STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DANIEL B. SMITH, Complainant, vs. MILWAUKEE TEACHERS' EDUCATION ASSOCIATION, Respondent.	Case 305 No. 52063 MP-2978 Decision No. 28337-C

Appearances:

Mr. Daniel B. Smith, on behalf of himself.

Perry, Lerner & Quindel, S.C., by Mr. Robert J. Lerner and Mr. Richard Perry, on behalf of the Milwaukee Teachers' Education Association.

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 January 12, 1995, alleging that the Milwaukee Teachers' Education Association, herein "MTEA", had committed a prohibited practice within the meaning of the Municipal Employment Relations Act, herein "MERA", by breaching its duty to fairly represent him. 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. The MTEA filed its answer on April 19, 1995, and hearing was held in Milwaukee, Wisconsin, on July 31 and August 1, 1995. The parties thereafter filed post-hearing briefs which were received by October 27, 1995.

Having considered the arguments and the record, I make and file the following Findings of Fact, Conclusion of Law and Order.

No. 28337-C

FINDINGS OF FACT

1. Smith is employed as a bi-lingual 7th/8th grade teacher by the Milwaukee Public Schools, herein "District", and resides at 2867 South Kinnikinnic Avenue, #223, Milwaukee, Wisconsin, 53207. He at all times material herein has worked at Vieau Elementary School in Milwaukee, Wisconsin.

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 the Vieau Elementary School whose principal is M. Lourdes Tovar.

3. The MTEA is the recognized collective bargaining agent for the District's teachers and maintains its principal address at 5130 West Vliet Street, Milwaukee, Wisconsin. At all times material herein, Mark K. Rosenbaum has served as one of MTEA's eleven (11) Assistant Executive Directors.

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). There is no evidence in this record that Principal Tovar knew about Smith's involvement in that proceeding.

5. The MTEA and the District are privy to a collective bargaining agreement which provides in Part VII, entitled "Grievance and Complaint Procedure", that:

> **GRIEVANCE AND COMPLAINT PROCEDURE**
>
> **A. PURPOSE**
>
> The purpose of this grievance procedure is to provide a method for quick and binding final determination of every question of interpretation and application of the provisions of this contract, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions. The purpose of the complaint procedure is to provide a method for prompt and

full discussion and consideration of matters of personal irritation and concern of a teacher with some aspect of employment.

B. DEFINITIONS

1. A grievance is defined to be an issue concerning the interpretation or application of provisions of this contract or compliance therewith provided, however, that it shall not be deemed to apply to any order, action, or directive of the superintendent or anyone acting on his/her behalf, or to any action of the Board which relates or pertains to their respective duties or obligations under the provisions of the state statutes which have not been set forth in this contract.

2. A complaint is a matter of dissatisfaction of a teacher with any aspect of his/her employment which relates primarily to wages, hours and working conditions and which does not involve a grievance as defined above. It may be processed through the application of the third step of the grievance procedure.

3. A continuing grievance or complaint is a situation where the time limits have been exceeded, but the condition continues to exist. Each day may constitute a new grievance or complaint. However, there shall be no retroactivity prior to the date of the filing of the written grievance or complaint, except that in the case of errors having a monetary impact not occurring as a result of teacher negligence, corrected payment shall be made retroactive for a period not to exceed one (1) year.

C. RESOLUTION OF GRIEVANCE OR COMPLAINT

If the grievance or complaint is not processed by the MTEA or the grievant within the time limits at any step of the grievance or complaint procedure, it shall be considered to have been resolved by previous disposition. Failure by the administration or the Board to communicate their disposition in writing within the specified time limit shall permit the MTEA to appeal the grievance or complaint to the next step of the grievance procedure or arbitration. Any time limits in the procedure may be extended or shortened by mutual consent.

6. Individual teachers under this language can file grievances on their own behalf

without the MTEA's concurrence. Smith received grievance forms from MTEA Staff Representative Rosenbaum after he requested them. Smith has never personally filed any grievances under his own name or on his own behalf at any time material herein. Neither Rosenbaum nor any other MTEA representatives have ever interfered with Smith's right to file grievances on his own behalf.

7. As of the time of the instant hearing, separate arbitration hearings were scheduled over three of Smith's claims, which the MTEA supported by filing grievances on his behalf on or about June 1, 1994, June 21, 1994, and January 11, 1995, and by proceeding to arbitration on those three matters. One grievance asserted that the District violated the collective bargaining agreement by subjecting Smith to unfounded misconduct charges; another grievance alleged that Smith's proposed involuntary transfer to another school for the 1994-1995 school year violated the contract; and the third grievance asserted that the District had given him an improper evaluation. The MTEA and Rosenbaum have diligently represented Smith's interests and have acted in good faith by filing and processing those grievances.

8. The misconduct charges against Smith stemmed in part from a March 28, 1994, petition signed by about 25 of Smith's fellow co-workers at the Vieau School which stated in pertinent part:

. . .

> Professionally, it becomes necessary for us to inform you about Mr. Daniel Smith and many of his unprofessional behaviors and antics. This cumulative list of behaviors does not mean that each staff member experienced them entirely. The list suggests that all of us have experienced, witnessed and/or have been affected by one or more of the inappropriate behaviors. We need to inform you about these so that we can maintain a quality education and atmosphere for our students. Some of these unprofessional behaviors include:
>
> - Verbal threats such as: "I have sued a principal before and I am going to do it again", and "I am not leaving this school until I get what I want."
>
> - Gun shooting behavior with the gun shot noise toward staff. He would use his thumb and pointing finger in a gun-like shape manner to shoot at staff. He would also verbalize the shooting noise.

- Making statements in front of students such as: "too bad we don't have any guns here", and then he would rephrase stating, "toy guns". After being questioned by the staff member he stated, "you didn't understand my humor."

- Continuously and purposely calling a teacher by a former teacher's name knowing very well what the teacher's name is.

- Intruding and interrupting classrooms. An example is when he intruded in a classroom that was testing. The door had a sign which read: "Do not disturb - Testing".

- He only communicates with staff when he needs something (supplies/equipment) and he does it with a demanding tone/voice.

- Unethical comments/conduct such as: repeatedly challenging a staff member to call the union and/or administrators during class time in front of students. Students' work and learning was interrupted by this behavior causing them to focus their attention on the staff members rather than their work.

Several staff members are considering a transfer to another school due to this stressful situation. This would be detrimental to the educational programs that we have all collaboratively worked for.

Due to his unpredictable and unstable behavior we are EXTREMELY concerned about the safety of the ENTIRE school community. Also due to the seriousness of this situation and the fear of repercussion by Mr. Smith we would like the signatures to be kept in extreme confidentiality. [Emphasis in original]

Thank you very much Ms. Tovar and Mr. Patterson for your time and consideration. The Milwaukee Teacher Education

Association (MTEA) suggested that we address our concerns in writing to you. Vieau Elementary School has been an important

landmark in this community for over 100 years. We believe that the dedication of past teachers, parents and staff will be continued at Vieau for the next 100 years.

Sincerely yours,

. . .

cc - Mr. Chuck Howard (MTEA)
Dr. H. Fuller

9. The signers of the petition sent a copy to MTEA President Chuck Howard and sent him the following note:

3-29-94

Dear Mr. Chuck Howard,

Attached, you will find a letter that over 20 staff members at Vieau Elementary School had written and signed. We had given this letter to the administration because we could not receive the much needed help from the MTEA when requested. The advice given to us from the MTEA was to confront the individual teacher alone with out any one from the MTEA conducting the meeting as a neutral individual. Teachers were not willing to do this because of the actions from this teacher such as his gun shooting motion with the gun shooting noise and much more. We at Vieau believe that the MTEA forced us into informing the administration about this individual because the MTEA could not represent us in solving this matter. Over 20 union paying members were denied services from the MTEA for not understanding the seriousness of this matter. We at Vieau are hoping that YOU may be able to help us resolve our concern with this teacher so that the atmosphere at Vieau can return to a safe place to work.

Sincerely yours,

Vieau Elementary School Staff

10. There is no proof that the MTEA or any of its authorized agents were involved with either the drafting or signing of said petition. At that time, there was no MTEA Building

Representative at the Vieau School. Rosenbaum visited with and spoke to Smith several weeks after said petition was signed.

11. Earlier, about 10 of Smith's co-workers at the Vieau School - Ms. Martin, Kim Stocke, Gloria Franco (?), Santa Lassa, Bertha Alvarez, Ms. Hernandez, Dawn Murphy, Shirley Kostizewa, Martha Ramirez, Gloria Gonzales, and Velma Payne - addressed separate, individual letters to the District's administrators complaining about Smith's conduct and/or the difficulty of working with him.

12. Smith in 1994 repeatedly asked the MTEA to replace Rosenbaum with another MTEA staff representative because, inter alia, Smith was unhappy with the quality of Rosenbaum's representation; because Rosenbaum had supposedly switched a certain document and refused to give him the original; because Smith charged that "Rosenbaum is either incompetent, or working with [sic] administration, or both"; and because Rosenbaum had refused to file harassment charges against Tovar and the District. The MTEA refused to replace Rosenbaum after fully investigating Smith's complaints.

13. Smith in 1994 hired private attorneys Lynn M. Novotnak and Jeffrey Hynes to represent him because he was unhappy with Rosenbaum's representation. The MTEA and its representatives never interfered with any of Novotnak and Hynes' efforts in representing Smith.

14. Attorney Novotnak, who apparently represented Smith for about a month, attended some of the meetings in 1994 with Principal Tovar where - in response to the aforementioned petition set forth in Finding of Fact 8, supra., - Smith's proposed discipline and 281-T evaluation were discussed. Novotnak told Rosenbaum that she wanted to interview some of the individuals who signed the petition against Smith. Rosenbaum concurred that she had the right to do so and sent her a copy of the petition. Rosenbaum did not interview any of those petitioners because Smith never asked him to do so and because Smith told him in about March, 1994 that he was represented by Novotnak and that Rosenbaum therefore was no longer his representative. Smith never asked Rosenbaum at that time to interview any of the individuals who filed the petition against him. Attorney Hynes subsequently represented Smith for about three months in some or all of those matters up to about May, 1994. Hynes told Rosenbaum to file grievances on Smith's behalf because he was using a strategy on Smith's behalf which called for filing "more paper" against the administration in the hope of generating as much pressure as possible against the administration to settle the case. Rosenbaum replied that he would not file any grievances which were without merit. Neither Hynes nor Novotnak ever filed any grievances on Smith's behalf.

15. Rosenbaum and the MTEA acted in good faith and exercised reasonable professional judgment when they investigated the circumstances of Smith's various claims detailed below and subsequently refused to file various harassment charges, grievances, or a prohibited practices' complaint on Smith's behalf and when they further failed to always act in accord with Smith's wishes.

16. The alleged harassment by the District included such things as calling Smith out of class, observing his classroom teaching, suggesting that Smith had possible drug addiction or alcohol addiction (a claim which Tovar subsequently withdrew), scheduling repeated meetings with Smith, and calling Smith over the school intercom in a supposed disrespectful manner.

17. Rosenbaum did not challenge Tovar's failure to ask Smith his side of the story before she wrote a letter critical of him because Arbitrator George Fleischli had earlier ruled that the District was not required under the parties' contract to speak to a teacher before doing so. Rosenbaum explained that fact to Smith; suggested that Smith file a response to Tovar's letter; and provided Attorney Novotnak with a copy of the Fleischli Award. Rosenbaum similarly did not support Smith's request to access all of the materials in his personnel file because the Milwaukee City Attorney earlier had issued an Opinion in 1981 which stated that some parts of an employe's file were confidential and need not be released. Rosenbaum did not immediately investigate Smith's claim that he had been verbally assaulted by a fellow teacher because Smith's claim was made close to the end of the school year; because he was busy with other matters; and because claims such as Smith's are regularly held over to when school starts again in the fall, which is why Rosenbaum had not completed his investigation of this incident as of the time of the instant hearing. Smith by letter dated December 6, 1994, asked the MTEA for all prior cases involving other teachers which were pertinent to his proposed 281 transfer and evaluation. Rosenbaum by letter dated December 14, 1994, refused to provide evaluations of other teachers on the ground that they involved confidential matters which could not be disclosed. Rosenbaum properly represented Smith's interests by telling Tovar that Smith was entitled to union representation when she spoke to him.

18. There is no evidence that the MTEA ever entered into any "deal" or arrangement with the District which provided that the MTEA would follow a "hands-off" policy in reference to any abusive actions taken by the administration against Smith and there is no evidence that the MTEA or its agents ever conspired to deprive Smith of his contractual or other legal rights.

19. A document entitled "Danger Lurks in the Workplace" was placed in the teacher mailboxes at Vieau School. Smith claims that it refers to him and that the MTEA was negligent because it did not do anything about it. There is no evidence that said material referred to him. The MTEA acted in good faith in not raising this issue on Smith's behalf.

20. Rosenbaum and the MTEA acted in good faith when they did not take any action after Smith was ordered to visit another school in order to improve his teaching and when Rosenbaum refused Smith's February, 1994, request that the MTEA file harassment charges after some of Smith's students were forced to go to the discipline room during a Valentine's Day class.

21. The MTEA and the District never substituted a letter and refused to provide Smith with the original letter filed by fellow teacher Ramirez who complained to Tovar over Smith's conduct.

22. Smith asked MTEA Assistant Executive Director Barry Gilbert for permission to telephone the MTEA any time during the school day because, in Smith's words, "an atmosphere of malevolence had been created in the building by the administration." Gilbert acted in good faith when he refused to take any steps to that effect. The MTEA also acted in good faith when it rejected Smith's additional request that it write a letter to the District's administration seeking a medical leave of absence for Smith on the ground that Smith had not provided a medical release authorizing the disclosure of his medical condition.

23. The MTEA and its representatives have not discriminated against Smith and they have not acted in an arbitrary or bad faith manner. The MTEA and its representatives have carefully investigated the circumstances surrounding Smith's various complaints and accusations and they have been extremely diligent in representing Smith and in providing him with proper representation at all times material herein.

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

CONCLUSION OF LAW

Respondent Milwaukee Teachers' Education Association has not breached its duty of fair representation in representing Complainant Daniel B. Smith and it therefore has not violated Section 111.70(3)(b), 1, 2 or 4, or any other section of the Municipal Employment Relations Act, ("MERA").

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 filed by Complainant Daniel B. Smith against Respondent Milwaukee Teachers' Education Association is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 20th day of December, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner

(Footnote 1/ appears on the following 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 TEACHERS' EDUCATION ASSOCIATION

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES

Smith filed a post-hearing statement which stated, in its entirety: "Rewrite of the Brief of Daniel Smith. I believe that Mr. Greco has been biased against my case from the start. He afforded me no pro se consideration, did not allow any evidence to be presented and ignored other key evidence." Daniel B. Smith /s/ 10-26-95."

The MTEA, in turn, asserts that under Mahnke v. WERC, 66 Wis. 2d 524, 225 N.W. 2d. 617 (1975), "Smith has utterly failed to show that the MTEA violated its duty of fair representation" and that the evidence in fact "overwhelmingly shows that the Union has vigorously represented Mr. Smith and continues to do so." The MTEA adds that "The law gives a union broad discretion in fulfilling its duty to fairly represent its members"; that the MTEA has fulfilled its duty by devoting "vast resources to Mr. Smith" which include the "three pending arbitrations going to the propriety of evaluations of Mr. Smith's performance and charges of misconduct against him"; and that the MTEA over the last two years has devoted more time and resources to Smith than any other of its 9,000 or so members.

DISCUSSION

The first issue which needs to be addressed here is Smith's bias claim and his assertion that he has not been given enough consideration as a pro se litigant. 2/ The record shows otherwise.

Thus, Smith was accorded the opportunity at the beginning of the July 31, 1995, hearing to give an opening statement which took up about 20 transcript pages; he was able to introduce all 241

2/ Smith earlier filed a request to disqualify the Hearing Examiner because of this supposed bias. The Hearing Examiner on July 26, 1994, denied said request in an Order Denying Motion to Disqualify Hearing Examiner. The Commission on July 28, 1995, affirmed the Hearing Examiner's denial of said Motion.

of his exhibits at the hearing; he was repeatedly given the opportunity to spell out his claims and to testify against the MTEA; and he was able to call any witnesses he wanted. Smith also was provided with all 50 of the subpoenas he earlier requested from the Hearing Examiner on July 24, 1995, and which were subsequently mailed to him on July 25, 1995.

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.

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.

Smith also was told at the hearing that the MTEA was correct in asserting that the applicable statute of limitations in this case was one year and that it therefore ran back to January 12, 1994; i.e., one year before the filing of Smith's instant January 12, 1995, prohibited practices complaint against the MTEA. 3/ When asked about this, Smith replied, "That's entirely incorrect" and asserted that there was no such statute of limitations. When asked to give the legal basis for his position, Smith failed to provide any.

Smith also claimed at the outset of the hearing that it was unfair to schedule the instant complaint case against the MTEA before his companion prohibited practices case against the District could be heard. However, Smith at no time prior to the hearing ever stated that he wanted his case against the District to go first. To the contrary, Smith made it clear in his prior correspondence to the Hearing Examiner that he wanted both cases to proceed independently of each other without any consideration of which one should go first. That being so, there is no merit to his belated request that this case should have been held in abeyance.

3/ Section 111.07(14), which is incorporated by reference in Section 111.70(4)(a), states: "The right of any person to proceed under this Section shall not extend beyond one year from the date of the specific act or unfair labor practice charged."

Smith also asserted at the outset of the hearing that he was never told by the Hearing Examiner when or where the instant hearing would start. Smith, in fact, was informed via an April 17, 1995, Notice of Postponement of Hearing that this proceeding and the related proceeding against the District would commence at 10:00 a.m. Monday, July 31, 1995, and, if necessary, 9:00 a.m. August 1-3, 1995, in the Milwaukee State Office Building, Milwaukee, Wisconsin. In a July 18, 1995, Order Dismissing Request for Consolidated Hearing and Establishing Separate Hearing Dates, the Hearing Examiner further informed Smith and the MTEA that the hearing involving the MTEA "scheduled for July 31 through August 3, 1995, will proceed as scheduled. . ." thereby informing both parties that the hearing would take place at the same time and location spelled out in the earlier April 17, 1995, Notice. Smith's contrary claim is false.

Smith also asserted near the end of the first day of hearing that he had not been sworn in as a witness and given the opportunity to testify saying, "my personal testimony you have not allowed at all." In fact, the transcript shows, at page 120-121, that Smith was sworn in as a witness and that he thereafter testified about the matters in dispute. Smith's contrary claim is false.

In addition, Smith was granted permission about midway through the hearing to amend his complaint against the MTEA so as to include allegations which arose following the filing of his original complaint.

All in all, then, we see that Smith introduced all of the 241 exhibits he wanted to introduce at the hearing; that he there was given full opportunity to spell out his claims against the MTEA; that he was given the opportunity to call any witnesses he wanted; that he earlier was given the 50 signed subpoenas he requested; that he was given advice on how to schedule so many witnesses for proceedings such as this; that Smith ignored that advice; that he refused to agree that this action is governed by a one-year statute of limitations; that he never requested before the start of the hearing that this case should not be heard until after his complaint against the District was heard; that he was given full notice of the hearing date and time; that he was given the opportunity to testify under oath; and that he was granted permission to amend his complaint.

Smith thus was given all of the process to which he was due.

Moreover, we must not forget that respondents in complaint cases before the Commission also have certain rights and that they, too, must be given due process and due consideration. Respondents thus are entitled to know the full details of the specific charges lodged against them so that they can properly defend themselves and they are entitled to a hearing which does not waste valuable time and resources by meandering around and which gets bogged down in irrelevant issues which have no direct bearing on the legal issues posed. Respondents also are entitled to a hearing which is limited to facts and pertinent evidence, as opposed to responding to a complainant's suspicions about what he/she thinks may have happened, but which, in fact is not supported by any evidence. Respondents similarly can object when a pro se complainant repeatedly admits that there is no proof regarding some of his/her claims, but who nevertheless seeks to call a great many

witnesses in the hope of uncovering relevant evidence. Respondents also are entitled to avail themselves of MERA's one-year statute of limitations so that they do not have to waste time and money to defend themselves against stale charges outside the limitations period.

Balancing the clash of a pro se's rights and a respondent's rights is not always an easy task - particularly when a pro se complainant fails to produce proper proof for so many of his claims and when he further chooses to ignore what legal advice is given to him. Nevertheless, the record here establishes that that balance has been fairly struck and that Smith has been given more assistance and leeway than that regularly given to parties who are represented by attorneys.

It is now time to turn to the substance of Smith's complaint allegations against the MTEA. In order to do that, it is first necessary to identify those claims.

Smith was asked by MTEA Attorney Robert J. Lerner to spell out some of those claims on cross-examination on the second day of the hearing. The transcript shows, at pp. 191-192, the following exchange between Attorney Lerner who asked the questions and Smith's replies:

> Q What evidence do you have that the union failed to file any grievance around this hostile environment and this harassment by other teachers?
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> A Well, I presented that yesterday.
>
> Q What evidence do you have, other than your feelings about it?
>
> A I presented it yesterday.
>
> Q What evidence did you present yesterday?
>
> A Well, I don't know. You'd have to look at yesterday's record.
>
> Q You were here yesterday. You can tell us again.
>
> A Yeah. Well, I presented several hours of evidence yesterday. I don't think I can really recall all that at this moment.
>
> Q You can't recall one specific iota of evidence, can you, that shows that --
>
> A I think the best thing would be to look at yesterday's record. That's my opinion.

Q I listened to yesterday's record. And I'm asking you, sir, do you have any evidence, other than your own personal feelings, that there was any improper action on the part of --

A I believe I have an abundance of evidence.

Q What is it?

A I presented it yesterday and I wasn't allowed to present it all yesterday either.

Attorney Lerner at that point moved that the Hearing Examiner direct Smith to answer his questions since Smith's prior answers were unresponsive. The Hearing Examiner did so and warned Smith that he would dismiss this claim if he did not immediately answer Lerner's questions. Smith then replied:

A Again, I would refer to yesterday's, but anyway, I'll try to answer to the best of my ability. I, on several dozen occasions, asked the union to press harassment charges, and they refused to do so. I met with Mr. Rosenbaum in a meeting to set up grievances. He did not follow through to the best of my recollection on all of those grievances that we had discussed. I sent dozens of letters or presented dozens of pieces of evidence, and I sent letters to the union as well indicating what was happening to me and requesting action, and no action was taken.

What else did I do? I was in constant contact with the union as to what was happening at the school. I let them know of every incident that I felt was of significance, and they failed to act. [Transcript, pp. 193-194].

Lerner further asked Smith, "What evidence do you have that [the MTEA] made those wrong choices [in not filing more grievances on Smith's behalf] for reasons that are violative of the law?" Smith replied: "I don't know. I don't know why they made their choices. I really can't answer your question on that." [Transcript, p. 195].

Lerner also asked Smith on cross-examination to spell out why he thought he was being discriminated against because of his union activities. Smith replied that that "possibly" was true, and, in response to a further question, said: "Yeah. Only a possibility, um-hum." [Transcript, pp. 183-184].

Smith then admitted that he was unaware of any conversations between Vieau School Principal Tovar and others regarding Smith's prior union activities at the Pierce School which led to the prohibited practices complaint proceeding set forth in Finding of Fact No. 4, supra. In addition, there is no proof in this record that Tovar knew about Smith's prior union activities at the Pierce School or the prohibited practices case in which he was involved.

There thus is not one bit of evidence - nary a scintilla nor an iota - supporting Smith's claim that there was a "deal" between MTEA and the District to the effect that the MTEA would do nothing on Smith's behalf when the District violated his rights. 4/

The record further establishes, as related in Finding of Fact 7, supra. that the MTEA has filed three separate grievances on Smith's behalf and that it has processed them all the way to scheduled arbitrations. Given that undisputed fact, it is clear that the MTEA has vigorously defended Smith's rights whenever it thought they had been violated. Indeed, the record shows - as established by Rosenbaum's uncontradicted testimony - that the MTEA in the last several years has spent more time and resources on Smith than on any of its other 9,000 or so MTEA members.

To be sure, the MTEA has not supported Smith on each and every of the countless allegations he has made against the District and it similarly has not taken up Smith's cudgel vis-a-vis the complaints he has against his fellow teachers, particularly the ones who individually complained about him, as well as those who signed the petition cited in Finding of Fact No. 8, supra. which accused him of "unprofessional behavior and antics" and which expressed concern over their physical safety.

But then again, and as the MTEA correctly points out, a union has wide discretion in determining which grievances it will process and that discretion will not be disturbed absent a showing that the union's actions are "arbitrary, discriminatory or in bad faith." See Mahnke v. WERC, 66 Wis. 2d. 524, supra, where the Wisconsin Supreme Court quoted the United State's Supreme Court's decision in Vaca v. Sipes, 386 U.S. 171 (1967), to that effect. The Court in Mahnke added, at 66 Wis. 2d. at 532: "The test is whether the action of the union was arbitrary or taken in bad faith in the performance of its duty of fair representation on behalf of its employee member." The Court further stated: "This is not to suggest that every grievance must go to arbitration, but at least that the union must, in good faith, weigh the relevant factors before making such determination." Id., at 534.

Here, the MTEA has done just that, in spades. That is reflected by the fact that it was

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4/ This is not to say that the District was not guilty of discriminating against Smith. That indeed may be the case if Smith can prove elsewhere that such discrimination occurred. All that is being decided here is that no such evidence exists in this record.

proceeding to arbitration over three separate grievances it filed on Smith's behalf and the further fact that it over the last several years has spent more time and resources on Smith than any other of the about 9,000 MTEA members it represents. In addition, I credit all of Rosenbaum's testimony to the effect that he did not honor all of Smith's requests and did not file any complaint cases or more grievances on Smith's behalf because in his professional judgment he thought they were without merit after he investigated them.

Rosenbaum's refusal to file even more grievances was, of course, at odds with Smith's apparent strategy of filing as many grievances and charges as possible in order to get the District to back off from disciplining him. That strategy was reflected in what Attorney Hynes told Rosenbaum in the Spring of 1994 and which is related in Finding of Fact 14, supra. Thus, Rosenbaum credibly testified:

> "His [Hynes'] reason was he was using or attempting to use a strategy with respect to Mr. Smith's behalf that the more paper we could throw at the administration, the more pressure would be put on them to possibly settle this case." [Transcript, p. 209].

The utter paucity of any evidence supporting Smith's baseless claims against the MTEA in this proceeding raises the question of whether Smith is following that same "strategy" vis-a-vis the MTEA. For by bringing such baseless charges, and by continuously attacking the quality of the MTEA's representation, Smith has guaranteed that the MTEA will pay close attention to his every complaint and that it will devote more time to him than any other MTEA member. That, in spite of the fact that about ten teachers have individually complained over Smith's conduct and that about 25 of his fellow co-workers have jointly signed a petition voicing their concerns over Smith's conduct, including his admitted propensity for aiming his fingers at others like a gun and telling them: "Bang! You're dead!"

But, it is unnecessary to speculate over what motivated Smith to file his baseless complaint here. Instead, it suffices to say only that the MTEA has been placed in the extraordinarily difficult situation of trying to protect Smith's rights at the very time that so many other MTEA members have voiced concerns over working with him. Indeed, and as related in Finding of Fact No. 9, supra, these same MTEA members have complained to the MTEA that it was not helping them in their difficulties with working with Smith and that they thus, in their words, have been "denied services from the MTEA for not understanding the seriousness of this matter."

The MTEA has responded to that situation by providing Smith with outstanding representation whenever it thought he was right and by concluding that Smith was not entitled to other representation and services after it carefully investigated and weighed the full circumstances of his other complaints and requests. If Smith was unhappy over these latter determinations, he of course was free to file his own grievances - which is a course of action he never took. He also was free to have his private attorneys assist him in filing his own personal grievances or complaints -

which again is a course of action he never took.

The MTEA has therefore fulfilled its duty, many times over, under Mahnke to fairly represent Smith. That is particularly true for Rosenbaum who, despite Smith's unwarranted personal attacks on him, has exhibited great professionalism and has done an outstanding job of representing Smith.

The record thus establishes that Rosenbaum and the MTEA did not discriminate against Smith and that they did not act in an arbitrary fashion or in bad faith in representing him and in ultimately deciding not to file any more grievances or complaints on his behalf. As a result, they did not breach their duty to fairly represent him under MERA.

Given all of the foregoing, the complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 20th day of December, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner