STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHRIS M. JANESKY, Complainant,

vs.

GREEN BAY AREA PUBLIC SCHOOL DISTRICT and **JOHN J. WILSON,** and the **GREEN BAY SUBSTITUTE TEACHERS ASSOCIATION,** Respondents.

Case 241
No. 68310
MP-4457

Decision No. 32602-B

Appearances:

Chris M. Janesky, 317 Cleveland Avenue, Manitowoc, Wisconsin 54220, appearing on his own behalf.

Robert W. Burns, Davis & Kuelthau, S.C, 318 South Washington Street, Green Bay, Wisconsin 54301, appearing on behalf of the Green Bay Area Public School District and John J. Wilson.

Richard Schadewald, 2720 Dauber Drive, Green Bay, Wisconsin 54313**,** appearing on behalf of the Green Bay Substitute Teachers Association.

ORDER ON REVIEW OF EXAMINER'S DECISION

On December 8, 2009, Examiner Steve Morrison issued Findings of Fact, Conclusions of Law, and Order in the above-captioned case, holding that the Complainant Chris Janesky had filed his complaint outside the one-year statute of limitations set forth in Sec. 111.07(14), Stats., made applicable to this proceeding by Sec. 111.70(4)(a), Stats. Hence, the Examiner dismissed Mr. Janesky's claim against the Respondent Green Bay Substitute Teachers Association (hereafter "Association") and the Green Bay Area School District and John Wilson (hereafter, collectively, "District").

On December 28, 2009, Janesky filed a timely petition seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The District filed a

response to Janesky's petition on February 11, 2010. No further written argument was received prior to the deadline established by the Commission for receipt of such argument, i.e., February 23, 2010, and the record was closed on that date.

For the reasons set forth in the Memorandum that follows, we have modified the Examiner's Findings of Fact, reversed his conclusion that the complaint was untimely, concluded that the Association violated its duty of fair representation, concluded further that Janesky's breach of contract claim has not been fully and fairly litigated, reopened the record for further proceedings on that issue, and ordered that the Association make Janesky whole for the costs of litigating the contract claim, including attorney's fees if any.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

A. The Examiner's Findings of Fact 1 through 4 are affirmed.

B. The Examiner's Finding of Fact 5 is modified as follows and, as modified, is affirmed:

> 5. Janesky worked as a substitute teacher in the District from approximately January 2000 through and including the school year 2004-05. During this period of time, he successfully completed a one-year probationary period. [1]

C. The Examiner's Findings of Fact 6 through 8 are set aside and the following Finding of Fact 6 is made:

> 6. In the spring of 2005, the District sent a letter to substitute teachers, including Janesky, asking them to return a form if they wished to continue substitute teaching in the following (2005-06) school year. Janesky did not return the form. When Janesky applied for unemployment compensation in

[1] The Examiner's Finding of Fact 5 stated only that Janesky had worked as a substitute teacher for the District in 2004-05. We have expanded the Finding to include a fuller description of Janesky's employment, which began in approximately January 2000 and continued thereafter without a break until the 2005-06 school year. We have also added the fact that Janesky successfully completed the contractual one-year probationary period at some point prior to the end of the 2005-06 school year. On several occasions during the hearing in this matter, Janesky questioned whether it was proper for the District to compel him to undergo a second probationary period during the 2006-07 school year. This point could affect the contractual validity of the District's termination of his employment on April 30, 2007. Janesky was not permitted at the hearing to question Wilson about this issue or about the circumstances surrounding his lack of employment during the 2005-06 school year. This ruling was incorrect and is one of the grounds upon which we have concluded that the contract claim has not been fully and fairly litigated.

approximately June 2006, his application was denied on the ground that he had a

reasonable assurance of working as a substitute teacher in the District the following year. The District removed Janesky's name from the active substitute list at some point prior to the start of the 2005-06 school year, and Janesky was not offered any substitute assignments during 2005-06. [2]

D. The Examiner's Finding of Fact 9 is renumbered Finding of Fact 7 and is affirmed.

E. The Examiner's Findings of Fact 10 through 13 are renumbered Findings of Fact 8 through 12, are modified as follows, and, as modified, are affirmed:

8. At the beginning of the 2006-07 school year, Janesky telephoned the District's payroll department and requested that he be offered assignments as a substitute teacher in the District. The individual with whom he spoke checked his file and informed him that his name would be placed on the active substitute list. Thereafter, Janesky was offered and accepted substitute assignments throughout the school year until the end of April 2007. At some point close to the end of April 2007, Assistant Superintendent Wilson became aware that Janesky had been returned to the active substitute roster. By letter dated

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[2] The Examiner's Findings of Fact 6 through 8 contained certain errors that we have corrected in the above new Finding of Fact 6. The Examiner stated that Janesky applied for unemployment compensation after both the 2004-05 and 2005-06 school years. The record does not contain information about whether or not Janesky applied for unemployment compensation after the 2005-06 school year – a year in which he was not on the District's active substitute teacher list and did not provide services to the District. The Examiner also stated that the Department of Workforce Development, Division of Unemployment Insurance "held a hearing on his [Janesky's] claim and determined him to [sic] ineligible for benefits based upon its finding that he had a 'reasonable assurance' of performing substitute teaching services" in the 2005-06 school year." However, the record does not indicate that DWD conducted a hearing in connection with Janesky's 2005 claim. Pursuant to Sec. 108.09, Stats., DWD/DUI responds to applications for unemployment compensation by issuing an "initial determination" of eligibility, and a party may appeal such initial determination by requesting an evidentiary hearing before a DUI examiner. Here, the record reflects that Janesky received an initial determination that he was not eligible for unemployment compensation on or about June 29, 2005. There is no evidence that Janesky appealed the initial determination or that a hearing was held. The Examiner's Finding of Fact 7 stated that, when Janesky did not return his portion of a letter from the District indicating an intent to return to substitute teaching for the 2005-06 school year, Janesky "was removed from the substitute teacher list *pursuant to the District's policy*" (emphasis added). Janesky, however, asserted at the hearing that, in years prior to 2006-06, he had failed to return such a letter of intent but had not been removed from the active substitute roster for the following year. Apropos of this argument, Janesky attempted to introduce evidence about failing to return the letter of intent in years prior to 2004-05, but was prevented from doing so by the Examiner's *sua sponte* ruling that such evidence was irrelevant. This ruling was erroneous. Janesky should have been permitted to offer this evidence, which could affect the factual issue of whether, in practice, the District did maintain a policy of removing employees, or Janesky individually, from the substitute roster for failing to return the form. This, in turn, could affect the contractual validity of the District's view that Janesky had been terminated from employment at the end of 2004-05 and was a "new employee" who was improperly returned to the active list in the fall of 2006. This in turn could affect whether or not the District had a contractual right to treat Janesky as being on probation during the 2006-07 school year. This error is one of the grounds upon which we have concluded that Janesky's contract claim was not fully and fairly litigated.

April 30, 2007, Wilson wrote to Janesky as follows:

> It recently came to my attention that you were being offered and accepting sub teaching assignments with our district since October of 2006.
>
> You had not worked for our district during the 2005-2006 school year. It appears that a clerical employee who has since left the employ of the district activated you improperly.
>
> In that you were not interviewed by me nor recommended and approved for employment in the Fall of 2006, I am removing you from the sublist and terminating your employment with the Green Bay Area Public Schools, effective May 1, 2007.

9. Shortly after receiving the above-quoted letter, Janesky telephoned Wilson and asked how he could be returned to the list. Wilson advised him that he would have to fill out an on-line application. [3]

10. During the summer of 2007, Janesky filled out an on-line application for substitute teacher employment. He heard nothing in response to his application. At the outset of the school year, Janesky was unsure whether or not he had been returned to the active substitute teacher roster basis and waited to receive calls. In late October, concerned that he not received any calls for substitute assignments or any response to his on-line application, Janesky began to contact Wilson's office about his (Janesky's) status. Janesky telephoned several times and received no response. At some point in late October or early November, Janesky visited Wilson's office in person, but Wilson would not meet with him. [4]

11. At some time in November or December 2007, Janesky contacted

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[3] The Examiner's Finding of Fact 11 stated that the record was "unclear" as to who told Janesky he could apply on-line for re-employment as a substitute. The record, however, is clear from both Janesky's and Wilson's testimony that Wilson provided this information to Janesky during their conversation after Janesky received the April 30 letter terminating his employment.

[4] The Examiner's Findings of Fact do not contain any information about Janesky's efforts during the fall of 2007 to determine his employment status. We have added this information because it is relevant to Janesky's argument, stated numerous times at the hearing, that he did not know until some time had elapsed during the fall of 2007 that he had not been returned to the active roster (and hence, whether or not the District had improperly terminated his employment), since, as a substitute, his employment was always contingent upon being called to work on an ad hoc basis, and since Wilson's office would not respond to Janesky's inquiries about his status. This information is pertinent to Janesky's argument that he did not know whether or not he had a ripe grievance until November or December, as he was unsure whether or not he had been returned to the list.

Association business representative Schadewald about not receiving substitute work. Schadewald told Janesky that, based on what Janesky related to him, he could see no reason why Janesky should not be subbing. Schadewald told Janesky that he (Schadewald) would initiate a grievance about the situation. At some point thereafter, in what Schadewald referred to as Level One of the grievance process, Schadewald discussed Janesky's situation with Wilson. Subsequently, Schadewald met with the Association's governing board and discussed the Janesky matter. The board asked Schadewald whether Janesky was "still a member of the union." Janesky replied "[T]hat's a no, at that time. So they said … you're not employed to represent nonmembers of the [A]ssociation." Pursuant to the board's direction, Schadewald dropped the grievance. After January 2008, Janesky inquired from time to time about the status of his grievance, but was not told until some time in the spring of 2008 that the Association was not pursuing it. [5]

12. By letter dated April 21, 2008, the Complainant wrote to Mr. Wilson as follows:

> This is to notify that I am filing a grievance against the Green Bay Public School District as of this time. I worked as a substitute teacher last year and I expected to work again this year.
>
> Hopefully, Level One of the grievance procedure will happen as soon as possible. Also, Levels Two; Three; and Four, if necessary.
>
> Thank you,
> Chris Janesky

F. The Examiner's Finding of Fact 14 is renumbered Finding of Fact 13, is

[5] The Examiner's Finding of Fact 12 had stated that "Although Schadewald refers to his actions as 'step one,' Wilson testified credibly that no grievance had ever been filed or was currently being processed by the Union on [Janesky's] behalf." That Finding also stated, "The record is unclear as to whether this determination was communicated to [Janesky] at this time." We view the record as clearly indicating that Schadewald filed a Level One grievance on Janesky's issue in or around December 2007. Schadewald so testified more than once at the hearing, and his testimony is consistent with Janesky's testimony that Schadewald said he would and had done so. The contract language (set forth in renumbered Finding of Fact 13) indicates that a Level One grievance need not necessarily be in writing. We harmonize the credible testimony of both Schadewald and Wilson by concluding that Schadewald filed an unwritten/informal Level One grievance by meeting with Wilson in or around December 2007, followed by an unwritten rejection by Wilson (also permitted by the contract). We also disagree with the Examiner that the record is unclear as to whether or not the Association communicated its decision not to pursue Janesky's grievance at or around the time that decision was made in December 2007 or January 2008. Janesky testified without rebuttal that he did not hear from the Association, despite efforts to follow up, from the time he was told a grievance was being filed in January 2008 until the spring of 2008, at which time he sent a letter to Wilson as set forth in renumbered Finding of Fact 12.

modified as follows, and, as modified, is affirmed:

13. The parties' collective bargaining agreement provides, in pertinent part, under Article IV - Grievance Procedure:

. Definitions

2. A "Grievance" may be an individual or a group of substitute teachers.

. . .

C. Initiating and Processing

1. Level one. The grievant will first discuss his grievance with this [sic] immediate supervisor (this may be the Principal or Assistant Superintendent-Human Resources), either directly or through the Association's designated representative. A written decision with reasons thereto shall be given to the grievant and the Association within ten (1) [sic] days if the grievance was filed in writing.

2. Level Two.

a. If the Grievant is not satisfied with the disposition of his grievance at Level One, he may file the grievance in writing to the Association within five (5) days after the decision at Level One, or fifteen (15) days after the grievance was presented, whichever is sooner. Within five (5) days after receiving the written grievance, the Association representative will refer it to the Superintendent.

. . .

c. If the written grievance is not forwarded to the Superintendent within sixty (60) days after the facts upon which the grievance is based became known, or the act or

condition on which the grievance is based occurred, then the grievance will be considered as waived. A dispute as to

whether a grievance has been waived under this paragraph will be subject to arbitration pursuant to Level Four.

. . .

G. The Examiner's Findings of Fact 15 and 16 are renumbered Findings of Fact 14 and 15 and are affirmed.

H. The following Finding of Fact 16 is made:

16. Throughout his employment with the District, Janesky had never received any notice or other indication of job performance deficiencies, nor has the District claimed that it terminated Janesky's employment based upon job performance concerns.

I. The Examiner's Findings of Fact 17 and 18 are set aside. [6]

J. The Examiner's Conclusions of Law 1 through 3 are affirmed.

K. The Examiner's Conclusions of Law 4 and 5 are set aside, the Examiner's Conclusions of Law 6 and 7 are reversed, and the following Conclusions of Law 4 through 7 are made:

4. Janesky's initiation of a grievance in November or December 2007, through the offices of Association representative Schadewald, occurred within one year of May 1, 2007, the earliest date on which Janesky's contractual claim arose; hence Janesky's initiation of the grievance procedure tolled the applicable one-year statute of limitations as to the District's alleged breach of collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats.

5. Janesky's prohibited practice complaint, filed on October 1, 2008, was timely, because it was filed within one year of the date (April 2008) on which Janesky knew or should have known that the grievance procedure had been exhausted.

6. The Association's refusal to process Janesky's grievance on the

[6] The Examiner's Findings of Fact 17 and 18 set forth information about the content of Janesky's amended complaint and the Examiner's interpretation of same. Such information is not properly included in findings of fact.

ground that he was not a current member of the Association and/or (having been discharged) not a current member of the bargaining unit violated the Association's duty of fair representation.

7. The issues surrounding Janesky's claim that the District violated the collective bargaining agreement by terminating his employment on or about May 1, 2007 and/or by refusing to reinstate him to the active substitute teacher roster in the fall of 2007 have not been fully and fairly litigated.

L. The Examiner's Order is set aside and the following Order is made:

1. Respondent Green Bay Substitute Teachers Association shall cease and desist from failing to fairly represent bargaining unit members, including Chris Janesky, in processing their grievances.

2. The Respondent Green Bay Substitute Teachers Association shall take the following affirmative action that will effectuate the policies of the Municipal Employment Relations Act:

a. Reimburse Mr. Janesky for the costs, including reasonable attorney's fees, if any, that he incurs when litigating the merits of his grievance in the prohibited practice proceeding against the Green Bay Area School District. Reimbursement shall be made within thirty (30) days after Mr. Janesky supplies the Association a copy of his receipt(s) evidencing payment for all or any portion of such costs.

b. Notify all Green Bay Area School District employees represented by Respondent Green Bay Substitute Teachers Association of the Commission's Order by posting copies of the Notice attached hereto as Appendix A for thirty days in conspicuous places where such employees work.

c. Notify the Wisconsin Employment Relations Commission and Complainant, in writing, within twenty (20) days of the date of this Order, as to what steps have been taken to comply with the Order.

3. The record is reopened to permit the Complainant Chris Janesky and the Respondent Green Bay Area Public School District to present evidence regarding Janesky's claim that the District breached the collective bargaining agreement between the District and the Green Bay Substitute Teachers Association, in violation of Sec. 111.70(3)(a)5, Stats.

Given under our hands and seal at the City of Madison, Wisconsin, this 21st day of June, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

APPENDIX "A"

NOTICE TO ALL GREEN BAY AREA PUBLIC SCHOOL DISTRICT EMPLOYEES REPRESENTED BY GREEN BAY SUBSTITUTE TEACHERS ASSOCIATION

Pursuant to the Order of the Wisconsin Employment Relations Commission issued on June 21, 2010, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify you that:

1. WE WILL fairly represent bargaining unit members in processing their grievances.

2. WE WILL NOT fail to fairly represent bargaining unit members by failing to adequately protect their interests while processing their grievances and/or reaching an arbitrary decision to drop their grievances.

Dated this _____ day of _____, 2010.

_____
President
Green Bay Substitute Teachers Association

THIS NOTICE WILL BE POSTED FOR THIRTY DAYS FROM THE DATE IT IS SIGNED AND SHALL NOT BE ALTERED, DEFACED, OR COVERED IN ANY WAY.

GREEN BAY AREA PUBLIC SCHOOL DISTRICT (Janesky)

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

Summary of the Facts

The facts as found by the Examiner and as modified and supplemented in our Order, above, can be summarized in most pertinent part as follows.

Chris Janesky began working as a substitute teacher in the District in approximately January 2000. He successfully completed the one-year probationary period set forth by the collective bargaining agreement. Towards the end of the 2004-05 school year, Janesky did not return a letter of intent that the District sent to substitute teachers that would have confirmed his desire to work during the following (2005-06) school year. In roughly June 2005, Janesky applied for unemployment compensation and was denied on the ground that he had a reasonable assurance of performing substitute teacher work during the following (2005-06) school year. He was not offered any substitute teaching work for the District in the 2005-06 school year.

At the beginning of the 2006-07 school year, Janesky contacted the District's business office, spoke with a District employee with substitute teacher-related responsibilities, and asked to be placed on the active call list. The employee told Janesky that she had checked his file and that he would be placed back on the list. Janesky thereafter was called with some regularity to handle substitute teaching assignments during the 2006-07 school year. By letter dated April 30, 2007, the District (through Assistant Superintendent Wilson) informed Janesky that he had been "activated … improperly" and that his employment was terminated effective May 1, 2007. Janesky has never received any indication of job performance problems and the District has not claimed any such basis for terminating his employment.

Upon receiving Wilson's May 1, 2007 letter, Janesky telephoned Wilson and asked what he could/should do to be able to substitute teach for the District. Wilson indicated that Janesky would have to fill out an on-line application; Wilson did not indicate one way or the other whether completing said application would result in Janesky obtaining substitute teaching employment during the next (2007-08) school year. Janesky completed the on-line application over the summer, but did not receive any response from the District. As fall began, Janesky was unsure what his employment status was, as he had not been contacted one way or the other. Also, as a substitute teacher, he often did not receive calls for work until October. In late October or so, Janesky began telephoning the District -- specifically, Wilson -- to determine his status, but was unable to obtain a response. At some point in October or November, he went to Wilson's office in person but Wilson would not meet with him.

In late November or December, Janesky contacted the Association to seek their assistance in returning him to the active substitute roster. He spoke with Association

representative Schadewald, who, based on the information Janesky had provided, agreed with Janesky that there seemed to be no reason why Janesky was not substitute teaching for the District. In late December or early January, Schadewald filed an informal grievance at Level One on Janesky's behalf and met with Wilson about Janesky's situation. Wilson declined to place Janesky on the call list. Schadewald thereafter consulted with the Association's governing board, who instructed him not to pursue Janesky's grievance because Janesky was not a member of the Association. Janesky thereafter contacted the Association from time to time about the status of his grievance but was unable to obtain information. By letter to Wilson dated April 21, 2008, Janesky filed what he termed a "grievance" against the District, based upon not working as a substitute teacher during the 2007-08 school year. By letter to Janesky dated April 30, 2008, Wilson responded, stating that the Association was not processing a grievance for Janesky and that Janesky lacked status to file a grievance "as an individual and also as a non-employee." Janesky filed the instant Complaint on October 1, 2008.

The Examiner's Decision and the Issues on Review

The Examiner did not reach the merits of Janesky's claims against either the Association or the District, because the Examiner concluded that Janesky's claims were filed outside the one-year statute of limitations set forth in Secs. 111.07(14) and 111.70(4)(a), Stats. The Examiner viewed Wilson's letter of April 30, 2007, terminating Janesky's employment and received by Janesky on or about May 1, 2007, as the event giving rise to Janesky's claims. In the Examiner's view, Janesky should have filed his complaint on or before May 1, 2008, in order for it to have been timely.

The Examiner notes Janesky's "effort to extend or toll the running of the one year statute of limitations," which, in the Examiner's view, was based upon three grounds, each of which the Examiner found without merit. First, Janesky's contact with the Association in or about November 2007 did not toll the limitations period, in the Examiner's view, because the contract requires grievances to be filed within 60 days of the occurrence – in this, within 60 days of May 1, 2007. Since the grievance was already untimely by November 2007, according to the Examiner, "the Union cannot be charged with a duty to pursue a grievance it knows to be barred by contract, nor is its refusal to do so sufficient to waive or toll" the one-year limitations period. Second, Janesky's letter dated April 21, 2008, attempting to file an individual grievance with the District, was also untimely, because by then the underlying termination letter was already more than 16 months old and the related grievance had been "waived" more than 10 months earlier. Third, the Examiner dismisses Janesky's assertion that he had relied upon advice by Commission agents that his complaint would be timely by stating that "off-hand comments of a member of the WERC may not morph an untimely matter into a timely one."

In his petition for review, Janesky challenges the Examiner's conclusion that his complaint was untimely, asserting "I worked for the Green Bay School District the last three years without handing in a required sheet of paper telling them of my intention to return. If

anything was filed late, it was because I did not know what my employment status was with the district at the time. Had I known what my status was (not hired), I would have filed earlier." The District responded by arguing that Wilson's letter terminating Janesky's employment, which Janesky received in May 2007, should have placed Janesky on notice of his employment status, and therefore his complaint, filed in October 2008, was well beyond the one year statute of limitations.

DISCUSSION

The basic principles that apply to this case are well-established. Janesky's underlying claim arose from his view that the District violated his rights under the collective bargaining agreement between the District and the Association when it attempted to terminate his employment in May 2007 and thereafter did not return him to active substitute teaching employment during the 2007-08 school year. Such an alleged contract violation also violates Section 111.70 (3)(a) 5, Stats. However, where, as here, the collective bargaining agreement in question provides for final and binding grievance arbitration, the Commission generally does not asserts its jurisdiction over the breach of contract claim, since the grievance/arbitration procedures are presumed to be the exclusive means of resolving such alleged claims. MAHNKE V. WERC, 66 Wis. 2D 524 (1974); RACINE EDUC. ASS'N. V. RACINE UNIFIED SCHOOL DIST., 176 Wis. 2D 273 (Ct. App. 1993); GRAY V. MARINETTE COUNTY, 200 Wis. 2D 426 (Ct. App. 1996); CITY OF MENASHA, DEC. NO. 13283-A (WERC, 2/77); MONONA GROVE SCHOOL DISTRICT, DEC. NO. 22414 (WERC, 3/85); WEST SALEM SCHOOL DISTRICT, DEC. NO. 32696-D (WERC, 10/09).

Janesky relies upon a well-established exception to this general rule: if he can prove that the Association, his collective bargaining representative, failed to fairly represent him and thereby thwarted his efforts to pursue a grievance over the alleged breach of contract, then the Commission will assert its jurisdiction to determine whether the agreement has been violated. MAHNKE, *supra*., GRAY, *supra*., MILWAUKEE BOARD OF SCHOOL DIRECTORS (BISHOP), DEC. NO. 31602-C (WERC, 1/07); WEST SALEM SCHOOL DISTRICT, SUPRA. In addition to allowing an employee to invoke our jurisdiction over his contract claim against the District, a union's breach of its duty of fair representation may also be alleged as a prohibited practice on the part of the union, specifically, a violation of Sec. 111.70(3)(b)1, Stats.. If such a violation is established, remedies are available from the union. MILWAUKEE BOARD OF SCHOOL DIRECTORS (BISHOP), SUPRA. Here, Janesky's complaint, as amended, asserts that the Association violated the law by breaching its duty of fair representation in the way it handled his grievance and also asserts that the District violated the law by breaching his rights under the collective bargaining agreement.

As noted in the preceding section of this memorandum, the Examiner did not reach the merits of Janesky's claims against either the Association or the District, but instead dismissed the complaint as untimely filed. We turn first to that issue.

1. Timeliness

The Examiner's approach to timeliness, which conflated the issue of whether Janesky's grievance was timely under the 60-day limit in the contractual grievance procedure with the question of whether his complaint was filed within the Commission's one-year statute of limitations, was clearly inconsistent with established Commission precedent.

In its seminal decision in HARLEY-DAVISON MOTOR CO., DEC. NO. 7166 (WERB, 6/65), interpreting analogous provisions of the Wisconsin Employment Peace Act, the Board (now the Commission) held that, in order to encourage the parties to use the contractual dispute resolution mechanism, the one-year limitations period for an employee to file a breach of contract claim against an employer would tolled during the employee's or union's pursuit of the contractual grievance procedure. See also LOCAL 950, INT'L UNION OF OPERATING ENGINEERS, DEC. NO. 21050-F (WERC, 11/84). This rule was refined in CITY OF MEDFORD, DEC. NO. 30537-B (WERC, 2/04), which added the proviso that the grievance procedure itself must have been invoked within one year after the employee knew or should have known about the breach of contract. Thus, pursuant to the foregoing standards, Janesky's complaint against both the District and the Association will be timely if (1) he attempted to invoke the contractual grievance procedure within one year of the date he knew or should have known that the District had allegedly violated his rights under the collective bargaining agreement; and (2) he filed his prohibited practice complaint within one year of the date on which he knew or should have known the grievance procedure was exhausted. [7]

Applying these standards, Janesky's complaint, filed on October 1, 2008, was timely even if we assume, *arguendo*, that his claim(s) against the District arose no later than May 1, 2007, the date on which Janesky received Wilson's letter removing him from the substitute list. Janesky invoked the contractual grievance procedure by contacting the Association at the latest by late December 2007, well within one year of May 1, 2007. In addition, on this record, the earliest Janesky knew or should have known that his grievance was being denied or dropped would have been April 2009 when Wilson advised him of same. His prohibited practice complaint, filed on October 1, 2008, was obviously well within a year of that date. [8]

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[7] We recognize that, under the foregoing standards, the District could have exposure for a breach of the collective bargaining agreement as a prohibited practice even though, had Janesky's claim been pursued properly through the grievance procedure, it may have been defeated for lack of timeliness. If, for example, Janesky's claim arose at the latest in May 2007, as the District argues, and, assuming *arguendo* that Janesky lacked an equitable basis for delaying his resort to the grievance procedure during the fall of 2007, then the Association's unlawful failure to process Janesky's grievance effectively may expose the District to liability it would not otherwise have incurred. This seeming anomaly, however, is inherent in the fact that the Commission's jurisdiction under Sec. 111.70(3)(a)5 has a one-year limitations period, whereas the parties' grievance procedure – whose default has triggered the Commission's jurisdiction over the breach of contract claim – had a shorter filing period. In noting this, we express no view on whether or not Janesky's grievance was, in fact, untimely under the contractual grievance procedure.

[8] Janesky filed his complaint *pro se* and did not initially name the Association as a respondent nor specify a violation of Sec. 111.70(b)1 on the part of the Association. He did state in his original complaint that "I filed a

Accordingly, Janesky's complaint met the requirements of the Commission's one-year statute of limitations, and we will address the merits of his case.

2. Duty of Fair Representation

The Association, as exclusive bargaining representative and party to the contract with the District, has a duty to handle grievances in "good faith." Generally speaking, unions, such as the Association, are allowed considerable discretion in deciding which grievances to pursue and how far to pursue them, for policy reasons set forth at length in MILWAUKEE PUBLIC SCHOOLS (BISHOP), SUPRA, DEC. NO. 31602-C (WERC, 1/07) at 14-15. The Wisconsin Supreme Court has articulated this duty as requiring a union to handle grievances in a way that is not "arbitrary, discriminatory, or in bad faith." MAHNKE V. WERC, 66 WIS.2D 524, 531 (1975), QUOTING VACA V. SIPES, 386 U. S. 171, 190 (1967). As to decisions to drop a grievance short of arbitration, the MAHNKE court commented, "It is submitted that such decision should take into account at least the monetary value of [the employee's] claim, the effect of the breach on the employee, and the likelihood of success in arbitration." MAHNKE, SUPRA, at 534.

The record is exceptionally clear in the instant case as to the Association's reason for dropping Janesky's grievance at an initial, informal step of the grievance procedure: he was not a member of the Association. See Finding of Fact 11, above. It is difficult to interpret this assertion except as an indication that the Association does not process grievances unless the grievant is a dues-paying member of the Association. As so interpreted, the Association has *ipso facto* violated the duty of fair representation. The duty of fair representation is a corollary of the union's status, once selected by a majority of the bargaining unit, to act as *exclusive* bargaining representative for everyone in the bargaining unit, regardless of whether a particular unit member is in favor of the union or is a member of the union as an organization. See MILWAUKEE BOARD OF SCHOOL DIRECTIONS (MURILLO), DEC. NO. 30980-C (WERC, 3/09). Employees have a statutory right not to join unions, including the union that represents them for purposes of collective bargaining. Sec. 111.70(2), Stats. It is a specific prohibited practice – and a *per se* breach of the duty of fair representation – for a union to take action against an employee's interests because that employee has exercised his statutory right not to

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grievance, but our union apparently did nothing to help me when they said they would." Janesky did not formally amend his complaint until March 9, 2009 to name the Association and identify an Association prohibited practice. Even if Janesky's amendment were required to meet a one-year time limit independent of the initial complaint, it appears on this record that the amendment would be timely because it was filed less than one year after April 2008, when Janesky learned that he would not be able to pursue his grievance. In addition, however, Commission case law makes it clear that an amendment such as this one would be timely as long as the underlying complaint was timely. See FLORENCE COUNTY, DEC. NO. 32435-C (WERC, 1/10) (Commissioner Gordon dissenting on other grounds) (holding that motion to amend in order to specify a duty of fair representation allegation should be allowed where that claim is "implicit in [the] original complaint," and indicating that the amendment "relates back" to the original complaint for timeliness purposes). See also, WEST SALEM SCHOOL DISTRICT, SUPRA, DEC. NO. 32696-D (WERC, 10/09) (construing a *pro se* complaint liberally, despite a failure to specify statutory grounds, so long as "the substance of the complaint itself makes it apparent that a claim is being presented that falls within the jurisdiction of the Commission." ID. at 4 n. 1).

be a member of the union. Sec. 111.70(3)(b)1, Stats.

It is possible that the Association spoke inartfully and did not intend to assert that its decision to drop Janesky's grievance was based on his lack of membership in the *union*, but rather the fact that he was not a member of the bargaining *unit*. Even if the record supported this contra-lingual interpretation, it would not exonerate the Association. To the extent Janesky was not a member of the bargaining unit in November/December 2007, it was because the District had terminated his employment. What Janesky wanted from the Association was an opportunity to challenge the fact that he was no longer working as a substitute teacher without any apparent cause. It is hard to imagine a more "arbitrary" ground for refusing to process a grievance over an employee's discharge than an assertion that the employee, having been discharged, is no longer a member of the bargaining unit.

Accordingly, we have little difficulty concluding that the Association violated its duty to fairly represent Janesky by deciding not to pursue his grievance because he was not a member of the Association and/or (having been discharged) not a member of the bargaining unit Such decision clearly did not take into account "the monetary value of [Janesky's] claim, the effect of the breach on the employee, and the likelihood of success in arbitration" as set forth in MAHNKE, SUPRA, at 534.

Since the Association has been found to have breached its duty of fair representation, we will assert our jurisdiction to consider the merits of Janesky's claim that the District breached the collective bargaining agreement by terminating his employment in or about May 2007 and/or by failing to return him to the active substitute list in the fall of 2007.

3. Breach of contract claims

Janesky's contentions regarding the District's breach of contract are reasonably apparent from his complaint, his comments at the hearing, and his written materials. He believes he had served the requisite one year of probation earlier in his employment with the District, should not have been terminated as a result of not returning the 'form" for the 2005-06 school year, should not have been considered as a "new employee" and on probation during the 2006-07 school year, and, even if he was correctly viewed as probationary during 2006-07, he was improperly terminated pursuant to Wilson's April 30, 2007 letter and improperly refused employment during the 2007-08 school year.

Article V.C. of the contract could be read to support Janesky's view that, once he had completed probation, he could be removed from the "active" substitute list, but not severed completely from employment, if he did not work at least 10 days during a school year. That article uses the term "newly-hired" to describe the substitute teachers who must undergo probation, and the term "removed from the active substitute teacher list" to describe the consequences of working less than 10 days in a school year. It is possible, on the face of the agreement, that there is a difference in status between "newly-hired" and "inactivated" for purposes of returning to the active roster. In addition, Article V.C. indicates that even during probation a substitute may be "dismissed" only "for reasons not arbitrary or capricious."

District contends, the contract on its face would appear to give Janesky a right to know and challenge the District's grounds for dismissing him.

As explained in footnotes 1 and 2, above, Janesky was prevented by certain rulings of the Examiner from introducing evidence about the authenticity/consistency of the alleged District "policy" that removed him from the active list at the conclusion of the 2004-05 school year, as he contends that he had previously failed to return the form and nonetheless remained on the active list. He repeatedly asked at the hearing why he should have to undergo a second probationary period, but was deterred from adequately pursuing that issue, particularly insofar as it may have been affected by his status during the 2005-06 school year. At one point the Examiner appropriately began to inquire more deeply into the nature of Janesky's contractual claims, but ultimately did not complete the inquiry. As noted above, one could argue, on the face of the agreement, that, even if Janesky were properly considered probationary during 2006-07, the District could not terminate him for arbitrary or capricious reasons. Would a "clerical error," even if such it was, satisfy the "arbitrary and capricious"standard for dismissal – an issue on which, at least arguably, the District would have the burden of proof/persuasion?

Because the record on the contract claim is so bare, in part because of the Examiner's erroneous evidentiary rulings, we have concluded it would unfair to either Janesky or the District to resolve the contract claims on the existing record. We have therefore reopened the record for purposes of determining that issue.

Remedy

As originally set forth in the Commission's 1988 decision in LOCAL 82, COUNCIL 24, AFSCME, AND UNIVERSITY OF WISCONSIN-MILWAUKEE HOUSING DEPARTMENT, DEC. NO. 11457-I (GUTHRIE) (WERC, 12/88), and reaffirmed in the relatively recent decision in MILWAUKEE BOARD OF SCHOOL DIRECTORS (BISHOP), SUPRA, the established remedy for the Association's failure to fairly represent Janesky, in violation of Sec. 111.70(3)(b)1, Stats., is to require the Association to pay Janesky's costs, including attorney's fees, if any, for litigating his claim that the District breached the collective bargaining agreement, in violation of

Sec. 111.70(3)(a)5, Stats. Since we have reopened the record on the latter issue, Janesky's litigation costs are presently unknown. As this was also the situation in BISHOP, we have utilized the approach set forth therein, such that the Association will pay those costs as Janesky incurs them. See Paragraph L of our Order, above.

Dated at Madison, Wisconsin this 21st day of June, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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