STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GERHARDT J. STEINKE, Complainant, vs. MILWAUKEE AREA VOCATIONAL, TECHNICAL, AND ADULT EDUCATION DISTRICT, Respondent.	Case 414 No. 45878 MP-2497 Decision No. 26943-A

Appearances:

Mr. Gerhardt J. Steinke, 4642 West Bernhard Place, Milwaukee, Wisconsin 53216, appearing pro se.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Mark L. Olson, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-3101, appearing on behalf of the Milwaukee Area Technical and Adult Education District.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On July 2, 1991, Gerhardt J. Steinke filed a complaint with the Wisconsin Employment Relations Commission alleging that the Milwaukee Area Vocational, Technical and Adult Education District had committed prohibited practices within the meaning of the Municipal Employment Relations Act by refusing to strike arbitrators from a panel such that an arbitrator could hear a grievance over the nonrenewal of Gerhardt Steinke. The Commission, on July 19, 1991, appointed Lionel L. Crowley, a member of its staff, to act as the Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held in Milwaukee, Wisconsin on September 10 and 13, 1991. The parties filed briefs and reply briefs, the last of which were exchanged on January 15, 1991. The Examiner having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Mr. Gerhardt J. Steinke, hereinafter referred to as the Complainant or Steinke, is an individual residing at 4642 West Bernhard Place, Milwaukee, Wisconsin 53216.

2. The Milwaukee Area Vocational, Technical and Adult Education District, hereinafter referred to as the Respondent or District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal offices located at 700 West State Street, Milwaukee, Wisconsin 53233.

3. The American Federation of Teachers, Local 212, WFT, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and its offices are located at 703 West Juneau Avenue, Milwaukee, Wisconsin 53233.

4. The District and the Union were parties to a collective bargaining

agreement from July 1, 1989 through June 30, 1991, which contained a grievance procedure which culminates in final and binding arbitration and contains the following provisions:

ARTICLE IV -- GRIEVANCE PROCEDURE

. . .

Section 2 -- Rights

a) Both parties, including their members and agents, have the right to make use of this procedure. A grievance may be filed at the step commensurate with the level of authority responsible for the act which is being grieved.

b) Either party shall have the right to be repre-sented by counsel or such additional persons as are deemed necessary at any step of this procedure.

c) The Union shall have the right to be present at any step of this procedure when an employee chooses to process a grievance on his/her own behalf. The Union shall receive prior notice of all such hearings.

. . .

11 Section 4 -- Steps

. . .

Step 4. (Arbitration)

If the grievance is not resolved satisfactorily, either party may appeal within fifty (50) work days for arbitration. Failure to make a written request to the WERC for a list of arbitrators within such fifty (50) work days shall mean that the grievance is closed. If a request for a list of arbitrators is timely made, but the requesting party does not proceed within twenty-five (25) work days after receipt of the list to select an arbitrator and schedule a hearing, the grievance shall be closed unless such failure is caused by the other party or the proposed arbitrator. The provisions covering arbitration are as follows:

a) In the selection of an arbitrator, the parties shall meet in an effort to reach mutual agreement. If no agreement is reached within two (2) weeks after the initial request for arbitration, then the arbitrator shall be selected as follows:

> The parties shall request a list of five (5) private arbitrators from the WERC. Either party may reject the entire list and ask for a second (2nd) list to be furnished. However, neither party may reject more than one (1) list. When a list is agreed upon, the parties shall then alternately strike names from

> the list, commencing with the party which loses a coin toss. The last person remaining upon such list shall be the arbitrator.

5. On March 15, 1990, the District non-renewed Complainant's contract for the 1990-91 school year. On March 15, 1990, after the non-renewal hearing, the Union and the District agreed to waive the third step of the grievance procedure and proceed directly to arbitration.

6. On March 16, 1990, the Complainant sent a letter to the District's Director of Labor Relations, Paul Vance, indicating that he was going to initiate a Step 3 grievance over his nonrenewal and would be seeking the Union's assistance in the matter. By a letter dated March 16, 1990, Vance responded indicating that the Union had indicated an intention to waive Step 3 and the Complainant's request for a Step 3 as well as his reference to the Union made it unclear to Vance whether to schedule a third step hearing and Vance asked Complainant to submit a definitive written statement regarding his relationship with the Union.

7. On March 28, 1990, Complainant filed an open records request for 268 documents. On April 9, 1990, the Union indicated that in light of the Complainant's request for a third step hearing, it would appear at said hearing and the third step proceeding would be treated as necessary prior to a request for arbitration by the Union. The District, by counsel, responded by a letter dated April 11, 1990 that it would proceed to a third step hearing and further indicated that it was unable to comply with the Complainant's voluminous request for records.

8. On March 29, 1990, the Complainant filed a grievance on his non-renewal. The District responded on April 11, 1990, asking the Complainant to waive Step 3 and pointed out that the administrator who would preside at the third step hearing was instrumental in presenting the administration's recommendation to the District's Board on Complainant's nonrenewal.

9. On April 17, 1990, the Complainant indicatd that he desired a Step 3 meeting, that he wanted an answer to whether he could have a court reporter present and that he needed responses to his records request for a meaningful Step 3 grievance hearing to take place. On April 18, 1990, Complainant reiterated his requests and positions.

10. On April 26, 1990, the District denied Complainant's request for a court reporter at the Step 3 grievance hearing and indicated that Complainant should notify the District when he had received his records request and was ready to proceed with the hearing.

11. The Complainant had filed a number of other requests for arbitration designated grievances A, B, C, and D and had filed certain prohibited practice complaints including Case 320 No. 43724 MP-2332 currently pending before Examiner Jane Buffett. The Complainant and District struck arbitrators in grievances A, B, C and D on or about May 24, 1990.

12. On September 11, 1990, hearing was held in Case 320 before Examiner Buffett at which hearing the Complainant withdrew two other complaints designated Cases 315 and 324. During the September 11, 1990 hearing, Complainant sought to amend his complaint to include his nonrenewal. The Union pointed out that a grievance was pending on the nonrenewal. Examiner Buffett ruled that she would not hear any evidence regarding the non-renewal and did not allow the complaint to be amended to include the nonrenewal.

13. On October 9, 1990, the Complainant requested a panel of arbitrators in order to select an arbitrator to hear the grievance (hereinafter grievance F) over his nonrenewal. On October 11, 1990, the Union by counsel indicated by letter that the Union and District had waived the step prior to arbitration on March 15, 1990 and asked that the panel sent to Complainant also be sent to the Union and District. On October 26, 1990, the Commission sent the names of five arbitrators to the Complainant, the Union and the District.

14. By a letter dated October 27, 1990, addressed to Dr. Barbara Holmes, with copies to counsels for the Union and District, the Complainant requested a meeting to strike arbitrators from the October 26, 1990 panel. By a letter dated November 5, 1990, to the same parties, the Complainant again asked for a meeting to strike arbitrators.

15. By a letter dated November 7, 1990 to the Complainant, Paul Vance indicated that before the District would strike arbitrators it needed to know if the Complainant was waiving Step 3 and additionally stated it was not appropriate to proceed until the validity of the settlement agreement could be clarified in the proceeding pending before Examiner Buffett. The Complainant, by a letter dated November 8, 1990 to Dr. Holmes with copies to counsels for the Union and District stated as follows:

Dear Dr. Holmes:

Re: Your subordinate's letter of 7 November 1990 (Grievance F)

Ten days ago your office was presented with my letter requesting that a subordinate of yours meet with me to select an arbitrator.

I see the following items of concern in the subordinate's letter.

He correctly cites my Friday 16 March 1990 letter. He neglects to mention or cite other correspondence that would enable your office to monitor your subordinate's activities. For reasons clearly outlined in previous documents, I shall wave (sic) Step 3.

As for "the settlement agreement of February 27, 1989" your subordinate errs, again. The agreement was signed 2/28/89.

Your subordinate is even more seriously mistaken as to the appropriate hierarchy of remedies. The transcript for the 9/11/90 WERC hearing indicates that Steinke's non-renewal should be handled separately from the stigmatizing forced early retirement agreement stipulating a 1993 retirement.

The arbitrator may or may not choose to rule on validity of the so-called "settlement agreement". As of now this is besides the point. It's not only appropriate but long overdue that we meet soon and engage in striking names. I see no reason for further delay. Unless your subordinate meets with me in good faith to strike names on or before Thursday 14 November 1990, I'll draw obvious conclusions and act accordingly with no further notice. I shall be happy to meet with your designated subordinate on any of the below dates at a reasonable time (8 AM - 4 PM).

Friday 11/9/90	Tuesday 11/13/90
Saturday 11/10/90	Wednesday 11/14/90
Monday 11/12/90	Thursday 11/15/90

I'm flexible and stand ready to act in good faith. It is a simple matter for your subordinate to schedule a meeting. Although I am sometimes away from my phone, I do clear all of my incoming phone calls every hour or so. Please advise.

I await a response. May I hear from you or your designate?

Gerhardt Steinke PHONE: 414-445-5565
4642 W Bernhard Place FAX: 414-447-0295
Milwaukee WI 53216

cc: Buffet, Craft, Fredricks, Hawks, Olson, Rivera, as indicated

On November 13, 1990, the Complainant again requested a meeting to strike arbitrators.

16. On March 20, 1991, Examiner Buffett issued an Order in Case 320 limiting the issues in said case to whether the Union and the District allegedly committed prohibited practices by their failure to respond to Complainant's inquiries regarding the Settlement Agreement. On June 15, 1991, the Complainant repeated his request to strike from the panel of arbitrators to hear his nonrenewal grievance. Apparently there was no response to this request and on July 2, 1991, the Complainant filed the instant complaint alleging that the District violated the agreement by its refusal to strike arbitrators.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

The District by its refusal to strike arbitrators has violated and continues to violate the terms of the collective bargaining agreement between the Union and the District and therefore has committed and is committing a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER 1/

IT IS ORDERED that the Milwaukee Area Vocational, Technical and Adult Education District, its officers and agents shall immediately:

1. Cease and desist from refusing to strike arbitrators related to the Complainant's grievance over his nonrenewal.

2. Take the following action which the Commission finds will effectuate the policies of the Municipal Employment Relations Act:

(Find footnote 1/ on page 7)

(a) Immediately meet with the Complainant and the Union and strike from the panel of arbitrators to select an arbitrator on Complainant's grievance over his nonrenewal.

(b) Notify the Commission within twenty (20) days of the date of this Order, in writing, of what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 21st day of February, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MILWAUKEE AREA VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

BACKGROUND

In his complaint initiating these proceedings, the Complainant alleged that the District violated the Municipal Employment Relations Act, presumably Sec. 111.70(3)(a)5, Stats., by refusing to strike arbitrators in accordance with Article IV, Section 4, Step 4 of the collective bargaining agreement. The District answered the complaint denying any and all allegations or assertions contained in the complaint.

Complainant's Position

The Complainant contends that in his nonrenewal letter of March 15, 1990, it states, "Pursuant to the current collective bargaining agreement, you may have this decision appealed . . . to arbitration..." He points out that the applicable collective bargaining agreement provided that he could act on his own to present a grievance including a right to invoke arbitration.

Complainant argues that the District presented much fallacious repetitive language to the effect that it did not really understand that Complainant was invoking his contractual rights to arbitration. He notes that the Union and the District with no written documentation but "a smile and a handshake" invoked step four arbitration on March 15, 1990. Complainant asserts that he filed a grievance and asked for a Step 3 hearing but the District and the Union stalled the matter until it became moot. The Complainant submits that Examiner Buffett ruled in October, 1990 that his nonrenewal should be handled independently by arbitration and thereafter he requested a panel of arbitrators from the Wisconsin Employment Relations Commission. The Complainant asserts that Step 3 died in 1990 and despite the lack of reference to Vance on his many requests to strike arbitrators, the Complainant asserts that the District was given extremely clear demands to strike from the panel and his requests were ignored. The Complainant asserts that the District is falsely asserting that "minor procedural problems" on Complainant's part prevented the District from striking arbitrators. The Complainant asserts that justice delayed is justice denied and that there is no excuse for the District not to meet to strike off arbitrators. The Complainant asks for an Order that the District immediately meet with Complainant to select an arbitrator to conduct a hearing on his nonrenewal.

District's Position

The District contends that it had no obligation to strike arbitrators until Complainant advised it that he desired to waive the third step grievance hearing or agreed to schedule the third step hearing. It submits that the Complainant hindered and obstructed the process by his failure to exhaust his internal grievance procedures. It claims that the District from day one was willing to go to arbitration on the grievance and the Union on the evening of March 15, 1990 waived the third step grievance hearing but the Complainant initiated a third step grievance. It submits that the Complainant asserted he needed certain records and never responded to requests about scheduling the third step grievance hearing and nearly five months later requested the District to strike arbitrators. The District points out it immediately advised the Complainant he needed to waive the third step hearing or complete said hearing before the parties could select an arbitrator. It submits that the Complainant failed to respond to its letter for nearly eight months and the response was the instant complaint. The District maintains that the only impediment to selecting an arbitrator to hear Complainant's nonrenewal grievance has been Complainant's failure to exhaust his contractual grievance procedure which was to either waive the third step hearing or advise the District to proceed with the third step hearing.

The District insists that it has not violated Article 4 Section 4 because the third step has not been completed and the parties cannot reach Step 4. It claims that the grievant never waived the third step and thus cannot go to Step 4. It submits that an employe who has failed to exhaust the contractual grievance remedies cannot maintain that the employer violated the contract. It argues that the Examiner should dismiss the complaint, otherwise every municipal employe would be invited to skip all of the grievance steps in a contract and proceed directly to arbitration. It claims that this would undermine the purpose of the grievance procedure and cause a flood of prohibited practice charges. The District alleges the Complainant has failed to prove by a clear and satisfactory preponderance of the evidence that a violation of Sec. 111.70(3), Stats., has occurred. The District asks that the complaint be dismissed on the grounds that the Complainant failed to adhere to the contractual procedures.

DISCUSSION

Article IV, Section 2 provides that employes may file grievances on their own behalf. There is no dispute that the Complainant and District struck arbitrators on grievances A, B, C and D, so the parties were not in disagreement on this point. Article IV, Section 2(c) states that the Union has the right to be present at any step of the procedure when an employe chooses to process a grievance on his/her own behalf. In the instant case, it is undisputed that the Union waived the third step hearing on the evening of March 15, 1990. The Complainant however indicated on March 16, 1990 that he intended to file a third step grievance and did so on March 29, 1990. No one disputes that the Complainant could process his own grievance at Step 3. There were a number of delays in scheduling the third step hearing in that the Complainant had requested certain documents and indicated he could not proceed with a meaningful hearing without these documents. On September 11, 1990 in a prohibited practice complaint before Examiner Buffett, the Complainant sought to amend the complaint before her to include his nonrenewal. Examiner Buffett ruled that the nonrenewal would not be included in the complaint before her. Thus, it appears that the initial delays involving Step 3 were, in part, the Complainant's fault.

On October 9, 1990, the Complainant requested a panel of arbitrators to hear his grievance over his nonrenewal. On March 26, 1990, the Commission Chairman sent the panel of arbitrators pursuant to the October 9, 1990 request. On October 27, 1990 in a letter addressed to Dr. Barbara Holmes, Complainant asked to strike arbitrators and on November 5, 1990 made the same request. On November 7, 1990 Mr. Paul Vance responded inquiring whether Complainant intended to waive the third step of the grievance procedure. It would seem apparent from the Complainant's request for a panel and by the letter requesting that the District meet to strike arbitrators that the Complainant was waiving the Step 3 hearing. The grievance procedure need not be exhausted where to do so would be futile or useless or an idle gesture. 2/ Here given the delay and waiver by the Union and suggested waiver by the District, it would appear that the request for a panel constituted an implied waiver.

In any event, by a letter dated November 8, 1990 to Dr. Barbara Holmes the Complainant stated as follows: "For reasons clearly outlined in previous documents, I shall wave (sic) Step 3." Thus, the third step hearing was clearly waived and the Complainant had complied with the contractual grievance procedure to proceed to Step 4, arbitration. The Complainant sought to strike arbitrators pursuant to the November 8, 1990 letter as well as again by requests on November 13, 1990 and again on June 15, 1991. The evidence fails to establish that the District responded to these requests.

I conclude that after November 8, 1990, the Complainant had waived Step 3 and was ready and willing to proceed to Step 4, and the District's refusal to strike arbitrators violated the terms of the parties' collective bargaining agreement which, in turn, constituted a violation of Sec. 111.70(3)(a)5, Stats. Having concluded that the District violated Sec. 111.70(3)(a)5, Stats., the Examiner has directed the District to comply with the collective bargaining agreement and meet with Complainant and strike arbitrators.

Dated at Madison, Wisconsin this 21st day of February, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

2/ Elkouri & Elkouri, How Arbitration Works (4th Ed., 1985) at 205.

By _____
Lionel L. Crowley, Examiner