on March 15.

As noted in the Findings of Fact, Mr. Benzing submitted his initial complaint to the Wisconsin Employment Relations Commission on August 10, 2000. However, he did not include the filing fee as set by ERC 10.21(1), W.A.C. until August 29, 2000. Inasmuch as the administrative code mandates that "the complaint is not filed until the fee is paid," Mr. Benzing's complaint is considered to be filed on that later date. *See,* AFSCME COUNCIL 24 WSEU, DEC. NO. 21980-D (WERC, 2/90), in which the commission amended the examiner's findings of fact to provide that the complaint was filed the date the filing fee was paid, not the date complaint was originally received by the Commission. In response to my request that he make his complaint more definite and certain, Mr. Benzing submitted his amended complaint on March 14, 2001.

As part of its routine handling of incoming mail, commission staff had date-stamped the initial submission on August 10, and the copies of the complaint later served on the parties carried that date stamp along with a typed label listing the case as being filed on August 29. I personally further contributed to the confusion, writing in my earlier order that the complaint had been "filed" on August 10. BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 30023-B (Levitan, 1/02). That statement was erroneous.

To compound the confusion, I explicitly held that "the relevant events transpired within one year of the filing of the complaint on August 10, 2000." Since the complaint was not filed until August 29, 2000, I must now reexamine the jurisdictional underpinnings of this part of the proceeding.

Section 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.

It formerly appeared well-settled that this commission considered this provision as tantamount to a jurisdictional matter, and that a complainant's failure to comply with its terms deprived the commission of jurisdiction to consider the complaint. In each of the last four decades, commission case law stated and reiterated this approach.

In RETAIL STORE EMPLOYEES UNION, LOCAL 444, DEC. NO. 8409-C (WERC, 6/68), the commission dismissed an untimely complaint, explaining that "the Commission's jurisdiction to determine whether an unfair labor practice has been committed … is specifically limited by Section 111.07(14) and can only be applied to those actions which occur within one

year from the date of filing of (the) unfair labor practice complaint." The commission held as a conclusion of law:

> That the Wisconsin Employment Relations Commission will not exercise its jurisdiction to determine the merits of the complaint filed in the instant matter *since said complaint was not timely* filed within the meaning of Section 111.07(14) of the Wisconsin Employment Peace Act. (emphasis added).

In CITY OF MADISON, DEC. NO. 15725-B (WERC, 6/79), the commission amended a conclusion of law as issued by a hearing examiner to read as follows:

> That, since the alleged prohibited practices occurred on a date more than one year preceding the date on which the complaint was filed, Sections 111.70(4)(a) and 111.07(14), Wis. Stats., *precludes the Wisconsin Employment Relations Commission from exercising its jurisdiction over the merits of said complaint*. (emphasis added). 2/

2/ In the proceeding, the underlying event occurred on July 27, 1976, and the complaint was filed July 28, 1977. In rejecting the Complainant's contention that the complaint was timely because the statute was meant to denote the full period from one vernal equinox to the next, a duration of 365 days, 5 hours, 48 minutes, 46 seconds, the Commission explained: "We do not believe that the legislature, in adopting the statutory provisions involved, ever intended to apply such an extra-terrestrial definition of the term 'one year.'"

In STATE OF WISCONSIN (DER), DEC. NO. 20909-B (WERC, 7/85), the Commission affirmed an examiner's order of dismissal and held as a conclusion of law that "(b)ecause the unfair labor practice complaint ... was filed more than one year after the occurrence of the unfair labor practices alleged," the complainant "lacks a right to ... receive a decision on the merits of that complaint." Without indicating at what point, if any, the respondents had raised the issue of timeliness, the commission explained that "the Examiner properly dismissed (the) complaint as having been filed more than one year after the unfair labor practices alleged therein."

In WSEU COUNCIL 24, DEC. NO. 27103-A (Schiavoni, 5/92), *aff'd by operation of law*, the examiner made the following conclusion of law:

> As to the first allegation in the complaint which occurred more than one year prior to the filing of the complaint on September 13, 1991, it is not appropriate to toll the application of the one year statute of limitation established in ...

> 111.07(14), Stats.; and the Commission is without jurisdiction to proceed on said allegation.

The text of the examiner's decision indicates that the respondents sought dismissal of the first allegation "as time-barred by the statute of limitations," but does not indicate at what point in the proceeding – answer, at hearing, or in post-hearing briefs – the respondents first raised that issue.

In CARPENTER'S LOCAL 264, DEC. NO. 27975-A (Burns, 6/94), aff'd by operation of law, the examiner held as a conclusion of law that since certain acts had:

> (o)ccurred outside of the one year statute of limitations provided for in Sec. 111.07(14), Stats., ...the Wisconsin Employment Relations Commission does not have any jurisdiction over any alleged prohibited practice arising out of such conduct."

The text of the award does not indicate whether the respondents ever raised the issue of timeliness, or whether the examiner did so on her own; the decision's jurisdictional paragraph does indicate that the parties did not submit written arguments. The examiner addressed the timeliness issue as follows:

> The Complaint in this matter was filed on October 22, 1992. The conduct of Respondent City of Milwaukee in terminating the employment of Robert M. Benish and Business Representative Bigler's decision not to file a grievance over this termination of employment occurred more than one year prior to October 22, 1992. *Accordingly, the Examiner does not have jurisdiction to determine whether or not this conduct involved a prohibited practice in violation of MERA.* (emphasis added).

In STATE OF WISCONSIN, DEC. NO. 26676-A (Gratz, 11/90), the examiner dismissed a complaint *without hearing* on the basis of the following conclusion of law:

> Section 111.07(14), Stats., ... establishes a one year time limit for filing unfair labor practice complaints.... Because the instant complaint was initiated in excess of one year after the date of the specific acts or unfair labor practices alleged in the amended complaint, the instant complaint, as amended, is time barred by Sec. 111.07(14), Stats.

In the Memorandum Accompanying Findings of Fact, Conclusions of Law and Order, Examiner Gratz discussed the procedural background of the case. That discussion states that

the respondents moved for dismissal without a hearing "either for lack of subject matter jurisdiction or on its merits," but does not indicate whether their jurisdictional claim included untimeliness as a basis. The examiner concluded his discussion of this issue as follows:

> Because under any and all interpretations of the facts the instant complaint was initiated in excess of one year after the date of the specific acts or unfair labor practices alleged in the amended complaint, the instant complaint is time barred by Sec. 111.07(14), Stats. In the Examiner's opinion, that is a sufficient basis on which to dismiss the amended complaint without a hearing. The Examiner has accordingly issued an order to that effect. DEC. NO. 26676-A, at 10.

The commission subsequently affirmed Examiner Gratz on all points material herein, holding as a conclusion of law that Sec. 111.07(14), Stats., "establishes a one year time limit for filing unfair labor practice complaints," and that "(b)ecause the instant complaint was initiated in excess of one year after the date of the specific acts or unfair labor practices alleged … the instant complaint … is time barred by Sec. 111.07(14), Stats.… STATE OF WISCONSIN, DEC. NO. 26676-B (WERC, 4/91).

Given a series of decisions almost thirty years old, the examiner in STATE OF WISCONSIN, DEC. NO. 28222-B (Shaw, 10/97), seemed on solid ground holding timeliness to be a jurisdictional issue, rather than a waivable statute of limitations. The Commission, however, determined he wasn't, reversing the conclusion of law that this statute is *not* a waivable statute of limitations. That is, despite several cases in which it used terminology indicating that the time limits were jurisdictional in nature, the commission held as a conclusion of law that Sec. 111.07(14), Stats., "is a statute of limitations which can be waived when not properly raised by a party as an affirmative defense." STATE OF WISCONSIN, DEC. NO. 28222-C (WERC, 7/98).

Frankly, I am not sure how the commission reached that conclusion, given the lengthy case law discussing this statute in jurisdictional terms. Indeed, several of the cases the commission cited as standing for the proposition that the commission has "historically referred to this provision as a statute of limitations," appear to stand for quite the opposite, including CITY OF MADISON, DEC. NO. 15725-B and STATE OF WISCONSIN, DEC. NO. 26676-B (misidentified in DEC. NO. 28222-C as DEC. NO. 6676-B), both quoted above.

However much I question the commission's conclusion that Sec. 111.07(14) is not jurisdictional, it is -- for now, at least -- commission precedent which I must follow, as I did in my earlier consideration of this complaint. *See, DEC. NO. 30023-B.* Accordingly, I must evaluate whether the respondents have waived their challenge to the complaint.

In answering this question, I must also be mindful off the great presumption, discussed above, that contested cases should not be dismissed prior to hearing except in extraordinary circumstances. So in order to determine whether such circumstances are here present, I believe it appropriate to review the complainant's extensive and revealing history before the commission. Accordingly, I take administrative notice of the following complaints he has brought before us over the last 11 years:

1. BARBARY AND BENZING V. WEAC AND BLACKHAWK TECHNICAL COLLEGE, Case 50, DEC. NO. 27140-A (Crowley, 2/92), -B (Crowley, 6/92), -C, (Crowley7/92) and -D (WERC, 2/93);

2. BENZING V. BLACKHAWK VOCATIONAL, TECHNICAL AND ADULT EDUCATION District, Case 54, DEC. NO. 28083/28084-A (Gallagher, 7/94), -B, (Gallagher, 9/94), -C (Gallagher, 10/96) and -D (WERC, 1/98);

3. BENZING V. WEAC, LOCAL UNION EXECUTIVE COMM. BTC/PARAPROFESSIONAL TECH. COUNCIL, Case 55, DEC. NO. 28543-A (McGilligan, 9/97) and -B (WERC, 12/97);

4. BENZING V. BLACKHAWK TECHNICAL COLLEGE, Case 61, DEC. NO. 28846-A (Crowley, 5/97), -B WERC, 6/97), -C (WERC, 7/97) and -D (WERC, 12/97);

5. BENZING V. BLACKHAWK TECHNICAL COLLEGE, Case 63, DEC. NO. 29066-C. (Gratz, 12/97); DEC. NO. 29066-D, 28598-D (WERC, 2/98)

6. BENZING AND STOKES V. WEAC/PTC, Case No. 64, DEC. NO. 29852-A (Jones, 11/00) and –B (WERC, 1/01).

The relevance of these prior cases extends beyond their sheer number, but gets to the heart of Mr. Benzing's practice before the commission.

In DEC. NO. 27140-A, Examiner Crowley was compelled, as I was, to issue an order granting respondent WEAC's motion that the complaint be made more definite and certain. Thus, since at least February 1992, Mr. Benzing has been aware that he must comply with the commission's rules regarding a "clear and concise statement of the facts," so that the respondent can understand and prepare a response to the charge. Yet a decade later, he was still violating the relevant administrative rule. This first experience bringing the commission

and this complainant together ended when Mr. Benzing violated an even more fundamental rule, the statutory requirement that he serve on respondent WEAC a copy of his complaint seeking circuit court review of the commission's decision affirming Examiner Crowley's dismissal of the complaint. Mr. Benzing therefore knows that both action and inaction have legal consequences.

The jurisdictional paragraphs in the consolidated DECS. NO. 28083-C and 28084-C give a sense of the nature of that litigation, similar in many ways to what is now before me:

> On January 7, 1994 Complainant Mark J. Benzing filed a complaint against Blackhawk Vocational, Technical & Adult Education District in Case 54, No. 50320, MP-2844, later amended on March 2, 1994. On March 13, 1994, Complainant filed a complaint against Respondent in Case 56, No. 50766, MP-2866. On April 12 and 18, 1994, respectively, Respondent filed Motions to Make These Complaints More Definite and Certain and on April 18th Respondent also filed a Motion to Consolidate the captioned cases which Complainant opposed by his letter received on May 11, 1994. On April 14, 1994 the Commission appointed Sharon A. Gallagher, a member of its staff, to act as Examiner in Case 54, No. 50320, MP-2844. On June 7, 1994, Complainant filed a Second Amended Complaint in Case 54, No. 50320, MP-2844. On June 20, 1994, the Commission issued its Order Consolidating these cases. On June 28, 1994, the Commission issued its Order appointing Sharon A. Gallagher to act as Examiner in Case 56, No. 50677, MP-2866. On April 25, 1994, Complainant filed a written opposition to Respondent's Motion to Make the Complaints More Definite and Certain. On July 15, 1994 the Examiner ordered Complainant to make his complaints more definite and certain, following Respondent's April 25, 1994 Motion thereon. On July 26, 1994 and August 8, 1994 Complainant complied with the Examiner's July 15th Order. On August 8, 1994 Respondent renewed its Motion to Dismiss and filed a Motion to Defer to Arbitration the complaint allegations of Sec. 111.70(3)(a)5 violations. By August 31, 1994 Complainant filed a response to Respondent's Motions. By September 7, 1994 Respondent filed its answer to these consolidated complaints. On September 23, 1994, the Examiner issued her Order to compel Benzing to make his complaints more definite and certain and her Order granting in part BTC's Motion to Dismiss allegations in the complaints that BTC violated State Statutes not administered by the WERC.
>
> Several hearing dates were scheduled in 1994 in this case, however due to illness in Respondent Counsel's family, the hearing Examiner's family and the illness of the Complainant, these various dates were cancelled. The first day of

hearing was held on January 24, 1995 at Janesville, Wisconsin. A stenographic transcript of those proceedings was made and received by the Examiner on March 7, 1995. At the first day of hearing, the Examiner granted BTC's Motion to Dismiss any allegations that BTC had violated Sec. 111.70(3)(a)5, Stats., as the April 7 and June 7, 1993 disciplinary actions had been fully processed through the grievance procedure. The hearing continued on October 17, 1995 (by mutual agreement of the parties) at Janesville, Wisconsin. Both the Examiner and Respondent Counsel were present at that time. However, Complainant did not appear for hearing on that day indicating by telephone call to Respondent Counsel that he was not well enough to proceed. On October 17, 1995 Respondent moved to dismiss the complaints but that Motion was denied by the Examiner, and the hearing was then adjourned due to the absence of Benzing.

The hearing resumed on October 23, 1995, and Benzing completed putting in his case in chief. Respondent renewed its Motion to Dismiss the Consolidated Complaints at the close of Complainant's case in chief. The Examiner granted that Motion after hearing oral arguments from both parties on the Motion. The Examiner summarized her reasons therefore on the record, but stated that she would issue formal Findings of Fact, Conclusions of Law and Order of Dismissal after both parties had had a full opportunity to submit briefs thereon. A stenographic transcript of continued proceedings was made and received by November 27, 1995. Benzing submitted a September 29, 1995 Motion to Amend Complaint in Case 56, an October 19, 1995 Amendment to Consolidated Complaints in Cases 54 and 56, and three Motions to Amend the Record/Transcript were received by the Examiner on November 29, November 30, and December 22, 1995 respectively. A "Motion to Reconsider Judgement" and a Motion to "Reconsider Order Dismissing Complaint" dated November 10, 1995 and May 10, 1996, respectively, were also received by the Examiner. Regarding the Motions filed after the close of the October 23, 1995 hearing, the Examiner wrote to the parties indicating that she would deal with these Motions in her formal decision herein. The Respondent resisted each of these post-hearing Complainant Motions in writing. The parties submitted their post-hearing briefs by February 16, 1996 and the record was closed on June 4, 1996 upon receipt of Complainant's last Motion to Amend Complaint (filed May 23, 1996) and Respondent's written response thereto. On September 16, 1996, Benzing filed another Motion to Reconsider Decision. On September 24, 1996, the Examiner advised the parties that Respondent need not respond to Benzing's Motion as she would not consider this Motion and that her decision would be issuing soon. The Examiner, having considered the evidence and

> arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

Those conclusions of law were that Mr. Benzing's motion to amend/correct the transcript lacked sufficient basis on which to be granted; that his motions to reconsider the examiner's order were premature; that his motion to amend the complaint was untimely; that the commission lacked jurisdiction to address allegations of violations of federal labor law; that the respondent college did not discipline him in any part because he had previously engaged in protected concerted activities; that the respondent college's actions had no reasonable tendency to interfere or restrain the complainant in the exercise of his protected rights; and that the respondent college did not in any other way violate any provision of MERA. With a discussion consisting of two paragraphs, the commission subsequently upheld the examiner in all regards. DEC. NO. 28083-D and 28084-D (WERC, 1/98).

On January 28, 1994, Mr. Benzing filed a complaint with the commission alleging that the Wisconsin Education Association Council and the BTC/Paraprofessional Technical Council had committed prohibited practices by failing to respond to his request to review a 1991 work study committee's findings because of an earlier complaint he had filed with the commission (*supra)*. On June 20, 1995, Mr. Benzing amended the complaint to include an allegation that the respondents had committed a prohibited practice by settling a grievance without his consent. Hearing Exmainer Dennis McGilligan found that the complaint as to the 1991 study was moot. As to the grievance settlement, the examiner found conclusive evidence in the record that Mr. Benzing had "acted in bad faith" by attempting to repudiate a settlement that he had expressly agreed to, and that the union respondents had "faithfully represented Benzing's interests to the very best of their ability." The examiner added:

> I am also of the opinion that Benzing's complaint regarding the … settlement is utterly without merit and that it is frivolous. I point this out so that Benzing is hereby put on express notice in this proceeding that he can be subjected to attorneys' fees and costs in another proceeding if he ever again engages in such baseless litigation. DEC. NO. 28543-A (McGilligan, 9/97).

Mr. Benzing thereafter filed a timely petition for review, in which he generally asserted that the examiner had made errors of fact and law and committed procedural errors, which errors he did not specifically identify. On December 5, the commission affirmed the examiner's decision. DEC. NO. 28543-B (WERC, 12/97).

DECISIONS 28846-A through D relate to a complaint Mr. Benzing filed with the commission on July 5, 1996 alleging that the respondent college had committed prohibited practices by giving him a discriminatory and retaliatory work performance evaluation on

July 6, 1995. On May 2, 1997 Examiner Crowley concluded as a matter of law that no such prohibited practices had occurred, and ordered the complaint dismissed. When Mr. Benzing failed to file a petition for review within the 20-day statutory time period, the examiner's findings, conclusion and order became the commission's by operation of law on May 23, 1997. On June 18, 1997, Mr. Benzing filed a Petition for Rehearing, which the commission granted on July 15. Despite this extraordinary gesture on the part of the commission, Mr. Benzing thereafter did not bother to file any additional written argument and the record was closed on September 9. The Commission thereafter reaffirmed the examiner's findings, conclusions and order on December 2. DEC. NO. 28846-D (WERC, 12/97).

While the matter referenced in DEC. NO. 28846 was proceeding, Mr. Benzing filed another complaint against the college on March 3, 1997, which he later sought to amend and expand. Examiner Marshall Gratz granted the respondent college's motion to dismiss multiple complaints without hearing. The examiner found that two of Mr. Benzing's allegations were time-barred, and that a third was beyond the Commission's jurisdiction because the complainant had not sought the use of an available grievance procedure. DEC. NO. 29066-C (Gratz, 12/97). The commission affirmed by operation of law, DEC. NO. 29066-D and 28598-B (WERC, 2/98).

While the matters referenced in DEC. NO. 28846 and DEC. NO. 29066 were proceeding, Mr. Benzing filed another complaint, this one against WEAC and the Paraprofessional Technical College on March 28, 1997. DEC. NO. 29852-A (Jones, 11/00). That complaint was held in abeyance for about three years while the parties attempted to settle the litigation. While such settlement efforts were ongoing, Mr. Benzing filed several amendments to his original complaint, the first being filed with the commission on May 29, 1998. Mr. Benzing contended that he filed a second amended complaint around October 29 of that year, but that complaint is not found in the commission's case file and the respondent avers it never received a copy. Mr. Benzing filed another amended complaint on November 15, 1999, adding Charles Stokes as a co-complainant, but not including an address or phone number for Mr. Stokes. Hearing in the matter was held on April 14, April 26 and May 23, all of 2000. On May 25, 2000, Examiner Jones sent a scheduling letter to the parties with the formal notice that he hearing would continue on September 12 and 13 at 9:00 a.m. Neither Mr. Stokes nor Mr. Benzing appeared at the hearing of September 12. While Mr. Stokes' absence was anticipated, Mr. Benzing's was not. Examiner Jones called the two phone numbers Mr. Benzing had provided, but both had been disconnected; he also called his own office, to see if Mr. Benzing had called to explain his absence. There was no such message. On September 14, Examiner Jones wrote to notify Mr. Benzing that he was to file a written explanation of his absence, and that failure to show good cause for his absence would result in the complaints being dismissed for lack of prosecution. On September 29, Mr. Benzing wrote to explain that he thought the examiner would be sending a reminder

notice, that he had a lot of adverse circumstances to attend to, and he essentially forgot about the hearing. Finding that Mr. Benzing's failure to attend the September 12 hearing constituted abandonment, Examiner Jones on November 15, 2000 dismissed the complaint and amended complaint with prejudice. On December 6, 2000 the full commission affirmed Examiner Jones' decision by operation of law.

To summarize: through six separate proceedings extending back for more than a decade, Mr. Benzing has accumulated extensive experience in commission practice and pleading. He has been made aware that he must comply with the administrative rule regarding a "clear and concise statement of the facts," DEC. NO. 27140-A. He has been made aware of the need for timely action, DECS. NO. 28083-C and 28084-C; DEC. NO. 29066-C. He has been made aware of the serious consequences of inattention and abandonment, DEC. NO. 29852-A. He has even been found to have acted in bad faith and been put on express notice that he was subject to an assessment of costs and fees if he "ever again engages in such baseless litigation," DEC. NO. 28543-B.

In the instant matter, Mr. Benzing waited almost three months before submitting a response to my Order directing that he submit a complaint that complied with the administrative rule requiring a clear and concise statement of the facts, which eventual response was materially inadequate. When I again twice directed Mr. Benzing to submit a proper complaint, he never responded at all. Finally, after eight months of inaction on the part of Mr. Benzing, I issued an order directing him to show cause why the matter should not be dismissed in its entirety for abandonment. While Mr. Benzing did finally respond to this order in a timely manner, the substance of his response was barely an explanation, and far short of a showing of good cause.

Mr. Benzing's casual approach to process and procedure did not stop there. On September 9 2002, he submitted yet another complaint, which he described as "a final draft of the complaint" he had earlier filed in August 2000. Dated August 9, 2000, but executed on September 5, 2002, the complaint includes two odd elements. The first is the assertion, contained in the second paragraph, that the respondents' illegal actions started around April 1993 "and continued throughout my employment until April of 2001." The second is this startling paragraph:

> The other two incidents that I mentioned in my last two paragraphs of the (rough draft (sent by mistake)) complaint. Are outside the States of Wisconsin statute of limitations and until I am able to prove otherwise are not an issue.

Mr. Benzing attests this "final draft" was prepared on August 9, 2000, yet it refers -- in the past tense -- to events of April, 2001. Since Mr. Benzing's employment at the college

actually ended in April, 2000, that may merely be a typographical error. However, the August 9, 2000 "final" version *explicitly references deficiencies in the "draft" version which could not have been known to him until well after that date.* How a "final" version drafted by August 9, 2000 could have shown awareness that a "draft" version was somehow submitted on August 10, 2000, that it was submitted by mistake, and that it contained elements outside the statute of limitations is far beyond me.

To put it bluntly, I do not believe Mr. Benzing when he states that the "final" version was drafted on August 9, 2000, and somehow overlooked until September, 2002. The simple explanation for the paragraph quoted above is, I believe, that Mr. Benzing is trying to pass off a later-created document as having been drafted two years earlier than it was, in an attempt to address deficiencies which had been exposed in the document he now calls a "rough draft."

This is an abuse of the process I cannot countenance. Accordingly, on the basis of the facts of this proceeding as seen against the backdrop of the entire administrative record of the complainant's practice before this commission, I have concluded that Mr. Benzing is not entitled herein to the traditional presumptions that normally protect a complainant from having a complaint dismissed without hearing.

I now turn, therefore, to considering whether respondents have waived their affirmative defense of untimeliness, and find that they have not.

As I found in BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 30023-B (Levitan, 1/02), respondent association raised timeliness as an affirmative defense in correspondence received March 30, 2001. During subsequent consideration, it also has raised the issue of timeliness under Sec. 111.07(14) in its correspondence of October 16, 2002. Respondent college has associated itself with the union's motions and arguments.

The underlying events occasioning Mr. Benzing's initial complaint were the three-day disciplinary suspension the college imposed and the union's subsequent decision not to pursue grievance #99-05 to arbitration. The union communicated that decision to Mr. Benzing by letter of August 12, 1999. Mr. Benzing filed his complaint on August 29, 2000 – more than one year after the event constituting the union's alleged prohibited practice, and several months more than that after the event constituting the college's alleged prohibited practice.

Accordingly, I have dismissed the initial complaint in its entirety.

As to the amended complaint, I have already dismissed the charges against the union as being time-barred. DEC. NO. 30023-B. I consider now the final element in the proceeding, the amended complaint against the college.

On March 14, 2001, Mr. Benzing filed an amended complaint alleging that when the college insisted on laying off the custodians and eliminating their bumping rights as part of the agreement for a new early retirement benefit, it did so to retaliate against him for past grievances. Since the college ratified the collective bargaining agreement on March 15, 2000, this element of the amended complaint is therefore timely, and one which raises questions of fact and law which can only be answered after a contested case hearing.

Accordingly, I shall now schedule a hearing in the matter of Mr. Benzing's complaint against the college, in which the only issue shall be whether the college's demand for lay-off of the custodial staff and their attendant loss of bumping rights was in retaliation against Mr. Benzing for his exercise of certain protected rights, including the filing of grievances.

Finally, I have denied Mr. Benzing's awkward attempt to add Mr. Stokes as a co-complainant, something the record shows he's had trouble with in the past, and something of some slight irony given that Mr. Benzing based his DWD Fair Employment complaint on the preferential treatment he claimed Mr. Stokes enjoyed in earlier disciplinary matters. While Mr. Stokes' affidavit notes the racial aspect of the custodial layoffs, and comments on Mr. Benzing's history of filing grievances, neither in his own narrative nor in endorsing the amended complaint does Mr. Stokes allege that either PTC/BTC or BTC acted towards him in a manner violative of MERA. Failing to state a claim, Mr. Stokes fails to join this proceeding as a party.

Again, I apologize to the parties for the extent to which I contributed to the protracted nature of this proceeding, and assure them that future consideration shall be more expeditious.

Dated at Madison, Wisconsin, this 19th day of May, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/
Stuart Levitan, Examiner

SDL/gjc
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