

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MR. KENNETH A. KRAUCUNAS,	:	
	:	
Complainant,	:	Case XCVII
	:	No. 22893 MP-849
vs.	:	Decision No. 16329-B
	:	
MILWAUKEE BOARD OF SCHOOL DIRECTORS,	:	
	:	
Respondent.	:	
	:	

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Examiner Sherwood Malamud having on February 13, 1979 issued his Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter wherein he concluded that Respondent had not committed prohibited practices within the meaning of Section 111.70(3)(a)1 or 5 of the Municipal Employment Relations Act (MERA) and therefore ordered that the instant complaint be dismissed in its entirety; and the Complainant having on March 5, 1979 filed a petition for Commission review of said decision pursuant to Section 111.70(5), Stats.; and neither party having filed a brief in support of, or in opposition to, said petition; and the Commission having considered the matter, reviewed the record and being satisfied that the decision of the Examiner be affirmed;

NOW, THEREFORE, it is

ORDERED

That the Examiner's Findings of Fact, Conclusions of Law and Order in the above-entitled matter be, and the same hereby are, affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 19th day of April, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas Slavney
 Morris Slavney, Chairman

Marshall L. Gratz
 Marshall L. Gratz, Commissioner

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND:

The instant complaint, as orally amended by Complainant Kraucunas at the May 18, 1978 hearing, alleges that Respondent committed prohibited practices within the meaning of Sections 111.70(3)(a)5 and 1 of MERA by violating the collective bargaining agreement between Respondent and Complainant's bargaining representative, the International Union of Operating Engineers, Local 950, on five separate occasions and by threatening Complainant with suspension if he pursued his grievances with respect to the aforementioned contractual violations. Complainant contended that the Examiner should assert the Commission's 111.70(3)(a)5 jurisdiction to determine the merits of the alleged contractual violations because Complainant's bargaining representative, herein the Union, failed to fairly represent him. Respondent denies that it violated the applicable bargaining agreement or interfered with Complainant's exercise of his statutorily protected rights. Respondent affirmatively asserts as a defense to Complainant's contractual claims that he failed to exhaust the contractually established grievance and arbitration procedure.

With respect to the alleged violations of Section 111.70(3)(a)5, the Examiner first quoted the following portions of Mahnke v. WERC 66 Wis. 2d 524, 532-533 (1975) as setting forth the prerequisites for Commission's assertion of jurisdiction over a breach of contract claim.

If it is established that the grievance procedure provided for in the collective bargaining agreement has not been exhausted then it must be proven that the union failed in its duty of fair representation before the employee can proceed to prosecute his claim against the Employer . . .

"We [the Court] believe the Employer is obligated in the first instance by way of affirmative defense to allege that the contract grievance procedure has not been exhausted. If this fact has been established by proof, admission or stipulation, the employee cannot prosecute his claim unless he proves the union breached its duty of fair representation to him."

Applying Mahnke, the Examiner found that the Respondent had raised the affirmative defense that the contractual grievance and arbitration procedure had not been exhausted vis-a-vis Complainant's five grievances; that the record established the failure to exhaust as asserted by Respondent inasmuch as the Union had not taken any of Complainant's five grievances to the available contractual arbitration procedure; and that the Commission would not exercise its jurisdiction to reach the merits of Complainant's contractual claims unless he established by a clear and satisfactory preponderance of the evidence that the Union breached its duty of fair representation toward him. When determining whether the Complainant had met this burden, the Examiner again turned to Mahnke, supra, for guidance, and concluded that the Union would have breached its duty of fair representation if its refusal to arbitrate Complainant's grievances was arbitrary, discriminatory or in bad faith. The Examiner also cited Mahnke for the

position that the Union's decision would not be found to be arbitrary, discriminatory or in bad faith if, when making same, the Union in good faith had weighed factors such as the monetary value of the Employer's claim, the affect of the Employer's alleged contractual breach upon the employe, and the likelihood of success in arbitration.

When applying the foregoing criteria for determining whether the Union had fairly represented Complainant, the Examiner first extensively examined Complainant's assertion that the Union had not fairly represented him during the processing of the various grievances. Said examination led the Examiner to the conclusion that "although Complainant was not satisfied with the representation provided . . ., both in the settlement offer elicited by [the Union] in the grievance procedure and the advice proffered to Complainant during the processing of the grievance, it is clear that [the Union] made a good faith effort to represent Complainant's interests." The Examiner also found that "Complainant was not prejudiced by the delay he experienced in receiving Respondent's third-step written disposition of his grievances" because when the Union "learned of Complainant's desire to proceed to arbitration, the Union was able to obtain an extension to October 28 in the time limitation for appealing Complainant's grievances to arbitration." With respect to the Union's critical decision not to arbitrate the Complainant's grievances, the Examiner concluded there was "not a scintilla of evidence which would indicate that in arriving at its decision, the Union was acting in a manner which was arbitrary, capricious or in bad faith." Said conclusion was based upon the Examiner's finding that the Union's negotiation committee, with the aid of the International Representative and an attorney, had engaged in a lengthy consideration of the grievances and concluded that they were without merit and thus should not be arbitrated. The Examiner also noted in Findings of Fact 25 and 26 that Complainant made no effort to exercise his known right to appeal the Union leadership's decision not to proceed to arbitration to the general membership. In light of the foregoing the Examiner found that the Union had met its duty to fairly represent Complainant and thus that under Mahnke, he could not assert the Commission's jurisdiction to determine the merits of Complainant's contractual claims.

As to Complainant's allegations that Respondent, through its agent Schlesinger, threatened him for pursuing his grievances in violation of Section 111.70(3)(a)1, the Examiner considered same and found that the record evidence did not support Complainant's charge. The Examiner found that:

As early as the April 12 meeting, Schlesinger considered recommending that Complainant receive a ten-day suspension for his failure to report to the Audubon School on April 7. At the April 12 meeting, when Kraucunas revealed that he would seek medical help for his problems, Schlesinger decided to hold any disciplinary recommendation in abeyance.

Schlesinger considered the imposition of discipline soon after the April 7 incident. The consideration of disciplinary action, at this early stage is unrelated to Complainant's decision to process the grievances. However, when Complainant rejected the settlement offer on May 10, two consequences resulted. First, Complainant was free to pursue his grievance through the remaining steps of the grievance procedure. Secondly, Schlesinger was free to act on his initial consideration to recommend that Complainant be suspended. The threat of discipline and the actual imposition of discipline was related to

Complainant's failure to report to the Audubon School on April 7, and is not attributable to Complainant's decision to pursue his grievances. Therefore, the Examiner dismissed Complainant's interference charge.

PETITION FOR REVIEW:

Complainant's petition for review, when given the broadest scope, asserts that (1) the Examiner's decision should be overturned in its entirety because of prejudicial delay in its issuance and (2) that the portion of the decision dealing with the Section 111.70(3)(a)5 allegation is not supported by the record. With respect to the delay, Complainant appears to argue that the Examiner unnecessarily and futilely delayed the issuance of the instant decision by awaiting the tardy arrival of a brief from Respondent long after the August, 1978 deadline for the submission of same. Turning to the allegedly erroneous portion of the Examiner's decision which focuses upon the Section 111.70(3)(a)5 claim, Complainant makes extensive factual argument with respect to the Union's alleged failure to provide him with fair representation. Said arguments reiterate those made to the Examiner in Complainant's post-hearing brief.

DISCUSSION:

The Commission is initially confronted with Complainant's assertion that he was prejudiced by the unnecessary delay in the issuance of the instant decision attributed to the Examiner's futile wait for Respondent's brief. Said assertion must be rejected because Complainant has failed to point to a legally recognized right which was substantially prejudiced by the delay between the Examiner's receipt of Complainant's brief and his issuance of the instant decision. While Complainant's assumption with respect to the reason for the delay may well be correct inasmuch as the Examiner did not close the record until February 7, 1979 and never received a brief from Respondent, the Commission, while finding said delay to be regrettable, does not find same to be the basis for overturning the Examiner's decision.

Turning to Complainant's contention that the Examiner erred by finding that the Union met its duty to fairly represent him, the Commission finds that the Examiner's findings and conclusions are firmly supported by the instant record. The arguments made by Complainant in his petition for review are in essence the same as those considered, discussed and properly rejected by the Examiner in his decision. Inasmuch as said decision adequately sets forth the appropriate legal analysis and the basis upon Complainant's arguments were found wanting, no useful purpose is served by repeating or amplifying upon same herein. For these reasons the Commission hereby affirms the Examiner's Findings of Fact, Conclusions of Law and Order dismissing the complaint in its entirety. 1/

Dated at Madison, Wisconsin this 19th day of April, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney
Morris Slavney, Chairman

Marshall L. Gratz
Marshall L. Gratz, Commissioner

1/ Aside from the previously discussed assertion regarding prejudicial delay, Complainant's petition did not take issue with the Examiner's dismissal of that portion of his complaint which dealt with alleged interference by Respondent. The Examiner's decision in that regard has nonetheless been reviewed by the Commission and been found worthy of affirmance.