STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PETER SCHNEIDER,
BYRON RACHOW, CHRIS LERANTH, Complainants,

v.

MILWAUKEE COUNTY and
MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION, Respondents.

Case 525
No. 61673
MP-3866

Decision No. 30588-A

Appearances:

Peter Schneider, 4602 South 47th Street, Greenfield, Wisconsin 53220, appearing ***pro se*** and on behalf of Complainants Byron Rachow and Chris Leranth.

Eggert & Cermele, S.C., Attorneys at Law, 1840 North Farwell Avenue, Suite 203, Milwaukee, Wisconsin 53202, by **Laurie A. Eggert,** appearing on behalf of Respondent Milwaukee Deputy Sheriff's Association.

Timothy R. Schoewe, Deputy Corporation Counsel, Office of Corporation Counsel, Milwaukee County, 901 North 9th Street, Room 303, Courthouse, Milwaukee, Wisconsin 53233, appearing on behalf of Respondent Milwaukee County.

ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS THE COMPLAINT AND DENYING COMPLAINANTS' MOTION TO AMEND THE COMPLAINT

On October 9, 2002, the above-named Complainants filed with the Commission a complaint, alleging that the above-named Respondents had violated Sec. 111.70(3)(a)5 and 111.70(3)(b)1, Stats., when, on January 9, 1998, the Respondents entered into a collective bargaining agreement that contained a wage provision that was adverse to the Complainants. On April 1, 2003, Coleen A. Burns, an Examiner on the Commission's staff was appointed to

conduct a hearing and to make and issue appropriate Findings, Conclusions and Orders. Thereafter, scheduling of the hearing on the complaint was held in abeyance pending settlement discussions between the parties. On October 25, 2004, Complainants requested that this matter be scheduled for hearing. Notice of Hearing on Complaint, scheduling the hearing for February 10, 2005, was issued on December 1, 2004. On December 27, 2004, Complainants' filed a motion to amend the complaint. On December 28, 2004, Respondent County filed a motion to dismiss the complaint alleging, *inter alia*, that the complaint was not timely filed. On January 5, 2005, Respondent Association filed a motion to dismiss the complaint, alleging, *inter alia*, that the complaint was not timely filed. On January 3, 2005 Complainants filed a written response in opposition to the County's motion to dismiss.

Now, having considered the motions and Complainants' response in opposition thereto, the arguments of the parties and the record as a whole, the Examiner makes and issues the following

ORDER

It is ORDERED that:

1. Complainants' motion to amend the complaint is denied.

2. Respondents' motions to dismiss the complaint are granted and the complaint is dismissed in its entirety.

3. The hearing on the complaint, previously scheduled for February 10, 2005, is hereby cancelled.

Dated at Madison, Wisconsin, this 11th day of January, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS THE COMPLAINT AND DENYING COMPLAINANTS' MOTION TO AMEND THE COMPLAINT

The complaint filed on October 9, 2002, alleges that, for several years prior to January 9, 1998, Complainants were employed by Respondent Milwaukee County as Deputy Sheriffs; were represented by the Respondent Milwaukee Deputy Sheriff's Association and that, on January 9, 1998, Respondent County and Respondent Association entered into a collective bargaining agreement and included the following:

> 3.01 WAGES
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> (3) Upon implementation of this agreement, the rate of pay of each employe who has received a 1997 step increase (adjustment) shall be further adjusted to the next highest step in pay range 17BZ which is closest to their current rate of compensation providing a minimum $20 biweekly pay increase. All other employes (i.e. those not having received a 1997 step increase prior to the implementation of this agreement) shall have their current rate of compensation increased to the next highest pay step in range 17BZ which is closest to their current rate of compensation providing a minimum $20 biweekly pay increase retroactive to the first pay period of the year 1997. No further step increases shall be granted in 1997.

The complaint further alleges that, by agreeing to this provision, Respondents arbitrarily, capriciously, and in bad faith, allowed Deputies with less seniority to make a higher wage rate, based entirely on what time of year a deputy was hired, in violation of Secs. 111.70(3)(a)5 and (3)(b)1 of the Wisconsin Statutes.

Respondent County and Respondent Association have each filed a motion to dismiss, which motions include the allegation that the complaint is untimely filed. Complainants oppose the motions to dismiss.

Respondents' motion to dismiss is governed by Chapters 111 and 227. As Examiner Richard B. McLaughlin stated in ONEIDA COUNTY, DEC. NO. 28240-A (8/95):

> 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 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. . .
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> . . .
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> Chapter 227 does not provide a summary judgment procedure. The right to hearing is explicit, and the dismissal of a contested case prior to evidentiary hearing is not. Pre-hearing dismissal of a contested case is, then, an uncommon result:
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> > 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. 1/ (cite omitted)

As Examiner McLaughlin also found, the Commission has reflected this reluctance to deny hearing in it own case law:

> 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. (Citing UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3)

A review of the complaint reveals that the Complainants allege that Respondents violated Secs. 111.70(3)(a)5 and 111.70(3)(b)1 of the Wisconsin Statutes when, on January 9, 1998, the Respondents entered into a collective bargaining agreement that contained a provision which, in the Complainants' view, adversely impacted the Complainants. Complainants' complaint was filed with the Commission on October 9, 2002.

MERA does provide the Commission with jurisdiction over alleged violations of Secs. 111.70(3)(a)5 and 111.70(3)(b)1, Stats., if such allegations are raised in a timely manner. Respondents each assert that these allegations were not filed in a timely manner and, thus, the complaint must be dismissed.

Sec. 111.07(14), Stats., which is made applicable to these proceedings by Sec. 111.70(4)(a), Stats., provides:

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

As Examiner Lauri Millot stated in TEAMSTERS UNION LOCAL 563, DEC. NO. 30637-A (12/03); AFF'D BY OPERATION OF LAW, DEC. NO. 30637-B (WERC, 1/04):

> This section is strictly construed by the Commission. In CITY OF MADISON, DEC. NO. 15725-B (WERC, 6/79), AFF'D, DEC. NO., 79-CV-3327 (CIR.CT. DANE, 6/80), the Commission held that a complaint filed 366 days after the act complained of was not timely. The one-year statute of limitation begins to run when "the complainant has knowledge of the act alleged to violate the Statute." STATE OF WISCONSIN, DEC. NO. 26676-B at 8 (WERC, 4/91) or in circumstances when the complaint did not learn of the event during the limitations period, the date upon which the complainant "knew or reasonably should have known," PREMONTRE HIGH SCHOOL, ET. AL., DEC. NO. 27550-B (WERC, 8/93) at 7. When addressing events that fall outside the statutory period, the Commission has adopted the principles enunciated by the United States Supreme Court in LOCAL LODGE NO. 1424 V. NATIONAL LABOR RELATIONS BOARD (BRYAN MFG. CO.), 362 US 411 (1960) at 418. MILWAUKEE AREA TECHNICAL COLLEGE, ET AL., DEC. NO. 28562-B, (CROWLEY, 12/95). The Court articulated that there are two situations wherein further consideration is warranted. Those situations include:
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> . . .
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> The first is one where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose (the statute of limitations) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time

> barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

And as further explained by Examiner McLaughlin in MORAINE PARK TECHNICAL COLLEGE, DEC. NO. 25747-C (MCLAUGHLIN, 8/89):

> The BRYAN analysis, read in light of the provisions of Secs. 111.70(4)(a) and 111.07(14), Stats., requires two determinations. The first is to isolate the "specific act alleged" to constitute the prohibited practice. The second is to determine whether that act "in and of (itself) may constitute, as a substantive matter" a prohibited practice.

In responding to Respondent County's motion to dismiss, the Complainants argue as follows:

> In addition, in response to Mr. Shoewe's letter dated December 23, 2004. The statute of limitations 111.07(14) reads "one year from the date of the specific act or unfair labor practice alleged." It is our contention that the unfair labor practice continues every year. The respondents' have admitted in their answer's that the practice continues to the present day.

Complainants must allege a "specific act" within the one-year statute of limitations that constitutes "in and of itself" a prohibited practice. The allegations of the complaint, as filed, rest solely upon Respondents' conduct in entering into a collective bargaining agreement on January 9, 1998. This conduct of Respondents is clearly outside of the one-year statute of limitations period. The complaint does not allege that Complainants did not have knowledge of this conduct within the limitations period.

Complainants' response to the motion to dismiss, *i.e.*, that the unfair labor practice continues every year, although not entirely clear, appears to be based upon the claim that the language agreed to on January 9, 1998 continues to be enforced. As the Association argues, the continued enforcement of this provision would be a prohibited practice only if Complainants' assertion that the original agreement to include this provision in the collective bargaining agreement violated MERA.

In summary, the Respondent conduct that Complainants claim is within the one year limitations period can be charged as a prohibited practice only through reliance on the earlier untimely prohibited practice claim. Thus, under the BRYAN analysis, Complainants' claim of a continuing violation is also untimely.

Motion to Amend Complaint

On December 27, 2004, the Examiner received a letter from Complainants that included the following:

> In addition, we motion to add to the complaint: age discrimination, an unfair labor and prohibited practice.

ERC 12.02(5) provides as follows:

> (5) AMENDMENT. (a) **Who may amend.** Any complainant may amend the complaint upon motion, prior to the hearing by the commission; during the hearing by the commission if it is conducting the hearing, or by the commission member or examiner authorized by the board to conduct the hearing; and at any time prior to the issuance of an order based thereon by the commission, or commission member or examiner authorized to issue and make findings and orders.

The Commission does not have jurisdiction over age discrimination claims. Although the Commission does have jurisdiction over unfair labor practices and prohibited practices, Complainants' motion to amend the complaint does not allege a "specific act" within the one-year statute of limitations that constitutes "in and of itself" a prohibited practice.

In WILMOT JT. SCHOOL DISTRICT NO. 9, DEC. NO. 21092-A (WERC, 10/84), the Commission granted an amendment to the complaint because it "found that the motion to amend was filed in time to clothe the Commission with jurisdiction of each of the violations alleged in the complaint…" By implication, a motion to amend that is not filed in time to clothe the Commission with jurisdiction of each of the violations alleged in the complaint may not be granted. Such a conclusion is consistent with STATE OF WISCONSIN, DEC. NO. 28072-B (8/97), wherein the Commission refused to permit the union to amend the complaint to add employees as named complainants because more than one year had passed from the date of the alleged unfair labor practice. Complainant's motion to amend the complaint was not filed in time to clothe the Commission with jurisdiction over the alleged violations of MERA and, thus, the Examiner has denied Complainants' motion to amend.

Summary

Complainants' complaint and the amendment to the complaint sought by Complainants does not state a timely cause of action upon which the Commission can grant relief. The Examiner has denied Complainants' request to amend the complaint and has dismissed the

complaint in its entirety. Accordingly, the hearing previously scheduled for February 10, 2005 is cancelled.

Dated at Madison, Wisconsin, this 11th day of January, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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