STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GERHARDT STEINKE, Complainant, vs. MILWAUKEE AREA VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, and LOCAL 212, AMERICAN FEDERATION OF TEACHERS, Respondents.	Case 320 No. 43724 MP-2332 Decision No. 26459-G

Appearances:

Mr. Gerhardt Steinke, 4642 West Bernhard Place, Milwaukee, Wisconsin 53216, appearing for himself.

Shneidman, Myers, Dowling & Blumenfield, Attorneys at Law, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, by Mr. Timothy E. Hawks, appearing for the Union.

Davis & Kuelthau, S.C., Attorneys at Law, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-3101, by Mr. Mark L. Olson, appearing for MATC.

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

On May 13, 1992, Examiner Jane B. Buffett issued Findings of Fact, Conclusions of Law and Order Dismissing Complaint with Accompanying Memorandum in the above-entitled matter. In her decision, Examiner Buffett concluded that neither Milwaukee Area Vocational, Technical and Adult Education District nor Local 212, American Federation of Teachers had committed prohibited practices within the meaning of Municipal Employment Relations Act by the manner in which they responded to Complainant Gerhardt Steinke's inquiries regarding a settlement agreement.

Complainant Steinke timely filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received on July 31, 1992.

On November 20, 1992, the Commission denied an October 19, 1992 Motion from Steinke that the review be held in abeyance.

Having reviewed the record, the Examiner's decision, the Petition for Review, and the parties written argument, the Commission makes and issues the following

ORDER 1/

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 2nd day of December, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/

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rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to

William K. Strycker, Commissioner

1/ Continued

be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

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

In the Background section of her decision, the Examiner set forth the following statement as to the nature of the complaint before her.

> On February 28, 1989 Complainant was a teacher employed by MATC. On that day a Settlement Agreement was executed by Complainant, the Union and MATC. The Agreement provided that Complainant would discontinue his classroom assignments and have a special assignment for the remainder of the semester. It provided that he could have a medical leave of absence during the 1989-90 academic year. On February 27, 1990 Complainant filed a complaint with the Wisconsin Employment Relations Commission. 2/
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> The exact nature of the unlawful conduct being alleged by complainant was unclear in the original complaint. In an attempt to clarify said complaint, extensive hearing was held on September 11, 1990. Subsequently, on March 20, 1991 the Examiner issued an order which, among other things, clarified the complaint in the following manner:
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> > In summary, what remains of the amended complaint document is an implied allegation that after the signing of the Settlement Agreement, MATC and the Federation did not respond to inquiries regarding the Settlement Agreement, and I conclude that proceedings in this matter should go forward on that allegation. 3/ (Footnotes omitted)

Examining the allegation against the Union, the Examiner reasoned as follows:

> Contrary to Complainant's allegations of Union unresponsiveness, the record shows that there were both meetings between Union Director of Labor Relations Frank Shansky and Complainant and four exchanges of letters in which Shansky responded to Complainant's questions. The inquiries fall into two general categories: the first, factual questions regarding the creation of the Agreement and the second, questions relating to compliance with its terms and the advisability of allowing the Agreement to stand.
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> Comparison of Complainant's letters with Shansky's responses reveals that Shansky responded to each letter in less than two weeks. 6/ A review of Complainant's and Shansky's numbering of question and

answers shows that each of Complainant's questions were addressed. As to the factual questions, the Complainant does not argue that any of those responses was factually in-correct, nor does the evidence show any such inaccuracy. In some instances, such as a response to a question asking the District's intent, Shansky asserted he did not have the information, and there is no evidence to contradict that assertion. In some instances, Shansky stated that he did not understand the questions, but Complainant did not restate the question in a further attempt to receive a response. (Footnote omitted)

Although Complainant in his letters and other actions expressed general dissatisfaction with the answers, that dissatisfaction was more a measure of Complainant's vehement disagreement with the underlying positions of the parties than an indication that the Union was not forthright in response to his inquiries.

The Union offered reasonable advice regarding the Agreement's value to Complainant and compliance with it. At a July, 1989 meeting of Complainant, Shansky and Union Grievance Chair Robert Jakubiak, Complainant asked about the possibility of overturning the Settlement Agreement and the effects of such a recision. Although the Union offered to request the District to overturn the Agreement if Complainant so desired, Shansky indicated that the Union believed that if the Agreement did not stand, Complainant would be in danger of being non-renewed. There is no evidence that such a conclusion had no reasonable basis.

Consistent with the Union's belief that the continued existence of the Agreement was in Complainant's best interest, Shansky, in his letter of November 17, 1989, unambiguously answered Complainant's question regarding an appropriate response to the request for information regarding medical treatment which came from Paul Vance, MATC's Director of Labor Relations. Shansky's December 6, 1989 letter was forceful in its admonition to Complainant to fulfill his obligation under the Agreement to provide certain information to the District.

Nothing in the record indicates that the Union's advice regarding the value of the Agreement was not reasonable and made in good faith. Additionally, the Union responsibly framed its advice in a manner that could be understood by the Complainant, and transmitted it to Complainant promptly.

In summary, the undersigned concludes that the Union responded to Complainant's inquiries in a manner that was reasonable, responsible and in good faith, and therefore did not violate Sec. 111.70(3)(b)1, Stats.

Turning to the allegations against MATC, the Examiner held:

II. MATC's Alleged Violations

> Complainant argues that MATC improperly failed to respond to his inquiries regarding the February 28, 1989 Settlement Agreement. Some of those inquiries, noted in Findings 10 through 12, questioned the bases of the agreement, as shown in such questions as two from the July 8, 1989 letter: "In your estimation what problem exists that you consider 'medical'?" and "If I have done something wrong, what is it? Who are my accusers?" Other questions sought information about the actual creation of the Agreement, such as this question from the July 17, 1989 letter: "Who wrote the copy?" None of the questions sought information that had any apparent bearing on what MATC would consider satisfactory compliance with the Agreement, nor does Complainant make that argument.
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> The record shows that MATC did not respond by letter, nor did it respond to each individual question, but rather, in a face-to-face encounter, Vance told Complainant that he should seek clarification from the Union.
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> . . .
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> In the case at hand, MATC's failure to give individual answers to Complainant's questions left him dissatisfied, as is clearly shown by his repeated letters. That dissatisfaction, however, does not necessarily indicate that a prohibited practice has occurred. The undersigned is unaware of case law wherein it was found that an employer committed a prohibited practice by its failure to answer questions of a dissatisfied employe regarding the creation of, and rationale for, a collective bargaining agreement. In short, there is no basis to conclude that MATC's limited responses to Complainant's questions interfered with his statutorily-protected rights. No violation of Sec. 111.70(3)(a)1, Stats., is found.
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> . . .

In his Petition for Review, Complainant asserts the following:

> Petitioner Steinke respectfully submits the following rationale:
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> 1. The examiner shows extreme bias in several issues. In 1990 the Complainant wrote letters to the Commission asking that Examiner Buffett be removed from the case. Reasons offered were not responded to. At that time, I was advised that she had no requirement to respond to my letters. I was further advised that "you can always appeal" and that at that time, and not

before, the WERC would consider my arguments as to why Steinke did not consider Examiner's Buffett role proper.

2. She writes in flagrant disregard of the facts in her 5/13/92 Findings of Facts. To give just one example, her statement on page 6 entry 6 has no foundation of fact. It is falsely based on vague unsupported statements from Franklin Shansky.

3. The examiner unilaterally decided to change the sine qua non concerns of Steinke's original complaint into a surrealistic secondary question of limited relevance. This unreasonable and biased action trivialized subsequent proceedings. At no place in his complaint, does complainant Steinke ever ask the respondents for "limited responses." In any rational meaningful congruent communications between people, more is required. The so-called "responses" proffered by both MATC and Union were useless platitudes at best. These "limited responses" were designed to distort reality and to corrupt understanding of all concerned. The language of Franklin Shansky from Local 212 and Paul Vance from MATC-Milwaukee was designed to hide reality, to separate words from truth, and to avoid responsibility. At all material times their "responses" were irrelevant, unnecessary and insufficient.

4. Steinke was given no opportunity to present evidence until September 1991. The record of the Thursday 3/15/90 meeting at MATC was not even allowed to be considered. The record shows that Steinke was correct in all essentials. Hawks said and wrote on the record what all three parties know when not playing evasive games. Steinke urges a meaningful review.

In his initial brief, Complainant asserts:

PETITIONER STEINKE WITHOUT RELUCTANCE ASKS THE COMMISSION TO:

* Reopen and review the record including following documents: Exhibits and transcript from Thursday 3/15/90 open meeting, all relevant letters and memos of probative value that have been exchanged between the parties including everything that and WERC officials and examiners obtained from the parties.

After the last round of briefs had been

exchanged for Buffett and the parties, Timothy Hawks asked Buffett "reluctantly" to reopen the record so that he could dispute one or more claims of Mark Olson. Olson had unequivocally stated that the Union had failed to ask MATC anything in particular about Steinke's putative "treatment plan." The union either asked MATC about what Steinke could do in order to comply with the "agreement" or they did not. Petitioner Steinke has no record of either MATC or Union consulting with one another on this matter. The record shows Paul Vance "forwarding everything to the Union" while the Union simultaneously refers Steinke to "employer."

A preponderance of the probative evidence shows a conspiracy. Hawks should be given a chance to demonstrate the existence of the Union presenting any relevant questions to MATC. If he writes contrary to fact, this also should be brought out.

* See Steinke's positions from briefs and below dated letters:

12/14/89	11/08/11 (sic)	01/27/92
03/15/90	11/09/90	02/11/92
03/16/90	11/10/90	02/14/92
04/10/90	11/14/90	02/21/92
04/18/90	11/19/90	02/22/92
04/19/90	06/05/91	02/28/92
04/20/90	06/15/91	03/12/92
04/21/90	06/26/91	03/18/92
04/23/90	07/01/91	04/04/92
09/11/90	07/26/91	04/08/92
09/14/90	08/06/91	04/17/92
09/15/90	08/07/91	04/25/92
09/17/90	08/09/91	05/04/92
09/09/20 (sic)	08/17/91	05/12/92
09/22/90	09/07/91	05/22/92
09/26/90	09/18/91	05/27/92
09/27/90	10/15/91	05/29/92
09/28/90	10/23/91	05/30/92
10/01/90	12/23/91	06/01/92
10/06/90	01/13/92	06/02/92
10/09/90	01/14/92	06/12/92
10/24/90	01/15/92	06/18/92

In response to Complainant's initial brief, the Union asserts the following: (1) there is no support in the record for the allegation of Examiner bias; (2) the Examiner's Findings of Fact (including Finding of Fact 6) are supported by the record; (3) the Examiner properly determined the nature of the allegation being raised by Complainant; (4) the Examiner properly concluded that the transcript of a March 15, 1990 non-renewal private conference was irrelevant to the complaint; and (5) Complainant has not provided a persuasive basis for reopening the record.

In its response to Complainant's initial brief, MATC contends that the Commission should affirm the Examiner. More specifically, MATC asserts that: (1) Complainant's attempt to have the Commission review matters not in the record before the Examiner should be rejected as statutorily improper; (2) there is no evidence in the record to support the Complainant's claim of Examiner bias; (3) the Examiner properly refined the issue to be litigated and during the six months between the date of the Examiner's Order and hearing on the merits of the complaint, or for that matter during the September 6, 1991 hearing, Complainant did not assert that the Examiner had a erred by the manner in which she stated the complaint allegation; (4) Complainant was given every opportunity to present evidence in support of the complaint; and (5) Complainant has not provided a persuasive basis for reopening the record.

In his reply brief, Complainant asserts: (1) the Examiner's unwillingness to accept certain evidence into the record demonstrates her bias; (2) Examiner bias is further demonstrated by the differing treatment accorded Complainant and the attorneys representing Respondents during the hearing; (3) Respondents engaged in conduct during the hearing which had the effect of prejudicing the Examiner against Complainant; (4) the Examiner badgered the Complainant rather than allowing him to present evidence; (5) Complainant did object to the Examiner's refining of the issue to be litigated; and (6) the Examiner improperly concluded that the responses of the Respondents were not

violations of the Municipal Employment Relations Act.

DISCUSSION

It is apparent from our review of the record that this was a difficult and complex proceeding. It is also apparent to us that the Examiner fulfilled her role in a fair and competent manner at all times herein. We have considered and rejected Complainant's assertions that the Examiner demonstrated bias by her conduct. To the contrary, from our review of the record, we conclude that the Examiner showed great patience and sensitivity to the difficulties which confront a layperson such as Complainant when litigating a prohibited practice proceeding.

Based on our review of the hearing transcript, we have rejected Complainant Steinke's claim of bias premised upon the Examiner's conduct during the hearing while on the record. Our review of the hearing transcript also enables us to reject Steinke's claim of bias based on alleged off-the-record Examiner conduct. 2/

We are able to reach this conclusion in the latter instance because our review of the Examiner's decision and the record is de novo. Under this circum-stance, our task is not one of merely determining whether the Examiner's decision is a reasonable one, but instead determining whether it is the decision we would reach based on the evidence and argument presented.

Our review of the evidence and arguments lead us to the same conclusions as the Examiner both as to identification of the litigation issue raised by Steinke and determination of whether the facts in the record amounted to prohibited practices. Accordingly, we affirm the Examiner's Findings and Conclusions.

We are further persuaded that there is no basis for reopening the record or concluding that Complainant did not have ample opportunity to present the evidence relevant to his case. The Examiner's exclusion of the March 15, 1990 non-renewal evidence was proper in the context of the issue being litigated before her.

Given all of the foregoing, we have affirmed the Examiner in all respects.

Dated at Madison, Wisconsin this 2nd day of December, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

2/ The Complainant argues that while the Examiner always referred to him as "Mr. Steinke," she referred to opposing counsel by their first names, while off the record.

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner