STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DANIEL B. SMITH, Complainant, vs. MILWAUKEE PUBLIC SCHOOLS, VIEAU ELEMENTARY SCHOOL, M. LOURDES TOVAR, ANDREW PATTERSON, DR. MYRA VACHON, DR. C. EDWARD LAWRENCE, MS. BARBARA HORTON, MR. ROBERT JASNA, DR. HOWARD FULLER, Respondents.	Case 294 No. 51379 MP-2922 Decision No. 28336-C

Appearances:

Mr. Daniel B. Smith, on behalf of himself.
Milwaukee City Attorney's Office, by Mr. Thomas J. Beamish, on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Amedeo Greco, Hearing Examiner: Daniel B. Smith ("Smith"), filed a prohibited practices complaint with the Wisconsin Employment Relations Commission, herein "Commission", on August 5, 1994, alleging that the aforementioned Respondents had committed prohibited practices within the meaning of the Municipal Employment Relations Act, herein "MERA", by discriminating against him because of his union activities and by interfering with his legal rights. The Commission on March 14, 1995, appointed the undersigned as Examiner to make and issue Findings of Fact, Conclusion of Law and Order as provided for in Section 111.07(5), Wis. Stats. Respondents filed their answer on May 30, 1995, and hearing was held in Milwaukee, Wisconsin, on August 19, 1996. There, for the reasons discussed below, I dismissed Smith's complaint after he repeatedly refused to answer questions and after he was repeatedly warned that his complaint would be dismissed if he persisted in not answering the questions posed.

I therefore make and file the following Findings of Fact, Conclusion of Law, and Order.

FINDINGS OF FACT

1. Smith is employed as a teacher by the Milwaukee Public Schools, herein "District", and resides at 2867 South Kinnikinnic Avenue, #223, Milwaukee, Wisconsin. He worked at Vieau Elementary School in Milwaukee, Wisconsin, before his involuntary transfer to Garland Elementary School on or about January 6, 1996.

2. The District operates a public school system in Milwaukee, Wisconsin, and maintains its principal offices at 5225 West Vliet Street, Milwaukee, Wisconsin, 53201-8210. One of the schools it operates is Vieau Elementary School whose principal is M. Lourdes Tovar who at all times material herein has acted on the District's behalf. Andrew Patterson, Dr. Myra Vachon, Dr. C. Edward Lawrence, Barbara Horton, Robert Jasna, and Howard Fuller at all times material herein have been employed by the District in various supervisory or managerial positions and have acted on the District's behalf.

3. The Milwaukee Teachers' Education Association, herein "MTEA", is the recognized collective bargaining agent for the District's teachers and other personnel and maintains its principal address at 5130 West Vliet Street, Milwaukee, Wisconsin.

4. The MTEA on May 15, 1990, filed a prohibited practices complaint with the Commission which alleged that the District - through the actions of Frederick Carr the Principal of the Franklin Pierce Elementary School where Smith then worked - had unlawfully interfered with and threatened Smith because of his concerted, protected activities on behalf of the MTEA. Wisconsin Employment Relations Commission Hearing Examiner Lionel L. Crowley subsequently found merit to that complaint and ordered the District to cease and desist from engaging in such activities and to post an appropriate Notice to that effect. See Milwaukee Board of School Directors, Decision No. 26560-B (11/90), affirmed by operation of law, Dec. No. 26560-C (12/90).

5. Smith on January 12, 1995, filed a prohibited practices complaint with the Commission alleging that the MTEA had committed a prohibited practice within the meaning of MERA by breaching its duty to fairly represent him. The undersigned was appointed by the Commission in that proceeding to make and issue Findings of Fact, Conclusion of Law, and Order as provided for in Section 111.70(5), Wis. Stats. Pursuant thereto, hearing was held in Milwaukee, Wisconsin, on July 31 and August 1, 1995. There, MTEA's attorney asked Smith seven separate times on cross-examination to spell out his claims against the MTEA. Smith seven separate times refused to do so. I then warned Smith that his complaint would be dismissed if he did not immediately answer the question. Smith then did so.

6. A dispute arose between the parties at that hearing regarding Smith's intention to subpoena fifty (50) or so witnesses. That dispute was addressed in my subsequent decision which dismissed the complaint and which stated:

> At the outset of the hearing, Smith said that he had not served any of the fifty subpoenas because he did not know how to do so and because he did not have their addresses. The Hearing Examiner then suggested that he could get their addresses from the telephone book and ruled that the MTEA would have to provide Smith with the addresses of any MTEA officials, even though such information had never been subpoenaed. The Hearing Examiner also informed Smith that he had the applicable Wisconsin Statutes pertaining to the signing of subpoenas with him and that he, Smith, was free to read them so he would know how to serve the subpoenas. Smith failed to do so and ultimately chose not to subpoena any witnesses.
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> In this connection, Smith had earlier failed to follow the Hearing Examiner's suggestion in Smith's related pending prohibited practices complaint against the District, Case No. 294, No. 51379, MP-2922, that he contact the other side in order to provide for the orderly scheduling of so many witnesses. Smith refused to do so, even though he was assured that he would be free to call any other witnesses and that such a listing would not be binding. By refusing to cooperate in that fashion here - which he of course had a right to do - Smith was entirely responsible for his own failure to have on hand any other witnesses prior to the start of the July 31, 1995 hearing. See Daniel B. Smith v. Milwaukee Teachers' Education Association, Decision No. 28337-C, (12/95), pp. 11-12, affirmed by operation of law, Decision No. 28337-D (1/96).

7. The aforementioned communication with Smith in that proceeding centered on my November 23, 1994, letter to him in this proceeding which noted that he intended to subpoena forty (40) witnesses and which therefore suggested, inter alia, that: "It would be helpful for Mr. Smith to provide me and Mr. Beamish by December 5, 1994, with the names of those witnesses he wishes to subpoena." Smith thereafter refused to do so.

8. A dispute arose between the parties at the outset of the instant hearing over Smith's desire to subpoena thirty (30) or so witnesses. When asked to identify the prospective witnesses who already had been served with subpoenas, Smith replied that Human Resources Administrator Raymond Nemoir and fellow teacher Helen Lselentis had been so served. I ruled that the District had to produce Superintendent of Schools Robert Jasna as a witness on the second day of the hearing even though he had not yet been served with a subpoena. I also ruled that the District was required to provide Smith with the addresses of certain teachers after lunch so that Smith could subpoena them. Smith then stated that subpoenas had not yet been served on about fifteen (15) or so other witnesses he wished to call. I informed Smith that he was required to already have served

those subpoenas, that the hearing would not be delayed if they were not properly served, and that they had to be served on either that day or by the next morning. In response to my question, Smith acknowledged that he had not checked the telephone book to learn the addresses of all of the witnesses he wanted to subpoena and that he could not recall the names of any witnesses that he supposedly did check.

9. Smith called Principal Tovar as his first witness and extensively questioned her about some of the matters in dispute.

10. During his questioning of Tovar, Smith moved to amend his complaint to include all matters up to the present which arose after he filed the instant complaint on August 5, 1994, and which included his involuntary transfer to Garland Elementary School on or about January 6, 1996. The District objected to the amendment. I ruled, over the District's objection, that Smith could amend his complaint in that fashion, but added that he could not add two other teachers as named respondents because they were not present at the hearing and because it was unclear as to whether they had been subpoenaed. It thus would have been unfair and prejudicial to make them involuntary parties in their absence.

11. The District after a lunch break that day provided Smith with a computer printout of the teacher addresses he was seeking.

12. Smith then asked for a break or an early adjournment of that day's proceeding so that he could subpoena those teachers as witnesses. Smith at that time failed to offer any valid reasons as to why those witnesses could not be subpoenaed either at the end of that day or at the beginning of the next day's hearing. The District opposed that request on the grounds that Smith had plenty of time to subpoena them earlier. The District also complained that the case already had been repeatedly postponed on Smith's behalf and that Smith had been told in the prior proceeding with the MTEA, ante, that Commission hearings would last until about 5:00 or 6:00 p.m. I sustained the District's objection because Smith had plenty of time to subpoena his witnesses before the day of the hearing and because I earlier had asked Smith to supply the District with a list of witnesses he intended to call so to avoid the very scheduling problems which surfaced here. Furthermore, there was no reason why Smith could not have subpoenaed them at days' end or at the beginning of the next day's hearing. In addition, there was no reason why Smith could not call the other ten (10) or so witnesses whose addresses he apparently had. Hence, he could have called them during whatever period of time it took for him to serve the subpoenas on his remaining witnesses.

13. Smith then claimed that "Mr. Greco is not telling the truth" and that "the $500 plus money I've spent in subpoenas so far is in doubt, which he's responsible for . . ."

14. I asked Smith eight (8) separate times to explain what he meant by the latter remark. He refused to do so by asserting "no comment" on six (6) of those occasions. I then warned Smith that he would be kicked out of the hearing and that his complaint would be dismissed if he did not

answer the question. He still refused to do so.

15. I asked Smith five (5) separate times to explain what he meant when he said "Mr. Greco is not telling the truth." He refused to do so on all five (5) occasions. I then twice warned Smith that the complaint would be dismissed if he did not answer the question posed. He still refused to answer after those warnings. I therefore ruled that the complaint was being dismissed for failing to answer the questions posed.

16. By asserting that the Hearing Examiner was not telling the truth and by refusing to answer the aforementioned questions, Smith engaged in intentional contumacious conduct which warranted his expulsion from the hearing and dismissal of his complaint.

17. There is no proof in this record that Respondents have discriminated against Smith or in any other way interfered with his statutory rights up to the date of the instant August 19, 1996, hearing.

Upon the basis of the foregoing Findings of Fact, I make the following

CONCLUSION OF LAW

Respondents up to the time of the instant hearing have not discriminated or in any other way interfered with Smith's rights in violation of Sections 111.70(3)(a)1 2, 3, 4 and 5, or any other sections, of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, I make and issue the following

ORDER 1/

IT IS ORDERED that the complaint and amended complaint filed by Complainant Daniel B. Smith against Respondents are hereby dismissed in their entirety with prejudice.

Dated at Madison, Wisconsin, this 10th day of October, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner

(Footnote 1/ appears on the next page.)

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.

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, CONCLUSION OF LAW AND ORDER

The issue here centers on whether Smith intentionally engaged in contumacious conduct and deserved to be expelled from the hearing after he questioned the Hearing Examiner's integrity and after he repeatedly refused to answer what he meant when he claimed that "Mr. Greco is not telling the truth" and that "the $500 plus money I've spent in subpoenas so far is in doubt, which he's responsible for: . . ."

As related in Finding of Fact Nos. 14 and 15, ante, Smith thereafter steadfastly refused to answer what he meant by those remarks even though he was asked thirteen (13) separate times to do so and even though he was warned three (3) separate times that he would be expelled from the hearing and that his complaint would be dismissed if he did not immediately answer.

By refusing to so answer, Smith was guilty of contempt and thereby was no longer entitled to abuse the Commission's processes by his obdurate behavior.

Smith never offered any explanation for his behavior and none can be surmised now. He, after all, was previously warned over his identical behavior in his prior complaint case against the MTEA when - as related in Finding of Fact No. 5, ante, - he was warned that his complaint would be dismissed if he did not immediately answer the question posed seven (7) times over by MTEA's attorney. Smith then finally answered the question. As a result, Smith certainly knew here what would happen if he persisted in not answering questions.

Smith therefore cannot claim that he was a mere pro se, and that he did not know what would happen here if he did not answer the questions asked. He, in fact, did know because of his past experience. Moreover, since Smith readily understands English, he certainly comprehended here what would happen in the face of his obdurate behavior even if the prior instance had not taken place. Any feigned ignorance on his part here therefore is without merit.

Lastly, it again must be emphasized that balancing a pro se's rights is not always an easy task given the great difficulty that some pro ses may have in knowing Commission procedures and their own legal rights and responsibilities under the law. But, there nevertheless are limits to how far the Commission's procedures should be stretched in favor of a pro se litigant who questions the

integrity of a Hearing Examiner and who then deliberately stands mute in the face of repeated warnings that his complaint will be dismissed unless he answers proper questions posed by the Hearing Examiner.

Here, Smith exceeded those boundaries by engaging in contumacious conduct at the hearing which was disruptive of the orderly hearing process and which undermined the authority and dignity of the Commission's process. That is why he was immediately warned about his contumacious behavior; why he was given repeated chances to explain his remarks; why he was expelled from the hearing after he failed to do so; and why his complaint and amended complaint are being dismissed with prejudice regarding all matters which occurred between Smith and Respondents up to the date of the instant hearing, i.e., August 19, 1996.

Hearing Examiners have the authority to exclude such individuals from Commission hearings and to dismiss their complaints pursuant to ERC 10.18(9) which authorizes Hearing Examiners "To take any other action necessary under the foregoing or authorized under the rules." Here, it was necessary to ask Smith to explain his remarks and to then dismiss his complaint for failing to do so because Hearing Examiners need the power to compel answers from recalcitrant witnesses or parties and because dismissal of a recalcitrant party's complaint is the only effective way of compelling such answers. That was proven when Smith finally answered questions in his earlier complaint proceeding against the MTEA only after he was warned that his complaint would be dismissed if he did not do so.

Furthermore, it is well-recognized that a pro se's complaint can be dismissed in the face of contumacious conduct, a course followed in Botany v. Heeringa, 521 F. Supp. 1369 (1981). There, a pro se plaintiff engaged in contumacious conduct by interrupting the judge's comments, by refusing to proceed with questions even after instructed to do so, and by insisting on his right to speak. The pro se plaintiff continued such conduct even after he was warned that his complaint would be dismissed if he did not comport himself properly. However, he still "persisted in his contumacious conduct" hence warranting the dismissal of his complaint with prejudice. 2/

The same situation exists here which is why Smith's complaint is being dismissed with prejudice.

Dated at Madison, Wisconsin, this 10th day of October, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

2/ See also, Oliveto v. Crawford County Circuit Court, 194 Wis. 2d. 418, 533 N. Wis.2d. 819 (1995), which discussed the elements of contempt.

By Amedeo Greco /s/
Amedeo Greco, Examiner