STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EUGENE A. HEM, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS, and MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Respondent.	Case 279 No. 49157 MP-2725 Decision No. 27698-B

Appearances:

Mr. Eugene A. Hem, 43 West Grand, Chilton, Wisconsin 53014, appearing pro se.

Perry, Lerner & Quindell, S.C., by Mr. Richard Perry, 823 North Cass Street, Milwaukee, Wisconsin 53202, appearing on behalf of Respondent Association.

Mr. Thomas Beamish, Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202, appearing on behalf of Respondent Board.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTIONS TO DISMISS

Eugene A. Hem, an individual, filed a complaint on April 14, 1993 with the Wisconsin Employment Relations Commission, alleging that the Milwaukee Board of School Directors had violated Sec. 111.70, Wis. Stats., by disciplining him and that Milwaukee Teachers' Education Association had violated Sec. 111.70, Stats., by representing him in bad faith in disciplinary proceedings. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Wis. Stats. Hearings were held in Milwaukee, Wisconsin on September 21 and November 10, 1993 and on July 14 and 15, 1994. During the fourth day of hearing, both Respondents filed Motions to Dismiss the proceeding. Complainant was permitted to file an Offer of Proof of any further testimony he wished to present, and a briefing schedule was established. The record with respect to the Offer of Proof and Motions was closed on October 16, 1994. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order Granting Motions to Dismiss.

FINDINGS OF FACT

1. Eugene A. Hem is an individual teacher employed as a teacher of science by the Milwaukee Board of School Directors, and has his address at 43 West Grand, Chilton, Wisconsin 53014.

2. Milwaukee Teachers' Education Association is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., and has its principal office at 5130 West Vliet Street, Milwaukee, Wisconsin 53208. Nancy Costello is a Business Representative of Milwaukee Teachers' Education Association and is its agent.

3. Milwaukee Board of School Directors is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats. and has its principal office at 5225 West Vliet Street, Milwaukee, Wisconsin 53208.

4. At all times material to this proceeding, Respondent Association has been the certified exclusive bargaining representative of the following unit of employes employed by Respondent Board:

> All regular teaching personnel (hereinafter referred to as teachers) teaching at least fifty percent of a full teaching schedule or presently on leave, as well as those teaching on a regular part-time basis less than fifty percent of a full teaching schedule, including guidance counselors, school social workers, teacher-librarians, traveling music teachers and teacher therapists, including speech pathologists, occupational therapists and physical therapists, community recreation specialists, activity specialists, music teachers 550N who are otherwise regularly employed in the bargaining unit, team managers, clinical educators, speech pathologists, itinerant teachers, diagnostic teachers, vocational work evaluators, community human relations coordinators, human relations curriculum developers, mobility and orientation specialists, community resource teachers, program implementors, curriculum coordinators and Montessori Coordinators, excluding substitute per diem teachers, office and clerical employees, and other employees, supervisors and executives.

5. Complainant's complaint alleges that Respondent Board disciplined him in violation of the collective bargaining agreement on several occasions and that Respondent Association represented him in bad faith on each and every one of those occasions. On the first day of hearings in this matter, on September 21, 1993, a Motion to Dismiss was granted with respect to acts which took place prior to April 14, 1992. The Examiner permitted Complainant to proceed to present evidence with respect to allegations of violation of Sec. 111.70 by either Respondent concerning two incidents, defined at that time as "allegations surrounding the Board's handling and the Union's handling of a three-day suspension which began with an allegation against Mr. Hem dated January 30, 1992, or there abouts, and allegations against the Board and Union concerning an incident which began on or about January 15 of 1993 and which resulted in a letter of some kind in his file. (September 21, 1993 transcript, pages 57-58). Complainant proceeded to call witnesses and all parties offered exhibits totaling approximately 100 documents, many of which are individually of considerable length. During the ensuing four days of hearing, five witnesses testified, totaling 601 pages. The record reveals that on numerous occasions, Complainant engaged in repetitive questioning on the same issues despite

sustained objections to said repetition. The record further reveals that on numerous occasions, Complainant engaged in repeated questioning concerning matters which had already been ruled to be irrelevant or immaterial. On the fourth day of hearing, Respondent Union moved to dismiss the proceeding on the grounds that Complainant had adduced no evidence demonstrating any violation of the statute. Complainant thereupon indicated an intention to testify personally. Complainant was invited to present such testimony at that time. Complainant refused to present his testimony unless represented by an attorney. The record is devoid of evidence that until that time, Complainant had made any significant effort to obtain an attorney. Complainant was instructed by the Examiner to prepare and present an Offer of Proof with respect to any further testimony he wished to offer, and was afforded an opportunity to prepare such Offer of Proof at that time. Complainant refused to present the Offer of Proof orally at the hearing. Complainant was offered an opportunity to present direct testimony or an offer of proof orally with the Examiner reserving any right to cross-examination of Complainant by the other parties until after Complainant had had further opportunity to secure an attorney.

Complainant refused to proceed in this manner. Complainant was then given an opportunity to present his Offer of Proof in writing, and a briefing schedule was established to permit the other parties to respond to the Offer of Proof, and to permit Complainant to reply to the responses. Prior to the adjournment of the hearing, Respondent Board also made a Motion to Dismiss the Complaint, on the same grounds as the Motion made by Respondent Association.

6. Complainant's Offer of Proof was timely filed on August 15, 1994, and includes 99 typed pages and 5 other pages. The Offer of Proof is headed by a completed copy, with Notice of Service, of an application for copyright of said document as a literary work, filed with the United States Copyright Office under the title "Rumble". The last of the responses to said Offer of Proof was filed on September 16, 1994, and the time period for further responses expired on October 16, 1994. Up to the date of this decision, no notice of appearance of an attorney representing Complainant has been filed.

7. The record as a whole fails to reveal that further proceedings in this matter would be substantially about the litigation of and oral argument on genuine issues of fact or law raised by the parties and remaining for disposition, within the meaning of Sec. ERB 12.04(1) of the Commission's Rules. The record as a whole demonstrates that further proceedings in this matter would consist essentially of irrelevant, immaterial, or unduly repetitious evidence within the meaning of Rule ERB 10.18. The record further demonstrates that Complainant has engaged in contemptuous conduct at a hearing within the meaning of Rule ERB 2.15. The record, including Complainant's Offer of Proof, fails to demonstrate any likelihood that further proceedings will generate probative evidence demonstrating by a clear and satisfactory preponderance of the evidence that either of Respondents has committed any act violative of any Section of 111.70, Stats.

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

CONCLUSIONS OF LAW

1. By his contemptuous conduct at a hearing, Respondent has warranted exclusion from further hearing within the meaning of Rule ERB 2.15 of the Wisconsin Administrative Code.

2. The facts adduced by Complainant, and the Offer of Proof filed by him, have demonstrated that further proceedings would involve the admission primarily of irrelevant, immaterial and unduly repetitious evidence within the meaning of Rule ERB 10.18 of the Wisconsin Administrative Code.

3. Rule ERB 12.04, Hearings, in its subsection 1, Scope, by requiring that "Hearings shall be limited by the commission, commission member, or examiner, as the case might be, to the litigation of and oral argument on genuine issues of fact or law raised by the parties and remaining for disposition", requires that this proceeding now be terminated.

4. Nothing in the record demonstrates by a clear and satisfactory preponderance of the evidence that either of the Respondents has committed any violation of Sec. 111.70, Wis. Stats., and nothing in Complainant's Offer of Proof establishes probable cause to believe that further proceedings would demonstrate such a violation.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER GRANTING MOTIONS TO DISMISS 1/

It is ordered that the Motions filed by Respondent Association and Respondent Board to dismiss the complaint be, and the same hereby are, granted, and the Complaint is hereby dismissed.

Dated at Madison, Wisconsin this 16th day of December, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Christopher Honeyman /s/
Christopher Honeyman, 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

(Continued on page 5)

1/ (Continued)

> 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

MILWAUKEE PUBLIC SCHOOLS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTIONS TO DISMISS

Background

The Complaint alleges, in essence, that the Board violated various Sections of Sec. 111.70, Stats., by disciplining Complainant on several occasions starting in 1990, and that the Association violated the same sections by representing the grievant in bad faith in these disciplinary proceedings and the resulting grievances. The complaint, a considerably garbled document, was clarified on the first day of hearing by explanations by the Complainant of its meaning, by Motions to Dismiss, and by subsequent arguments from all parties, totalling approximately the first 70 pages of the transcript. At that time I

granted a motion to dismiss a considerable portion of the subject matter of the complaint as untimely, and determined that what remained to be tried as a case were allegations surrounding the Board's handling and the Union's handling of a three-day suspension which began with an allegation against Complainant on January 30, 1992, or about that date, and allegations against the Board and Association concerning an incident which began on or about January 15 of 1993, which resulted in a disciplinary letter in his file. The parties were cautioned at the outset of the hearing that since Complainant was an individual, unrepresented by an attorney, and facing attorneys of significant experience on the other side, considerable latitude would be allowed to permit the Complainant to get across the substance of his case without undue attention to the more technical requirements.

The hearing has consumed four days, spread over an unusually large number of months because of requests for adjournment received at various times from all three parties. As the proceeding continued, the number of objections received to repetitive, cumulative and irrelevant evidence began to mount, and Complainant was frequently instructed to move on to more probative and non-repetitive matters. On the third day of hearing, Complainant was advised by me in response to a series of objections to his questioning that such questioning could not be allowed to continue indefinitely, even though he vigorously protested that he had matters not yet in the record to bring forth. On the fourth day of hearing, both Respondents filed Motions to Dismiss on the grounds that Complainant had been given substantial opportunity to present probative evidence, had failed to produce any evidence demonstrating any likelihood of a violation of the Statute by either Respondent, and showed no signs of doing so in the future. Complainant expressed at that time a wish to testify personally, which was granted, but then refused to testify unless represented by an attorney. This refusal continued after Complainant was given an opportunity to make a direct sworn statement in the capacity of witness, with any cross-examination to be deferred until after he had had an opportunity to obtain an attorney. Complainant was then instructed to make an Offer of Proof orally with respect to all further testimony and other evidence he might wish to adduce in support of the complaint. Complainant refused to do so. Complainant was then given an opportunity to present his Offer of Proof in writing, with a briefing schedule thereupon established.

Discussion

All of the testimony received in this matter through four days of hearing was presented by witnesses called by Complainant, but adverse to him. The facts which can be established at this time are therefore found as fact only where they are convincingly testified to or otherwise shown in documents, and not apparently controverted as to their factual nature (as distinct from their underlying meaning) by Complainant in his Offer of Proof. Amid a welter of allegedly factual material, the following appear to be relevant.

Complainant has been employed by the Milwaukee Public Schools as a Science teacher for approximately 31 years. At least since 1990, he has several times been accused by students in his racially mixed classes of making racially and sexually derogatory comments, and of other conduct considered to be misconduct by the District. The District has several times brought charges against him for such acts, some of which were found to be untimely as the subject of the complaint on the first day of hearing. Respondent Association has represented Complainant on each occasion, and Complainant has been dissatisfied with the quality and extent of that representation.

The sum and substance of an unusually large amount of testimony is that there is no evidence presently in the record that the Association or the Board did anything beyond the ordinary in either's handling of the disciplinary incidents or the grievances related thereto. All of the testimony is to the effect that the District followed its normal procedure, and that the

Association in turn followed its normal procedure. Nothing in the evidence adduced in these four days demonstrates any dereliction of duty to represent fairly on the part of the Association, or any conduct which I can recognize as suggesting, let alone establishing, a violation of any section of the Municipal Employment Relations Act by the District. Complainant's Offer of Proof can most honestly be described as a prolonged, garbled, and confused document which is on its face concerned largely with matters already found to be irrelevant during the hearing. Nothing in that document generates any confidence on my part that further hearing in this matter would produce evidence of a violation of the Municipal Employment Relations Act by either Respondent.

Yet because a ruling of this kind is now made at a point where it constitutes a ruling on Motions to Dismiss, rather than upon the fullest and most complete record which Complainant still desires to adduce, something more must be added. A phrase which is much bandied about in jurisprudence is the concept of the "day in court." I believe that the underlying purpose of the "day in court" idea is a noble one: that a party charging wrongdoing by someone, frequently an opponent more powerful and better represented than the party making the charge, must be given a fair opportunity to make his or her case. The concept, however, must be honored with certain limitations. Fundamentally, these limitations address the rights of the opposing parties not to be dragged into litigation over matters for which little or no evidentiary or legal support can be mustered, simply because someone is dissatisfied with them. A balance must be struck between the fair opportunity to have one's say, and the potentially abusive result of allowing that say to go on to the complainant's definition of satisfaction.

Both Respondents here have now protested that this proceeding has gone on too long. Upon review of the record, I agree. First, there is, as noted above, nothing established in the record to date which demonstrates a violation, or even the suggestion of a violation. That alone might be understandable given Complainant's choice of trial tactics, namely to call only witnesses whom he clearly identified as adverse to himself. Complainant's Offer of Proof, however, does not improve his chances. Overall, I simply cannot follow its reasoning to conclude from that document any chain of logic, according to the system of logic with which I am familiar, which would show any prospect that by proceeding to prove the matters contained in that document Complainant could establish by a clear and satisfactory preponderance of the evidence any violation of MERA whatsoever by either Respondent. Further, the above-noted confused and garbled nature of Complainant's presentation make it extremely unlikely that further hearing would produce probative evidence.

In the context of the motions to dismiss, I must note further that several of the Commission's Rules come into play. These are:

> ERB 2.15 Contempt. Contemptuous conduct at a hearing shall be grounds for exclusion from the hearing.
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> ERB 10.18 Powers of Individuals Conducting Hearings. Individuals conducting hearings shall have the authority to take the following action, subject to these rules within the Commission's power:
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> . . .
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> 3. To rule upon offers of proof, receive relevant evidence, and exclude irrelevant, immaterial, or unduly repetitious evidence;
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> . . .
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> ERB 12.04 Hearings. (1) Scope. Hearings shall be

> limited by the commission, commission member, or examiner, as the case might be, to the litigation of and oral argument on genuine issues of fact or law raised by the parties and remaining for disposition.

Complainant's conduct requires me to apply all three of these rules. First, the repetitive raising of subjects already dismissed from the proceeding, including personal relationships among members of management or of the Association, as well as matters found untimely, and the like, requires the application of Rule ERB 12.04(1). Complainant was repeatedly warned about continuing to raise these matters prior to the time that the Motions to Dismiss were made. Second, Complainant's Offer of Proof appears to include largely material of the character discussed in Rule ERB 10.18(3), i.e., irrelevant, immaterial or unduly repetitious evidence. In particular in this context, I note that Complainant has utterly failed to explain why he continues to charge the Association with failure to represent him as to the most significant disciplinary incident found timely, namely a three-day suspension issued in 1992. Complainant's Offer of Proof does not explain in any logical way any reason to discount any of the evidence convincingly adduced in the record to date with respect to the Association's handling of his grievance related to that incident. The record evidence is all to the effect that the Association processed the Complainant's grievance until a step in the appeal process at which the Complainant himself explicitly instructed the Association to withdraw the grievance, stating that he would accept the three-day suspension because he needed the time anyway to use in his campaign to be elected President of the United States.

Finally, this is that rare proceeding in which some application must be given to rule ERB 2.15, lest the entire concept of contemptuous conduct lose any meaning before the Commission. Complainant has repeatedly refused to follow instructions from the Examiner to proceed to new subject matter and to avoid intemperate personal remarks directed at the other parties. But in particular, two events constitute contemptuous conduct within the meaning of ERB 2.15, as I interpret that rule. The first is Complainant's intransigent refusal to proceed as instructed at the fourth day of hearing, at which time he was required to present an Offer of Proof and refused to do so. My subsequent allowance of a written Offer of Proof does not vindicate Complainant's conduct, but is rather an attempt to ensure that the record is as complete as possible under the circumstances. The second instance is literally on the face of Complainant's written Offer of Proof, which constitutes an application for copyright to the United States Copyright Office as a literary work under the title "Rumble". This I can interpret only as an act exemplifying the term "frivolous"; though a term often over-used by litigants, in this instance I can think of no more appropriate term. I believe that Rule ERB 2.15's reference to "contemptuous conduct" includes concepts related to frivolous litigation, as well as to conduct engaged in during an adjournment of a hearing, particularly in a document which by its nature replaced the oral Offer of Proof at hearing which Complainant had been instructed to give and had refused to give.

For all of these reasons, I find both Respondents' Motions to Dismiss to be amply merited, and have therefore dismissed the complaint.

Dated at Madison, Wisconsin this 16th day of December, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Christopher Honeyman /s/
Christopher Honeyman, Examiner