STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NASSER NAHAVANDI, Complainant vs. UNISERV-NORTH, WINNEBAGOLAND, MR. HENRY KROKOSKY, EXECUTIVE DIRECTOR (FOX VALLEY TECHNICAL INSTITUTE FACULTY ASSOCIATION), AND MR. DAVID NANCE, Respondents	:	Case I No. 23366 MP-882 Decision No. 16505-G
NASSER NAHAVANDI, Complainant, vs. FOX VALLEY TECHNICAL INSTITUTE, Respondent.	:	Case XXII No. 23367 MP-883 Decision No. 16504-G

Appearances:

Nasser Nahavandi, appearing on his own behalf.

Michael Stoll, Staff Counsel, Wisconsin Education Association Council, appearing on behalf of Respondents Uniserv-North et al.

Mulcahy & Wherry, S.C., Attorneys at Law, by Dennis Rader, appearing on behalf of Respondent Fox Valley Technical Institute.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above named Complainant having filed two complaints with the Wisconsin Employment Relations Commission on July 31, 1978 which ultimately alleged that the above named Respondents had committed certain prohibited practices within the meaning of the Municipal Employment Relations Act; and the Commission having appointed Peter G. Davis, a member of its staff, to act as Examiner in said matters and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats., and the Examiner having consolidated said complaints for the purposes of hearing; and hearing having been held in Appleton, Wisconsin on December 5, 1978; December 6, 1978; January 24, 1979; January 25, 1979; February 2, 1979; February 22, 1979; February 23, 1979 and March 2, 1979; and the parties having filed briefs until June 8, 1979; the Examiner, having considered all of the evidence and arguments presented by the parties, makes and issues the following

FINDINGS OF FACT

1. Nasser Nahavandi, herein Complainant, was employed as a teacher by Fox Valley Technical Institute from 1966 through his January 23, 1978 discharge.

2. At all times material herein, Fox Valley Technical Institute, herein Respondent Institute, was a municipal employer which operated an educational facility in Wisconsin.

3. At all times material herein, Fox Valley Technical Institute Faculty Association, herein Respondent Association, was a labor organization which functioned as the exclusive collective bargaining representative of certain employes of Respondent Institute including Complainant. Respondent Association was one of nine labor organizations which, through their affiliation with the Wisconsin Education Association Council, herein WEAC, comprised UniServ-North Winnebagoland, herein Respondent UniServ-North. Since March 15, 1977, Henry Krokosky, herein Respondent Krokosky, has been employed by WEAC as an advisor to Respondents UniServ-North and Association on matters pertaining to labor relations. David Nance, herein Respondent Nance, was employed by WEAC from February 1977 until at least July 13, 1978 as a law clerk and ultimately as an attorney who advised various labor organizations, including Respondent Association, on matters pertaining to labor relations.

4. At various times during his teaching career Complainant perceived that Respondent Institute was treating him unfairly. At least since 1969 the bargaining agreements between Respondent Institute and Respondent Association have contained a contractual grievance procedure culminating in final and binding arbitration which was available to employes such as Complainant for the resolution of disputes regarding alleged contractual violations. Complainant did not file any grievance under those collective bargaining agreements between Respondent Institute and Respondent Association which covered the period of Fall 1969 through Fall 1977. Complainant's failure to file a contractual grievance during this period was not the result of any effort by Respondent Association to discourage or preclude Complainant's utilization of the contractual grievance arbitration procedure.

5. On or about September 1, 1977 Complainant ceased performing his classroom responsibilities because of his perception that the amount of harassment he was receiving from Respondent Institute had become so great that it prevented him from teaching. On September 7, 1977 Respondent Institute reprimanded Complainant for failing to properly report his absence. Complainant grieved said reprimand and Respondents UniServ-North, Association, and Krokosky fully and fairly represented Complainant during the processing of said grievance. Complainant ultimately decided not to pursue his grievance beyond the 2nd step of the grievance arbitration procedure contained in the 1977-1979 bargaining agreement between Respondent Institute and Respondent Association. On January 23, 1978 Respondent Instiute discharged Complainant because his continued absence from work. Complainant grieved the discharge and Respondents UniServ-North, Association, Krokosky, and Nance fully and fairly represented Complainant during the processing of said grievance pursuant to the grievance arbitration procedure contained in the parties 1977-1979 contract. Respondent Association withdrew the discharge grievance during the arbitration step of said procedure.

6. Respondents UniServ-North et.al. took no action vis-a-vis Complainant which violated a collective bargaining agreement.

7. From July 31, 1977 through the July 31, 1978 filing of the instant complaints, no Respondent took any action vis-a-vis Complainant which had a reasonable tendency to interfere with or coerce Complainant in the exercise of his legal rights.

8. From July 31, 1977 through the July 31, 1978 filing of the instant complaints, Respondent Institute took no action vis-a-vis Complainant because of hostility toward any protected concerted activity in which Complainant may have engaged.

Based upon the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Respondent Fox Valley Technical Institute did not commit any prohibited practices against Complainant Nasser Nahavandi within the meaning of Section 111.70(3)(a) 1, 2, 3, 4, 5, 6 or 7, Stats.

2. Respondents UniServ-North Winnebagoland, Henry Krokosky, Fox Valley Technical Institute Faculty Association, and David Nance did not commit any prohibited practices against Complainant Nasser Nahavandi within the meaning of Section 111.70(3)(b)1, 2, 3, 4, 5, or 6 Stats.

Based upon the above and foregoing Findings of Fact, and Conclusions of Law, the Examiner makes and issues the following

ORDER

That the instant complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 21st day of December, 1979.

By _____
Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The instant dispute had its genesis in Complainant's perception that he had been treated unfairly by Respondent Institute over a period of years, that this unfair treatment had ultimately led to his discharge, and that Respondents UniServ-North et.al. had failed to adequately aid him in his efforts to challenge his employer's actions. At the beginning of the extremely lengthy hearing which this perception generated, Complainant, being unfamiliar with the manner in which his perception might most appropriately be translated into prohibited practice allegations, chose the shotgun approach of asserting that Respondent Institute had violated Section 111.70(3)(a) 1, 2, 3, 4, 5, 6 and 7 Stats., and that Respondents UniServ-North et.al had violated Section 111.70(3)(b) 1, 2, 3, 4, 5 and 6, Stats. At the close of Complainant's case, Respondents Institute and Respondents UniServ-North et.al. seperately moved for the dismissal of all of the foregoing alleged prohibited practices on the grounds that Complainant had failed to present any evidence which could support a finding that they had violated any of said statutory provisions. The Examiner granted Respondent Institute's motion with respect to Section 111.70(3)(a) 2, 4, 6 and 7 Stats., and Respondents UniServ-North et.al.'s motion with respect to Section 111.70(3)(b) 2, 3, 5 and 6 Stats. Said action was based upon the Examiner's conclusion that no credible evidence had been presented which could in any way be construed to support said allegations. Given this total lack of evidence, it was not possible to even make ultimate findings of facts regarding the dismissed allegations and no useful purpose would be served by a hypothetical discussion of how Complainant could have met his burden of proof with respect thereto. Thus the remainder of this decision will focus upon those allegations which were arguably supported by some evidence and thus were not dismissed during the hearing.

ALLEGATIONS AGAINST RESPONDENTS UNISERV-NORTH et.al

COERCION

Section 111.70(3)(b)1, Stats. makes it a prohibited practice for a municipal employe "To coerce or intimidate a municipal employe in the enjoyment of his legal rights,..." Complainant appears to argue that Respondents UniServ-North et.al failed to adequately represent his interests during his conflict with Respondent Institute. More specifically Complainant seems to focus upon the conduct of Respondents UniServ-North et.al. during the several months which preceded and followed his discharge. If the record were to reveal that said Respondents had indeed failed to meet their duty to fairly represent Complainant, a finding of coercion under the above quoted statute would be warranted. However, as the discussion that follows will show, the record does not support such a finding.

In June 1977 Complainant called Respondent Krokosky regarding a question which Respondent Institute had raised about the validity of Complainant's teaching certification. Respondent Krokosky advised Complainant to correct any certification deficiencies as soon as possible. Later that summer Complainant arranged a meeting with Respondent Krokosky during which he explained what he had done to resolve the certification issue and also discussed in a general fashion some of the problems which he perceived existed between himself and Respondent Institute. Complainant did not assert that Respondent Institute was violating any of his legal or contractual rights and Respondent Krokosky saw no basis for concluding that any of Complainant's rights were in fact being violated.

Sometime shortly after September 7, 1977 Complainant met Respondent Krokosky and showed him the letter of reprimand which he had received

from Respondent Institute for allegedly failing to properly report his absences from work. Respondent Krokosky advised Complainant to grieve the letter and prepared a September 14 grievance for Complainant's signature. After Respondent Institute denied the grievance on September 19, Complainant again met with Respondent Krokosky and followed his advice by appealing the grievance to the next contractual step. They also agreed that a meeting with a WEAC staff attorney might be useful to pursue Complainant's perceptions regarding the harassment he felt he had received from Respondent Institute. Such a meeting was scheduled for October 3. During this entire period, Complainant was absent from the classroom and was receiving sick leave benefits. On September 30 Respondent Institute denied Complainant's grievance at the second step of the grievance procedure.

On October 3, 1977 Complainant and Respondent Krokosky met with WEAC staff attorney Bruce Meredith and discussed Complainant's belief that he had been unfairly treated by Respondent Institute in the past and that said treatment had created an atmosphere in which he had found it impossible to work. During said meeting Complainant was asked to prepare a chronological summary of his past complaints and upon receipt of same several weeks later, Respondent Krokosky discussed Complainant's past problems with Meredith. They concluded that no violations of the contract between Respondent Institute and Respondent Association appeared to exist. With respect to Complainant's current reprimand grievance, Respondent Krokosky, believing that Complainant had arguably followed the proper procedures with respect to his absence, advised Complainant to process the grievance to the third step. Complainant disregarded this advice and via an October 17 letter informed Respondent Institute that he would not be pursuing the reprimand grievance any further.

On October 24, 1977 Respondent Krokosky met with representatives of Respondent Institute and discussed a variety of matters including Complainant's situation. There was discussion about Complainant's perception of past unfair treatment as well as his current status. Although Respondent Institute expressed some skepticism about the nature of the "illness" which was preventing Complainant from working, it indicated that Complainant's job was still intact and that when his sick leave ran out on November 7, 1977, an unpaid leave of absence would be available to Complainant if he could verify his need for same. Respondent Krokosky relayed this information to Complainant and advised him to contact William Sirek, Respondent Institute's Director, to discuss the situation further. Complainant accepted said advice and met with Sirek on November 3. Following said meeting Complainant received a letter from Sirek which confirmed that Complainant's sick leave would be exhausted on November 7, 1977 and that if he wanted to return to work, Complainant would have to submit a doctor's statement indicating that he had been treated during his absence and was now able to return. This requirement was reiterated by Sirek during a November 14 meeting with Complainant. Complainant was unwilling to provide such a statement because he had not actually been treated for an illness during his absence. In light of Complainant's position, a representative of Respondent UniServ-North contacted Sirek and learned that a doctor's statement simply indicating Complainant's ability to return to work would meet Respondent Institute's needs. This information was then communicated to Complainant with advice that compliance with the Respondent's request would be in Complainant's best interest. However, Complainant continued to refuse to provide any doctor's statement and communicated his refusal directly to Sirek. Through a November 16 letter Sirek told Complainant that if he did not report to work with the required doctor's statement by November 18, Respondent would consider said failure to report cause for discharge.

Upon learning of the November 16 letter, Respondent Krokosky, given Complainant's refusal to produce the required statement and his judgement that said refusal might well ultimately constitute valid cause for Complainant's discharge, asked Complainant if he was interested in pur-

suing a settlement of the dispute which would include Complainant's resignation. Complainant agreed and on November 20 Respondent Krokosky met with representatives of Respondent Institute and negotiated a tenative agreement that if Complainant resigned, Respondent Institute would purge his personnel file, give a positive recommendation of Complainant to prospective employers, allow him to maintain his membership in group insurance plans, and not seek to recover any of the sick leave monies which Complainant had received since the start of his absence. Respondent Krokosky explained the settlement terms to Complainant who agreed to same. However, on November 29, before all of the terms of the tentative agreement had been finalized, Complainant, unbeknownst to Respondent Krokosky, sent Sirek a letter of resignation which was independent of the terms of the tentative agreement. Said letter concluded with the statement "I can not single handedly counteract the immense unlimited and unchecked power of your supervisors. They had done everthing possible that I can think of forcing me to resign."

On December 10, 1977 Complainant changed his mind and, unbeknownst to Respondent Krokosky, wrote Sirek withdrawing his letter of resignation. Respondent Institute accepted said withdrawal on December 13. On December 15 Respondent Krokosky, having learned of the resignation and its withdrawal and having been informed by Respondent Institute that it would now seek to discharge Complainant, sent Complainant the following letter:

> I received the carbon copy of your December 9th letter to Mr. Sirek on December 12, 1977. As it does not accurately reflect the facts in your case, I am writing this letter to clarify what actually happened.
>
> 11/15 - Laurie Aragon, WEAC Staff, strongly advised you not to send your letter, dated November 14th, to Mr. Sirek in which you stated that you could not comply with his directive of November 4th. You indicated via phone that you would not do so at this time. (Also see Ms. Aragon's letter of November 15th to you). Approximately 8:00 p.m. that evening you called our office and left a message with Ms. Georgia Bergman to have us mail or deliver the letter to Mr. Sirek.
>
> 11/16 - Your letter of November 14th was mailed to Sirek.
>
> 11/17 - At approximately 9:30 a.m., you called our office and said not to send the letter.
>
> (In a later discussion with Mr. Sirek, I did indicate to him that the letter had been sent by mistake, attributing it to a breakdown in communications. Although this was not a mistake on our part as we had followed your directions, this was done to mitigate, if possible, the effects the letter would have on your continued employment.)
>
> 11/21 - 11/23 I talked with Mr. Sirek and Mr. Whaley concerning your situation. They were ready to proceed immediately with dismissal charges against you but they agreed to delay them until I had a chance to talk with you. I was to give them an answer by the morning of the 28th.
>
> We met and went through all of the alternatives. I again strongly urged you to get a

letter from your doctor. You said you wouldn't. With that in mind, the choices were then to either resign or face dismissal charges. The major pro's and con's of the two were:

Resignation	Dismissal
+ Looks better on employment record.	- Looks worse on employment record.
+ Good chance of collecting unemployment either for "quit with cause" or after working 4 weeks and earning $200.	-Probably no chance at unemployment.
+ Can stay in group hospital and dental at own expense.	- District might contest your staying in plan.

Based upon the facts of your case and the above pro's and con's, it was my recommendation that it would be better to resign as the chances of winning your case before the Board and/or an arbitrator were small. Also, in return for your resignation, I would try to get the District to agree to the following: expunge and destroy all personnel file materials from September 7th to the present; a positive recommendation from Mr. Sirek; not file any legal action against you to collect for the sick leave to which they do not feel you were entitled; and not to contest your claim for unemployment compensation. You were asked to draw up a letter of recommendation for yourself that Mr. Sirek would sign and to think about any other conditions you wanted attached if you did choose to resign. You were to let me know of your decision no later than 9:00 a.m. on the 28th.

11/28 - On Monday morning, you said that your decision was to resign. (You also did not bring the letter of recommendation as requested.) Later that day, I met with the Administration and they agreed to recommend that the Board accept your resignation with all of our conditions except for agreeing not to contest an unemployment compensation claim if you filed for "resignation with cause." You called later that day and I informed you of the results of that meeting. At that time, you mentioned that you had talked to an attorney and were thinking about getting a doctor's excuse. I again strongly advised you to do so, but said that it should be done immediately as I was to inform Mr. Sirek of your decision the next day.

11/29 You called and said that you had thought about it again, that the attorney said that he hadn't had all of the facts in the case, and that you had again reached the decision to resign and gave me the authority to submit your resignation in return for the accompanying conditions agreed to by the District. I went to see Sirek, informed him of your decision, and gave him an unsigned copy of your resignation along with the draft of a letter specifying the conditions which the

District would agree to in return for your resignation. I told him that once the Board had acted on your case on Wednesday evening, that I would give him a signed copy of your resignation in return for the letter from the District with the accompanying conditions.

11/30 - I was informed by my office that you had mailed your resignation to Mr. Sirek. This was not the procedure to be followed as I was to submit it only in return for the letter from the District.

12/12 - Received your letter of December 9th to Mr. Sirek. The first paragraph is directly opposite what you told me. It was your decision to resign and you authorized me to negotiate the conditions that the District would agree to in return for your resignation.

12/13 - Was informed by Mr. Whaley that you had requested your resignation be withdrawn.

Was informed by Mr. Whaley at 3:25 p.m. that the Board will honor your withdrawal of resignation. However, Mr. Whaley will immediately initiate dismissal proceedings according to the contract.

- - -

In conclusion, I have diligently tried to represent you to the best of my ability. However, your frequent "changes of mind" have seriously hampered my efforts and have undermined my creditability as a representative of the Entire FVTI-Faculty Association. Nevertheless, I am prepared to spend as much time and effort as possible in defending you against the District's charges in your forthcoming dismissal proceedings and I strongly urge you to contact me immediately. However, if you choose to be represented by outside councel before the Board, that is your decision.

I must again remind you, though, that any outside attorney fee's and other expense are your sole responsibility and not that of FVTI-FA, WESC, WEAC OR NEA.

Shortly thereafter Complainant contacted Respondent Krokosky and expressed his displeasure with the content of the foregoing letter.

Through a December 21 letter Respondent Institute informed Complainant that it would consider his dismissal during its January 23, 1978 board meeting. Complainant did not contact Respondents UniServ-North et. al. about representing him at said meeting and on January 23, 1978 Respondent Institute discharged Complainant for "failure to report for work, as scheduled, without any excuse from your absence."

Complainant subsequently grieved the discharge and with assistance from Respondents Krokosky and Association processed his grievance through the various steps of the contractual grievance procedure. Respondents Krokosky and Association helped Complainant prepare for the various meetings with Respondent Institute's representative which occurred as the grievance was processed and fully investigated the allegations made by Complainant during said meetings as well as Respondent Institute's response thereto. Said investigation led Respondent Krokosky to conclude that there was no substantial evidence of any contractual violations by Respondent Institute. Thus when representatives of

Respondent Association met on April 26, 1978 with Complainant and Respondent Krokosky to consider Complainant's request that the grievance be pursued to final and binding arbitration, Krokosky took the position that the Association should not arbitrate Complainant's grievance because he could not think of any theory which might successfully be pursued before an arbitrator to overturn the discharge. Complainant spoke on behalf of his arbitration request. After much discussion Respondent Association's Executive Board voted to arbitrate Complainant's grievance with the understanding that Complainant was obligated to cooperate fully with whomever it assigned to handle his case. The president of Respondent Association's Executive Committee then sent the following letter to Complainant confirming said decision.

> The Faculty Association Executive Board has decided to submit your case for binding arbitration. You must follow the procedures to the letter as outlined in the Master Contract.
>
> The Faculty Association welfare committee will monitor the binding arbitration process. You must coordinate your activities through the welfare committee and Hank Krokosky from WESC, concerning all matters in this process.

Shortly thereafter Respondent Krokosky received the following letter from Complainant dated April 26, 1978.

> "In view of the recent development regarding my appeal and all the previous happenings and circumstances surrounding the case I have decided to file complaint against WEA and other parties involved. After careful examination of all facts I strongly believe this was the only alternative left for me to get a fair deal."

As Respondent Institute and Respondent Association began to set up the arbitration hearing, Complainant wrote Respondent Krokosky and asked what action if any he should take. Respondent Krokosky answered with the following letter.

> In response to your letter of April 30th, the procedure contained in the contract for obtaining an arbitrator is being followed. Once an arbitrator is obtained and a time and place set for the hearing, you will be notified. In addition, when future interviews to prepare you case are scheduled, you will be notified.
>
> Also, please send the doctor's certificate which you said you would obtain and the name and phone number (home and office) of that book salesman to this office.

Said letter brought the following response from Complainant:

> Thank you for your letter of May 3, and hope you will arrange the meeting for arbitration very soon. For your information I stopped at FVTI yesterday and requested both Mr. Marv Davis and Mr. Sihak to contact you to speed up arbitration process.
>
> All I am requesting is to have the meeting to be scheduled as soon as possible and I will have all the information ready to be presented to the arbitrator. I would assume it is very essential that certain members be present in case there is any questions by the arbitrator to be answered. If there is no objection I was considering to bring an attorney at my own expense to be present

in the meeting in addition to other members who have to be present since there is an attorney for the board in the meeting. Regarding your comment about the doctor's certificate, I am sure you are referring to our recent meeting before going to the board. I will be glad to explain exactly what you told me and what I told you regarding this matter. Otherwise my position has been very clear on this issue from the beginning. As far as the name and address of the salesman, whatever information I have had I have told you on various occassions and I will be glad to tell the arbitrator the same information and circumstances. Mr. Krokosky, may I ask you please schedule the meeting for the arbiteration at the earliest date possible. In order all parties present the facts available to the arbitrator and he then make the decision. I am most concerned about the delay related to this case which is affecting me.

P.S. If there is going to be any reason for further delay, I request an immediate meeting with Mr. Marv Davis and Mr. Lou Cihak to be present to discuss this matter in order to prevent any further delay.

The foregoing letter provoked the following response from Respondent Krokosky.

In regards to your letter of May 4th, I would like to make the following points:

1) Arbitration Hearing - The proper contractual procedure has been followed and a letter, dated May 5th, has been sent to the Wisconsin Employment Relations Commission asking them to appoint an arbitrator to resolve the dispute.

2) Certain Members Present at Arbitration Hearing - I have no idea who you mean. If you believe that any of the faculty would be helpful to your case, you should let us know immediately. Lou did talk to Mr. Barribeau and Mr. Gunderson previously, but what they know would either be of minimal help or possible damaging. However, their use as potential witnesses will be re-evaluated before the arbitration hearing is held.

3) Use of your Own Attorney - The Faculty Association agreed to go to binding arbitration on your case with the clear understanding that WEAC/UniServ staff would represent you. An outside attorney is not necessary.

4) Doctor's Certificate - At a meeting held on March 20th, I asked you, "Are you willing to get a statement from a doctor that you are physically able to come back to work?" (Dick Jones and Lou Cihak were in attendance at this meeting). You said that you would do this for Thursday. On the 23rd, you said that you weren't able to get in to see a doctor, but that you did have an appointment for 3:00 p.m. on March 29th. You were told to keep that appointment.

   Nasser, that Doctor's certificate may be important in your case as the past practice of the District appears to require the submission of one after an extended illness.

5) Information on Salesman - The arbitrator may permit you to testify concerning what the salesman told you. However, even if he/she does, your testimony will be given "zero" weight as it is heresay evidence. Therefore, I make the same request. Please send the name and phone numbers (home and office) of the salesman to me immediately. His testimony would be extremely crucial in your case.

Said letter and Complainant's general suspicion regarding the quality of the representation he was receiving led him to write the following May 11 and May 17 letters to Respondent Krokosky and Chairman Morris Slavney of the Wisconsin Employment Relations Commission.

Dear Mr. Krokosky,

I received your letter dated May 9, 1978 and I am pleased to know that the request for arbiteration hearing has been filed with Employment Relations Commission.

In view of my strongest belief that my interest and right is not being served by you representing me, I respectfully request you to step aside from my case and another Uniserv member to be chosen to represent me.

Dear Mr. Slavney,

I am requesting you to choose the arbitrator without any consideration of recommendation by Uniserv Office in Appleton or its legal staff. I sincerely believe the selection of the arbitrator without any influence of the parties involved would be in the interest of justice.

I do appreciate your cooperation and attention on this matter.

On May 23, 1978 Complainant was informed that Respondent Nance would be handling the case and that the arbitration hearing would be held on July 13, 1978 at the campus of Respondent Institute. Shortly thereafter Complainant received the following letter from the president of Respondent Association's Executive Board as well as the following memorandum of understanding which was attached thereto.

Because of recent occurrences, I believe that it is necessary to clarify my letter of April 28, 1978. When the FVTI-FA Executive Board decided to submit your case to binding arbitration, it did so with the clear intent that you follow all procedures, cooperate fully with all parties, and be represented by WESC/WEAC personnel. Therefore, in order to see that you fully understand our position, please sign the attached memorandum and return it to me no later than June 2, 1978. Failure to do so will leave us no alternative but to withdraw our request to submit your case to binding arbitration, and, in that event the Board's decision will stand.

Thank you in advance for your cooperation in this matter.

Memorandum of Understanding
between the Fox Valley Technical
Institute-Faculty Association
and Nasar Nahavandi

> The Executive Board of the Fox Valley Technical Institute-Faculty Association has decided to submit Nasar Nahavandi's case to binding arbitration. In return, Nasar Nahavandi agrees to follow all procedures; cooperate fully with representatives of FVTI-FA, WESC, and WEAC; and to be represented at the arbitration hearing by Attorney David Nance, WEAC in-house councel.

Complainant subsequently signed said memorandum. On June 27, 1978 Respondent Nance met Complainant for 4 or 5 hours in preparation for the arbitration hearing. Shortly thereafter Respondent Nance wrote Complainant the following letter regarding the June 27 meeting.

> I am writing this letter to reemphasize a number of points I made during our meeting on Tuesday, June 27.
>
> 1.) It is essential that you prepare a written chronology of events relevant to your case. While our discussion on Tuesday was helpful to me in gaining a better understanding of the nature of your experience at Fox Valley, it did little to help me develop a systematic method of explaining your entire case to the arbitrator. Regardless of the justice of your cause, you don't have a prayer of winning if the arbitrator is confused as to who did what to whom, when.
>
> If possible, your chronology should be broken down by school terms, i.e. spring 1966, Fall 1977, etc. Each "chapter" covering a school term should explain chronologically what happened over the course of that term.
>
> In order to shorten the chronology, you should restrict yourself to explaining what happened only. That is, do not take any extra space to set out your opinions as to why a certain thing was done to you, or as to the unfairness of the thing you are discussing. While you may be able to offer a certain amount of this type of testimony at the hearing, you should understand that the primary function of the hearing is to obtain the facts. The arbitrator will then draw his own conclusions.
>
> Again, let me emphasize that when you are describing something that happened that was relevant to your case, you must indicate to the best of your ability, when it happened. Your case covers in excess of 14 years and it is very easy for a listener to become confused as to what exactly you are talking about. When writing your chronology, you must stop yourself before you write about an incident and first answer these three important questions;
>
> 1) Most important - When
> 2) Also important - who, i.e., who was there and who said or did what.
> 3) Also helpful - Where i.e., where did the incident take place.
>
> If you do not provide adequate answers to these questions when you are testifying at the hearing, your testimony will be of very little help to you. Writing a chronology which puts everthing in its proper context would be very good practice for you.
>
> 2.) During our discussion on Tuesday, June 27, we talked about your having another attorney present at

the hearing. I would like to make my position clear on this.

You have the right to have another attorney present at the hearing. However, the Association cannot consent to his taking any part in the proceeding. I would reemphasize that it would be a great waste of your money for you to retain a private attorney to sit and observe a potentially lengthy hearing. It would be an unnecessary waste since you or your private attorney will be given access to a complete transcript of the hearing after the Association has completed its work on the case. I would strongly prefer that you not bring your own attorney to the hearing.

3.) Please try to complete your chronology of events promptly. Forward it to me as soon as you can. I would also like you to send me all the documents you have which relate to your career at FVTI. I realize that this is quite a pile of paper, but believe me, I will find the time to review it. Many of the materials may be very helpful in terms of adding to and backing up your testimony.

4.) I am planning on spending the entire day before the arbitration with you, preparing for the hearing. But it would be helpful for me to meet with you again before that. You mentioned that you might be coming down to Madison soon. It would be good if you could come down some time during the week of July 3-7 and bring you chronology and other records. I will be here at the WEAC offices all during that week. Please let me know if and when you will be coming and I will arrange to have time to see you.

Good luck on writing your chronology. I recognize that it will be quite a task, but it will help you to organize your recollections so you can testify about them clearly.

The June 27 meeting created suspicions in Complainant's mind regarding Respondent Nance's abilities and his committment to Complainant's case. His suspicions were strengthened when Respondent Nance discussed the possible postponement of the hearing and ultimately led Complainant to send the following July 4 letter to Chairman Slavney.

I am writing to you to request you to consult and advise Mr. David Nance, to have his questions in writing to me if possible or have third impartial party present in all our conferences with him. This is due to very extensive lengthy questioning on the phone, and type of interview which had with me on June 27, when he met me at my home, his June 30 and July 1, telephone conversation follow up to postpone the hearing, which I did not agree. (See my letter of reply July 1 and explanation of his conversation of June 30). I am finding the situation very confusing particularly his telephone conversation of afternoon of July 3, which I will be glad to explain.

Further, awhile back I asked him if he contacted Mr. Bob Riepe he told me had talked to him and he will testify for me, as yesterday I asked him if he has received his letter his answer was no. I like to know what Mr. Nance has done to follow up this matter. Please understand I do not wish to give any excuse to be used to delay my hearing, nor I can sit here and

allow the confusion continue and as I indicated I will be glad to explain some of the reason for this confusion and suspicion. I am prepared to present my case on July 13 and I will appreciate any further assistance from Mr. Nance as long as I will have the opportunity to be heard. With reference to my letters dated April 20, May 11, to Mr. Krokosky, May 17 to you as well as the content and timing of the letter of Mr. Marv Davis dated May 25 to me. On various occassions, I asked Mr. Nance if I could only bring an attorney or another party to hearing as my protection, his answer has been no. Please be assured of my cooperation with all WEAC staff, but I found it essential to communicate with you for a better understanding of the situation.

Looking forward to your cooperation and support, I remain.

Note: I have enclosed additional copy of this letter and the three attached copies in a self addressed envelope for Mr. Stephen Schoenfeld. If contacting him prior to arbiteration is not in violation of law, please mail the envelope to him.

Shortly thereafter Respondent Nance received a phone call from Stephen Schoenfeld, the Wisconsin Employment Relations Commission staff member assigned to hear Complainant's case, who directed Nance to instruct Complainant to cease his efforts to communicate with the arbitrator. Nance complied with Schoenfeld's request.

On July 10, 1978 and July 12, 1978 Respondent Nance met with Complainant to prepare for the July 13 arbitration hearing. Following said meetings Respondent Nance, who had interviewed other individuals in an effort to find evidence supportive of Complainant's allegations and had fully and professionally explored all of Complainant's charges, concluded that no substantial evidence of contractual violations existed.

On July 13, 1978, Complainant arrived at the site of the arbitration hearing and informed Respondent Nance that he was feeling ill and wanted to ask Arbitrator Schoenfeld for a postponement. When Schoenfeld arrived for the hearing, Complainant began speaking directly to him about his desire for a postponement. After some discussion, the subject of a possible settlement was raised and Schoenfeld ultimately obtained the agreement of Complainant, Respondent Association and Respondent Institute that the grievance would be withdrawn, Complainant would resign, and Respondent Institute would give Complainant a positive letter of recommendation and purge his personnel file of all materials related to the discharge. However, after all the necessary documents had been prepared, Complainant had second thoughts about the settlement, refused to comply with its terms, and left the hearing. Shortly thereafter, Respondent Nance and Association decided to withdraw Complainant's grievance based upon their feelings that the proposed settlement had been fair and in Complainant's best interest; that Complainant's rejection of same and subsequent departure from the hearing violated the Memorandum of Understanding which he had signed; and that the slim chance of success in arbitration were now virtually nil given Complainant's absence and Schoenfeld's previously expressed inclination not to grant a postponement.

The instant record, which has only briefly been summarized in the preceding pages, clearly establishes that Respondents UniServ-North et.al. met their duty of fair representation vis-a-vis Complainant at all times. 1/ There is no credible evidence in said record which would support

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1/ Mahnke v. WERC 66 Wis. 2d 524(1975)

a finding that any of said Respondents had engaged in any arbitrary, discriminatory or bad faith conduct while representing Complainant. Indeed the record reveals that Respondents UniServ-North et.al not only avoided the type of arbitrary conduct which Mahnke prohibits but also provided Complainant with high quality representation under trying circumstances. The ultimate good faith decision to withdraw Complainant's grievance was based upon factors which could properly be considered under Mahnke and does not constitute a breach of the duty of fair representation. There being no evidence which would support a finding that Respondents UniServ-North et.al. failed to fairly represent Complainant at any time, there is no basis for a finding of illegal coercion against said Respondents and thus the instant allegation has been dismissed.

VIOLATION OF COLLECTIVE BARGAINING AGREEMENT

Section 111.70(3)(b)4, Stats. makes it a prohibited practice for a labor organization to violate a collective bargaining agreement. An examination of the instant record reveals no evidence to support Complainant's allegation that Respondents UniServ-North et.al. violated any bargaining agreement.

ALLEGATIONS AGAINST RESPONDENT INSTITUTE

INTERFERENCE

Section 111.70(3)(a)1, Stats. makes it a prohibited practice for a municipal employer to engage in any activity which has a reasonable tendency "To interfere with restrain or coerce municipal employes in the exercise of their rights guaranteed" in Section 111.70(2), Stats. 2/ Inasmuch as Sections 111.07 and 111.70(4)(a) Stats. establish a one year statute of limitation for such prohibited practice allegations, only actions which occurred during the period of July 31, 1977 through the July 31, 1978 filing of the instant complaint were considered by the Examiner. Said consideration did not reveal any action by Respondent Institute which had a reasonable tenency to interfere with Complainant's rights under Sec. 111.70(2) Stats. Thus said allegation has been dismissed. 3/

DISCRIMINATION

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer "to encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms and conditions of employment;..." Complainant appears to argue that the perceived harassment which ultimately set the stage for his discharge was in part motivated by Respondent Institute's hostility toward his unwillingness to "join their camp." 4/ Such an allegation, if supported by a clear and satisfactory preponderance of the evidence might constitute a discriminating effort by Respondent Institute to discourage Complainant from exercising his statutory right to engage in

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2/ Winnebago County 16930 (9/79)

3/ Given Complainant's lack of familiarity with the law, he was unable to specifically direct the Examiner's attention to any specific act or acts which he believed constituted interference. Thus the Examiner of necessity examined all actions by Respondent Institute during the period in question. Inasmuch as a discussion of said examination would create a decision of epic proportions which would only yield a finding of no violation with respect to each of Respondent Institute's actions, no such discussion is found in this decision.

4/ As noted earlier in this decision the statute of limitations established by Sections 111.07 and 111.70(4)(a) Stats. precludes a finding of a statutory violation with respect to any act which ocurred prior to July 31, 1977.

protected concerted activity. However, the record does not in fact contain adequate support for Complainant's assertion. There is no convincing evidence that Respondent Institute was hostile toward any protected concerted activity in which Complainant may have engaged or that Respondent Institute's actions toward Complainant were in any way motivated by a desire to discourage him from exercising his statutory rights. Thus this allegation must be dismissed.

VIOLATION OF COLLECTIVE BARGAINING AGREEMENT

Section 111.70(3)(a)5 makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. However, the Commission will not assert its jurisdiction over a breach of contract claim when the contract allegedly violated contains a grievance arbitration procedure for the resolution of such disputes unless said procedure was not exhausted by the employe because the labor organization breached its duty of fair representation. 5/ A general application of this doctrine to the instant case precludes consideration of all possible violations of the parties' 1977-1979 contract except those which Complainant actually grieved and thereby attempted to exhaust the contractual procedure. 6/ With respect to the two grievances which the Complainant actually filed, Respondent Institute raised the defense that the contractual grievance arbitration procedure had not been exhausted. The record confirms that the grievance procedure was not exhausted with respect to either grievance and thus unless this failure to exhaust is excused by Respondent Association's failure to fairly represent Complainant, the undersigned is precluded from considering the merits of the two grievances. With respect to the reprimand grievance, the grievant voluntarily chose not to pursue same beyond the second step of the grievance procedure and thus no finding of a failure to fairly represent is possible. Turning to the discharge grievance, it has already been concluded that Respondent Association met its duty to fairly represent Complainant in that regard. In light of the foregoing the undersigned cannot assert the Commission's jurisdiction to determine the merits of Complainant's contractual claims.

Dated at Madison, Wisconsin this 21st Day of December, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner

5/ Mahnke op. cit.

6/ Complainant appears to argue that he never filed grievances under past contracts because he knew Respondent Association would not have adequately represented him. However the record contains no convincing evidence to support Complainant's assertion. Even if such evidence existed, claims of past contractual violations would be time barred by the statute of limitations inasmuch as the 1977-1979 contract became effective on July 1, 1977.