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-H
NASSER NAHAVANDI, Complainant, vs. FOX VALLEY TECHNICAL INSTITUTE, Respondent.	Case XXII No. 23367 MP-883 Decision No. 16504-H

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

Examiner Peter G. Davis having, on December 21, 1979, issued his Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above-entitled matters, wherein he found that neither of the Respondents had committed prohibited practices within the meaning of Sections 111.70(3)(a) and 111.70(3)(b) of the Municipal Employment Relations Act (MERA) and dismissed the complaints filed in these matters; and the Complainant having, on December 31, 1979, filed a petition for Commission review of said decision, pursuant to Section 111.07(5), Stats.; and none of the parties herein having filed a brief in support of, or in opposition to, said petition; and the Commission having reviewed the record, and being satisfied that the decision of the Examiner be affirmed;

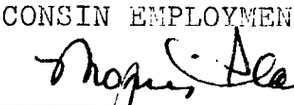
NOW, THEREFORE, it is

ORDERED

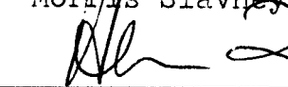
That the Examiner's Findings of Fact, Conclusions of Law and Order in the above-entitled matters be, and the same hereby are, affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 1st day of April, 1980.

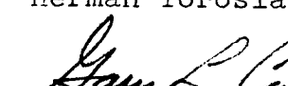
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 

Morris Slavney, Chairman



Herman Torosian, Commissioner



Gary L. Covelli, Commissioner

FOX VALLEY TECHNICAL INSTITUTE FACULTY ASSOCIATION, I, Decision No. 16505-H and FOX VALLEY TECHNICAL INSTITUTE, XXII, Decision No. 16504-H

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

BACKGROUND:

In his amended complaint, the Complainant, Nasser Nahavandi (hereinafter "Nahavandi") alleged that Respondent, Fox Valley Technical Institute (hereinafter referred to as "FVTI") committed various prohibited practices as defined by the Municipal Employment Relations Act (MERA) and that Respondents, UniServ-North, Winnebagoland; Mr. Henry Krokosky, Executive Director of the Fox Valley Technical Institute Faculty Association; and Mr. David Nance committed prohibited practices in violation of Sections 111.70(3)(b)1 and (3)(b)2 of MERA in that they failed to fairly represent him in his dispute with FVTI. Respondents FVTI and the Association denied the Complainant's allegations, the former claiming that it did not commit any prohibited practices as defined by MERA, and the latter claiming that it fulfilled its duty to fairly represent the Complainant. Upon the motions of both above-named Respondents, during hearing on this matter the Examiner dismissed a number of the Complainant's allegations. Following eight days of hearing, and the submission of briefs, the Examiner found that the Association and its representatives met their duty of fair representation, vis-a-vis the Complainant, at all times, and that FVTI did not interfere with the Complainant's rights, as set forth in Section 111.70(2) of MERA, or discriminate against the Complainant in an effort to discourage his exercise of his rights thereunder, pursuant to Section 111.70(3)(a)3 of MERA. The Examiner further concluded that the Association did not violate the applicable 1977-1979 collective bargaining agreement, hereinafter referred to as the Agreement, between it and FVTI covering the Complainant, and that the Complainant's failure to exhaust the grievance procedure set forth in the Agreement precluded consideration of possible violations of the Agreement by FVTI. As a consequence, the Examiner dismissed the complaints against both Respondents.

By letter dated December 31, 1979, the Complainant requested that the Commission review the Examiner's decision. The Complainant offered no further argument in support of said request, although he stated as follows:

> Considering the facts presented in the many days of hearing, the decision is totally unreal. The information backing the decision is unbeleivably (sic) one sided, not reflecting the truth and the real intention of the happenings and definitely distorting the facts. Also despite the one sided approach, some of the information given is untrue to the best of my knowledge. In all honesty it does not do justice to what actually and really happened and the facts presented in the hearing.

The Complainant was afforded the opportunity to submit additional written arguments (but not oral argument or evidence) in support of his petition but failed to do so in a timely fashion. The Respondents did not file briefs or make further arguments in response to the Complainant's request for review. We have considered the arguments and evidence of record in reviewing the Examiner's decision.

DISCUSSION:

The record amply supports the Examiner's conclusion that the Association and its representatives (including Messrs. Krokosky and Nance) fully and fairly represented the Complainant during the course

of his various disputes with FVTI beginning in the fall of 1977 and continuing through the summer of 1978. The Complainant introduced evidence of an alleged campaign of harassment and pressure directed against him by FVTI, its officers and agents ostensibly from the beginning of his employment with FVTI in 1966. However, it is clear that a contractual grievance procedure which included the exclusive remedy of arbitration as the final step in said procedure was available to the Complainant through a succession of collective bargaining agreements in effect between FVTI and the Association dating back to at least 1969 (Employer's Exhibits 28, 29, 30, 31, 33 and 35) and that the Complainant never attempted to utilize that procedure or for that matter, to contact the Association relative to his problems with FVTI at any time prior to the fall of 1977, with the exception of one occasion in 1972 that did not result in a grievance. The Complainant did contact the Association regarding a "personal problem" in June of 1977, but there is no record of the outcome of that contact. Nor did the Complainant present any convincing evidence that the Association, or its representatives, at any time discouraged him from contacting the Association relative to those problems. The record further reveals that the Complainant failed to cooperate with Mr. Nance relative to the latter's request that the Complainant prepare a chronology of pre-1977 events in preparation for the arbitration of this matter scheduled for July 13, 1978. Finally, it should be noted that, absent a showing of a continuing grievance, the applicable one-year statute of limitations bars consideration of matters occurring more than one year prior to the filing of the Complainant's complaint (i.e. prior to July 31, 1977). The Complainant has made no showing of the existence of a continuing grievance. Therefore, the Commission is barred from considering any events that may have occurred prior to July 31, 1977, and will not consider the merits of the Complainant's allegations regarding any such events.

The U.S. Supreme Court has defined a labor organization's duty of fair representation as follows:

> The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, and was soon extended to unions certified under the N.L.R.A. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. . . .
>
> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. . . .
>
> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. . . . In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke

> arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. . . .
>
> If the individual employee could compel arbitration of his grievance, regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. . . . It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedure . . . if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration. Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration. For these reasons, we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract merely because it settled the grievance short of arbitration. 1/

Similarly, the Wisconsin Supreme Court has stated as follows:

> The Supreme Court in Vaca left no doubt that a union owes its members a duty of fair representation, but that opinion also makes it clear that the union may exercise discretion in deciding whether a grievance warrants arbitration. Even if an employee claim has merit, a union may properly reject it unless its action is arbitrary or taken in bad faith. . . .
>
> The test is whether the action of the union was arbitrary or taken in bad faith in the performance of its duty of fair representation on behalf of its employee member.
>
> . . .In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances. 2/

The record of this proceeding demonstrates that at every turn, the Association sought to accommodate the Complainant only to have the Complainant repeatedly frustrate and obstruct its efforts to provide effective representation.

1/ Vaca v. Sipes, 385 U.S. 895 (1964). The National Labor Relations Board first defined a breach of the duty of fair representation as an unfair labor practice under Sec. 8(b) of the N.L.R.A. in Miranda Fuel Co., 140 NLRB 181, 51 LRRM 1584 (1962).

2/ Mahnke v. WERC, 66 Wis2d 524, 225 N.W.2d 617 (1975), quoting Vaca v. Sipes, supra, n. 2. See also Moore v. Sunbeam Corp., 459 F.2d 811 (7 Cir., 1972).

The events leading up to this proceeding began with the Complainant's prolonged absence from his duties beginning in September 1977, and his alleged failure to follow FVTI's established procedure regarding reporting of absences, which resulted in a letter of reprimand being issued on September 7, 1977, by Mr. John Eid, the Complainant's supervisor. The Complainant thereupon filed a grievance by letter dated September 14, 1977, which was denied by FVTI on September 19, 1977, appealed to Step 2 of the grievance procedure on September 26, 1977, and denied again by FVTI on September 30, 1977. Although the Complainant wrote one additional letter relative to this grievance, he apparently did not pursue it further, and there is no evidence to support a finding that the Association breached its duty of fair representation with regard to that grievance.

The Complainant's second difficulty arose as a result of his prolonged absence from his duties as a result of an alleged illness beginning in September 1977. The Complainant, however, did not provide any evidence of medical treatment, or other substantiation of this "illness," and on a number of occasions refused to comply with FVTI's request that he do so as a condition of returning to work. The Complainant similarly refused to provide, at the Association's request and advice, either evidence of illness or a doctor's statement of his fitness to return to work, even when it was clear that such would be acceptable to FVTI as the sole condition of his return to work. He once again refused to do so even after a warning from FVTI on November 16, 1977, that failure to do so would result in the institution of proceedings for his termination. The Complainant's failure to provide any information as to his physical condition following an "illness" of close to three months (most of which was taken as paid sick leave) certainly provided FVTI with a basis for believing that his prolonged absence was due to other factors and that the Complainant had misused his sick leave benefits, and to institute dismissal proceedings as a result.

The Complainant resigned his position on November 29, 1977, apparently on the advice of the Association that such would be a better course of action than to allow FVTI to proceed with dismissal. The Association apparently had reached an agreement with the Complainant that it would be empowered to negotiate certain favorable conditions accompanying his resignation, and that the Complainant would not resign until such conditions were agreed to by the Association and by FVTI. The Complainant, however, disregarded this agreement, by resigning on his own, and by denying that he had authorized the Association to negotiate the terms of his resignation. He further muddied the waters by withdrawing his resignation on December 10, 1977. FVTI thereupon proceeded with dismissal charges based upon the Complainant's failure to report to work over a period of several months and his refusal to provide evidence of illness. In spite of the Complainant's numerous reversals of position and failures to heed the advice of his bargaining representative, the Association agreed to defend him in the upcoming dismissal proceedings.

On January 23, 1978, FVTI terminated the Complainant's 1977-1978 contract, whereupon the Association filed a grievance on his behalf and appealed the grievance through the contractual grievance procedure all the way to arbitration. The Association did so, in spite of the Complainant's periodic criticism of its handling of the grievance and threats of legal action against the Association, and in spite of Director Krokosky's recommendation that the grievance not be appealed to the arbitration stage. Arbitration of the matter before the arbitrator was scheduled for July 13, 1978.

The Association kept the Complainant very well informed as to the nature of the arbitration process and as to what evidence would be required in the presentation of his case. In addition, the Complainant specifically agreed "to follow all procedures; cooperate fully with representative of FVTI-FA, WESC and WEAC, and to be represented at the arbitration hearing by Attorney David Nance, WEAC in-house concel (sic)." Attorney Nance spent considerable time and energy in the matter and met with the Complainant a number of times. He requested the Complainant to prepare a detailed written chronology of his employment at FVTI dating back to 1966--a reasonable, almost essential element of sound preparation for the Complainant's case. Yet, the Complainant apparently did not prepare the requested chronology. Mr. Nance also diligently followed up on locating and talking to witnesses that were potential assistance to the Complainant in the presentation of his case. The record reveals that he was quite conscientious in his preparation of the Complainant's case, and that no breach of the Association's duty of fair representation occurred in connection therewith.

The Complainant on numerous occasions insisted that the grievance concerning his dismissal be processed as quickly as possible. A number of the Complainant's letters during the period prior to the arbitration hearing scheduled for July 13, 1978, referred to the need to hold the hearing as soon as possible and insisted that delays would be intolerable. The Complainant continued to send such letters to the Association, to Mr. Nance, to Mr. Krokosky and to the Commission up until a few days prior to the date of hearing. In fact, the Complainant refused to go along with Mr. Nance's suggestion on June 30, 1978, to postpone the hearing due to the unavailability of an important witness on the scheduled date. However, at the hearing on the morning of July 13, 1978, the Complainant reversed course once again, and requsted the Arbitrator to postpone the hearing, citing alleged illness, disorganization of files and a claimed false statement by an allegedly key witness. The parties to the arbitration, with the assistance of the Arbitrator, concluded a settlement of the matter, but the Complainant refused to approve it and walked out of the hearing. Following this episode, the Association withdrew the Complainant's grievance and ceased its representation of the Complainant.

The record clearly establishes that in spite of the Complainant's numerous reversals of position, failures to follow advice and indications of displeasure with the quality of the Association's representation of his interests, the Association sought to accommodate the Complainant to the utmost possible degree at every step of the way. The Association continued to do so through the arbitration stage in spite of a threat by the Complainant to file a complaint against it and in spite of the Complainant's numerous communcations with the Commission expressing a desire to have an outside representative and/or observer present at all proceedings. The Association ceased its representation of the Complainant only after it was firmly convinced that the Complainant had repeatedly made it impossible for it to provide effective representation, and after it had concluded that the odds that the Complainant would prevail on his grievance were at best remote. We find the Association's decision to terminate its representation of the Complainant following the July 13, 1978 hearing to be well within the scope of its discretion as bargaining representative, and that the Association amply fulfilled its duty of fair representation under prevailing standards established by applicable law.

Furthermore, there is no evidence in the record to indicate that the Association violated the 1977-1979 Master Contract (or indeed any predecessor contract) vis-a-vis the Complainant, and we affirm the Examiner's conclusion on that point.

With regard to the Complainant's allegations against FVTI, we affirm the Examiner's conclusion that FVTI did not commit any prohibited practices within the meaning of MERA Sections 111.70(3)(a)1 and 111.70(3)(a)3. In particular, there appears to be nothing in the record to support a conclusion that FVTI discriminated against the Complainant in any fashion with the intent or effect of hindering him from the exercise of his rights under MERA Section 111.70(2). Nor were any actions taken by FVTI of such a nature as to "encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms and conditions of employment" within the meaning of MERA Section 111.70(3)(a)3. Any discipline that FVTI may have considered and/or imposed upon the Complainant in 1977-1978 stemmed from his individual conduct, independent of his relationship to the Association or his activities as a member thereof.

With regard to the Complainant's allegations that FVTI committed a prohibited practice under MERA Section 111.70(3)(a)5, by allegedly violating the 1977-1979 Agreement, we note that that Agreement contained a grievance procedure, which culminated in final and binding arbitration. We further note that the Complainant failed to appeal his first grievance (i.e. concerning the September 7, 1977 reprimand) beyond Step 2 of the grievance procedure, and that he caused the aborting of the arbitration of his second grievance (i.e. concerning his dismissal on January 23, 1978) by his conduct at the hearing held on July 13, 1978. The Commission is precluded from asserting its jurisdiction over an allegation of violation of a collective bargaining agreement under the circumstances, since the Complainant himself precluded exhaustion of the applicable grievance-arbitration procedure in both grievances and since the Association did not breach its duty of fair representation with respect to either grievance. 3/ We, therefore, affirm the Examiner's dismissal of the Complainant's allegations in this regard.

Dated at Madison, Wisconsin, this 1st day of April, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Gary L. Covelli, Commissioner

3/ See, e.g., Milwaukee Board of School Directors, (15825-B) 6/79; City of Menasha (Police Department), (13283-A) 2/77; Beloit Joint School District, (14702-B) 3/77; Madison Joint School District, (14866, 14867) 8/76; and City of Madison (Fire Department), (15079-D, 15171-C) 1/78.