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-B

Appearances:

Alan C. Olson & Associate, S.C., 2880 South Moorland Road, New Berlin, Wisconsin 53141-3744.[1]

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

ORDER GRANTING, IN PART, RESPONDENT'S MOTION TO DISMISS 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

[1] Complainant appeared pre se through the pre-hearing conferences. Ms. Allen first appeared on brief.

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, respectively, 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. Respondent also filed a motion on June 9, 2006, in which it sought dismissal of the complaint 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 matter was briefed by the parties. The Examiner issued an order granting the motion to dismiss in part on August 26, 2006 [2] in which he dismissed all of the allegations of the complaint with two exceptions. The first, exception was the allegation that Respondent violated its duty of fair representation by not seeking judicial review of Arbitrator McAlpin's award sustaining Complainant's layoff and non-selection for the full-time position. In that regard, the Examiner noted the allegation of the complaint was ambiguous as to this allegation and afforded Complainant an opportunity to amend his complaint to make that allegation clearer. The second allegation the Examiner excepted was Complainant's allegation that Respondent secretly withdrew Complainant's grievance dated June 5, 1998, before Arbitrator McAlpin. The Examiner then held a pre-hearing conference on October 5, 2006. Complainant verbally clarified his complaint as to the second excepted issue during the pre-hearing conference. He withdrew his allegation that Respondent violated its duty of fair representation by not informing him of the statutory deadline for seeking judicial review of Arbitrator Mc Alpin's award, but maintained his allegation that Respondent violated its duty of fair representation in the manner it made the decision to not seek judicial review of the award. The parties agreed to have the two excepted issues decided separately. They agreed to address the timeliness issue first. The parties also stipulated to facts addition to those stated in the Examiner's previous decision for the motion decision concerning the issue of timeliness. The Examiner set a briefing deadline on the motion to dismiss as to the timeliness issue; however, the parties developed a disagreement before the briefs were filed. The Examiner held a telephonic pre-hearing conference on December 8, 2006, during the course of which the parties amended their stipulation of fact. The parties filed briefs as to the motion with respect to the timeliness issue, the last of which was received January 24, 2007.

[2] Decision No. 31781-A

ORDER

1. The complaint filed herein is dismissed with respect the allegation that Respondent violated its duty of fair representation by withdrawing the June 5 grievance.

2. The hearing in this matter is indefinitely postponed. The Examiner will hold a telephonic pre-hearing conference Wednesday, April 4, 2007, at 9:00 a.m. The Examiner will initiate the call to the parties' counsel. The call will be to Attorney Michael Phillips at (608) 276-7711 and to Attorney Jennifer Allen at (262) 785-9606. The purpose of the hearing will be to discuss the status of the violation of the duty, if any, of Respondent to seek judicial review of the arbitration award.

Dated at Madison, Wisconsin, this 26th day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

D.C. EVEREST AREA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER GRANTING, IN PART, RESPONDENT'S MOTION TO DISMISS COMPLAINT

The procedural history of this case is set out above and will not be restated here. This is a supplemental decision on the motion to dismiss. The prior decision is Dec. No. 31781-A. The relevant motion facts from that decision are:

> 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 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.

The parties stipulated to the following additional facts during the most recent pre-hearing conferences:

1. There was some agreement between attorneys Pieroni and Rutlin by themselves at the commencement of the hearing as to the phrasing of the issues before Arbitrator McAlpin. There is a dispute as to whether Complainant was privy to that discussion.

2. Arbitrator McAlpin was not in the discussion listed in 1.

3. Attorneys Pieroni and Rutlin phrased the issue and then jointly submitted it to Arbitrator McAlpin who read it on the record in everyone's presence, including Complainant.

4. There was no discussion between the attorneys and Arbitrator McAlpin off the record at the arbitration hearing relating to the substance of the case or the phrasing of the issue.

The Examiner noted that in his December 12, 2006, summary of the December 8 pre-hearing conference that the sole basis upon which Mr. Mudrovich was alleging that Respondent dropped his June 5 grievance was the stipulation stating the issues before the arbitrator and not on any later fact. There is no allegation that the grievance was dropped by being abandoned in the post-hearing argument. The parties stipulated to the statement of the issues before Arbitrator McAlpin at the outset of the hearing on May 5, 1999 as follows:

> Did the District violate Article Articles 10, 32(B)(5), 32(E), and/or 32(I) when it laid off the grievant from his 805 position, and failed to appoint him to a 100% position for the 1998-99 school year? If so, what is the appropriate remedy?

Arbitrator McAlpin's award states:

> "Finally, the Arbitrator would note that the issues of substitute teaching during the current school year and Grievant's not receiving the 30% posting are not before him."

For the purposes of this motion, the parties understand that this provision is a statement that the June 5 grievance was not before Arbitrator McAlpin. He did not otherwise directly address the June 5 grievance in his award.

POSITIONS OF THE PARTIES

Respondent

Complainant's allegation that Respondent violated its duty of fair representation by allegedly conspiring with the Employer's attorney to drop his June 5 grievance is barred by the one-year statute of limitations, Section 111.07(14), Stats. The last "specific act" which Respondent engaged in with respect to the June 5 grievance was the statement of the issue to the arbitrator. This was more than one year prior to the filing of the complaint. The WERC holds that the one-year statute starts from the date the complainant knew or should have known of the last act and not from the knowledge of the consequences of the act or the motivation of the act.

Complainant

The sole issue for decision is whether the complaint's allegation of Respondent's dropping the June 5 grievance is time-barred. The statute of limitation in Sec. 111.07(14), Stats., begins to run on the date the "specific act or unfair labor practice alleged or on the date

that the person bringing the complaint knew or should have known of an alleged act or practice. The Complainant was unaware that the arbitrator considered the June 5 grievance dropped until Complainant read the arbitrator's award. The complaint was filed on January 17, 2001, 364 days after the award was rendered.

The Examiner should not assume that because Complainant heard the issue read into the record that he should have known the grievance had been dropped. His attorney claims he had no idea that the arbitrator considered the June 5 dropped. How should Complainant have known? The attorney's lack of knowledge should also be imputed to Complainant. The arbitrator permitted evidence and argument on matters related to the June 5 grievance without objection. The June 5 grievance was jointly submitted in evidence at the arbitration hearing. The post-hearing arguments contained arguments with respect to the June 5 grievance. The submission of evidence and argument regarding the June 5 grievance supports Complainant's belief that a decision would be issued on the specific grievance.

In its reply brief, Complainant acknowledges that the statute begins to run from when a complainant knew or should have known of the act underlying the unfair labor practice. This case is distinguishable from CITY OF MEDFORD, DEC. NO. 30537-B (WERC, 8/93). Complainant was not given any notification whatsoever that his June 5 grievance had been dropped. In fact, the information he had received had been quite the opposite. It was not until January 18, 2000, that he even became aware that the act was unlawful. This case is more consistent with the other cases where the act was not known or concealed from the complainant.

DISCUSSION

This standards applicable to this motion were stated in the previous decision. To summarize, 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. 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. As to the issues decided herein, the parties have made an extensive stipulation of fact. 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.

This section is strictly construed by the Commission.

The issue presented for decision now is when the one-year statute of limitation began to run with respect to the allegation that Respondent violated its duty of fair representation by "dropping" the June 5 grievance. Specifically, the act constituting the alleged "dropping" of

the June 5 grievance occurred May 5, 1999. Complainant alleges that he first learned that the grievance had been dropped when he read the arbitrator's award on January 22, 2000. The complaint was filed on January 18, 2001, more than one year after the act, but less than one year after reading the award. Thus, the specific issue in this case is whether the one-year statute of limitation begins from the date of the act, May 5, 1999, or the date that Complainant allegedly first learned of the act, January 22, 2000. The Examiner concludes that it started on May 5, 1999, well over a year before the complaint was filed. Accordingly, that issue is untimely pursuant to Sec. 111.07(14), Stats.

The Examiner notes that the complaint is predicated on a strained inference from the undisputed facts. The parties stipulated to the statement of the issues in a discussion between their respective counsels before the hearing. They then stated the issue to Arbitrator McAlpin prior to going on the record, but in the full presence and hearing of complainant. Respondent offered evidence with respect to both grievances during the hearing and provided arguments expressly with respect to both grievances in its brief. Complainant, inferring backward from that statement by the arbitrator, concludes that the parties must have conspired to drop the grievance in the phrasing of the issue. The better inference is that no such agreement between the attorneys expressly occurred and that the arbitrator's inference was unilateral.

Nonetheless, for the purposes of this decision the Examiner must treat the complaint as true. Accordingly, I assume for this decision that parties agreed in phrasing the issue that the issue as phrased would imply that Respondent was abandoning the June 5 grievance. The parties have agreed that the Respondent's attorney made no other reference to the arbitrator implying that the June 5 grievance was dropped. He, instead, continued to submit evidence and argument as to the June 5 grievance for the remainder of the proceeding.

The statute of limitations begins to run when the complaining party knew or reasonably should have known of the facts supporting the prohibited practice complaint. The start is not delayed until the complaining party first learns of the legal inference that the actions constitute a violation of law. See, CITY OF MEDFORD DEC. NO. 30537-B (WEC, 8/93); JOHNSON V. AFSCME COUNCIL 24, DEC. NO. 21980-C (WERC, 2/90). The Examiner concludes that under the Complainant's assumed facts, the fact supporting the prohibited practice was the parties stating the issue to the arbitrator and not the parties' alleged surreptitious agreement.[3] Complainant heavily relies upon GUZNICZAK V. STATE OF WISCONSIN, DEC. NO. 26676-B (WERC, 4/91). In that decision employer failed to make a required pension contribution, but misrepresented that it had made the contribution. The failure to make the contribution was the

[3] Complainant heard the statement of the issue and alleges that the arbitrator understood the withdrawal implication, if any there was, solely from that statement. By complainant's theory Respondent obfuscated the withdrawal agreement by continuing to actively submit evidence and argument supporting the June 5 grievance. While complainant alleges that the sophisticated arbitrator was not misled, he should be treated as being misled, presumably because he was unsophisticated. Be that as it may, the issue raised by the later obfuscation is one of understanding the import of the statement of the issue, not of concealing the statement of the issue.

fact underlying the unfair labor practice complaint therein. The Commission held that the time limit commenced when the complainant therein first reasonably should have learned of the failure to make the contribution. In this case, no one concealed the statement of the issue or misrepresented its import. The allegation, at best, is that Respondent obfuscated its import by continuing to argue with respect to the June 5 grievance. All of that conduct was directed to the arbitrator in the presentation of the case. The Examiner concludes that the statute commenced on Mary 5, 1999, and the complaint is time-barred as to this issue.

Dated at Madison, Wisconsin, this 26th day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

SHM/gjc
31781-B