STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GEORGE A. MUDROVICH, Complainant,

vs.

**WISCONSIN EDUCATION ASSOCIATION COUNCIL,
and CENTRAL WISCONSIN UNISERV COUNCILS,
and D.C. EVEREST TEACHERS ASSOCIATION,** Respondents.

Case 56
No. 59584
MP-3710

Decision No. 31781-A

Appearances:

Mr. George A. Mudrovich, 1308 Marquardt Road, Wausau, Wisconsin 54403, appearing on his own behalf

Mr. Michael D. Phillips, Legal Counsel, Wisconsin Education Association, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin, 53708-8003

ORDER GRANTING, IN PART, RESPONDENT'S MOTION TO DISMISS COMPLAINT, AND AFFORDING COMPLAINANT AN OPPORTUNITY TO AMEND COMPLAINT

On January 18, 2001, George A. Mudrovich (herein Complainant) filed a complaint with the Wisconsin Employment Relations Commission (herein Commission) alleging that the Wisconsin Education Association, Central Wisconsin Uniserv Councils and D.C. Everest Teachers Association, (herein collectively Respondent) committed prohibited practices within the meaning of Section 111.70(3)(b), Stats. by not fairly representing him with respect to grievances he filed June 5, 1998, and July 7, 1998, against his former employer, D.C. Everest School District (herein Employer). The Complaint was held in abeyance at Complainant's request pending the outcome of another complaint filed by Complainant with the Commission involving the Employer and Respondent. On March 2, 2006, Complainant notified the Commission that he wished to proceed on this complaint. The Commission appointed Stanley H. Michelstetter II, a member of the Commission's staff, to act as the Hearing Examiner in this matter by order dated August, 10, 2006. The Examiner held a telephonic

scheduling conference on April 27, 2006. Pursuant to the Examiner's direction, Respondent filed its answer on May 26, 2006. This matter is scheduled for an in-person pre-hearing conference on August 28, 2006. Respondent also filed a motion on June 9, 2006, in which it sought to dismissal on the grounds that it was filed after the one year limitation period contained in Section 111.07(14), Stats., as made applicable to prohibited practice proceedings by Section 111.70(4)(a), Stats., and on the basis that the complaint failed to state a cause of action. The parties were afforded an opportunity to brief the motion to dismiss, the last of which was received August 8, 2006.

Now, having considered the motion, the parties' arguments and the record as a whole, the Examiner makes and issues the following

ORDER

1. The complaint filed herein is dismissed with respect to all allegations that Respondent violated its duty to fairly represent Complainant with respect to a grievance filed July 7, 1998 with respect to all matters involving the investigation of said grievance, the advocacy of said grievance in arbitration before Arbitrator McAlpin and all other respects occurring before January 18, 2000. This order does not extend to Complainant's possible allegation that Respondent violated its duty, if any, to fairly represent Complainant with respect to seeking review of the award of Arbitrator McAlpin dated January 18, 2000.

2. The hearing in this matter is bifurcated. The issue to be heard first is whether this complaint is timely pursuant to Section 111.07(14), Stats., with respect to Complainant's allegation that Respondent secretly withdrew Complainant's grievance dated June 5, 1998, before Arbitrator McAlpin.

3. The Complainant is afforded an opportunity to amend his complaint to make it more definite with respect to his possible allegation or allegations that Respondent violated its duty to fairly represent Complainant with respect to all post-award matters involving the award of Arbitrator McAlpin dated January 18, 2000. The motion to dismiss the same as failing to state a cause of action is taken under advisement until the complaint is amended or the time for amending the same expires. Any such amendment will be duly filed with the Commission, no later than September 8, 2006. Respondent's answer will be due postmarked ten (10) days after the filing of the amended complaint.

4. The pre-hearing conference scheduled for September 28, 2006, is hereby indefinitely postponed.

Dated at Madison, Wisconsin, this 25th day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter /s/
Stanley H. Michelstetter II, Examiner

D.C. EVEREST AREA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER GRANTING, IN PART, RESPONDENT'S MOTION TO DISMISS COMPLAINT, AND AFFORDING COMPLAINANT AN OPPORTUNITY TO AMEND COMPLAINT

The procedural history of this case is set out above and will not be restated here. For the purposes of this motion, the following facts are not disputed. The statement of facts is based upon the complaint and matters of which the Examiner took notice pursuant to Section 227.45(3), Stats.[1]

MOTION FACTS

Respondent is the exclusive collective bargaining representative of the professional teachers employed by the D.C. Everest School District. Complainant was a member of the bargaining unit represented by Respondent. Respondent and the Employer had a collective bargaining agreement in effect at all material times which contained a grievance procedure culminating in final and binding arbitration. Complainant was employed as a part-time junior high school French teacher by the Employer, becoming an 80% of full-time teacher for the 1997-8 school year. On August 5, 1997, Complainant filed a civil action against fellow teachers. Thereafter, there was tension among the faculty of the junior high school because of the lawsuit. The Employer offered Complainant an 80% teaching contract for the 1998-9 school year which Complainant accepted. On June 1, 1998, the Employer posted a 30% teaching position in junior high school French, for the 1998-9 school year. Complainant was qualified to perform the work and had sought to become full-time. The Employer posted the 30% position rather than making Complainant full-time in retaliation for having filed the lawsuit. Complainant was the sole person to apply for the position. He filed a grievance dated June 5, 1998, alleging that the Employer violated the collective bargaining agreement by posting a 30% position rather than a 20% position. Had the Employer posted the 20% position, Complainant would have been able to fill the position and would have effectively become a regular full-time teacher. Thereafter, the Employer withdrew the position and decided to create a full-time French teacher position for the 1998-9 school year. Article 32(I) of the collective bargaining agreement provides as follows:

> Part-Time to Full-Time Assignment: In the event that a regular part-time position covered by this contract becomes a regular full-time position at any time during the year it is understood that the employee occupying the regular part-time position may be layed (sic) off immediately and that he/she may apply

[1] These include the collective bargaining agreement in effect between the Employer and Respondent at the relevant time, the arbitration award of Arbitrator McAlpin and the procedural recitations therein. The Examiner has also accepted Respondent's submission of the briefs of both parties and its affidavit that it contemporaneously mailed Complainant a copy of Respondent's briefs in the arbitration case. The latter is the equivalent to an affidavit of mailing customarily accepted in our proceedings

> for the regular part-time (sic, should be full-time) position together with other applicants for the position. Full-time teachers reduced to regular part-time shall not be subject to this provision.

The Employer laid-off Complainant, gave him a chance to compete for the full time position, and hired a new employee to fill the full-time French position. On July 7, 1998, Complainant filed a grievance which, as amended, alleged that the Employer violated the collective bargaining agreement when it applied Article 32(I) in this circumstance, particularly when it had routinely made part-time employees into full-time employees without applying this provision, at all times in the past. He also contended, among other things, that the Employer acted in bad faith when it made this decision, in violation of Article 32(E) which reads as follows:

> Appeal of Layoff Decision: . . . The layoff decision shall stand unless, in making the layoff determination, the superintendent or the Board acted in bad faith in utilizing and/or applying the procedures in this article.

Both of the grievances were processed by Respondent and the Employer to the arbitration stage. The parties selected Arbitrator McAlpin as the neutral arbitrator. The complaint herein, in essence, alleges that Respondent reluctantly took the two grievances to arbitration before Arbitrator McAlpin. Complainant employed outside counsel to advise him with respect to the lawsuit and the arbitration matter. Respondent, by its staff attorney Stephen Pieroni, represented Complainant in the arbitration proceeding. There is no allegation that Complainant sought to intervene individually or by separate counsel in the arbitration proceeding. The arbitration hearing was held on May 5, 6, 7, July 22 and 23, 1999. The parties to the arbitration proceeding filed written arguments well before the decision by Arbitrator McAlpin. Complainant received a copy of those briefs contemporaneously with the Arbitrator. The last brief was received by the Arbitrator on December 30, 1999. Arbitrator McAlpin rendered an award on January 18, 2000. An accurate copy of the award is attached to the Respondent's motion to dismiss. Attorney Pieroni mailed the award to Complainant and he received it on January 22, 2000. Arbitrator McAlpin did not sustain any grievance. No one sought review of the arbitration award.

PLEADINGS

The Complaint alleges that Respondent was hostile to him because he filed the civil lawsuit. Paragraph 60 of the complaint alleges that Respondent violated its duty of fair representation implicit in Section 111.70(3)(b), Stats., as follows:

> WEAC, CUC, and DCETA acted in an arbitrary, discriminatory, and bad faith manner in their representation of Complainant in the matter of the arbitration by, *inter alia*, concealing and/or deliberately failing to investigate the factual basis surrounding the history of the collective bargaining agreement as it relates to the Layoff Clause; by dropping the June 5, 1998 grievance without the

> Complainant's knowledge or input; by failing to provide adequate representation during the arbitration; by misleading the Complainant as to the appropriate analysis of the collective bargaining agreement; and by deliberately misleading the Complainant as to the statute of limitations in appealing Arbitrator McAlpin's decision to circuit court. . . . . "

Complainant's paragraphs 56, 57, 58, and 59 constitute the specific acts to which Complainant broadly alludes in paragraph 60. The Examiner summarizes these allegations as follows:

1. Respondent did not call witnesses on his behalf during the arbitration hearing which ended July 23, 1999.

2. Respondent did not introduce evidence in the arbitration hearing attacking the credibility of the Employer's administrators and school board members.

3. Respondent did not introduce any of the witnesses Complainant thought should have been introduced to refute the Employer's allegation about having previously invoked Article 32(I) of the applicable collective bargaining agreement.

4. Respondent's misled Complainant about the history of the layoff provisions of the applicable collective bargaining agreement. The Director of CWUC was Thomas Coffey until he retired in August, 1998. In June 1998, Complainant asked Coffey how long the disputed layoff provision had been in the collective bargaining agreement. Coffey told him that he did not know and invited Complainant to look through past collective bargaining agreements. Complainant did so and, incorrectly, concluded that 1984-5 was the first year it had been inserted. Coffey agreed with this statement even though he had participated in negotiations for the 1977-78 contract in which the language was first adopted. Complainant then told Attorney Pieroni of his conclusion. In July, 1998, Attorney Pieroni told Complainant that Mr. Micke had first negotiated the disputed provision in the 1984-5 agreement. Complainant heard the testimony under oath of the Mr. Coffey in October, 2000, that Coffey was representing the Respondent and first negotiated the disputed language into the applicable collective bargaining agreement for the 1977-78 school year. The essence of the allegation is that Mr. Coffey deliberately lied to Complainant about when it had been inserted until that time.

5. Respondent "simply" dropped the June 5, 1998, grievance in a side-bar conference with the arbitrator and the attorney representing the Employer.

6. Respondent refused to make the argument with respect to the June 5, 1998, grievance that under the terms of the applicable collective bargaining agreement the Employer is prohibited from laying off employees in "bad faith."

7. Respondent refused to advance the legal theory that the Employer was prohibited by the applicable collective bargaining agreement from invoking the layoff provisions when it was not reducing staff (or work available for Complainant).

8. Respondent misled Complainant as to the time limit for "appealing" the arbitrator's award.

Respondent filed its answer on May 26, 2006, in which it admitted item 1. It denied items 2, 4, 5, 7 and 8. It admitted it did not introduce witnesses as to item 3, but did introduce documentary evidence on the points in question. It denied information sufficient to form a belief on item 6. Respondent affirmatively alleged with respect to item 5: ". . . . Complainant remained present during all discussion at hearing, both on and off-the-record, conferred with Pieroni and affirmed Pieroni's actions." Respondent also denies that it ever abandoned the June 5 grievance.

On June 9, 2006, Respondent filed a motion to dismiss the complaint on the grounds that it was untimely under Section 111.07(14), Stats., and, also, that it failed to state a claim upon which relief could be granted by the Commission.

POSITIONS OF THE PARTIES

Respondent

Two of Complainant's allegations are barred by the one-year statute of limitations, Section 111.07(14), Stats. The first is his allegation that the Respondent violated its duty of fair representation by failing to investigate the history of the collective bargaining agreement. The complaint was filed January 18, 2001 thus, the window for the complaint goes back to January 17, 2000. The complaint alleges at paragraph 56(G) that the Respondent "refused" to advance that argument at the arbitration hearing. The Complainant at paragraph 92 alleges that Attorney Pieroni refused to present this legal theory. Put simply, the Association assessed its best arguments and, in its discretion, advanced those arguments. The Association holds wide discretion to craft its litigation. NEAL V. NEWSPAPER HOLDINGS, INC., at 369-70 (7th Cir. 2003) Complainant understood as of the last day of hearing, July 23, 1999, that Respondent was not going to advance that argument.

The second allegation which is time barred is that Respondent violated is duty of fair representation by allegedly failing to provide adequate representation during the arbitration. Complainant understood as late as July 23, 1999, the last day of hearing, that the Association's

representation did not meet his standard of sufficiency. This is well before the one-year period.

Three of the complaint's allegations fail to state a claim. The first is its allegation that Respondent dropped its June 5, 1998, 30% grievance. However, Complainant cannot establish that the Respondent dropped the grievance. The complaint fails to allege any facts to support the allegation that the June 5th. Grievance was dropped. Indeed, the Respondent submitted the grievance in question to the Arbitrator as Joint Exhibit 2, and argued the merits of the grievance in its Reply Brief. Mr. Pieroni's affidavit notes that he read Arbitrator McAlpin's award and did not know why the arbitrator viewed the grievance as un-submitted. .

The second is the allegation that Respondent violated its duty of fair representation by misleading Complainant as to the appropriate analysis of the collective bargaining agreement. Respondent digested Complainant's pro-offered facts, appraised itself of the terms of the collective bargaining agreement, and then applied the facts to advance its best arguments. Complainant ensconced himself fully in that process as an active participant. Hence, to which "appropriate analysis" might the complaint refer? In this case, the Association provided the Complainant with zealous representation based upon its analysis of the case. Its loss at arbitration does not render its theory of the case a violation of the duty of fair representation. Under no interpretation of the Respondent's arbitration briefs does the Respondent's argument before the arbitrator fall outside the wide range of reasonableness accorded the Respondent under the law of the duty of fair representation.

The third allegation that does not state a claim is the allegation that Respondent misled Complainant about the applicable statute of limitations to seek court review of the arbitrator's award. See, Sec. 788.13, Stats. Only Respondent, not Complainant, had standing to challenge the award.

Respondent replied to Complainant's initial brief as follows. The time limit bars Complainant's allegation that the Respondent concealed and/or deliberately failed to investigate the bargaining history of Article 32(I). Beneath this allegation, Complainant is offering a contract nullity argument. Complainant admits in Paragraph 56(G) of his Complaint that Mr. Pieroni refused to present the argument. In any event, the Arbitrator's award at p. 35 rejects this line of argument and treats Article 32(I) as controlling of the dispute and not limited by the other provisions of Article 32, the just cause clause or any other restriction on the Employer's layoff power. Accordingly, the alleged misrepresentation is irrelevant to the case at hand. Further, the theory of Mr. Mudrovich's complaint is that had he known all of the facts about Article 32(I), he would have been more strident in seeking to have Mr. Pieroni pursue this line of argument; however, the fact is that Complainant knew as of the date of Respondent's final brief in the arbitration case that Respondent would not, and had not, made the argument. This is well over one year before the filing of the Complaint.

The Complaint's allegation that Mr. Pieroni dropped the June 5th grievance lacks merit under the law. The evidence shows that Respondent did not drop the June 5th grievance. The

record shows Respondent litigated, at length, the position that the Employer's choice to post a 30% rather than 20% position violated the collective bargaining agreement because it evinced "bad faith," violated Section 10F. See, tr. p. 1124-25, 1127-28, 1143, Respondent's initial brief, appendix A, p. 56. As to Section 10F, see, Respondent's Reply Brief, p. 29-30. Alternatively, the Complainant fails to offer clear and satisfactory evidence that the Respondent violated its duty of fair representation. The fact that Respondent may have refused to take a case to arbitration or that it settled a case against a grievant's wishes will not prove a violation of the union's duty of fair representation. Here the Union took the case to arbitration.

Alternatively, Complainant's argument presumes material facts, unassailable by hearing and then employs those facts to reach unsupportable conclusions. Complainant assumes that if the Employer had posted the part-time position at 20%, Complainant would have become a full-time employee. There is no guarantee that Arbitrator McAlpin would have granted the remedy Complainant sought. Complainant's argument rests on factual inquiry. As such, it cannot reasonably sustain a claim that the Respondent breached its duty of fair representation. Complainant then argues that since he would have been a full-time teacher that the issue with respect to Article 32(I) would be moot since the provision only applies to part-time employees. However, he also misunderstands Article 32(I). Had the arbitrator increased him to full-time, Article 32 (I) would have applied to that action as well. Thus, he would have been laid off in either circumstance. Respondent concentrated the bulk of its litigative efforts upon the main issue, whether the Employer employed the layoff procedures in a manner consistent with the agreement. The June 5th grievance was always subordinate to that effort.

Complainant

Complainant stipulated to the jurisdictional-type facts stated at pp. 1-2 of Respondent's brief. Respondent's assertion that it did not drop the June 5, 1998, grievance is not a sufficient basis for dismissing that allegation prior to hearing. The statutory time limit begins when Complainant learned on reading Arbitrator McAlpin's January 18, 2000, award that the same had been dropped at hearing. The discussion dropping the grievance and framing the issue was held off the record and out of Complainant's presence. Complainant heard the parties' stipulation of the issue at hearing, but could not have been expected to understand from that stipulation that the June 5, 1998, grievance was dropped. Complainant reiterates his assertion that this action was taken in bad faith because Respondent really was trying to be unsuccessful in the arbitration before Arbitrator McAlpin. Complainant disputes the assertion in Mr. Pieroni's brief that Mr. Pieroni advised him prior to the May, 1999, arbitration hearing that the June 5, 1998, grievance was essentially "moot." Complainant deserves the right to cross-examine Mr. Pieroni as to his motivation for this action.

The claim that Respondent purposefully misled Complainant regarding the bargaining history of Article 32(I) of the collective bargaining agreement is not time-barred. Complainant first learned of this misrepresentation in October, 2000, only 3 months before the complaint was filed. The statute of limitations begins to run when Complainant knew or should have known of the violation. This line of argument was important because Attorney Pieorni chose

to attack the Employer's position based on the absence of a past practice of applying Article 32(I). However, the stronger argument was that the history of the provision, correctly presented, would show that the provision was never intended to be applied the way the Employer chose to apply it against Complainant. Complainant also argues that he has not yet learned of all of the complete set of facts surrounding the contract history of Article 32(I) and requests that he be allowed to discover them through examination of witnesses at the hearing.

Complainant concedes that there were some issues he was aware of with respect to the adequacy of Complainant's representation of him before one year prior to the filing of the complaint. However, he did not know of all of the misdeeds of Mr. Pieroni regarding the central issue of Article 32(I) prior to one year filing the complaint. Accordingly, the Complaint should be viewed as timely.

In response to Respondent's brief, Complainant argues that his assertion that Respondent intentionally failed to provide him with "proper" representation by dropping the June 5, 1998, grievance does state a claim. As a result of Respondent's act, Complainant was denied a full-time position and denied all of his future wages and benefits.

Respondent's assertion - that Complainant's argument about the history of Article 32(I) is a "contractual nullity" - is a misconstruction. Complainant does not contend that any application of Article 32(I) was a violation of the agreement, but rather since it had never been used in the more than 20 years which it was in the agreement shows that its application was "fraudulent." Complainant did not know this history was longer until three months prior to the filing of the Complaint.

Complainant deserves an opportunity to prove the following allegations at a hearing. Respondent dropped the June 5, 1998, grievance. The fact that Respondent put on arguments about the grievance at the hearing was merely pretext to disguise its bad faith action in dropping the grievance.

Respondent's assertion that Complainant's argument that he would have gotten the 30% teaching position had the Employer not withdrawn it, is an argument which resists factual inquiry is inconsistent with the record. First, the Employer had a clear need to have an additional French class or it would not have posted it. Second, Complainant was the only person to apply for the position. Third, Complainant was qualified. Fourth, the District admitted at the hearing before the WERC in case no. 57582, that the reason it withdrew the posting was to insure Complainant did not become full-time. Had Respondent made this argument a reasonable arbitrator would have ordered that Complainant be awarded a full-time contract.

DISCUSSION

Motion practice is limited before the WERC. However, the WERC will entertain motions to dismiss based upon a failure to state a cause of action or based upon the one-year

statute of limitations in Section 111.07(14), Stats. See, WAUSAU INSURANCE COMPANY, DEC. NO. 30018-C (WERC, 10/03). The limits on WERC motion practice are well stated in DAIRYLAND GREYHOUND PARK, DEC. NO. 28134-B (McLaughlin, 10/95). See, also, BLACKHAWK VOCATIONAL AND TECHNICAL COLLEGE, DEC. NO. 30023-C (Levitan, 5/03), p. 19 *et. seq*. The Commission broadly construes complaints in making decisions upon motions. The Commission may take into account stipulated facts and/or take notice of material as permitted by Sec. 227.45, Stats.

Section 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 extend beyond one year from the date of the specific act or unfair labor practice alleged.

Examiner Millot in TEAMSTERS UNION LOCAL 563, DEC. NO. 30637-A (12/03), *aff'd. by operation of law* DEC. NO. 30637-B (WERC 1/04) recently succinctly summarized the WERC's long standing policy in applying this statute as follows:

> 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 limitations 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, 2/91) or in circumstances when the complainant 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 U.S. 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. These situations include:
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> . . .
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> The first one is 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 the 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.

The core of Complainant's complaint is that the Respondent committed a prohibited practice within the meaning of Section 111.70(3)(b)1, Stats., by violating its duty to fairly represent him with respect to two grievances it arbitrated on his behalf before Arbitrator McAlpin. It may also be construed to allege that Respondent secretly withdrew and refused to process one of those grievances before the arbitrator. Under the Commission's well established case law, insofar as it is relevant to this matter, a labor organization violates the duty it owes to those it represents when it arbitrarily, discriminatorily or in bad faith administers its representation of the employee with respect to the arbitration of the employee's grievance. The Commission further defined the inquiry as follows in CITY OF MEDFORD, DEC. NO. 30537-C (WERC, 8/04)

> [T]o establish a breach of the duty a complainant has the burden of establishing that the "union's conduct toward a member . . . is arbitrary, discriminatory, or in bad faith" MAHNKE V. WERC, 66 Wis. 2D 524 at 531 (quoting VACA V. SIPES, 386 U.S. 171, 190 (1967). 'Bad faith" for this purpose 'calls for a subjective inquiry and requires proof that the union acted (or failed to act) due to an improper motive". NEAL V. NEWSPAPER HOLDINGS, INC., 349 F3D 363, 369 (7th Cir., 2003). 'Arbitrariness' generally focuses on whether the union has made a reasoned decision about proceeding with the grievance, MAHNKE, 66 Wis. 2D at 534, keeping in mind the '"wide range of reasonableness"' that the union must be allowed. MAHNKE, at 531, quoting HUMPHREY V. MOORE, 375 U.S. 349 (1964).

One-year Starting Date

Complainant filed this complaint on January 18, 2001. The first question is when the statute of limitations period in Sec. 111.07(14), Stats. generally began to run. Respondent's position is that it began to run for issues concerning its representation before Arbitrator McAlpin as of the last day of the hearing, July 23, 1999. Complainant's position seems to be that it began to run when he discovered the last piece of evidence which would support his claim. The Examiner concludes that for the claims of improper representation involved in this case, it began to run when the record was closed by the arbitrator. Arbitrator McAlpin's award recites that the record was closed (final briefs were received) on December 30, 1999. There is no contention that there were any arguments made by the parties to Arbitrator McAlpin after that time. The Examiner notes that Complainant does not seek relief from the Employer under Section 111.70(3)(a)5, Stats. Complainant alleges he was present throughout the hearing. He received copies of the written arguments filed by Respondent with Arbitrator McAlpin and Complainant alleges that he discussed the nature of the case with his own private

attorney.[2] Accordingly, Complainant had notice of every aspect of the nature and quality of Respondent's advocacy before the arbitrator, except as to matters that may have been concealed from him. Accordingly, the statute of limitations starts from December 30, 1999, for all allegations of violation of the duty of fair representation pertaining to the representation before Arbitrator Mc Alpin, except those matters which were concealed from Complainant.

Tolling for Exhaustion of Dispute Resolution Procedure

The Examiner notes that the Commission treats the statute of limitation imposed by Section 111.07(14), Stats., as tolled concerning quality-of-advocacy duty of fair representation cases until the applicable dispute resolution process is completed. However, this rule does not apply where the complainant does not make a companion allegation against the employer under Section 111.70(3)(a)5, Stats. See, LOCAL 950 INTERNATIONAL UNION OF OPERATING ENGINEERS, DEC. NO. 21050-B (Honeyman, 12/83), rev'd. on other grounds, DEC. NO. 21050-C (WERC, 7/84); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 22557-A (Honeyman, 6/85). Accordingly, the Complaint is generally time-barred with respect to all allegations that Respondent violated its duty of fair representation in the way it litigated the grievances before arbitrator McAlpin.

Possible Exception for Lack of Knowledge as Result of Respondent's Alleged Misrepresentation

The Examiner elucidates the basis for dismissing some of the specific allegations made by Complainant. Complainant's allegation that Respondent failed to investigate and/or concealed the factual basis of the bargaining history of the collective bargaining agreement underlying his grievance relates to his claim in paragraph 56(D) that Respondent concealed and/or negligently did not find out that Article 32(I) of the agreement was first adopted for the 1977-78 school year agreement, rather than the 1984-5 school year, as he was wrongly "told"[3] by Respondent's local president (who had actually negotiated the language for the 1977-78 school year agreement). As noted, the inquiry whether Respondent violated its duty to represent Complainant is a limited inquiry. The test is whether its overall representation was arbitrary, discriminatory or in bad faith, not whether each and every decision or action was erroneous or could have been done better. The purpose of the test is to accord the labor organization its "wide range of reasonableness" in meeting its responsibilities. See, for example, Examiner Burns' discussion in MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 31602-B (7/06), p. 27, *et. seq*. Under that test, the concern about the contractual history is only one potential piece necessary to establish the violation-of-collective bargaining agreement cause of action before Arbitrator McAlpin. The deliberate concealment of this fact would certainly be, if proven, evidence tending to show bad faith. In this case, Complainant was aware of the alleged bad faith well more than a year prior to the filing of the Complaint.

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[2] See, Paragraph 56(G) of the Complaint.

[3] There is a factual dispute as to whether Mr. Coffey actually made an intentional misrepresentation.

The alleged concealment did not prevent Complainant from learning any significant fact affecting his cause of action. The record is obviously not complete on the allegations which Complainant thinks might have been proven before the arbitrator, but his complaint details the following potential arguments. First, the fact that this provision has been in the collective bargaining agreement for a longer time would show that the Employer has never exercised this provision over even a longer period than was presented by Respondent to the arbitrator. Second, the language now appearing in Article 32(I) was first adopted by the parties as part of Article 10, while the parties at the same time adopted a rudimentary layoff provision as Article 31. Article 10 contained the non-renewal provisions and also contained the "just cause" provision[4] and, therefore, Article 32(I) is subject to the just cause provision. Third, the same history shows that the language of Article 32(I) which allegedly restricts the Employer from using any of its layoff power except when there is a decrease in enrollment was adopted in Article 31 of the 1977 contract.[5] The parties renumbered Article 31 as 32 and moved Article 32(I) to Article 32. As such, Article 32(A) restricts layoffs in Article 32(I) to situations only when there is a reduction in staff. Arbitrator McAlpin rejected this argument, but the bargaining history would more clearly show that the intention to subject Article 32(I) to Article 32(A). Fourth, the same line of reasoning demonstrates that the parties intended that the good faith limitation of Article 32(E) also restrict layoffs under Article 32(I).[6] Fifth, the same line of reasoning shows that the provision requiring notice of layoff to be provided to a teacher before June 1 also applies to Article 32(I).

The statute of limitations begins from the date that one knew or should have known of the facts which are the subject of a complaint before the Commission. See, PREMONTRE HIGH SCHOOL, ET AL., *supra*. In that case, a former employer gave an employee a bad reference. The former employer concealed the fact that it gave the employee a bad reference. The Commission reversed the examiner, finding that the act alleged to be the unfair labor practice was the giving of the bad reference in retaliation for having exercised protected rights. On that basis, it found the concealment tolled the statute of limitations. Unlike that case, the history of

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[4] Article 10(F) reads, in relevant part, now and for the purpose of this decision alone presumably read the same in 1977:

> Standard for Discipline: No teacher shall be discharged, non-renewed, suspended, reduced in rank or compensation or deprived of any professional advantage except for just cause. . . . .

[5] Article 32(A) now reads in relevant part:

> Board Rights: Whenever a reduction in staff becomes necessary during the term of the individual teaching contract because of (a) decrease in enrollments, (b) educational program changes, (c) budget or financial limitations . . . .

[6] Article 32(E) provides in relevant part:

> Appeal of Layoff Decision: . . . . The layoff decision shall stand unless, in making the layoff determination, the superintendent or the Board acted in bad faith in utilizing and/or applying the procedures provided in this article

Article 32(I) was a minor piece of the evidence underlying the contract interpretation portion of Complainant's grievances before Arbitrator McAlpin.

Complainant's first point above would show that Respondent should have argued that the Employer never used Section 32 (I) to lay off a part-time teacher over the 20 years the provision existed, not merely the 14 which Respondent actually argued. Respondent's reply brief to the arbitrator showed at p. 24 that it made the argument that the layoff provision of Article 32(I) had never been used:

> Contrary to the administration's assertions, the record reveals that Article 32.I was never previously invoked to layoff a part-time incumbent when a position was increased from part time to full time. . .

The issue on that point is not that the argument was not made, but that it could have been made in a much stronger fashion. Complainant had notice of the actual argument when he received a copy of Respondent's brief.

Complainant's second potential argument listed above, that bargaining history would show that the Employer's right to layoff could only be exercised when there is a reduction of staff, was never made by Respondent because it concluded the argument essentially worked as a nullification of Section 32(I). Complainant was aware as of December 30, 1999, that that this argument was not made. Therefore, Complainant's bargaining history theory as it relates to the "reduction-in-force" argument does not extend the statute of limitations as to this point.

Respondent actually made arguments relating to Complainant's position that the provisions requiring "good faith" and "just cause" applied At page 26 of Respondent's initial arbitration brief, it argued:

> The history of application of Article 32.I supports the Association's interpretation that the application of Article 32.I must be harmonized with the just cause provision.

Respondent expressly made the "just cause" argument at page 23 of its initial brief:

> Article 32I of the Collective Bargaining Agreement allows the district to lay off an employee in specified circumstances. However, the termination of Mudrovich's employment was in bad faith and was not a valid Article 32.I layoff. [Capitalization modified by Examiner.]

It reiterated this argument at page 13 of its arbitration reply brief:

> Article 32.E of the Collective bargaining agreement provides that a layoff under Article 32 will not stand if the School District has acted in Bad Faith; the

> District's "layoff" of Mudrovich was in bad faith and may not stand. [Capitalization modified by Examiner.]
>
> . . . .
>
> The circumstances surrounding and reasons given for Mudrovich's "layoff" did not accord with the negotiated purpose of Article 32.I; Article 32.I was improperly invoked in this case to circumvent the just cause requirements of Article 10; such a misuse of that provision constitutes bad faith.

In this context Complainant's argument about the concealed history is one of degree (that the argument could have been made better) rather than the arguments were not made because Respondent concealed facts which were favorable to him. The Examiner reaches a similar conclusion with respect to the fifth line of reasoning, the June 1 notification date. Under those circumstances, the statute starts from the date Complainant knew the nature of the argument which was, in fact, made. That date was December 30, 2000, and the complaint is time-barred on this issue.

Alternatively, the Examiner notes that paragraph 56(D) of the complaint alleges that Complainant first learned that the language first appeared in the collective bargaining agreement for the 1977-78 year by a public records check in October, 2000.[7] The statute of limitations begins when one should have known of the facts. See, PREMONTRE HIGH SCHOOL, ET AL., *supra*., at p. 7. Paragraph 56 E notes that Complainant was offered an opportunity to investigate past contracts to determine when the language was inserted into the contract from the records of Respondent. This offer was made prior to the hearing and it appears that Complainant participated in the investigation of the facts. He came to the mistaken conclusion from reviewing the past contracts in Respondent's files that it was first inserted in the contract for the 1984-85 school year, rather than for the 1977-78 school year. In any event, unlike the facts in PREMONTRE, Complainant had public access to the information from the Employer's records and could, had he so desired, have verified prior to the arbitration hearing when the language first appeared in the contract. Accordingly, this allegation does not change the date of the commencement of the statute of limitations.

Finally, on this point, the Examiner notes that the entire line of argument made by Complainant on this point would not have affected the results of the arbitration. Arbitrator McAlpin made himself quite clear in overruling that line of argument when he stated at page 35 of his award:

> It is without question for this Arbitrator that Article 32(I) is the controlling provision in this case. Under the four corners doctrine, both sides have attempted to bring in other provisions which would, to some degree in their

[7] The Examiner is concluding that if the Employer had the documents in October, 2000, it would have had them prior to the arbitration hearing.

> view, modify how 32(I) would be applied. The Association has made reference to Article 10, the just cause provision and Article 32(B)(5), which is the layoff notice and 32(E) appeal of lay off. . . . .
>
> A reading of 32(I) shows that the language is exceedingly clear and unambiguous. It is specific and, therefore, controls and supersedes other more general clauses. . . . .

The arbitrator then went on to impose upon the Employer in applying a test that its decision not be "arbitrary, capricious, unreasonable or discriminatory." This imposed standard is essentially the same as the arbitrary standard of Article 32(E). He noted that it was a "relatively easy standard to meet. He then concluded that Article 32(I) was permissive not mandatory. He concluded that the fact that it may not have been invoked in the past did not mean it could not be invoked now. Finally, he concluded:

> Therefore, this case is not about teaching, but it is about interpersonal and professional relationships. The record in this case shows that the Grievant tends to self-destruct due to an over-exaggerated sense of . . . what seems to be fair to him. He has an extreme lack of sensitivity to other people's feelings. . . . . The record shows that even during the final evaluation process the Grievant showed no remorse or willingness to resolve perceived problems. The Grievant does not even acknowledge that he was part of the problem.. Therefore, the District would have a reasonable expectation of continuing problems in those areas. . . . .
>
> Overall, while the Arbitrator has some reservations as to the evaluation process, the District has met the minimum requirements of 32(I) and not acted in an arbitrary, capricious, unreasonable or discriminatory manner and, therefore, the grievance shall be denied.

Accordingly, the Examiner concludes that the issue of concealment is really an evidentiary issue related to Complainant's allegation that Respondent acted in bad faith. The alleged concealment in this regard did not delay Complainant's knowledge of any fact essential to his cause of action. The facts concerning the nature of Respondent's argumentation before the arbitrator were well known to Complainant more than a year prior to the filing of this complaint. Complainant knew one contract interpretation argument was not made. Complainant's other arguments concerning contract interpretation were actually made, but made unsuccessfully. Accordingly, the statute began to run then. The statute is not tolled merely because Complainant may not know each and every detail which might have made those arguments stronger. Any other conclusion would render Section 111.07(14), Stats., a virtual nullity in duty of fair representation cases. Additionally, because the arbitrator found those arguments without merit and also found that the Employer acted in good faith when it failed to hire him for the full-time position, Complainant's arguments that the newly discovered facts could have caused a different result in the arbitration case, are without merit.

Finally, Complainant knew, or should have known, of the facts underlying the contract history prior to December 30, 1999, even if Respondent had tried to conceal them. Accordingly, the late discovery does not extend the time limit of Section 111.07(14)(a), Stats.

The Examiner notes that the same is not true with respect to Complainant's allegation that Respondent secretly withdrew the June 5th grievance in a side-bar conference before the arbitrator. The refusal to process a grievance or the settlement of a grievance in itself may be a separate violation of the duty of fair representation under well-established Commission law, if done arbitrarily, in bad faith or for discriminatory reasons. The Complaint, broadly read, sufficiently alleges that this action alone violated the duty of fair representation. There are a number of factual issues with respect to this allegation. The first is whether it was, in fact, withdrawn or "dropped." Complainant contends it was withdrawn or dropped, while Respondent alleges that it fully litigated this grievance before Arbitrator McAlpin. There also is a factual issue under Section 111.07(14), Stats., as to when Complainant knew or should have known that the grievance was dropped. Complainant contends that it was secretly dropped. Respondent alleges that all of its actions at the arbitration hearing concerning this grievance were known to Complainant more than one year prior to the filing of the complaint. The Examiner is satisfied that the issue of timeliness of the filing of the complaint with respect to this issue can only be resolved after a hearing before the Examiner. The Examiner finds it very likely that the issue of timeliness will finally resolve the entire issue with respect to the June 5th grievance. Accordingly, the Examiner has herein bifurcated the hearing as to that issue. The hearing will be limited to the issue of whether or not Section 111.07(14), Stats., bars the allegation concerning the alleged dropping of the June 5th grievance and matters relating to Respondent's possible violation of the duty of fair representation with respect to its post-award responsibilities. The bifurcation is subject to review at the scheduled pre-hearing conference.

Post-award Fair Representation

The Examiner finds there is substantial ambiguity surrounding Complainant's allegation in Paragraph 58 of his complaint concerning possible post-award court-review of Arbitrator McAlpin's award. It reads in relevant part:

> . . ., Complainant asked Pieroni whether or not the arbitration decision could be appealed to circuit court. Pieroni informed him that this was possible. Complainant asked what the statute of limitations was. Pieroni told him that the arbitration decision would not be final until one year had passed from the date of McAlpin's written decision. In a March 16, 2000 letter, Complainant specifically asked whether there were any relevant timelines related to his case, and whether there was anything he needed to avoid in order to protect his state or federal claims against the District. Pieroni did not inform Complainant that, under Wisconsin statutes, arbitration decisions may not be appealed to circuit court later than 3 months after the arbitration decision was rendered. . . . ."

Narrowly read, the complaint alleges that only because Respondent dropped the June 5 grievance at hearing, Complainant wanted to seek review of his arbitration award before the Circuit Court. His complaint may then be read that Attorney Pieroni representing Respondent misled him about the time limit for seeking review of arbitration awards in Circuit Court. See, Sec. 788.13, Stats. Broadly read, this allegation may be an allegation that Respondent violated its duty of fair representation by arbitrarily, discriminatorily or in bad faith not seeking review of the award in Circuit Court.[8] The Examiner cannot tell what is intended. The Examiner agrees with Respondent if the narrow reading is appropriate the complaint fails to state a cause of action. The complaint alleges that Complainant was represented by separate counsel with respect to his individual rights as to these grievances. See, paragraph 56(G). In any event, Complainant has no obligation under its duty of fair representation to advise an individual grievant as to how, if at all, to seek review of an arbitration award, which it has accepted as final and binding. If the broad reading is appropriate, then the complaint would state an arguable cause of action for violation of the duty of fair representation with respect to Respondent's duties to represent Complainant in seeking post-award relief. Any such allegation is clearly timely under Section 111.07(14), Stats., because the award was rendered within one year of the filing of the complaint. Under the circumstances, the Examiner concludes that Complainant is entitled to an opportunity to amend his complaint and that the motion to dismiss as to that aspect of the complaint be taken under advisement.

I note that Complainant has informed the Examiner that he will be out of town on vacation until August 23. I have attempted to allow sufficient time for him to respond after he returns, but to do so before the scheduled pre-trial. The Examiner will consider a request to extend that time limit. This case is currently scheduled for a pre-hearing conference on Monday, August 28. It is inappropriate to hold the conference until the complaint is amended. Accordingly, I have indefinitely postponed the pre-hearing conference.

The Examiner notes that although various allegations are time-barred as independent prohibited practices, the Examiner will allow testimony at hearing with respect to that conduct as may be relevant and necessary to establish the possibility of improper motivation on Respondent's part. This decision is based upon the case law cited above.

Dated at Madison, Wisconsin, this 25th day of August, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter /s/
Stanley H. Michelstetter II, Examiner

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[8] The Examiner is satisfied that there is no reading of this paragraph or the complaint as a whole which can be read to seek relief against the Employer under Section 111.70(3)(a)5, Stats., with respect to these grievances.