STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARK J. BENZING, Complainant, vs. BLACKHAWK VOCATIONAL, TECHNICAL & ADULT EDUCATION DISTRICT, Respondent.	Case 54 No. 50320 MP-2844 Decision No. 28083-C
MARK J. BENZING, Complainant, vs. BLACKHAWK VOCATIONAL, TECHNICAL & ADULT EDUCATION DISTRICT, Respondent.	Case 56 No. 50677 MP-2866 Decision No. 28084-C

Appearances:

Mr. Mark J. Benzing, 2022 Dewey Avenue, Beloit, Wisconsin 53511 pro se.

Godfrey & Kahn, S.C., 131 West Wilson Street, Suite 202, P.O. Box 1110, Madison, Wisconsin 53701-1110, by Mr. Jon E. Anderson, on behalf of the Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINTS

On January 7, 1994 Complainant Mark J. Benzing filed a complaint against Blackhawk Vocational, Technical & Adult Education District in Case 54, No. 50320, MP-2844, later amended on March 2, 1994. On March 13, 1994, Complainant filed a complaint against Respondent in Case 56, No. 50766, MP-2866. On April 12 and 18, 1994, respectively, Respondent filed Motions

to Make These Complaints More Definite and Certain and on April 18th Respondent also filed a Motion to Consolidate the captioned cases which Complainant opposed by his letter received on May 11, 1994. On April 14, 1994 the Commission appointed Sharon A. Gallagher, a member of its staff, to act as Examiner in Case 54, No. 50320, MP-2844. On June 7, 1994, Complainant filed a Second Amended Complaint in Case 54, No. 50320, MP-2844. On June 20, 1994, the Commission issued its Order Consolidating these cases. On June 28, 1994, the Commission issued its Order appointing Sharon A. Gallagher to act as Examiner in Case 56, No. 50677, MP-2866. On April 25, 1994, Complainant filed a written opposition to Respondent's Motion to Make the Complaints More Definite and Certain. On July 15, 1994 the Examiner ordered Complainant to make his complaints more definite and certain, following Respondent's April 25, 1994 Motion thereon. On July 26, 1994 and August 8, 1994 Complainant complied with the Examiner's July 15th Order. On August 8, 1994 Respondent renewed its Motion to Dismiss and filed a Motion to Defer to Arbitration the complaint allegations of Sec. 111.70(3)(a)5 violations. By August 31, 1994 Complainant filed a response to Respondent's Motions. By September 7, 1994 Respondent filed its answer to these consolidated complaints. On September 23, 1994, the Examiner issued her Order to compel Benzing to make his complaints more definite and certain and her Order granting in part BTC's Motion to Dismiss allegations in the complaints that BTC violated State Statutes not administered by the WERC.

Several hearing dates were scheduled in 1994 in this case, however due to illness in Respondent Counsel's family, the hearing Examiner's family and the illness of the Complainant, these various dates were cancelled. The first day of hearing was held on January 24, 1995 at Janesville, Wisconsin. A stenographic transcript of those proceedings was made and received by the Examiner on March 7, 1995. At the first day of hearing, the Examiner granted BTC's Motion to Dismiss any allegations that BTC had violated Sec. 111.70(3)(a)5, Stats., as the April 7 and June 7, 1993 disciplinary actions had been fully processed through the grievance procedure. The hearing continued on October 17, 1995 (by mutual agreement of the parties) at Janesville, Wisconsin. Both the Examiner and Respondent Counsel were present at that time. However, Complainant did not appear for hearing on that day indicating by telephone call to Respondent Counsel that he was not well enough to proceed. On October 17, 1995 Respondent moved to dismiss the complaints but that Motion was denied by the Examiner, and the hearing was then adjourned due to the absence of Benzing.

The hearing resumed on October 23, 1995, and Benzing completed putting in his case in chief. Respondent renewed its Motion to Dismiss the Consolidated Complaints at the close of Complainant's case in chief. The Examiner granted that Motion after hearing oral arguments from both parties on the Motion. The Examiner summarized her reasons therefor on the record, but stated that she would issue formal Findings of Fact, Conclusions of Law and Order of Dismissal after both parties had had a full opportunity to submit briefs thereon. A stenographic transcript of continued proceedings was made and received by November 27, 1995. Benzing submitted a September 29, 1995 Motion to Amend Complaint in Case 56, an October 19, 1995 Amendment to Consolidated Complaints in Cases 54 and 56, and three Motions to Amend the Record/Transcript were received by the Examiner on November 29, November 30, and December 22, 1995 respectively. A "Motion to Reconsider Judgement" and a Motion to "Reconsider Order Dismissing

Complaint" dated November 10, 1995 and May 10, 1996, respectively, were also received by the Examiner. Regarding the Motions filed after the close of the October 23, 1995 hearing, the Examiner wrote to the parties indicating that she would deal with these Motions in her formal decision herein. The Respondent resisted each of these post-hearing Complainant Motions in writing. The parties submitted their post-hearing briefs by February 16, 1996 and the record was closed on June 4, 1996 upon receipt of Complainant's last Motion to Amend Complaint (filed May 23, 1996) and Respondent's written response thereto. On September 16, 1996, Benzing filed another Motion to Reconsider Decision. On September 24, 1996, the Examiner advised the parties that Respondent need not respond to Benzing's Motion as she would not consider this Motion and that her decision would be issuing soon. 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, Conclusions of Law and Order.

FINDINGS OF FACT

1. Mark J. Benzing (Benzing or Complainant) is an individual who has, since 1990, been employed by Blackhawk Technical, Vocational & Adult Education District and he is therefore an employe within the meaning of Sec. 111.70(1)(i), Stats. Complainant's address is 2022 Dewey Avenue, Beloit, Wisconsin 53511.

2. Blackhawk Technical, Vocational and Adult Education District (BTC or Respondent) is a municipal employer within the meaning of Section 111.70(1)(j), Stats., and has its offices located at 6004 Prairie Road, Janesville, Wisconsin 53547.

3. The statute of limitations periods relating to Cases 54 and 56 are January 6, 1993 through January 7, 1994 and March 1, 1993 through March 2, 1994, respectively. The April 7 and June 7, 1993 disciplinary action taken against Complainant fall within the statute of limitations periods in these cases. Any and all actions/events involving Complainant and Respondent (and/or its agents) which occurred before January 6, 1993 and after March 2, 1994 are outside the relevant statute of limitations periods covered by these cases.

4. Russ Stevenson is not a supervisor within the meaning of Sec. 111.70(1)(o), Stats., and he is therefore not an agent of Respondent. Dr. James Catania, Jeff Amundson, Richard Borremans and Alan Ferguson were at all times relevant to these cases, supervisors of BTC within the meaning of Sec. 111.70(1)(o), Stats., and they are therefore agents of Respondent.

5. During all times relevant herein, Complainant worked for BTC as a custodial employe on the 11:00 p.m. to 7:00 a.m. shift and is a member of the bargaining unit covered by the 1992-95 collective bargaining agreement between BTC and Blackhawk Technical College/ Paraprofessional Technical Council, WEAC, NEA, hereafter Union. The 1992-95 labor agreement provides for final and binding arbitration of disputes arising thereunder and it also contains the

following provisions under Article V - Grievance and Complaint Procedure, Section 2 - General Applications:

. . .

4. Employees shall have the right to present their grievances without fear of any penalty.

. . .

8. The concept of "work now and grieve later" shall apply unless the employee's immediate health or safety is endangered.

6. The labor agreement also contains the following provisions which pertain to the grievances filed by Complainant regarding the discipline he received for his actions of March 16, 1993 and May 14, 1993:

ARTICLE 9 -- FAIR DISCIPLINE, DISMISSAL

. . .

In administering discipline short of suspension or discharge, the Employer shall not act in an arbitrary or capricious manner. Non-probationary employees shall not be suspended or discharged without just cause.

. . .

ARTICLE 16 -- SICK LEAVE

. . .

Section 4 - Use

A. If an employee is unable, for any reason, to report to work on any scheduled shift, it shall be the responsibility of that employee to notify, personally or by telephone, his/her immediate supervisor, prior to the time he/she was to report to work on such scheduled shift.

. . .

D. Sick leave benefits under this provision shall be paid to the employee on sick leave only for the actual work days missed due to medical inability to perform his/her normal duties or sick leave taken for illness in the immediate family (spouse and child).

Section 5 - Regulation

The District may require a doctor's statement or other pertinent evidence as proof of a valid absence for absences allowed under this Article where the District has reason to believe there has been an abuse of sick leave benefits. An employee shall not receive any sick leave benefits for any day that such employee abuses the benefits of this Article. Abuse of the sick leave provision shall subject the employee to discipline.

. . .

SIDE LETTER #3

CUSTODIAL/MAINTENANCE OVERTIME

When work to be performed on overtime is part of an employee's regular job duties, such overtime work shall be offered first to that employee.

Should said employee decline such overtime work for reasons acceptable to the employer, such work shall be offered by seniority on a rotating basis as per the procedure specified below.

When scheduled overtime work is not part of the regular job duties of a specific employee (i.e. consists of general duties, additional assignments, coverage of special events, etc.), such overtime shall be offered by seniority on a rotating basis within the department.

The employer shall maintain a list of all employees in each department (custodial and maintenance), by seniority, starting with the most senior. When a scheduled overtime opportunity is

> presented, the employer shall contact the most senior employee on the appropriate list. If the overtime is refused, the employer shall contact the next person on the list. Future scheduled overtime opportunities will be offered to employees in the order established by the lists, starting from the employee following the employee last working overtime.
>
> Notwithstanding the above, the employer reserves the right not to offer maintenance overtime work to a maintenance employee who is not qualified to perform that work.
>
> Should all employees on the affected list refuse overtime, the District may assign the work. No employee may be assigned to work more than ten (10) hours of mandatory overtime in any one week except in an emergency or extenuating circumstances.

7. In response to complaints made by Benzing and fellow employe Jesus Barbary, on February 12, 1991, BTC and the Union agreed to conduct a study of custodial employe work area sizes. On April 19, 1991, the Joint Work Committee Study (made up of two managers and two bargaining unit members) concluded that custodial work areas and work assignments should stay the same, as the assigned areas were "appropriate considering the responsibilities of all custodial personnel on the various shifts." Both Barbary and the Complainant sought to file grievances regarding the results of this in-house Work Study on the grounds that the Study had not been done in good faith and had not been done by neutral parties. The Union refused to file such a grievance.

8. In September, 1992 Complainant was suspended for thirty days for using improper judgement in utilizing Consolidated Food Services goods. The Complainant filed a grievance and the Union represented him in that case. The Union and BTC negotiated a reduction in the discipline meted out, from a thirty day suspension to a five day suspension. Complainant signed a settlement agreement regarding this grievance which Complainant stated did not, in his view, constitute a true settlement agreement but merely constituted an acknowledgement that Respondent had taken disciplinary action against him.

9. On August 8, 1991 Complainant and Jesus Barbary filed a prohibited practice complaint (Case 50, No. 46915, MP-2558) against the Union (later amending the complaint to add BTC as a Respondent), alleging that the Union had violated its duty to fairly represent Barbary and Complainant by its participation in the 1991 in-house Joint Work Study Committee, by the results produced by that Committee and by the Union's decision not to file a grievance on behalf of Barbary and Complainant regarding the alleged lack of fairness of the 1991 Work Study and the lack of neutrality of the Union (and management) Committee members. In Case 50, the complaint also alleged that certain statements made to Barbary by then-Union official Steigman at a

February 1, 1991 custodial staff meeting conducted by supervisors Borremans and Jeff Amundson violated the Act. On July 17, 1992, WERC Hearing Examiner Crowley dismissed the complaint in Case 50 in its entirety, finding no violations of Section 111.70(3)(b)1 or 4, Stats., and therefore finding that he had no jurisdiction to proceed further on the Section 111.70(3)(a)5, Stats., allegations Barbary and Complainant had made against BTC (Decision No. 27140-C). Barbary and Complainant appealed Crowley's decision to the WERC but Barbary later sought dismissal of his portion of the complaint while his appeal was pending before the Commission as part of a settlement agreement he entered into regarding an Equal Rights Division complaint he had filed against BTC. On February 8, 1993 the Commission dismissed the portion of the Case 50 complaint relating to Barbary based upon his request therefor and considered and decided the merits of Complainant's appeal. The Commission affirmed Examiner Crowley's Findings of Fact, Conclusions of Law and Order regarding Complainant (Decision No. 27140-D). Complainant appealed the Commission's decision in Rock County Circuit Court; on August 16, 1993, but that court dismissed Complainant's Petition for Review because Complainant had failed to serve a copy of his Petition for Review upon the Union (Decision No. 27140-E).

10. On March 12 and March 28, 1993 Complainant filed two grievances, both of which objected to the results of the 1991 Work Study. In response, the Union negotiated with Respondent to have a second Work Study performed by a neutral third party and the Union sought and received the signatures of all seven unit custodians on an agreement to this effect before the second Work Study was conducted. The agreement signed by the custodians detailed how the second Work Study would be set up and conducted, what the results would be used for, and it stated that the results would be binding on all parties to the agreement. Before this second Work Study was agreed upon and conducted by the neutral third party, Benzing and Barbary were transferred, at their request, to new smaller work areas which had become available at BTC. The second Work Study was conducted by Jack Dudley, sometime after the filing of the WERC Case 50 by Complainant and Jesus Barbary. After the second Work Study was completed, BTC hired a part-time custodian to help out on the night shift.

11. On April 7, 1993 the Complainant received a written reprimand and Respondent docked Complainant one day's pay for his absence from his regular 11:00 p.m. to 7:00 a.m. shift on March 16 - 17, 1993. Complainant had been subpoenaed to testify by Jesus Barbary, the plaintiff in a civil defamation suit against fellow BTC custodian Steigman, beginning at 9:00 a.m. on March 17, 1993. (BTC was not a party to this civil law suit). After having received the subpoena, Complainant had attempted to use a personal leave day on March 16, 1993 but Complainant later requested to use sick leave for that day. Complainant filed a grievance regarding BTC's disciplinary action which the Union took to arbitration before Arbitrator Edward B. Krinsky. On June 1, 1994, Arbitrator Krinsky issued an award in favor of the Union which ordered BTC to "remove the reprimand" from Complainant's file "and to pay him the amount which it docked" from Complainant's pay for his absence on March 16, 1993. In his decision, Arbitrator Krinsky observed as follows, in ruling on the merits of the case and regarding BTC's argument that Complainant in

the grievance hearing was not a believable witness:

. . .

> The Employer may be correct, in some or all respects, that the Grievant is not a credible witness. The Arbitrator does not have confidence that he (Complainant) is a credible witness. . . . He did not leave the Arbitrator with the impression that he was forthcoming or particularly cooperative in responding to questions. However these things are all beside the point. In this proceeding the Employer has the burden of showing that the Grievant abused his sick leave when he took it on the evening in question, and the Employer has not met that burden. . . .

BTC fully complied with the Arbitrator's order. Between March, 1993 and June, 1993 (when the 1992-95 collective bargaining agreement was finally executed), the Union and BTC negotiated and ultimately agreed to change the personal leave language of the contract to allow night shift custodians to take four hours of personal leave at the start or end of their shifts. This agreement essentially settled grievances filed by Complainant and by Barbary regarding BTC's previous denial of personal leave to night shift employes.

12. On June 7, 1993, Complainant was disciplined because of an incident which occurred on May 14, 1993 in which Complainant had failed to report to BTC for a mandatory training session. BTC gave Complainant the following letter, dated June 7, 1993, regarding this disciplinary action:

> This letter is to notify you that you are being suspended for six (6) work days. The reason for this suspension is for using improper judgement and insubordination in not reporting to work on May 14, 1993 after being specifically directed to do so by your supervisor.
>
> On May 4, 1993 you were notified by memo from your supervisor, Jeff Amundson, that you were required to attend two (2) half-day training sessions scheduled for May 14 and May 17, 1993. The memo stated that the "sessions are mandatory and everyone is expected to attend". On May 13, 1993, the evening before the first training session, you called your supervisor and indicated you had a conflict and would not attend the training. Your supervisor indicted to you that the training is mandatory and instructed you to attend. On May 14, 1993 you did not attend the training. During our discussion with you regarding this incident, you indicated that you did not feel you could be required to work overtime under the labor contract.

> Your failure to report to work as instructed constitutes poor judgement and insubordination on your part. Such behavior is not acceptable. As a result of your actions, you are hereby reprimanded and will be suspended for six (6) work days.
>
> This action is being taken to impress upon you the seriousness of these violations and to impress upon you the need for you to use proper judgement in reporting promptly to work and the need for you to follow the instructions of your supervisor. In the future you are expected to conform your behavior to the directives of your supervisor. Any question you may have regarding application of the labor agreement may be addressed with your union representatives or the Personnel Office. The fact that there may be a question in your mind regarding provisions of the labor agreement does not allow you to disregard the instructions of your supervisor.
>
> This is the third incident of inappropriate behavior on your part within a ten (10)-month period of time, and the second incident in the last two (2) months of not following the direct instructions of your supervisor. In September, 1992, you were suspended for five (5) days for improper judgement in utilizing goods from Consolidated Food Services. In April, 1993, you were reprimanded and your pay docked for one (1) day for failure to report to work even though your supervisor instructed you to do so.
>
> Please be advised that any occurrence of similar behavior in the future will result in further, more severe discipline, up to and including discharge from employment.

Complainant signed the above-quoted disciplinary letter on June 14, 1993 and typed the following answer thereto:

> Note: During the investigation of this matter I informed you that I was requierd (sic) by my physician to take a medication that produced drowsiness and that made it immposible (sic) to drive to and from the training session on May 14, 1993. And also I informed you that this medication was to be taken with out (sic) fail, and that I will be in the future producing a letter from my physician making truth to this claim. And also that I was not informed or aware that the training session could not be made up at a latter (sic) date.

13. The Union represented Complainant on his grievance regarding both BTC's discipline of Complainant on April 7, 1993 and June 7, 1993. During the processing of these grievances, Local Union President Biermeier sought the advice of VTAE Consultant Leigh Barker. Ms. Barker, in a letter dated September 30, 1993 to Ms. Biermeier, advised the Local Union to take both of these grievances to arbitration. In his grievance regarding the six-day suspension, Benzing stated that Respondent had failed to consider the reasons for his failure to attend the May 14, 1993 training session and that because his health and safety were in danger due to the medication he was taking, Article V, Section 2-8 should be applied so that he would be exempt from the "work-then-grieve" rule of the contract.

14. On August 11, 1994 five unit custodial employes (including Benzing and Barbary) filed a class grievance, objecting to the second Work Study conducted by neutral Jack Dudley. Ultimately, all grievants, except Benzing dropped out of this grievance. In addition, two other grievances were filed separately by Complainant and Barbary on this same issue. The Union did not proceed to arbitration on the Complainant's "class" grievance, as BTC had not implemented the results of the second Work Study at that time. As of January 24, 1995 one grievance (filed by Barbary) was still pending and was going to arbitration regarding the results of the second Work Study.

15. On October 21, 1994, the day before a scheduled arbitration hearing before Arbitrator Gil Vernon regarding Respondent's June 7, 1993 suspension of Complainant, the Respondent, Union and Complainant tentatively agreed to a settlement of the grievance. The settlement was confirmed over the telephone with all parties present on the line. The Union thereafter drafted the following settlement agreement which was executed by both the Union and Respondent. However, Complainant refused to sign the agreement despite his prior verbal agreement to its terms. The settlement agreement read as follows:

> The Blackhawk Technical College ("College"), Mark Benzing ("Grievant") and the Blackhawk Technical College/ Paraprofessional Technical Council/Wisconsin Education Association Council/National Education Association (BTC/PTC) do hereby agree as follows as a complete resolution of all issues arising under the labor contract pertaining to the discipline of Benzing issued by College on or about June 7, 1993:
>
> 1. The letter of discipline issued to the Grievant dated June 7, 1993, is hereby withdrawn and Exhibit A attached hereto shall be substituted in the Grievant's personnel file.

2. The level of discipline imposed by the College shall be changed from a six (6) day unpaid suspension to a three (3) day unpaid suspension. Grievant hereby accepts the discipline.

3. The Grievant shall receive pay for the three (3) previously unpaid days restored pursuant to this agreement on or before November 15, 1994.

4. If there are no other incidents of insubordination involving Mr. Benzing for a period of three (3) years (June 7, 1993 - June 7, 1996), the disciplinary letter will be removed from Mr. Benzing's file and his record regarding this event cleared.

5. By entering into this agreement, the College does not admit to the violation of any of the Grievant's rights under the law or the labor contract.

6. This settlement resolves only the labor contract issues presented in the grievance. It does not resolve other cases which the Grievant may have filed against the College.

7. The BTC/PTC hereby consents to this settlement and agrees to be bound thereby.

It is undisputed in this case that although Benzing agreed to all of the terms of the above-quoted settlement agreement reached verbally by the parties on October 21, 1994, he never signed the agreement.

16. By her letter dated October 26, 1994 Union Representative Leigh Barker wrote to Benzing (copying Respondent) in relevant part as follows:

. . .

> I received a telephone message from you on Monday that you "decided against the settlement on Friday and wants (sic) to go to arbitration."
>
> Mark, we negotiated in good faith and agreed on a settlement to grievance 93-05 on Friday, October 21, 1994. You were a party to this settlement, informing me in person and the district's attorney via

> the telephone that you agreed to the settlement. In fact, this was done because the parties had thought we had an earlier settlement, which you said you had not agreed to. Consequently, we made sure you were a party to and agreed to this settlement.
>
> Based on your word, my word and the district's word, we reached an agreement. Both parties then contacted the arbitrator and informed him that the matter was settled.
>
> As far as the BTC/PTC is concerned, the issue is resolved. We made a binding commitment. We do not and will not agree to settle an issue and then go back on our word. You, as a member of the BTC/PTC also have an obligation and responsibility to honor your verbal commitment.
>
> To that end, I will be forwarding the settlement agreement, signed by the district and the BTC/PTC to you for your signature.
>
> . . .

17. Beverly Biermeier, a local union official from 1990 through 1994 stated that during the period when she served as a union officer, she received complaints from other unit custodians almost daily regarding their working conditions; that she disregarded these daily work complaints because most of them did not constitute violations of the contract, but that when actual grievances were reported to her, she dealt with these to the best of her ability, pursuant to the contract. Biermeier stated that Benzing never had any trouble filing grievances during the period that she was a union official and that if the Union representative did not wish to sign off on a grievance, Complainant signed his own grievances to begin their processing. Biermeier also stated that she was subpoenaed by employe Al Steigman to testify at the civil defamation trial against Steigman brought by Barbary; that Biermeier was subpoenaed to appear at 9:00 a.m. on March 17, 1993; that approximately two weeks prior to March 17th, Biermeier put in a request to use personal leave time on March 17th, as the 9:00 a.m. trial conflicted with her regular work hours at BTC; and that she did not receive approval of her personal leave request until after her appearance as a witness on March 17, 1993.

18. Biermeier stated that she was present at the June 7, 1993 grievance meeting with Complainant, Supervisor Amundson and Personnel Director Alan Ferguson, when Complainant received the June 7, 1993 letter of discipline. At this meeting, Ferguson asked Complainant to read the letter of discipline and Complainant refused, stating he was too tired. After Ferguson and Amundson left the room for a few moments, Biermeier advised Complainant that she was afraid BTC wanted to fire Complainant for insubordination because he was not cooperating and because the June 7th disciplinary letter was grounded in part upon insubordination, Biermeier advised Complainant to cooperate immediately. Biermeier also stated she was present at a grievance

meeting with Complainant at which she observed BTC District Director, Dr. James Catania, seated in a wheelchair, come around the side of his desk for apparently no reason. At this time, Catania touched Complainant's arm and asked Benzing if he was taking notes. Biermeier stated that she believed Catania was upset but she did not recall that Catania made any comment regarding Complainant's grasping at straws in filing grievances. Biermeier's testimony is credited over Benzing's.

19. Dorothy Lockwood was employed by BTC as a full-time bargaining unit custodian for approximately five and one-half months beginning in February, 1993. Lockwood was discharged before the end of her six-month probationary period. Biermeier stated that at some point during Dorothy Lockwood's employment she (Biermeier) advised Lockwood to complete her work if she wanted to get through her probationary period. After Lockwood was terminated during her probationary period, Biermeier asked BTC for its reasons for terminating Lockwood, and BTC indicated that Lockwood had not worked effectively, had not completed her shift work, and had done a lot of talking. Lockwood stated that bargaining unit member Russ Stevenson (also leadman on the night shift), had several conversations with her regarding Complainant. The first conversation occurred early in her employment when Stevenson told her that he was glad that Lockwood would be working in her assigned work area (formerly Complainant's work area), as Stevenson had not been happy with the way that work area had been cleaned before Lockwood was hired. Later on in Lockwood's employment, Stevenson told Lockwood that he (Stevenson) did not trust Complainant around Lockwood and that Lockwood should stay in her work area and Complainant should stay in his work area. At a time unknown, Stevenson stated in the presence of Lockwood and other unit employes that he (Stevenson) was "mad at Jesus Barbary" and he (Stevenson) wished he had a white robe. "I'd stick it in their mail box both of them and let them think the Klan was here." Lockwood stated that someone else present made a comment about burning a cross but at this point and Lockwood left the room. Lockwood was the only witness that testified regarding this last comment by Stevenson.

21. Lockwood also stated herein that she had one conversation with Supervisor Jeff Amundson regarding Complainant two days after the completion of the second day of EEOC sensitivity training (which had occurred on or about June 10, 1993) as follows:

> (by Ms. Lockwood):
>
> We had the seminar for civil rights, and Gladys Benzives (ph.) I think was her last name is how you pronounce it, she had a seminar, and after we had the final day of that seminar, two days later I came into work, and Russ said, "Dorothy, Jeff wants to speak to you." And so I said, "All right, Where is he," and he said he was standing in front of the custodian closet down in the IO building, and he pointed to the hallway.

So I walked over to the hallway. Jeff was there, and he said, "Yes, I want to talk to you about the seminar we just finished." He said, "We can step into this room," which I stepped into this room, which is kind of funny because he has his own office and he could have told me whatever there, and instead he had me go into a classroom to talk to him.

So I went in and sat down, and he said, "What did you think of the seminar?" and I said, "I think it was informative, and if everybody can get past their hang-ups, they can learn from what she had to say about working together and people coming from different backgrounds and different races and different religions, and it's a new world, and we've all got to learn to work with each other."

And he says, "yes," he goes, "That's right. Who do you think needs to change?" I said, "I think you've got four of them. I think you need to talk to Russ and Al and Mark and Jesus. They've all got to forget what's happened in the past and start working better together." And he goes -- he blew up, "I don't think Al has a problem at all."

I said, "Well, I'm sorry, but I feel Al is prejudice. (sic) He goes, "I don't think Al is prejudice" (sic). I said, "That's your opinion, and my opinion is I think he is." And then he goes, "Well, I'll tell you what. We've had a hard time with Mark, and I'll tell you what. He's not going to pull me in court again. He pulled me in two times before, and he's not going to pull me in again!" And then he says, "I'm telling you now, don't you talk to Mark, and don't you talk to Jesus, because I'm not going to court again!"

And I said, "I've been married to my husband a long time. He never has told me who I can and cannot talk to, and so you're not going to tell me who I can and cannot talk to, especially on my lunch breaks and my breaks!" And he said, "I'm warning you," and he got pretty upset. I thought he maybe was going to take a swing at me.

At the time he was in a rage, and then at the same time he realized that he was screaming at me, and he stepped and backed off and said, "Well, I'm going to discuss this with the rest of them. You're free to go now," or something like that. I can't remember

> exactly. And I said, "Okay," and walked out of the classroom, and Russ was still standing in the hallway waiting for me to come out.

Lockwood stated that Complainant was the only unit custodian who was not present for the first day of the mandatory EEOC sensitivity training session on May 14, 1993. Lockwood stated that it was not until mid-June to mid-July, 1993 that she had her first conversations with Complainant regarding the inequality of the work areas at BTC.

22. At the instant hearing, Complainant admitted that on May 4, 1993 he received a written notice from BTC stating that the training session, then scheduled to occur May 14, 1993, was "mandatory" and that he knew that this meant he was required to attend the session. Complainant stated that for approximately one year prior to the May 14th training session, he had been taking a sedative medication and he understood that he should not drive after taking this medication. After he was disciplined on June 7, 1993, Complainant sought a doctor's excuse (dated July 13, 1993) in an attempt to prove his position in his grievance. The doctor's slip reads as follows:

> Mr. Benzing is taking Damelon . . . This is a sedative medication to be used on a daily basis.

On cross-examination herein Complainant stated the following regarding his use of this medication on March 16 - 17, 1993:

> (by Mr. Anderson)
>
> Q . . . Did you take your medication on the day you went to the hearing in the court case involving Mr. Stiegman?
>
> (by Mr. Benzing)
>
> A Yes, I did -- no, I didn't. I took it the night before. I went to bed and took medication, called in absent, excuse me.

23. Complainant stated that at an August 25, 1993 grievance meeting (at which Union official Biermeier was present) Dr. Catania became abusive and upset, that Catania came out from behind his desk in his wheel chair, grabbed the Complainant's arm, asked if he (the Complainant) was taking notes, and stated that Complainant, by filing his grievance was grasping at straws. Complainant also stated that after a different grievance meeting with Dr. Catania (at a time unknown), Dr. Catania asked the Complainant to stay a moment after the other participants left the room to which the Complainant agreed. When Dr. Catania and Benzing were alone, Dr. Catania asked Complainant if it would be all right if he (Catania) dropped the disciplinary action against

Complainant. Complainant answered that this would be fine but that he (Benzing) had two more grievances coming up shortly. At this point, Dr. Catania said nothing, turned in his wheel chair and wheeled away from the Complainant, leaving the area.

24. The record evidence demonstrated without dispute that custodian Russ Stevenson is not a supervisor or manager of BTC and that in his conversations with Lockwood he was speaking as an individual, not on behalf of BTC. The conversation that Lockwood had with Supervisor Jeff Amundson regarding the effectiveness of the EEOC sensitivity training occurred on or about June 10, 1993, after the June 7, 1993 discipline of Benzing. No evidence was submitted to connect this conversation with any other discipline of Complainant. No evidence was offered to show that Benzing had been threatened, coerced or restrained by any comments made by Amundson, Borremans, Personnel Director Allen Ferguson or Director Dr. Catania. The grievance procedure was fully available to Complainant during the period 1990 through 1994 and the Union represented Complainant regarding the April 7, 1993 and the June 7, 1993 discipline of Complainant by bringing the former case to grievance arbitration and winning it before Arbitrator Krinsky and by settling the latter grievance on October 21, 1994 with the full consent, understanding and agreement of the Complainant. Complainant did not have a legal right to insist that the Union continue to represent him on the June 7, 1993 disciplinary matter after he reneged on his agreement to a full settlement thereof. No evidence was offered to connect Complainant's participation in WERC Case 50 with the disciplinary actions taken against him by Respondent on April 7 and June 7, 1993.

25. The events recounted and facts found in Findings Nos. 7 through 9 herein occurred outside the statute of limitations periods applicable to these cases.

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

CONCLUSIONS OF LAW

1. Starting in or around August, 1991, Benzing engaged in protected concerted activities by his involvement in WERC Case 50. Benzing also engaged in such activities by filing grievances in early 1991, early 1993, and in August, 1994 regarding the size of BTC custodial employes' work areas. BTC knew of Benzing's protected concerted activities. BTC's agents, including Catania and Stevenson, did not demonstrate that they had any animosity or hostility against Benzing because he had filed grievances against BTC or because he assisted in filing the Complaint in WERC Case 50 on August 8, 1991. BTC did not discipline Benzing in any part because Benzing had previously engaged in protected concerted activities.

2. Respondent by its agents' actions and statements had no reasonable tendency to interfere with, restrain or coerce Complainant in of his rights guaranteed by Sec. 111.70(2), Stats., at any time during the relevant statute of limitations period, in violation of Sec. 111.70(3)(a)1, Stats.

3. Respondent, by its agents' actions in disciplining Complainant on April 7 and June 7, 1993 did not violate Sec. 111.70(3)(a)3, Stats.

4. By entering into and executing the October 21, 1994 settlement agreement of the June 7, 1993 discipline of Complainant, Respondent did not violate Sec. 111.70(3)(a)1 or 3, Stats.

5. Any other violations of Sec. 111.70(3)(a), Stats. alleged by Complainant are dismissed. All allegations that Respondent violated federal labor laws are also dismissed for lack of WERC jurisdiction.

6. Benzing's Motions to Amend/Correct the Transcript lacked sufficient basis on which to grant those Motions. Benzing's Motions to Reconsider Judgment/Order Dismissing Complaint are premature. Benzing's Motion to Amend Complaint filed May 23, 1996 is untimely.

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

ORDER 1/

IT IS ORDERED that the consolidated complaints, as amended be, and the same hereby are

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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 (Continued)

dismissed in their entirety, and that the Complainant's Motions to Amend/Correct the Transcript/Record, his Motions for Reconsideration and his May 23, 1996 Motion to Amend Complaint be, and they hereby are, denied in their entirety.

Dated at Oshkosh, Wisconsin this 1st day of October, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

1/ (Continued)

> 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).

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINTS

Complainant has essentially alleged that BTC committed prohibited practices by its April 7, 1993 and June 7, 1993 discipline of Complainant all because he filed a prior WERC complaint in Case 50 on August 8, 1991 and/or because he filed grievances against BTC during the statute of limitations period herein. Respondent has denied it committed any prohibited practices on the ground that no evidence of animus was proven by Complainant, that no causal connection exists between the Complainant and his filing of Case 50 and/or the filing of any grievances by Complainant and that the disciplinary actions which BTC took against Complainant were fully litigated and remedied through the parties' grievance arbitration procedures. The Respondent moved to dismiss the complaint in its entirety several times including at the close of Complainant's case in chief on October 23, 1995 and the Examiner granted that Motion on October 23, 1995, with the understanding that the parties were free to file briefs thereon and that a written decision would issue in these cases.

Parties' Positions:

After the close of the hearing, Complainant filed the following documents in the instant case which were received on the dates indicated below:

1) Motion to Reconsider Order Dismissing Complaint, 11-10-95;

2) Motion to Amend Record, 11-27-95;

3) Motion Requesting Correction of Transcript, 11-29-95 (seeking to amend the 11-10-95 Motion);

4) Motion Requesting to Amend Record, 11-30-95;

5) Motion to Amend, 12-22-95 (seeking to amend the 11-27-95 Motion);

6) Motion to Reconsider Judgment, 5-10-96;

7) Motion to Amend Complaint, 5-23-96;

8) Motion to Amend, 7-26-96 (seeking to amend the 5-10-96 Motion).

9) Motion to Reconsider, 9-16-96.

In these various Motions, Complainant sought to amend the complaints herein to include allegations that by its actions toward Complainant, BTC had violated the Taft-Hartley Act and the Occupational Safety and Health Act. Complainant also argued in his "Motion to Reconsider Order Dismissing Complaint" that none of Complainant's witnesses were proved unreliable; that Respondent's agents' actions toward Complainant were "intentional, excessive and unwarranted" that Complainant "was subjected to hostile and/or abusive work environment, created by Respondent's agents"; that none of the evidence proffered by Complainant was challenged or disproved by Respondent; that Complainant met his burden of proof "in regard to the two disciplinary actions taken "by Respondent". Complainant therefore sought a decision to be "rendered on the allegation that Respondent's agents violated specific articles of the collective bargaining agreement and the Municipal Employment Relations Act, 111.70(3)(a)5 . . ." and that Respondent "obviously retaliated against Complainant, for filing a complaint with the Commission. . . ." Complainant also sought to "correct" and "amend" the record, to add Complainant objections to certain evidence/Examiner rulings on the record (which Complainant had not made at trial), on the ground that Complainant was unfamiliar with the Commission's rules. In addition, Complainant argued that BTC had failed to thoroughly investigate his defenses regarding the discipline of June 7, 1994 because BTC refused to accept Complainant's doctor's excuse and BTC imposed "un-warranted (sic), unjust and excessive amount of discipline."

BTC filed responses to the above-listed Motions on November 30, 1995, February 14, 1996 and June 4, 1996. In these documents, BTC argued that the Commission is without jurisdiction to decide violations of federal laws such as Taft-Hartley and OSHA; that the Commission's rules ERC 10.13(6), Wis. Adm. Code, allow for corrections of transcripts, but not "amendments" thereof; and that Complainant's Motions constitute an effort to add to the transcript which is distinctly different from correcting clerical, typographical or transcription errors; that Complainant lacked sufficient grounds for his Motions as they do not involve errors affecting the substance of the transcript; and that allowing these additions to the transcript at this late date would deny BTC the right to make any meaningful response thereto.

In its document received February 14, 1996, BTC argued that it could find no authority for filing a Motion to Reconsider prior to the Examiner having issued his/her written decision. Respondent also argued that Complainant's Motion to Reconsider lacks merit because no newly discovered evidence was offered to warrant reconsideration of the Examiner's preliminary, informal decision to dismiss the complaints herein.

In its brief received February 16, 1996, Complainant argued that all of his required

corrections would affect the substance of the record and did not relate to the conduct of the hearing or the introduction of evidence. Complainant also stated that he had no objection to allowing Respondent to file a response to his requested amendments/corrections.

Discussion:

Procedural Matters:

Complainant Benzing filed several Motions to Amend the complaints herein during the pendency of the case (before the conclusion of the hearing) and after the hearing was concluded. ERB 12.02(5) Wis. Admin. Code, provides:

> AMENDMENT.
>
> (a) Who may amend. And complainant may amend the complaint upon motion, prior to the hearing by the commission; during the hearing by the commission if it is conducting the hearing or by the commission member or examiner authorized by the commission to conduct the hearing; and at any time prior to the issuance of an order based thereon by the commission, or commission member or examiner authorized to issue and make findings and orders.
>
> (b) Conformance to Evidence. At the conclusion of the hearing, the complaint, on motion, may be amended as necessary to conform to the evidence as to minor and immaterial variances which might appear in the record.

Benzing's motions during the hearing conformed to ERC 12.02(5)(a), Wis. Admin. Code. They were generally allowed by the Examiner. However in his post-hearing Motions to Amend, Benzing sought to add violations of federal laws (Taft-Hartley and OSHA) and he repeatedly attacked the discipline meted out against him on April 7 and June 7, 1993 was "excessive and unwarranted."

In regard to Benzing's reference and/or allegations that BTC violated federal labor relations laws in its actions toward Benzing, it is clear that the federal labor relations statutes which Mr. Benzing has referred to, simply do not apply to public sector employes or to the public employment setting. Rather, Sec. 111.73(3)(a)1, Stats., protects municipal employes from municipal employer interference, restraint or coercion in the exercise of their rights guaranteed by Sec. 111.70(2), but it does not protect municipal employes from municipal employer violations of the federal labor relations laws cited by Benzing. 2/ Based upon the

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2/ See, e.g., AFT Local 212 and Milwaukee Area Technical College, Dec. No. 28664-A (Burns, 5/96), citing Milwaukee Area Technical College, et al., Dec. No. 28562-B (Crowley, 12/95); Onalaska School District, Dec. No. 28243-A (Gratz, 6/95); Monona Grove School District, Dec. No. 20700-G (WERC, 1986); Racine Unified School District,

Dec. No. 20736-A (Shaw, 7/84), aff'd by operation of law, Dec. No. 20736 (WERC, 10/84).

record herein, I find that the WERC lacks jurisdiction to consider and determine whether the federal laws cited by Mr. Benzing in his Motion have in fact been violated and these allegations shall be dismissed.

Regarding Benzing's attempts to amend or correct the record in this case, I note that ERB 10.13(6), Wis. Adm. Code, provides:

> Corrections of Transcript. Corrections of the official transcript may be made only when they involve errors affecting substance and shall be made only in the manner herein provided. Proposed corrections shall be submitted by stipulated or motion. Corrections pursuant to a motion, shall not be ordered except upon notice and opportunity for submission of statements in opposition. When corrections are so ordered the necessary physical corrections shall be made in the official transcript.

Benzing has sought by his Motions, to insert into the transcript, objections and grounds therefor which he never stated at the original hearings herein. I agree with Respondent that ERB 10.13(6), Wis. Admin. Code, was essentially intended to allow parties to seek correction of clerical errors in a transcript which, if left uncorrected, would change the meaning or substance of the transcribed words. I also agree that Benzing's "corrections" in fact constitute additions to the record which have nothing to do with clerical and/or typographical errors. Furthermore, I agree that the introduction of post-hearing objections deprives BTC of its ability to respond to those objections at a meaningful time (during the hearing). In addition, I note that were Benzing's Motions granted, BTC's rights on appeal could be adversely affected. Thus, I find that Benzing's Motions to Amend the Record and/or Correct the Transcript do not involve "errors" as contemplated by ERB 10.13(6), Wis. Adm. Code, and those Motions are hereby denied.

Regarding Benzing's Motions to Reconsider Judgment/Reconsider Order Dismissing Complaint, again I agree with BTC that these motions, having been filed on November 10, 1995, May 10, 1996 (and September 16, 1996) were premature as the undersigned had not then issued this decision. Clearly, Mr. Benzing will have a full right to review of this decision by a proper appeal to the Commission as provided in Sec. 111.07(5), Stats. Finally, Benzing's Motion to Amend Complaint filed in May, 1996 comes too late and cannot, in fairness, be granted post-hearing.

Substantive Allegations:

Section 111.07(14), Stats., which is made applicable to these proceedings by Sec. 111.70(4)(a), Stats., provides:

> The right of any person to proceed under this section shall not exceed beyond one year from the date of the specific act or unfair labor practice alleged.

As Examiner Crowley stated in Milwaukee Area Technical College, et al., 3/ this section is strictly construed. As Examiner Crowley further stated:

> The Commission has adopted the principles of Bryan Mfg. Co. to address the significance of events falling outside of a statutory limitations period. 5/ In that case, the United States Supreme Court addressed two situations which pose the relevant considerations. The Court addressed those situations thus:
>
> > . . . The first is one where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. there, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose (the statute of limitations) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. 6/ (footnotes omitted)

As Examiner McLaughlin stated in Moraine Park Technical College, Dec. No. 25747-C (8/89):

> The Bryan analysis, read in light of the provisions of Secs. 111.70(4)(a) and 111.07(14), Stats., requires two determinations. The first is to isolate the "specific act alleged" to constitute the prohibited practice. The second is to determine whether that act

3/ Dec. No. 28562-B (12/95).

> "in and of (itself) may constitute, as a substantive matter" a prohibited practice.

Applying this analysis to these cases, I conclude that the Complainant must allege a "specific act" within the applicable one-year statute of limitations period which "in and of itself" constitutes a prohibited practice. Absent such an allegation, evidence of Benzing's prior employment history and the prior acts of BTC are time barred and cannot form the basis for a prohibited practice finding.

Sec. 111.70(2), Stats., provides in part as follows:

> Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employes shall have the right to refrain from any and all such activities . . .

Sec. 111.73(3)(a)1, Stats., makes it a prohibited practice for a municipal employer to interfere with, restrain or coerce municipal employes in the exercise of rights guaranteed them under Sec. 111.70(2), Stats. A finding of anti-union animus or motivation is not necessary to establish a violation of Sec. 111.70(3)(a)1, Stats. 4/ Nor is it necessary to prove that an employer intended to interfere with employes or that there was actual interference. 5/ The statute prohibits conduct which has a reasonable tendency to interfere with the exercise of lawful concerted activities. 6/ Unlawful interference must be proved by demonstrating by a clear and satisfactory preponderance of the evidence that the Employer's conduct contained either a threat of reprisal or a promise of benefit which would tend to interfere with the rights of employes guaranteed under Sec. 111.70(2), Stats. 7/

In the instant case, the record showed that Benzing was hired by BTC at the end of 1990. On August 8, 1991, Benzing and Jesus Barbary filed a WERC complaint against the Union, later

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4/ City of Evansville, Dec. No. 9440-C (WERC, 3/71); 69 Wis.2d 140 (1975).

5/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84).

6/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87), aff'd by operation of law, Dec. No. 23232-B (WERC, 4/87).

7/ Western Wisconsin VTAE District, Dec. No. 17714-B (Pieroni, 6/81) aff'd by operation of law, Dec. No. 17714-C (WERC, 7/81); Drummond Jt. School District No. 1, Dec. No. 15909-A (Davis, 3/78) aff'd by operation of law, Dec. No. 15909-B (WERC, 4/78); Ashwaubenon School District, Dec. No. 14774-A (WERC, 10/77).

amending that complaint to include BTC as a respondent. In September, 1992, Benzing was initially suspended for thirty days for using improper judgment regarding Consolidated Foods Services goods. Benzing filed a grievance regarding this suspension and the Union represented

Benzing thereon. This resulted in BTC's agreement to reduce Benzing's suspension from thirty days to five days. Both Benzing and the Union agreed to this reduction in punishment and the grievance was dropped. 8/

On April 7, 1993, almost two years after Benzing and Barbary filed the WERC complaint in Case 50, BTC reprimanded Benzing for allegedly misusing sick leave. Benzing filed a grievance and the case went to arbitration. On June 7, 1993, BTC suspended Benzing for six days for his failure to attend a mandatory training session. Again, Benzing filed a grievance regarding this discipline and during the processing of that grievance, Benzing offered BTC a doctor's excuse to explain his absence. On June 1, 1994 Arbitrator Edward Krinsky issued an award in favor of Benzing regarding the April 7, 1993 discipline. BTC complied fully with the Arbitrator's order. On October 21, 1994, the day before the scheduled arbitration hearing regarding the June 7, 1993 suspension of Benzing, Benzing, the Union and BTC agreed upon a full settlement of that case and the hearing was then cancelled. However, Benzing later changed his mind regarding the settlement and refused to sign the settlement document. At this point, the Union refused to further represent Benzing on the matter, and the grievance was dropped. Thus, it is clear from Benzing's Motions and brief herein that he believes BTC retaliated against him by the discipline BTC issued on April 7, 1993 and June 7, 1993.

The Commission has stated the standard governing violations of Sec. 111.70(3)(a)1, Stats., in this manner:

> Violations of Sec. 111.70(3)(a)1, Stats. occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. . . . If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere. . . . (E)mployer conduct which may well have a reasonable tendency to

8/ All of these events occurred outside the one-year statute of limitations periods applicable to these complaints.

interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats. if the employer has valid reasons for its actions. 9/

9/ Cedar Grove-Belgium Area School District, Dec. No. 25849-B (WERC, 5/91) at p. 11-12.

In addition, Section 111.70(3)(a)3, Stats., provides that it is a prohibited practice for a municipal employer:

> to encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment.

Section 111.70(3)(a)3, Stats., is violated when it can be shown by a clear and satisfactory preponderance of the evidence that: (1) The employe was engaged in protected, concerted activities; (2) The employer was aware of said activities; (3) The employer was hostile to such activity; (4) The employer's action against the employe was based at least in part on said hostility. 10/

Based upon the record in these cases, it is clear that Benzing had engaged in the protected concerted activities 11/ of filing grievances and a prior WERC complaint during the years 1991 and 1993. 12/ It is also clear that BTC and its agents were fully aware of Benzing's protected concerted activities. However, Benzing failed to prove that agents of BTC harbored any animosity or hostility against him because he had engaged in these protected concerted activities. Rather, the record showed that BTC transferred Benzing to a smaller, more desirable work area after he and Jesus Barbary repeatedly complained and filed grievances regarding the size of custodial employes' work areas at BTC.

10/ See, Muskego-Norway v. WERB, 35 Wis.2d 540 (1967). See also Green County, Dec. No. 26798-B (WERC, 7/92).

11/ It is clear from Moraine Park Technical College, Dec. No. 25747-A (WERC, 1/90), that events which took place more than one year prior to the filing of the instant complaints may be used to shed light on BTC's conduct within the relevant statute of limitations period.

12/ Benzing never alleged that BTC violated MERA in its actions toward him because he (Benzing) had filed grievances against BTC.

Benzing has argued that the April 7 and June 7, 1993 disciplinary actions were harsh and unwarranted. According to precedent, whether Arbitrator Krinsky's award regarding the April 7th discipline of Benzing was reasonable and based upon sufficient evidence is not an issue that the Commission will consider in a complaint case alleging violations of Sec. 111.70(3)(a), Stats. 13/ Thus, the Commission has traditionally declined to conduct de novo reviews of arbitration awards, as this would destroy the final and binding quality of arbitration awards. 14/

13/ See e.g., City of Neenah, Dec. No. 10716-A (Schurke, 5/72), aff'd by op. of law, Dec. No. 10716-B (WERC, 6/72).

14/ Ibid.

Benzing has also argued that by failing to fully investigate the situation before it issued him the June 7th disciplinary action and by its refusal to further process the case after Benzing reneged on the settlement thereof, BTC thereby violated MERA. Addressing these arguments would also involve analyzing the validity/reasonableness of BTC's actions and the October 21, 1994 settlement agreement which the Commission has traditionally declined to do for the reasons stated above. In addition, I note that the U.S. Supreme Court has long held that grievants do not have an absolute right to have their grievances arbitrated. 15/ Therefore, if by his complaints in this area, Benzing is arguing that he was entitled to arbitration of the June 7th disciplinary action, such an argument must be flatly rejected and cannot form the basis for a finding that BTC violated MERA. 16/

In addition, there was no evidence that any hostile statements were ever made to Benzing by BTC agents 17/ regarding his protected concerted activities. Although a statement was made to former employe Dorothy Lockwood by Supervisor Amundson, that statement was made several days after Benzing received the June 7, 1993 disciplinary action. Thus, there was no causal connection shown to exist between Amundson's statement and the discipline Benzing received. 18/

15/ Vaca v. Sipes, 386 U.S. 171, 191 (1967).

16/ The Union is not a party in these cases so that an analysis of the Union's conduct in processing Benzing's grievances cannot be performed herein.

17/ Russ Stevenson has been found herein not to be a statutory supervisor and therefore not an agent of BTC. Statements made by lead man Russ Stevenson were not shown to have been authorized or approved by Respondent or its agents.

18/ I note that Dorothy Lockwood was discharged before the completion of her probationary period at BTC, making it reasonable to conclude that she may have had some ulterior motive in testifying in the manner in which she did in the instant hearings. In addition, I

In regard to Benzing's allegations that Dr. Catania harbored animosity against him (presumably) because of his grievance filing activities, I note that Union Representative Biermeier failed to corroborate Benzing's assertions that Dr. Catania made a statement that Benzing was "grasping at straws" in filing grievances. I also conclude that Biermeier's testimony should be credited over Benzing's based upon both witnesses' demeanor at these hearings, as well as Benzing's admissions that he knew that the May 14, 1993 training session was mandatory. In addition, I do not find that the fact that Dr. Catania's touching Benzing's arm during a grievance meeting or Dr. Catania's abruptness in terminating his conversation with Benzing after the grievance meeting had any tendency to interfere with, restrain or coerce Benzing in the exercise of his Sec. 111.70(2), Stats., rights.

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note that the statements to which she testified were hearsay. However, for the sake of argument, I have assumed herein that Lockwood's testimony was credible and have based my conclusions thereon.

In regard to whether BTC disciplined Benzing on April 7 and June 7, 1993 because he had engaged in protected concerted activity, I note that during his testimony, Benzing did not dispute the fact that he had been absent from work on March 16, 1993 and May 14, 1993. Benzing also admitted that he knew that the May 14, 1993 training session was "mandatory" and that he "had to be there". 19/ Thus, based upon the record in these cases, BTC had valid reasons for its actions and there was no evidence that BTC had violated Sec. 111.70(3)(a)1 or 3, Stats., at any time relevant hereto.

Dated at Oshkosh, Wisconsin this 1st day of October, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

19/ Benzing's arguments that the discipline meted out against him was excessive and unwarranted go to the merits of the underlying grievances in this case which are not and cannot be before me.