STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JESUS BARBARY, Complainant, vs. BLACKHAWK TECHNICAL COLLEGE, Respondent.	Case 57 No. 52192 MP-2985 Decision No. 28448-B
JESUS BARBARY, Respondent, vs. BLACKHAWK TECHNICAL COLLEGE/ PARAPROFESSIONAL TECHNICAL COUNCIL, WISCONSIN EDUCATION ASSOCIATION COUNCIL AND NATIONAL EDUCATION ASSOCIATION, Respondent.	Case 58 No. 52193 MP-2986 Decision No. 28449-B

Appearances:

Mr. Jesus Barbary, Post Office Box 485, Beloit, WI 53512 appearing pro se.

Wisconsin Education Association Council, Post Office Box 8003, Madison, WI 53708-8003, by Ms. Mary Pitassi, Associate Counsel, appearing on behalf of the Respondent Labor Organizations.

Godfrey & Kahn, S.C., Post Office Box 1110, Madison, WI 53701-1110 by Mr. Jon E. Anderson, for the Respondent Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel J. Nielsen, Examiner: On February 3, 1995, Jesus Barbary (hereinafter referred to as either Complainant or Barbary) filed with the Wisconsin Employment Relations Commission ("Commission") a complaint of prohibited practices against Blackhawk Technical College (either "BTC" or "the College") alleging that the College had engaged in a variety of prohibited practices, statutory violations, constitutional violations, and contractual violations.

On that same day, the Complainant also filed a complaint of prohibited practices against the Blackhawk Technical College Paraprofessional Council ("BTC/PTC" or "Association"), the Wisconsin Education Association Council ("WEAC") and the National Education Association ("NEA") alleging that these organizations had also committed a variety of prohibited practices, statutory violations, constitutional violations, and contractual violations. The complaints were subsequently amended by the Complainant's own motion on March 10, May 2, August 31, October 3, and December 30, 1995. The complaints were assigned to Marshall L. Gratz, an examiner on the Commission's staff, and were consolidated for hearing. After the Complainant objected to the consolidation, Examiner Gratz recused himself and the complaints were assigned to Daniel Nielsen, another member of the Commission's staff.

On August 29, 1995, the Examiner, on his own motion, ordered the Complainant to make his complaints more definite and certain, and to distinguish between the claims that related to Section 111.70, MERA and the collective bargaining agreement, and those rooted in the state and federal constitutions, various other state and federal statutes, the common law, and other non-MERA sources. The Complainant was advised that the Examiner lacked jurisdiction over those non-MERA matters. The clarified complaints were submitted on October 13, 1995. The Respondents filed Answers to the complaints on November 6, 1995, denying the Complainant's allegations and asserting that many were outside the Commission's jurisdiction and/or barred by the statute of limitations.

By letter dated November 16, 1995, the Complainant asked the Examiner to recuse himself based on misconduct, incompetence and unfairness, and that request was denied by the Examiner on November 20th. The Complainant requested that the Commission remove the Examiner, and this request was denied on December 28th.

Hearings were held on January 18 and 19, April 23, 24, and 29, and August 12, 13, 14 and 15, 1995 in Beloit, Wisconsin, during which time the Complainant presented such testimony, exhibits and other evidence as was relevant. At the conclusion of the Complainant's case, the Respondents moved to dismiss the complaints, and the Complainant requested summary judgment. The motions were taken under advisement, and the parties submitted written arguments in support of their motions. Owing to certain health difficulties, the Complainant's argument was not received until February 21st. On February 25th, the College moved to strike portions of the Complainant's brief as containing evidence outside the record. That motion was granted on March 3rd, and the Complainant's motion to reopen the record was denied on March 7th, whereupon the record was closed. 1/

Now, having considered the evidence, the arguments of the parties, the applicable provisions of the statute, and the record as a whole, the Examiner makes the following

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1/ In addition to the pleadings on file and the transcripts and exhibits adduced at hearing, the Examiner takes administrative notice of the entire contents of the files in these cases, an index of which is attached hereto as Appendix "A".

FINDINGS OF FACT

1. The Complainant, Jesus Barbary, was at all material times a municipal employee within the meaning of Section 111.70. He is an African-American male, whose mailing address is Post Office Box 485, Beloit, Wisconsin 53512.

2. The Respondent, Blackhawk Technical College is a municipal employer which provides general and vocational education services to citizens in and around Rock County, Wisconsin. It maintains its principal offices at 6004 Prairie Road, Janesville, Wisconsin. The President of the College is Dr. James Catania. Robert Borremans is a Vice President of the College with responsibility for administrative affairs. Valerie Gallaway was, at all relevant times, the College's Administrator of Human Resources. The College's Facilities Manager is Jeff Amundson.

3. A. The Respondent Blackhawk Technical College Paraprofessional Council is a labor organization maintaining its offices c/o 6004 Prairie Road, Janesville, Wisconsin. At all relevant times, until September of 1994, Beverly Biermeier was the President of the Association. In September of 1994, Cheryl Ford became President of the Association. In September of 1995, Jane Lee became the President of the Association, and Sandra Hough became the Vice-President. At all relevant times, Donna Vohs was the chief steward of the Association, responsible for grievance processing. The Association is affiliated with, and received support services from, the Wisconsin Education Association Council.

B. The Respondent Wisconsin Education Association Council is a labor organization maintaining its offices at Post Office Box 8003, Madison, Wisconsin 53708-8003. WEAC provides support services to the Association in negotiating and administering its collective bargaining agreement with the College, including assistance in processing and litigating grievances. Leigh Barker was, at all relevant times, the WEAC consultant with principal responsibilities for assisting the Association.

C. The Respondent National Education Association is an umbrella group comprised of state and local labor organizations, maintaining its offices at 1201 16th Street, NW, Washington DC 20036. The NEA has no role in representing employees at the College, and is not a labor organization for purposes of this proceeding.

4. The Association represents a bargaining unit at the College consisting of "all regular full-time employees in maintenance, custodial and clerical positions, but excluding professional, managerial and supervisory employees." Given the numerical predominance of clerical employees in the bargaining unit, a separate custodial representative is named to act as a steward for the custodial and maintenance personnel.

5. At the times relevant to this proceeding, the members of the College's custodial and

maintenance staff have included, among others, Jesus Barbary, Mark Benzing, Charles Stokes, Russ Stephenson, Everett Montanye, Allan Stiegman, Kris Sheridan, Ron Garthwaite, Francis Peck and Joyce Hieden.

6. The Association and the College are parties to a collective bargaining agreement which provides, inter alia:

> PREAMBLE
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> THIS AGREEMENT covering wages, hours and working conditions made and entered into at Janesville, Wisconsin between the Blackhawk Board of Vocational, Technical and Adult Education (hereinafter referred to as the "Board"), and Blackhawk Technical College/Paraprofessional Technical Council/Wisconsin Education Association Council National Education Association (hereinafter referred to as the "Union").
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> WITNESSETH: That
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> WHEREAS, the purpose of the Agreement is to promote harmony, cooperation and efficiency in the working relationship between the parties so that the employer, the employees, the school and the public may be benefitted and to promote the peaceful adjustment of differences that may arise between the parties.
>
> NOW, THEREFORE, it is agreed that the following provisions shall cover this Agreement.
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> . . .
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> ARTICLE 1 - RECOGNITION
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> Section 1 - Bargaining Unit Definition
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> The Board recognizes the Union as the exclusive bargaining representative for all employees of the Board as described in the Wisconsin Employment Relations Commission Certificate submitted under the date of September 14, 1989, Case 49, No. 42508, ME-2920, including all regular full-time employees in maintenance, custodial and clerical positions, but excluding professional, managerial and supervisory employees. Regular full-time employees shall be defined as those employees who work forty (40) hours or more per week.
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> . . .

Section 3 - Dues Deduction

The Blackhawk Technical College shall collect and forward to the Blackhawk Technical College/Paraprofessional Technical Council Education Association the dues of Union members. The District

shall deduct an amount to provide monthly payments of dues for membership in the United Education Profession, as determined by the Union, from the regular semi-monthly salary check of each member who has authorized such deductions in writing. The amount so deducted pursuant to such authorization shall be remitted to the Union on or before the eighth (8) day of the month following the month in which such deductions were made. The District shall provide the Union with a list of employees from whom membership dues deductions are made with each monthly remittance to the Union.

Authorization to collect dues by payroll deduction shall remain in full force and effect until revoked by the member in writing to both the Union and the District in accordance with applicable law. Such revocations during any membership year shall not be effective until thirty (30) days after receipt by the Union and the District of the written revocation.

Section 4 - Fair Share Agreement

1. All employees in the bargaining unit shall be required to pay, as provided in this Article, their fair share of the costs of representation by the Union. No employee shall be required to join the Union, but membership in the Union shall be available to all employees who apply, consistent with the Union constitution and bylaws.

2. The District shall deduct in twenty-four (24) equal installments from the monthly earnings of all employees in the collective bargaining unit, except exempt employees, their fair share of the cost of representation by the Union, as provided in section 111.70(1)(f). WI. Stats., and as certified to the District by the Union. The District shall pay said amount to the treasurer of the Union on or before the eighth (8) day following the month in which such deductions were made. The date for the commencement of these deductions shall be determined by the Union; however, all employees,

except exempt employees, shall be required to pay their full fair share assessment regardless of the date on which their fair share deductions commence. The District will provide the Union with a list of employees from whom deductions are made with each monthly remittance to the Union.

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ARTICLE 2 - MANAGEMENT RIGHTS

The Board retains and reserves the sole right to manage its affairs in accordance with all applicable laws and legal requirements, except as limited by the specific provisions of this Agreement. Included in this responsibility, but not limited thereto, is the right to:

1. Determine the number, structure and location of all departments and divisions

2. Determine the kinds and number of services performed

3. Determine the number of positions and classifications thereof, to perform such services

4. Direct the work force

5. Establish qualifications for hire

6. Promote and retain employees

7. Test and to hire

8. Transfer and assign employees

9. Suspend, discharge, demote, or take other disciplinary action

10. Release employees from duty because of a lack of work or a lack of funds

11. Maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments

12. Make reasonable work rules.

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the District Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement and Wisconsin Statutes; Section 111.70, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and Laws of the State of Wisconsin, and the Constitution and Laws of the United States.

ARTICLE 3 - UNION RIGHTS

1. The Union may hold meetings within any building owned or rented by the Board upon approval of the person responsible for scheduling which is subject to the educational programs and availability.

2. Subject to the demands of the educational programs of the District, the Union will be permitted to use District equipment such as copy machines, computers, printers, etc. in relation to Union activities. The Union agrees to pay for the cost of copying materials and for any supplies consumed in regard to this paragraph.

3. The Union may use the inter-District distribution system for the purpose of communicating with its members.

4. The duly authorized representative of the Union shall receive three (3) copies of the minutes for all Board meetings, and prior to all Board meetings, shall be provided with three (3) copies of any agenda prepared for such meetings. All copies required under this paragraph shall be placed in the mailbox of the designee of the Union. The Union, through its officers or members shall, upon their request, be entitled to appear before the Board at any meeting and to speak on any issues on the agenda of such meeting.

5. The Board shall make available to the Union a total of six (6) days annually for Union business. The Union shall give written notification of the intention to take such leave to the President/District Director at least five (5) working days prior to the time such leave is requested, and shall designate the person or persons who are to take such leave. It is understood that this provision shall mean that a total of six

(6) days leave for Union purposes is the total leave allowed, regardless of the number of Union representatives using such leave. Such leave shall be with pay.

ARTICLE 4 - UNION ACTIVITY

It is agreed by the parties that the Union will not conduct its internal business such as soliciting members, collecting dues or holding union meetings during working hours. Officers of the

Union may conduct such routine business as posting of notices on bulletin boards of the school where they are employed, but not travel to other schools, while on duty, to perform this function. In the event that any members of the bargaining unit are required to participate during working hours in grievance meetings or in negotiations with the District respecting this Agreement, they shall be granted the necessary time and shall suffer no loss of pay.

It is further agreed by the parties that the Union shall provide to the President/District Director by August 1 of each year *(and when changes occur) a list of its officers and members of the Union Grievance Committee.

The business representative of some other duly qualified and authorized Union representative may visit the schools during hours of operation for purposes consistent with the Agreement. If meetings where bargaining unit members are necessary or required, such meetings shall be scheduled so as not to interfere with the regular work hours of the employee.

ARTICLE 5 - GRIEVANCE AND COMPLAINT PROCEDURE

Section 1 - Definition of Grievance

A grievance is defined as a complaint by a bargaining unit employee or the Union that there has been an alleged violation, misinterpretation or misapplication of this Agreement.

Section 2 - General Applications

1. The written grievance provided for herein shall give a clear and concise statement of the alleged grievance including the facts upon which the grievance is based, the issues involved, the contract provision(s) involved, and the relief being

sought.

2. The Union shall have the right to be present: to present, process or appeal a grievance at any level on behalf of any employee.

3. Employees shall have the right to have a Union representative present at any step of the grievance procedure.

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

5. Should a grievance not be answered within the allotted time period, it may be processed through the next step of the procedure.

6. The time limits specified in this procedure are an integral part of this Agreement, but may be waived or extended in any specific instance by mutual agreement in writing.

7. Grievances concerning discipline may be initiated at the level at which the discipline was imposed.

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

Section 3 - Methods of Presenting Grievance

STEP ONE - Within twenty (20) working days after he/she knew or should have known of the causes of such grievance, the employee will present his/her grievance in person or by a duly authorized representative of the Union to the employee's immediate supervisor in a meeting called for the purpose of attempting to resolve the matter informally prior to the institution of a written grievance. The supervisor shall respond verbally to the employee or Union representative within five (5) working days of the time he/she is informed that this is Step One of the grievance procedure. The supervisor must be informed that this is Step One of the Grievance Procedure within the aforementioned twenty (20) work day period.

STEP TWO - If the grievance has not been resolved satisfactorily, it shall be presented, in writing, to the employee's immediate supervisor within five (5) working days after the supervisor's verbal

response was due. The supervisor shall then respond, in writing, within five (5) working days to the grievant with a copy to the authorized Union representative.

STEP THREE - If the grievance has not been resolved satisfactorily, it shall be presented to the Administrator of Personnel Services, in writing, within seven (7) working days after the response of the immediate supervisor was due. The Administrator of Personnel Services shall then hold a meeting with the grievant and/or Union representative within seven (7) working days after receiving the grievance, and shall, within five (5) working days of the date of the meeting, respond to the grievant in writing with a copy to the authorized Union representative.

STEP FOUR - If the grievance has not been resolved satisfactorily it shall be presented, to the President/District Director, in writing, within seven (7) working days after the written response of the Administrator of Personnel Services was due. The President/District Director shall then hold a meeting with the grievant and/or Union representative within seven (7) working days after receiving the grievance, and shall, within five (5) working days of the meeting, respond to the grievant in writing with a copy to the authorized Union representative.

STEP FIVE - If the grievance has not been resolved satisfactorily, it shall be submitted, in writing, to the Board. Submission to the Board shall be no later than ten (10) work days after the written response of the President/District Director was due. The Board may waive a hearing at this step of the procedure except for cases involving suspension without pay or discharge. In cases involving suspension without pay or discharge, the hearing shall be held at the next regularly scheduled meeting following the receipt of the grievance provided the grievance was received by the Board no later than ten (10) work days prior to said meeting or at a special meeting called by the Board in its discretion for this purpose. The Board shall communicate its decision in writing to the grievant with a copy to the authorized union representative within five (5) work days of the meeting.

In all other cases, the Board shall make the decision to waive or hear the grievance at its next regularly scheduled meeting provided the grievance was received by the Board no later than ten (10) work days prior to said meeting or at a special meeting called by the Board in its discretion for this purpose. The Board decision to hear or to waive hearing a grievance shall be communicated in writing to the

grievant with a copy to the authorized union representative within five (5) work days of the meeting. Board hearings under this section shall be conducted at the next regular meeting of the Board or at a special meeting called for this purpose, whichever occurs sooner, but in no case later than within thirty (30) work days of the decision to hear the grievance. The Board shall communicate its decision, in writing, to the grievant with a copy to the authorized union representative within five (5) work days of the meeting.

STEP SIX - If the grievance has not been resolved satisfactorily within twenty (20) work days, the Union may petition the Wisconsin Employment Relations Commission for a panel of five private arbitrators. The parties shall alternatively strike two names from the panel, with the party striking first to be determined by a coin toss. The remaining name shall be the arbitrator. The

arbitrator shall determine whether there has ben a violation of one or more specific provisions of this Agreement but shall have no power to modify or amend this Agreement. Each party shall bear its own costs involved in such arbitration. The decision of the arbitrator shall be binding upon both parties.

ARTICLE 6 - PERSONNEL FILES

1. Employees shall have the right to review their personnel files and to receive copies of materials contained therein upon reasonable notice to the employer. Union representatives shall have the right to examine an employee's file materials upon written authorization of the employee.

2. The official personnel file shall be kept in the District Personnel Office.

3. Records of grievances shall not be placed in the personnel file.

4. If the employee disagrees with any information contained in the personnel records, removal or correction of that information may be mutually agreed upon by the employer and the employee. If an agreement cannot be reached, the employee may submit a written statement explaining the employee's position which will be attached to the disputed personnel record.

5. At least once each year, the employee will have the right to

request that material in the file be removed. Materials may be removed by mutual consent.

6. Nothing in this article authorizes an employee or representative to inspect or receive copies of personnel records exempted by Section 103.13 WI Stats.

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ARTICLE 9 - FAIR DISCIPLINE, DISMISSAL

Ordinarily, the Employer shall follow the principle of progressive discipline, but the Employer need not follow such principle in cases of theft, use/sale/possession of drugs, or fighting/endangering safety, whereupon a summary dismissal may be utilized.
Non-Probationary employees shall not be disciplined, suspended or discharged without just cause.

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ARTICLE 13 - EVALUATION

The primary purpose of evaluation is to improve the quality of service and to make known to the employee his/her strengths and areas where improvements can be made.

1. The District will orient all new employees regarding evaluation procedures and instruments at the time of hire. If the instrument is changed, all employees will be reoriented.

2. Employees shall be given a copy of an evaluation report prepared by their supervisors and shall have the right to discuss the report with their supervisors.

3. The employee has the right to answer any evaluation report and have his/her answer attached to the file copy.

4. No bargaining unit employee may be assigned to prepare an evaluation report concerning any other bargaining unit employee for purposes of promotion, demotion, discipline and/or continued employment.

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ARTICLE 15 - HOLIDAYS

1. Full-time employees shall be allowed paid holidays each year as follows:

A. New Year's Day
B. Good Friday
C. Memorial Day
D. Independence Day
E. Labor Day
F. Thanksgiving Day
G. Friday after Thanksgiving
H. Christmas Eve
I. Christmas Day
J. New Year's Eve

2. When Christmas Eve and New Year's Eve fall on a Saturday or Sunday it shall be celebrated on the preceding Friday or the day following Christmas or New Year's, the day to be decided at the discretion of the District with regard to the School Calendar.

3. The employee must work the regularly scheduled day before and day after each holiday to be eligible for holiday pay with the exception of scheduled vacation, sick leave for illness of the employee or other approved absence with pay.

4. The President/District Director will announce at least 30 (thirty) days prior to a holiday which falls on a weekend whether the holiday will be observed prior to or following the weekend.

ARTICLE 16 - SICK LEAVE

Section 1 - Eligibility

Eligibility for sick leave shall begin after the completion of the probationary period, but accumulation shall be retroactive to the time of initial employment.

Section 2 - Computation

Regular full-time employees shall accumulate twelve (12) days sick leave per year, at the rate of one (1) day per month, each month in which the employee has no break in continuous service.

Section 3 - Accumulation

Employees shall be permitted to accumulate up to one hundred thirty

(130) days of sick leave. A statement of accumulated sick leave credit shall be given to each employee on or about September 1 of each year.

Section 4 - Use

1. 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.

2. In the event an employee is aware in advance that sick leave benefits will be needed or due, it shall be the duty of the employee to notify the supervisor and the Administrator of Personnel Services as far in advance as possible in writing of the anticipated time and duration of such sick leave, the reason for requesting such sick leave and, medical certification that the employee will be unable to perform his/her normal work function. Employees will be required to begin using sick leave on the date which their doctor certifies that they are medically unable to perform their normal duties.

3. An employee on sick leave is required to notify the supervisor and Administrator of Personnel Services at the earliest possible time of the anticipated date on which the employee will be able to resume his/her normal duties. The employee's doctor shall immediately inform the Administrator of Personnel Services in writing of any change in the employee's status which would affect the anticipated date that the employee could return to his/her normal duties. The District may require a certificate from the physician of the Board's choosing that an employee on sick leave is medically unable to perform his/her normal duties and the District may require such medical certification from time to time until the employee returns to his/her normal duties. The District shall pay the full cost of any such required medical certificate that is not paid for by insurance.

4. 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 due to doctor or dentist appointments, or due to medical tests, or sick leave taken for illness in the immediate family (spouse and child). Employees will make a reasonable effort to

schedule appointments outside of work hours.

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.

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ARTICLE 24 - SAFETY

When the employer requires safety equipment, uniforms or other special purpose clothing for safety purposes to be utilized by an employee, the employer shall furnish such equipment, uniform or special purpose clothing. In the event the employer requires safety shoes, the employer shall furnish same at no more than one pair per year. Employees shall be required to use any items furnished for safety purposes and shall exercise reasonable care regarding such items.

Employees may direct any suggestions/requests relative to safety equipment through their immediate supervisor to the Vice-President for Administrative Services.

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ARTICLE 29 - NO LOCK OUT

The District agrees that it will not lock out any of the employees of the bargaining unit.

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ARTICLE 21 - RULES GOVERNING AGREEMENT

1. The Agreement shall become effective and shall remain in full force and effect for the period of July 1, 1992 through June 30, 1995.

2. This Agreement constitutes the entire Agreement between the parties, and no statements shall supersede any of its provisions. Any amendment supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. Waiver of any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement.

3. If any provision of this Agreement, or amendment hereto, is or shall at any time become contrary to Federal or State law, or a ruling of the Wisconsin Employment Relations Commission, then such provision alone shall become null and void and the parties shall enter into immediate negotiations for the purpose of rewriting the article or section in a manner that enables it to conform to the requirements of said laws or rulings.

4. Both parties shall abide by the terms of this Agreement.

5. Any individual contract or agreement between the Board and an individual employee shall be subject to and consistent with the terms and conditions of this Agreement. If an individual contract contains any language inconsistent with this Agreement, this Agreement shall be controlling.

6. Negotiations on a successor agreement shall begin on or before March 1 of the year the Agreement is due to expire.

7. In the event the parties do not reach a written successor agreement to this Agreement by the expiration date of this Agreement, the provisions of this Agreement shall remain in full force and effect during the pendency of negotiations and until a successor agreement is reached or until this agreement is terminated pursuant to paragraph 8.

8. In the event that either party desires to terminate this Agreement, written notice must be given to the other party not less that ten (10) days prior to the desired termination date which shall not be before the nominal end of the term in paragraph 1.

ARTICLE 32 - RIGHT TO UNION REPRESENTATION

1. An employee shall be entitled to the presence of a Union

representative, upon request, at an investigatory interview with the District which is reasonably likely to result in disciplinary action against the employee or which has as its purpose the gathering of information intended to or reasonably likely to have such a result.

2. The District shall advise the employee of the purpose(s) of the interview at the time that the employee is directed to meet with the District.

3. If the specific Union representative is unavailable to meet with the employee and the District at the scheduled time and place, the employer will make a reasonable effort to reschedule the meeting. However, the time, place and manner of the interview shall be under the control of the employer.

4. The employee shall have the right to consult privately with his/her Union representative prior to the commencement of the meeting. Where possible, such consultation shall be held during the employee's non-working time and shall not unreasonably delay the interview.

5. The Union representative does not have the right to answer questions directed to the employee in the investigative interview.

7. A. In 1991, Mr. Barbary and Mark Benzing expressed dissatisfaction with the configuration of work areas for the custodians, believing that the workload was not evenly distributed. A joint College-Association study committee looked at the work distribution and decided not to recommend any changes. In response, Benzing and Barbary filed a prohibited practice complaint with the WERC asserting that the study was biased and unfair. The complaint was dismissed with prejudice.

B. In the Fall of 1993, as a result of continuing grievances and complaints about the issue of workload distribution, the College and the Association revisited the configuration of custodial work areas. The Association raised the possibility of having an independent consultant review the work areas. After meetings between WEAC Consultant Leigh Barker and each custodian who had grieved the distribution of work during which they agreed that a study would resolve their grievances, the concept was accepted by the membership. The Association and the College agreed on the use of Jack Dudley, a consultant who had done similar work for other districts.

C. Dudley conducted a study and presented his preliminary findings to a meeting of the custodial staff, Barker, Jeff Amundson and College Vice-President Bob Borremans in

November of 1993. Barbary expressed concerns about the findings, to the point that he was escorted into the hall and told to stop being abusive to Dudley.

D. After the meeting, the College refined some of its cleanliness expectations for Dudley, and he revisited the work areas, accompanied by lead worker Russ Stephenson representing the Association and supervisor Jeff Amundson representing the College. Based on this fresh set of observations, Dudley revised his findings and presented a new proposal at the end of March of 1994.

E. On March 31st, the final proposal was shared with the custodial staff, and options for assigning staff members to the new area were discussed, with a target date for implementation of August 15th. At the outset of the meeting, College HR Director Valerie Gallaway distributed a questionnaire asking custodians to choose among three options for reassignment. However, at a meeting in mid-March the College had agreed to accept whatever method the Association preferred, and Leigh Barker objected to the College's effort to poll the members. She collected some of the questionnaires, and none of them were returned to Gallaway. No consensus was reached at the March 31st meeting. Another meeting was held on May 1st, but again no agreement was reached.

F. Mr. Barbary filed another grievance challenging the Dudley study, but the Association Executive Committee decided that it was premature, given that the study had not been implemented. In July, the College pressured the Association to select some means of reassigning custodians, so that the implementation could go forward. The Association Executive Committee concluded that a unanimous position was not likely, and so voted to go along with the method preferred by a majority of the custodial staff. Based on discussions to that point, and the questionnaires that Barker had collected at the March 31st meeting, they advised the College that custodians should continue to work the same shifts and general areas they had prior to the Dudley study.

G. On August 11th, Mr. Barbary sent Barker a class action grievance, protesting the decision to accept the current assignments without the input of any custodial representative, and also raising an October 1993 memo from Amundson, in which he had advised the custodians that work had to be done "fully and completely". He also filed a separate grievance on August 25th, listing Charles Stokes and himself as the grievants. Barker met with the custodians as a group in early September and after that met again individually with each custodian. She also held meetings with College officials about the custodians' concerns. As a result of these meetings, all of the custodians but Barbary and Benzing removed their names from the August 11th grievance, and Stokes also withdrew from the August 25th grievance. The two grievances were put on hold, pending conclusion of the work study discussions between the Association and the College. On February 3, 1995, the Association presented the College with a series of modifications it wanted in the work areas. The Association's proposed modifications were ultimately accepted by the College, and were implemented sometime in late February 1995 of thereafter.

8. On July 15, 1992, video cameras were installed in the College's kitchen by Mike Pook of the audio-visual department at the request of Chico Pope, a representative of Consolidated Management Co., the food service contractor for the College. The purpose of installing the camera was to monitor a theft problem. Everett Montanye and Al Stiegman each saw the equipment in the kitchen before it was installed. At roughly the same time, someone pulled the plug on the refrigerator in Room 1324, where custodians sometimes kept their lunches. Mr. Barbary and co-worker Mark Benzing then took to keeping their lunches and snacks in the refrigerator in the kitchen. They were videotaped removing items from the kitchen, and were suspended with pay pending an investigation. Beverly Biermeier, the Association President, interviewed Pope, Amundson and Stiegman, as well as meeting with the custodians as a group. She also spent a weekend viewing the videotape. As a result of the College's own investigation, and Biermeier's findings, both Barbary and Benzing were reinstated without any discipline.

9. At some time in 1993 or 1994, lead custodian Russ Stephenson approached Tara Kilby and several other employees of the College's library, to ask that they monitor the amount of time that Mr. Barbary spent in the library. At the time, Barbary was not always completing his work assignments. Kilby was concerned about being asked to monitor another employee and later raised the issue with her supervisor, Ron Curtis, who advised her that she need not do so. Kilby also raised the issue in general terms at an Association meeting without providing names or specifics. The topic was discussed, though no action was taken. No library employee ever monitored or reported on Barbary's use of the library.

10. Sometime in 1993, Association President Beverly Biermeier was named a night supervisor. This is a part-time non-unit position, providing an information resource for people who come to the campus in the evening hours. She was responsible for making rounds of the buildings to note any problems, responding to any emergencies, and keeping a log of any unusual occurrences during the evening. Biermeier held this position for two semesters, and was succeeded by Sandra Hough, who performed the same duties. The night supervisor does not hire, evaluate, direct or discipline employees, nor does the night supervisor effectively recommend such actions, and is not a supervisory position.

11. In early May of 1994, Jeff Amundson directed Russ Stephenson to move Mr. Barbary's work cart from a closet used by the kitchen to another closet provided for the use of custodians. Barbary had previously been asked to move the cart himself, but had not done so. Stephenson moved Barbary's cart, and advised him of the move when he reported for work at 2:30 p.m. Barbary subsequently filed a grievance, alleging that his privacy had been invaded and some personal belongings were missing from his cart. The College denied the grievance. In order to resolve the matter, the Association sent a letter to the College President, Dr. Catania, expressing the Association's view that common courtesy would have dictated Barbary be warned of the movement of his cart, and that employees should be provided with a private space for their belongings. The Association also paid Mr. Barbary $10.00 for his loss, rather than spend the much larger sums that would have been required to arbitrate the issue. Barbary accepted the payment.

12. In May 1994, elections were held for Association office. Mr. Barbary was the only member nominated for the office of President. After ballots were printed, others indicated an interest in running as write-in candidates for the offices of treasurer and president. The election was conducted by having members given ballots at the switchboard, marking them and placing them in the ballot box. Beverly Oestreich, the switchboard clerk, had the duty of passing out ballots. Oestreich reminded people of the write-in candidates as she distributed the ballots. When Mr. Barbary became aware of this, he complained that this constituted electioneering by the ballot clerk. Because of this complaint, a meeting was held and Oestreich apologized for her mistake. The membership voted to invalidate the first vote and hold a second election. The ballots from the first vote were discarded, and a second election was held via mail ballot, with Cheryl Ford being elected the President.

13. On June 27, 1994, Mark Benzing filed a grievance demanding that the College provide custodians with Hepatitis B vaccinations. Chief steward Donna Vohs and President Cheryl Ford investigated the grievance, including interviews with Rich McKnight, the Associate Dean of Service Occupations, who expressed the opinion that the nursing program's wastes did not pose any particular hazard to the custodial staff. Vohs also met with Gallaway, who said she would look into what other schools were offering. They also discussed putting the issue on the table for negotiations over the next contract. At the same time these discussions were proceeding, Gallaway denied the grievance on the grounds that the universal precautions in the existing Exposure Control Plan were adequate to avoid infection with hepatitis or HIV. College President Dr. James Catania also denied the grievance, on September 15, 1994, noting that, even though there was no contract violation, the issue could be referred to the Exposure Control Plan Study Committee for further discussion. On November 8th, the Executive Committee of the Association

met and discussed whether to appeal the grievance to arbitration. Barker had sent a letter the previous day, expressing her opinion that the grievance could not be won before an arbitrator, since no provision of the contract appeared to require the inoculations sought. The Executive Committee voted not to take the grievance to arbitration. Mr. Barbary then filed a complaint with the Department of Labor, Industry and Human Relations, which conducted an on-site investigation on February 3, 1995. The inspection resulted in an order to the College to provide custodial employees with Hepatitis B vaccinations by May 1, 1995.

14. The College maintains a position of lead custodian. In August or September of 1994, Russ Stephenson stepped down as lead custodian, and Charles Stokes took his place. Stokes was at the same time the custodial representative for the Association. Stokes conferred with the Association before accepting the lead custodian position to be sure there was no conflict of interest. The lead custodian does not have the authority to hire, fire, discipline, or effectively recommend such actions. It is a lead worker position, rather than a supervisory position.

15. A. On August 3, 4 and 5, 1994, Mr. Barbary served a three day suspension for failing to complete work assignments. Barbary filed a grievance challenging the suspension, and the Association took this grievance to arbitration. The hearing on this grievance was originally scheduled for May 31, 1995 before Arbitrator David Johnson. However, the College's primary witness, Valerie Gallaway was suffering from a medically complicated pregnancy, was confined to bed and was not available to testify. The College requested a postponement of the hearing, and the Association agreed through Leigh Barker. July 31, 1995 was selected as the new date for the hearing. As that approached, counsel for the College telephoned Barker, and informed her that Gallaway was not available for the hearing owing to continued health problems. Barker said she could not agree to another postponement, but ultimately she did not oppose his request to the arbitrator. Her decision was influenced by a desire not to poison her long term relationship with the College, as well as considerations of professional courtesy.

B. On August 1, 1995 Arbitrator Johnson wrote a letter to WERC General Counsel Peter Davis, advising him that he was withdrawing as the arbitrator. His withdrawal was based on phone calls and memos that Mr. Barbary had sent to him, indicating that the Association had suggested he and the College unilaterally postponed the hearings. Arbitrator Johnson advised Davis that the Association had participated in the decisions to postpone, and that he believed the Association might be suggesting otherwise to Mr. Barbary for reasons of member relations, conduct which he said was offensive to him.

C. On August 30th, Mr. Barbary submitted a "Request for Default" to Davis, based on the postponements of the arbitration hearing, which was copied to the Examiner. The request for default was refused on December 28, 1995, but Davis advised Mr. Barbary that he could file a prohibited practice complaint or amend the instant complaints. The suspension grievance remains pending before Arbitrator Zeidler.

16. In November of 1994, Sandra Hough was named as a night supervisor. On November 8th, her first night working on her own, she received a call from Cheryl Ford, who indicated that she had slipped on a pile of mud on the sidewalk near some construction outside the

College. Hough informed College Dean Jean Soderburg, who asked Mr. Barbary, who was on duty, to clean up the mud. Mr. Barbary went outside, but came back in saying he could not find any mud pile. Later that evening, someone else told Hough that there was a mud pile on the sidewalk, and she asked Barbary to go out and clean it up. He said that he had lifting restrictions on his hands as a result of an earlier injury. Hough then observed Soderburg go outside with a piece of cardboard, and return saying she had cleaned up the mud. Hough noted the complaints about the mud pile in the night log book. Barbary was subsequently suspended for five days for not cleaning up the mud pile when asked. He filed a grievance over the suspension, and the grievance is pending in arbitration. His advocate in that proceeding is WEAC representative Charles Garnier.

17. On November 16, 1994, Mr. Barbary received a performance evaluation, which he contended was negative and inaccurate. He filed a grievance, and on May 31, 1995 the Association advised him that it would not pursue the matter to arbitration, based upon the fact that the College had been put on notice that the Association did not agree with the evaluation and because he had the right to submit a formal rebuttal to the evaluation for inclusion in his permanent file.

18. On December 14, 1994, Mr. Barbary sought and was granted a medical leave of absence, running through the start of his shift on December 22nd. As he had no sick leave, the leave was to be without pay, and Borremans conditioned his return on a medical release to resume working. When he attempted to return, he presented a slip releasing him to work "less stressful" work. Borremans refused to reinstate him, because less stressful work was not available. As December 22nd was the last day before the holiday shutdown, Barbary was concerned that he would lose his holiday pay if he was not returned to work. He asked to be allowed to use vacation time for December 22nd and January 3rd so that he was in pay status on the day before and the day after the holidays, and this request was granted. He subsequently filed a grievance over being forced to take an unpaid leave and to use his vacation time. The Association processed the grievance through the steps of the grievance procedure, but declined to take it to arbitration. On May 30, 1995, Donna Vohs sent a letter to Mr. Barbary explaining the decision. She noted that the College could not realistically be expected to accommodate his request for a less stressful work environment on short notice, and that the College had agreed to his request to use vacation in order to avoid losing the holiday pay.

19. On February 7, 1995, Mr. Barbary initiated the instant complaint proceedings against the College and the Association, WEAC and the NEA.

20. A. On February 8, 1995, Charles Stokes reported to Jeff Amundson that he had attended an in-service training session at the campus and had had a confrontation with Mr. Barbary. According to Stokes, the instructor asked Stokes after the session what to do with some trash generated during the class and he advised him that the night custodian would handle it. Mr. Barbary overheard Stokes' comment and told him that he should mind his own business. Stokes took exception to Barbary's remarks and the two men argued. Barbary asked Stokes if he would like to step outside, and then grabbed a chair and threatened to bash Stokes' head in with it. He did not, however, actually strike Stokes.

B. Stokes left the campus, and called Amundson from home to advise him of the incident. Amundson took down the information and told Stokes to avoid further contact with Mr. Barbary. Later that evening, Barbary stopped by Stokes' home. Barbary claims this was to discuss his desire to file a grievance over some unrelated matters, while Stokes testified that Barbary told him he had not actually been trying to fight with him, but rather to give him a hug, and to caution him that it would be his word against Stokes'. Barbary left without further incident, but left some papers behind related to a discrimination complaint he had made. The next morning, Barbary called Stokes and asked him to return the papers. Stokes instead gave them to the personnel office at the College.

C. Mr. Barbary was suspended from the College and was discharged, effective February 21, 1995. He filed a grievance challenging the discharge, and the grievance is pending in arbitration. His advocate in that proceeding is WEAC representative Charles Garnier. He also filed for unemployment compensation benefits, and was initially awarded benefits. The College contested the initial award, and a hearing was held on April 5, 1995 before an administrative law judge for DILHR. Barbary represented himself at the hearing, at which Stokes was called as a witness for the College. During the course of the hearing, the College produced documents related to the discipline, but did not include riders which the Complainant had submitted in rebuttal to the documents. The Complainant objected to this during the course of the unemployment compensation hearing. The administrative law judge overturned the initial determination and denied unemployment benefits to Barbary.

21. On May 13, 1995, Mr. Barbary asked Cheryl Ford to provide representation in the portion of this complaint that is directed against the College. Ford referred the request to Barker, who declined to provide such representation, noting that the Association was a respondent in the litigation, that Barbary was suing them and that, "we cannot be both defendant and your representative".

22. On August 14, 1995, Arbitrator Raymond McAlpin denied a grievance challenging a letter of reprimand and an order to participate in customer satisfaction training imposed on Mr. Barbary for rudeness in late 1993. Leigh Barker had represented him in the case before the arbitrator. Barbary asked the WEAC legal department to review the Award with an eye to challenging it or filing discrimination charges against the arbitrator. WEAC Staff Counsel Stephen Pieroni reviewed the award and determined that there was no basis for a challenge. Barbary objected to this conclusion, and WEAC engaged an outside attorney to review the Award. That attorney reached the same conclusion. Before receiving notice of the second attorney's opinion, Barbary submitted a paper entitled "Request Inquiry into Unethical Conduct, Racist Ruling and/or Award, Competency and Integrity of Arbitrator Raymond McAlpin in WERC Case A/P M-95-183" to Peter G. Davis, General Counsel of the WERC. On December 28, 1995, after receiving written statements of position from the College, the Association and Barbary, Davis replied, indicating that the Commission would take no action as the courts had jurisdiction over appeals of arbitration awards, and the arbitrator's conduct was not outside of ethical standards.

23. While the McAlpin Award was being reviewed, Mr. Barbary asked WEAC to

replace Leigh Barker as his counsel in his pending arbitration cases. Legal Services Director Don Krahn suggested that he be represented by Stephen Pieroni, but insisted on a written consent to such representation. Barbary and Pieroni met and spoke over the phone. During their meeting, Pieroni suggested the possibility of settling the outstanding grievances through a

resignation and buyout. Barbary rejected the suggestion and told Pieroni he did not wish to be represented by him. He requested a different WEAC representative, and was assigned Charles Garnier. These arbitrations were placed "on hold" at Mr. Barbary's request, pending the outcome of the instant complaint proceedings.

24. The conduct of the Association, in processing the grievances concerning workload allocation, and in negotiating and implementing the Dudley work study and its subsequent modifications, as set forth in Finding of Fact No. 7, above, was neither arbitrary, discriminatory, nor taken in bad faith. The assignment of a new work area to Mr. Barbary as a result of the Dudley study was motivated by a desire to implement the study, and was not taken in whole or in part as retaliation against Mr. Barbary for any protected activity.

25. The allegations concerning the paid suspension of Mr. Barbary in 1992 as set forth in Finding of Fact No. 8, above, are time barred for the purposes of remedy in this complaint proceeding. The Association played no part in initiating the video surveillance. The actions of the Association in connection with investigating the underlying incident were neither arbitrary, discriminatory nor in bad faith.

26. The allegations concerning the efforts of lead custodian Russ Stephenson to have library employees monitor Mr. Barbary's time in the library as set forth in Finding of Fact No. 9, above, do not demonstrate any arbitrary, discriminatory or bad faith conduct by the Association. The Association had no role in the attempted monitoring, the lead custodian was not making this effort on behalf of the Association or in his capacity as an Association member or officer, and Mr. Barbary's movements were not monitored. The attempt to have Mr. Barbary's time in the library monitored was motivated by concerns over his use of time, and was not motivated in whole or in part by a desire to retaliate against him for any protected activity.

27. The employment of Beverly Biermeier and Sandra Hough as night supervisors does not present any conflict of interest with respect to their positions with the Association. The night supervisor position is not supervisory within the meaning of MERA. The employment of Biermeier and Hough in this position did not influence any actions taken by them as Association officers, and had no effect on the internal operation of the Association.

28. The movement of Mr. Barbary's work cart, as described in Finding of Fact No. 11, above, was not motivated in whole or in part by his involvement in any protected activity. Mr. Barbary voluntarily settled his grievance over this incident. The Association's conduct in investigating and resolving this incident was neither arbitrary, discriminatory nor taken in bad faith.

29. The electioneering undertaken by Beverly Oestreich in the 1994 Association elections as set forth in Finding of Fact No. 12, above, was a personal act, not undertaken at the behest of the Association or its leadership. The Association's decision to rerun the election by mail did not prejudice Mr. Barbary in any way, nor did it interfere with any of Mr. Barbary's protected rights. The Association's actions with respect to the election were neither arbitrary, discriminatory nor taken in bad faith.

30. The Association's processing of Mark Benzing's grievance over Hepatitis B vaccinations, as set forth in Finding of Fact No. 13, above, was not arbitrary, discriminatory nor taken in bad faith. The Association reasonably concluded that the grievance could not be won in arbitration, and considered the merits of the grievance, the other options available for pursuing the matter, and the likelihood of prevailing in arbitration in deciding not to arbitrate.

31. Mr. Barbary's filing of a complaint with DILHR over the provision of Hepatitis B Vaccinations, as set forth in Finding of Fact No. 13, above, was protected concerted activity. His subsequent discharge was not motivated in whole or in part by hostility to that activity.

32. Mr. Barbary's filing of the instant complaints of prohibited practices was protected concerted activity. His subsequent discharge was not motivated in whole or in part by hostility to these activities.

33. The employment of Russ Stephenson and Charles Stokes as lead custodians, as set forth in Finding of Fact No. 14, above, does not present any conflict of interest with respect to their positions with the Association. The lead custodian position is not supervisory within the meaning of MERA. The employment of Stephenson and Stokes in this position did not influence any actions taken by them as Association officials, and had no effect on the internal operation of the Association.

34. Leigh Barker's conduct in agreeing to a postponement of the May 31, 1995 grievance arbitration hearing, and in not opposing a postponement of the July 31, 1995 grievance arbitration hearing, as set forth in Finding of Fact No. 15, above, was neither arbitrary, discriminatory nor taken in bad faith. It was motivated by considerations of professional courtesy and the likelihood that a postponement would be granted no matter what position the Association took on the issue, given the unavailability of the College's principal witness.

35. Sandra Hough's action in recording the November 8, 1995 mud pile incident in the night log as set forth in Finding of Fact No. 16, above, was not inconsistent with any responsibility she may have had as a member or official of the Association. This action was not undertaken on behalf of the Association, nor in her capacity as a member or official of the Association. The College's subsequent suspension of Mr. Barbary was not motivated in whole or in part by hostility to any protected activity.

36. The Association's decision not to seek arbitration of Mr. Barbary's grievance over the College's refusal to immediately reinstate him upon his return from medical leave on December 21, 1994, as set forth in Finding of Fact No. 18, above, was neither arbitrary, discriminatory nor taken in bad faith. The Association reasonably concluded that the grievance would not be sustained in arbitration.

37. The Association's decision not to seek arbitration of Mr. Barbary's grievance over the College's refusal to immediately reinstate him upon his return from medical leave on December 21, 1994, as set forth in Finding of Fact No. 18, above, was neither arbitrary, discriminatory nor taken in bad faith. The Association reasonably concluded that the grievance would not be

sustained in arbitration.

38. The actions of Charles Stokes in reporting the February 8, 1995 confrontation with Mr. Barbary to Amundson, and subsequently handing Mr. Barbary's papers over to the College's personnel office rather than returning them to him, and in testifying at the unemployment compensation hearing, set forth in Finding of Fact No. 20, above, were not undertaken at the behest of the Association, nor were they actions undertaken in his capacity as a member or official of the Association.

39. The College's decision to terminate Mr. Barbary for the February 8, 1995 confrontation with Mr. Stokes was not motivated in whole or in part by hostility to any protected activity.

40. The failure of the Association to provide representation to Mr. Barbary at his unemployment compensation hearing as set forth in Finding of Fact No. 20, above, was neither arbitrary, discriminatory nor taken in bad faith. Mr. Barbary made no clear request for representation, and the Association has neither a contractual nor a legal obligation to provide representation to Mr. Barbary in such proceedings.

41. The refusal of the Association to provide representation to Mr. Barbary in the portion of this complaint proceeding that is directed against the College, as set forth in finding of Fact No. 21, above, was neither arbitrary, discriminatory nor taken in bad faith. The Association would have a clear conflict of interest in providing such representation, given that a finding of prohibited practices against the Association is a condition precedent to receiving relief from the College for the vast majority of Mr. Barbary's allegations.

42. The conduct of WEAC legal counsel Stephen Pieroni in refusing to appeal the McAlpin award or file suit against Arbitrator McAlpin, and in suggesting that Mr. Barbary enter into a voluntary settlement of his various grievances against the College, as set forth in Findings of Fact Nos. 22 and 23, above, was neither arbitrary, discriminatory, nor taken in bad faith.

43. That the Complainant, Jesus Barbary, has failed to provide proof by a clear and satisfactory preponderance of the evidence, of any violation of Section 111.70, MERA.

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

CONCLUSIONS OF LAW

1. That the Complainant, Jesus Barbary, is a municipal employe, within the meaning of Section 111.70 (1)(i), MERA.

2. That the Respondent, Blackhawk Technical College, is a municipal employer, within the meaning of Section 111.70 (1)(j), MERA.

3. That the Respondents, Blackhawk Technical College Paraprofessional Council and Wisconsin Education Association Council are labor organizations within the meaning of Section 111.70(1)(h), MERA.

4. That the Respondent, National Education Association, is not, for the purpose of these proceedings, a labor organization within the meaning of Section 111.70(1)(h), MERA.

5. That by the conduct described in the above Findings of Fact, the Respondent College did not commit prohibited practices within the meaning of Section 111.70(3)(a), MERA.

6. That by the conduct described in the above Findings of Fact, the Respondent labor organizations did not commit prohibited practices within the meaning of Section 111.70(3)(b), MERA.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 2/

IT IS ORDERED that the instant complaints of prohibited practices be, and the same hereby are, dismissed in their entirety.

Dated at Racine, Wisconsin this 24th day of July, 1997.

2/ Any party may file a petition for review with the Commission by following the procedures set forth in section 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 orders 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
> (Continued)

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

2/ (Continued)

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 in 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 new 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 an exceptional delay in receipt of a copy of any findings or order it may extend the time for 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

Contentions of the Parties

A. The Complainant

The Complainant asserts that the College and the Association conspired against him during his entire tenure with the College, from 1991 through his discharge in February of 1995. He has engaged in a variety of protected activities on behalf of himself and other members of the custodial staff, including seeking modifications of work areas, fighting against racial discrimination, obtaining Hepatitis B vaccinations for custodians, and filing grievances to protect the integrity of the contract. The College took a variety of actions, including suspending him for three days, suspending him for five days, assigning him an unfairly large work area, denying his request to return from a medical leave, spying on him and discharging him. In each of these cases, the Association, rather than representing him, actively abetted the College's efforts or engaged in sham representation. The Association has allowed itself to be dominated by the College, by allowing its officers and representatives to serve simultaneously as supervisors for the College. Furthermore the Association allowed its members to conduct surveillance of the Complainant, denied him a fair election when he was a candidate for Association president, refused to provide him with legal representation at his unemployment compensation hearing and in this complaint proceeding, arbitrarily refused to take his grievances to arbitration, misled him and worked against his interests in postponing one of his arbitrations, and allowed a member of its legal department to intimidate him and work against his interests. For all of these reasons, the Examiner should find in favor of the Complainant and award him such backpay and other legal and equitable relief, including interest, as is appropriate.

B. The Respondent Association and WEAC

The Association asserts that the majority of the Complainant's charges are not within the Examiner's jurisdiction. Many of them are time barred as having occurred over one year before the filing of these complaints. Others concern claimed contract violations that have been resolved in the grievance procedure, or are currently pending in arbitration, and the Examiner should not exercise the Commission's jurisdiction, but should defer to the grievance and arbitration process. As for the remaining allegations, the Complainant has failed to prove the required threshold for proceeding, which is that the Association acted in an arbitrary, discriminatory or bad faith manner in taking or not taking action. Thus the complaint against the Association and WEAC should be

dismissed.

C. The Respondent College

The Respondent College asserts that the Complainant is unhappy over events during his time with the College, but that his unhappiness cannot be equated with violations of MERA. Many of the Complainant's allegations concern constitutional claims, common law claims, and miscellaneous statutory claims unrelated to MERA, and the Examiner has no jurisdiction over them. With respect to others, they are contract claims that are either pending in arbitration or have been resolved in the grievance procedure. As to the remaining allegations, there is no evidence whatsoever that any of the College's actions with respect to the Complainant were motivated by hostility to his protected activities or were intended to interfere with or restrain him in exercising his protected rights. As the Complainant has failed to prove any claim, the instant complaints should be dismissed.

Discussion

The Complainant has raised a large number of alleged violations of MERA and other laws. To the extent that his complaints go beyond MERA, they are outside of the Examiner's jurisdiction. With respect to the remaining claims, many go to violations of the collective bargaining agreement. The Commission will not generally exercise its discretion to entertain complaints of Section 111.70 (3)(a)5 violations where there is a grievance procedure with final and binding arbitration. 3/ The exception to this principle is that a Complainant may proceed with a 3(a)5 claim if he can demonstrate that he has been prevented from effectively protecting his contractual rights because the Union has failed in its duty to fairly represent him. 4/ Thus the merits of a contractual claim can only be reached if the Complainant first proves a violation of Section 111.70(3)(b). There are, however, other aspects of the complaints which allege that the College has violated statutory rather than contractual rights. The allegations of independent violations of Section 111.70 (3)(a) will be addressed first in this decision, followed by an analysis of the Complainant's (3)(b) duty of fair representation and (3)(a)5 contract violation claims.

I. Employer Prohibited Practices

A. Section 3(a)1, MERA - Interference

Section 111.70 (3)(a)1, MERA makes it a prohibited practice for municipal employers to

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3/ Jt. School District No. 1, City of Green Bay, et. al., Dec. No. 16753-A (WERC, 12/79); Milwaukee County Sheriff's Dept., Dec. No. 27664-A (Crowley, 10/93).

4/ Mahnke v. WERC, 66 Wis.2d 524 (1975).

"interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." Those guaranteed rights include 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." Improper intent is not a necessary element of a Section (3)(a)1 violation, and a municipal employer may violate the law if its actions, whatever they were intended to accomplish, have a reasonable tendency to interfere with the exercise of protected rights. This is an objective test, which focuses on how a reasonable person would have understood the employer's actions. and not whether in a given case employee rights were actually interfered with or restrained. 5/

The only allegations in the complaints that might constitute free-standing interference claims would be those that go to employer surveillance of the Complainant. While his arguments do not sort these out in a clear fashion, the Examiner reads the pleadings and the record to assert surveillance in 1993 or 1994 when lead custodian Russ Stephenson asked Tara Kilby and other library employees to monitor how much time he was spending in the library during his shift, and in 1994 by Sandra Hough, when she noted in the night log that a mud pile had not been cleared away by the Complainant.

There is some conflict in the record as to the request for monitoring of his use of the library, but where there are differences I have credited the testimony of Tara Kilby as to this incident. Accepting Kilby's version, there was no interference. The purpose of the surveillance was not to determine whether the Complainant was engaged in protected activity. It was to discover whether he was in the library reading during his shift instead of doing his assigned work. The request for surveillance was not initiated or approved by management, as Stephenson was not a supervisor and was not acting on the orders of any superior. The only member of management to have any involvement with the request was Kilby's supervisor, Ron Curtis. His involvement was limited to telling Kilby that she did not have to comply with Stephenson's request. This is inconsistent with a management inspired campaign of surveillance. Even if the College had been involved in attempting to ascertain the Complainant's use of work time, there was no exercise of protected rights implicated in this incident. There was no representation campaign underway or any other event that might trigger a heightened sensitivity to employer efforts to monitor the work force. A reasonable person would not find him or herself restrained or coerced in the exercise of Section 2 rights by having the employer try to insure that they were actually working when they were being paid to do so.

The notation of the mud pile incident in the night log does not constitute surveillance.

5/ See generally, City of Evansville, Dec. No. 9440-C (WERC, 3/71); WERC v. Evansville, 69 Wis.2d 140 (1975); Juneau County, Dec. No. 12593-B (WERC, 1/77); St. Croix Falls School District, Dec. No. 27215-B (Burns, 1/93); Ripon School District, Dec. No. 27665-A (McLaughlin, 1/94).

Hough's job was to trouble-shoot during the evening hours and to record any unusual occurrences. The Complainant's apparent failure to complete a work assignment after several complaints were made falls within the definition of an unusual incident. The fact that his

name was written down in a log does not mean that he was the subject of surveillance, and there is no reason to believe that he was singled out for mention in the log for any reason other than being an actor in an unusual incident.

B. Section 3(a)2, MERA - Domination

Section 111.70 (3)(a)2, MERA makes it a prohibited practice for an employer to "initiate, create, dominate or interfere with the formation or administration of any labor or employee organization or contribute financial support to it" aside from wages for time spent in grievance processing and conferences with the employer. Violations of this section after the formation of the labor organizations generally fall into one of two categories, depending upon the extent of employer influence. An employer interferes with a labor organization where it is actively involved in its affairs to the extent that the organization's independence is threatened. 6/ Where the employer has actually subjugated the organization to its will, so that it is no longer capable of effectively and independently representing employees' interests, the labor organization may be said to be dominated. 7/

In this case, there is no evidence of employer involvement in the formation of the Association. The Complainant asserts that the College has dominated the Association after its creation by having Association officers and officials serve as lead custodians and night supervisors, and by contributing financial support to it through dues deductions and fair share payments. The lead custodian position is a lead worker job, and does not meet any of the statutory criteria for supervisory status. The night supervisor is misnamed, in that it also lacks any of the statutory indicia of supervisory status. Thus the occupants of these positions are not aligned with the interests of the employer for collective bargaining purposes, and there is no conflict of interest in holding these jobs while being active in the Association. As for the employer's role as a collection agent for Association dues and fair share monies, this is specifically authorized by Section 111.70 (1)(f), (2), and (3)(a)6. Aside from the fact that the Complainant did not like the decisions made by the Association in some cases, there is absolutely nothing in the record to suggest that the Association is dominated or influenced by the College. Indeed, the record shows that the Association is vigorous and active in its representational duties and has taken positions at odds with those taken by the College, including the prosecution of grievances on behalf of the Complainant.

6/ Columbia County, Dec. No. 22683-B (WERC, 1/87); Rock County, Dec. No. 28494-A (Jones, 1/96).

7/ Kewaunee County, Dec. No. 21624-B (WERC, 5/85); Barron County, Dec. No. 26706-A (Jones, 8/91); Rock County, Dec. No. 28494-A (Jones, 1/96).

C. Section 3(a)3, MERA - Discrimination

Under the Commission's long-standing Muskego-Norway line of cases, 8/ the test of whether an employer's actions constitute discrimination in violation of Section 111.70(3)(a) 3 has four prongs:

1. The employee was engaged in protected activity;

2. The employer was aware of the activity;

3. The employer was hostile to the activity;

4. The employer's conduct was motivated, in whole or in part, by hostility to the protected activity.

The Complainant's various activities, including grievance filings, filing a complaint with DILHR over the lack of Hepatitis B vaccinations for the custodians, and agitating for a reallocation of work areas, all generally fall into the category of protected activity. The College was certainly aware of these actions, since most of them involved complaints against it and its officials. However, the Complainant has failed to demonstrate any nexus between these activities and any adverse employment decision. There is no evidence of hostile statements by College personnel, nor any adverse actions which are closely linked in time to a protected activity and might be assumed to have been motivated by the activity. The discharge of the Complainant followed closely on the heels of the DILHR inspection of the campus, and the initial filing of these complaints with the WERC, but the evidence in the record suggests that the discharge decision was motivated solely by the confrontation with Stokes. 9/ The contractual merits of the discharge are not before the Examiner, but certainly the proposition that physically threatening a co-worker might lead to a discharge, when the employee involved had already been given a three day and a five day suspension, would not cause any experienced observer to conclude that something else must lie behind the discipline. On the face of it, it is a reasonably predictable response. 10/

8/ Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540, 151 N.W.2d 617 (1967).

9/ In connection with this, I note that the College would have received copies of these complaints on February 8th, at the earliest, as the General Counsel's letter of transmittal is dated February 7th.

10/ Without ruling on or considering their merits, the other acts of discipline against the Complainant are likewise associated with allegations customarily considered to fall within the scope of just cause, and the level of discipline in each case appears to be consistent with progressive discipline. On the face of it, there is nothing about the degree of penalty or the timing of the discipline that raises any suspicion about the College's true motives and, as with the discharge, there is no showing of a nexus between involvement in protected

As for the Complainant's concern that he was assigned a larger work area as a result of the Dudley work study than was objectively justified, again there is no evidence to even suggest a connection between his status as one of the original grievants in the work study grievances and the work area he was ultimately assigned. The College left it to the Association to choose how the new work areas would be assigned, and there is nothing to show that the Association leadership colluded with the College in ultimately choosing to leave workers in the same shifts and general areas. Two other custodians received larger increases to their work areas than did the Complainant, including Charles Stokes, whom the Complainant has generally identified as being aligned with management.

D. Section 3(a)4, MERA - Refusal to Bargain

Various portions of the complaint make reference to alleged refusals to bargain, although neither the evidence adduced at hearing nor the post-hearing arguments make it clear what the alleged refusal is. It appears that this is primarily directed to the negotiations over work load reallocations in connection with the Dudley study. In any event, the College's duty to bargain goes to the Association as the majority representative. The Complainant, as an individual, has no enforceable right to bargain with the College and no legal standing to assert a violation of Section 111.70 (3)(a)4. 11/

II. Contract Violations and the Duty of Fair Representation

Section 111.70 (3)(a)5 makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. Section 111.70 (3)(b)4 is a parallel provision, making it a violation of MERA for a labor organization to violate the contract. However, where the parties have negotiated a contract which includes grievance arbitration as the mechanism for enforcing contractual rights and the grievance procedure has not been exhausted, the Commission will not exercise its discretion to hear claims of 3(a)5 and 3(b)4 violations. Instead, the Commission will honor the parties' contract and the grievance procedure will be presumed to be the exclusive venue for these claims. This is a rebuttable presumption, and the Commission will assert its jurisdiction to hear contract claims where the parties waive reliance on the grievance procedure, 12/ or where there is clear and satisfactory evidence that the grievance and arbitration machinery cannot be relied upon to dispose of employee grievances. 13/ In this case, the Complainant

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activity and the imposition of discipline.

11/ City of LaCrosse, Dec. No. 26518-B (WERC, 1/91).

12/ Allis Chalmers Mfg. Co., Dec. No. 8227 (WERB, 10/67).

13/ Typically this occurs where the party alleged to have violated the contract rejects the

alleges that he has not had effective access to the contract because the Association has failed in a variety of ways to fairly represent him.

A. The Association's Duty of Fair Representation

The Association is the exclusive representative of the employees. This exclusive status confers certain legal rights on the Association and carries with it corresponding responsibilities, chief among them the duty to provide fair representation to each of its members. Fair representation is not, however, perfect representation, nor is it a guarantee that every individual member will be satisfied with each act or decision taken by the labor organization. The Commission and the courts have recognized that:

> The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. ... Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes...". 14/

The duty is satisfied so long as a labor organization represents its members' interests without hostility or discrimination, exercises its discretion with good faith and honesty, and acts without arbitrariness in its decision making. Thus the legal formulation for a breach of the duty of fair representation is whether the Union's actions are arbitrary, discriminatory or taken in bad faith. 15/

B. Specific Complaints

The Complainant points to numerous instances in which he believes the Association has evinced hostility to him and acted contrary to its duty:

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arbitration provision (Mews Ready-Mix, 29 Wis.2d 44 (1965)), or where an employee does not have meaningful access to the grievance procedure because the labor organization has violated its duty to fairly represent the employee (Mahnke v. WERC, 66 Wis.2d 524 (1975).

14/ Humphrey v. Moore, 375 U.S. 335 (1964); See also, Milwaukee County, Dec. No. 28754-B (McGilligan, 1/97).

15/ Vaca v. Sipes, 386 U.S. 171 (1967); Mahnke v. WERC, 66 Wis.2d 524 (1975); Gray v. Marinette County, 200 Wis.2d 426 (Ct.App. 1996); Milwaukee County, Dec. No. 28754-B (McGilligan, 1/97).

- The failure of other custodians to warn the grievant and his fellow African-American colleague, Mark Benzing, of the presence of a video camera in the kitchen in 1992;

- The Association's agreement to modified work areas and its refusal to allow him to post to a smaller work area in 1994;

- The involvement of Russ Stephenson in an effort to have Tara Kilby monitor his use of the library in 1993 or 1994;

- The assignment of Beverly Biermeier and Sandra Hough as night supervisors;

- Russ Stephenson's movement of the Complainant's work cart in 1994 and his resulting loss of personal possessions;

- The irregularities in the 1994 Association elections in which he was the only candidate for President listed on the printed ballot;

- The Association's refusal to arbitrate Mark Benzing's grievance over Hepatitis B vaccinations;

- The appointment of Russ Stephenson and Charles Stokes to lead custodian positions while they were members of the Association;

- The Association's agreement to postpone the Complainant's arbitration hearings before Arbitrator Johnson;

- Sandra Hough's notation of his failure to clear away a mud pile in November of 1994;

- The Association's refusal to arbitrate his November 1994 performance evaluation;

- The Association's refusal to arbitrate his grievance over his attempt to return from a medical leave in December of 1994;

- Charles Stokes' participation as a witness in the investigation of the confrontation between the Complainant and Stokes on February 8, 1995, and as a witness in his subsequent unemployment compensation hearings;

- The Association's failure to provide legal representation for him at his unemployment compensation hearing;

- The Association's failure to provide legal counsel to him in this proceeding;

- WEAC's failure to appeal the McAlpin Award;

- The discussions the Complainant had with WEAC legal counsel Stephen Pieroni, which he took to be intimidating;

- The Association and WEAC's general handling of his various discipline grievance arbitrations;

The assignment of other unit employees to jobs as night supervisors and lead custodians, and Hough's entry of the problem with the mud pile in the night log have already been addressed. There is nothing to show a conflict of interests for these employees or that any decision making of the Association was affected by their status as lead custodians or night supervisors. The jobs are not truly supervisory. Hough's conduct in keeping accurate log entries was in no way inconsistent with the Association's duty to represent the grievant when he was subsequently disciplined, and that case is still pending in arbitration.

The failure of some of the white custodians to warn the Complainant and Mark Benzing of the video cameras in the kitchen in 1992 illustrates a consistent theme and a pervasive problem in the Complainant's case. Assuming for the sake of argument that this was a conscious decision, and that it was made in hopes of causing trouble for the Complainant, this may be evidence of personal hostility to him by some co-workers. Carrying it a step further, as the Complainant does with every one of his allegations, it may be evidence of racial prejudice by some co-workers. What it does not show is any hostility or discrimination by the Association as an entity. The Complainant, throughout these proceedings, has interpreted any evidence of personal hostility or ill-will by individual co-workers as being attributable to the Association. The duty of fair representation is not a guarantee of camaraderie or good fellowship in the workplace, and the Association does not have an obligation to referee personality conflicts. In the case of the videos, the Association's president and another member spent 36 hours viewing the videotapes, conducted extensive interviews, and succeeded in demonstrating that there was no case to be made against the Complainant for pilferage. He was reinstated with no loss of pay and no record of discipline for the incident. With respect to its legal duty to him as a member of the bargaining unit, the Association's conduct in the video incident was above reproach. Far from being evidence of laxity or hostility, this incident is a textbook example of vigorous and effective representation of a member.

Other areas in which the Complainant seems to confuse the personal actions of other unit members with the actions of the Association are the efforts of Russ Stephenson to have Tara Kilby monitor his use of the library and the role of Stokes as a witness against him. As discussed above, Stephenson appears to have acted on his own in initiating the request for monitoring his library usage. Tara Kilby is as much a member of the Association as Stephenson and she and other library

staff declined to do any monitoring of the Complainant's time. She raised the issue in general terms as a topic for discussion at an Association meeting, but that appears to be the only connection between the request and the Association. No action was taken against the Complainant and he filed no grievance over this. The Complainant has not identified any Association involvement with Stephenson's request, and if it played no part in the incident it cannot have violated its duty. 16/

16/ At various times, the Complainant has raised the issue of Russ Stephenson moving his work cart from one closet to another, and the alleged loss of some personal items. It is not completely clear whether he is alleging this as a free-standing violation, as proof of hostility by Stephenson or as an example of poor representation by the Association. In any event, it is proof of none of these propositions. Stephenson acted on the orders of his supervisor, the Association found a compromise position and the Complainant voluntarily settled his grievance over the issue.

As for Charles Stokes, the Complainant claims that there is a conflict in Stokes being the Association's custodial representative and Stokes reporting him to Amundson. Without presuming to make any findings of fact on the merits of the discharge, if Stokes believed he was physically threatened by the Complainant, he has no duty whatsoever to remain silent. Putting aside the folklore about union members not informing on other union members, there is no law demanding that even the most dedicated union adherent tolerate threats from another employee in the name of union brotherhood. Solidarity is not some sort of curtain to hide misconduct or thuggery. This same principle applies to Stokes' testimony at the unemployment compensation hearing. He is not required to commit perjury or expose himself to contempt in order keep his union credentials in good standing, and the fact that the Association took no steps to prevent him from reporting or testifying redounds to its credit. 17/

The issue of the work areas studies illustrates another pervasive misconception the Complainant brings to these cases -- a confusion between the duty of fair representation and the duty to obtain the result he personally desired. The reconfiguration of work areas was an on-going controversy, stretching over some five years, marked by competing interests among the custodial staff. Assuming a constant amount of work to be performed, any reconfiguration of areas would necessarily increase some staff members' workloads and decrease others. The Association, and Leigh Barker in particular, expended enormous amounts of time and effort on finding an acceptable answer to the custodial staff's complaints. When the Association and the College agreed to hire an outside consultant, Jack Dudley, it was a reasonable step aimed at obtaining an objective analysis of the problem. The Dudley study was the subject of many meetings, before and after its completion, as well as extensive argument, reconsideration and revision.

17/ The Complainant also asserts that the papers he left at Stokes' house should have been returned to him, rather than being given to the College's personnel office. He alleges that this was an invasion of his privacy and a breach of Stokes' duty to him as the Association's custodial representative. Stokes had been ordered not to have any contact with the Complainant during this time, pending an investigation into the confrontation between the two men. The documents left at Stokes' house concerned a different complaint that he was pursuing over his belief that there was racial discrimination at the College. Copies of these papers had already been sent to College officials by the Complainant. There was nothing secret about them.

When the final version of the Dudley study was presented, the College agreed to reassign work areas in whatever manner the Association wanted. There were two choices -- either custodians could retain their shift assignments and the work areas roughly corresponding with their current areas, or the new areas could be treated as vacancies, subject to posting. The Complainant wanted to use his seniority to get an easier assignment. The Association determined that the new areas were not vacancies within the meaning of the contract, and assessed the majority will of the staff as favoring the status quo. There was a decision to be made, and whatever the ultimate choice, there would be some employees who would benefit and some who would not. That is inevitable in collective bargaining, and to suggest that personal dissatisfaction with a decision can give rise to a suit is to suggest that no decision can ever be made. There is nothing arbitrary about the decision to forego posting the new areas, and there is absolutely no evidence that it was aimed at the Complainant. 18/

The Complainant points to the 1994 elections for Association officers as demonstrating hostility to him. The defect identified at the time of the election and in the instant complaint hearings is that the ballot clerk told voters that they should remember that there were write-in candidates for president and treasurer. 19/ The ballot clerk, Beverly Oestreich, said at the time

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18/ The Complainant asserted in his testimony that another custodian shouted "don't let them post", or words to that effect, during the March 31, 1994 meeting on this subject. He took this to be aimed at him and at Mark Benzing. By itself this proves only that the other custodians did not want to disrupt the current assignments. Given that any change in the Complainant's favor would probably be at their expense, the fact that other custodians opposed posting the work areas is proof of nothing more than that they understood what was going on in the meeting. The Complainant vigorously argued for his interests in the meeting. Under his theory, had the decision favored him, his comments would be proof that the Association violated it duty of fair representation to the other custodians. Neither the law nor common sense puts a labor organization in such a ridiculous predicament.

19/ There is some disagreement as to whether she urged people to vote for these candidates or simply advised voters that the write-in candidacies existed. This disagreement is not

that she erred, that it was her mistake alone, and offered an apology. The Association membership responded by discarding the ballots and conducting a second ballot by mail. The Examiner can find nothing in this sequence of events to demonstrate any institutional hostility to the Complainant. Once the mistake was made, the Association membership took the most reasonable course open to it to restore the integrity of the election process. Certainly he was disappointed in his bid to become president of the Association, and his disappointment was doubtless deepened by the fact that he lost despite being the only candidate on the ballot. It is in the nature of elections that someone wins and someone loses. The fact that a majority of the membership voted for another candidate does not establish that a majority was hostile to him, nor does it taint the winner's subsequent efforts to represent him in his various employment complaints. Those must be measured on their own merits.

The remaining complaints go to the handling of various grievances, arbitrations and other litigation by the Association and WEAC. In the case of his negative performance evaluation, the Association explained that a statement of disagreement with the evaluation by the Association and the ability to attach a rebuttal was a sufficient remedy. This is hardly an arbitrary decision, as it is unlikely that an arbitrator would grant substantially more relief even if the grievance was sustained. As to the December 1994 leave of absence, the Association explained that it viewed the grievance as a poor candidate for arbitration, since the Complainant himself had presented the College with a limitation on his return to work, and it was unrealistic to think that the College could accommodate a request for a less stressful work environment on short notice. Again, this is a pragmatic assessment of the problems the case would present in arbitration, and declining to arbitrate a case because it is a likely loser is not an arbitrary action. The same logic applies to the Association's decision not to pursue Benzing's grievance over the Hepatitis B vaccinations, which the Complainant apparently believes injured him by forcing him to file a complaint with DILHR. Assuming for the sake of argument that the Complainant has standing to complain about this, there is no failure of the Association's duty. Barker opined that there was no contract provision that was violated, and thus the case could not be won before an arbitrator. While the Complainant points out that DILHR ordered the vaccinations, there is a difference between persuading a state regulator and persuading an arbitrator. The Association must weigh the chances of winning under the contract, and Barker's interpretation of the contract was not unreasonable.

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relevant to the outcome of this decision.

The Complainant asked the Association to be present at the unemployment compensation hearing, and now asserts that this was a request by him for legal representation, a request which was denied. It does not appear that a clear request was made, but whether it was or not, the Complainant has failed to explain why the Association had any duty to represent him in such a forum. Certainly it would be appropriate for a labor organization to assist a member in an unemployment compensation hearing, but such representation is not a duty associated with being the exclusive bargaining representative, as is representation in a grievance procedure. 20/

The Complainant has bitterly protested the actions of Leigh Barker in not opposing two postponements of the arbitration hearing over his three day suspension. Barker may well have soft-pedaled the extent of her acquiescence when she spoke with Barbary about the postponements, and might have suggested more strongly than was appropriate that the arbitrator had made the decision. It is easy to understand how this second delay could have upset the Complainant. However, the fact that he was upset and felt he had been misled does not turn this into a prohibited practice. There was a compelling reason for the inability of Gallaway to attend

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20/ In his clarification of the complaints, the Complainant appears to have withdrawn his charge that the Association's failure to represent him in this proceeding is a violation of the duty of fair representation. To the extent that this remains an active claim, is wholly without merit. The cases have been consolidated for hearing. In order to prevail against the College on most of his claims, the Complainant must first prove a violation of the Association's duty of fair representation. The Complainant would in effect ask the Association to conduct a suit against itself. No attorney could accept such a role, and if one did no examiner would allow the representation to go forward.

the hearing. It is extremely unlikely that the College would have been forced to present the testimony of its principal witness by telephone on July 31st if it did not wish to do so. At best, a vehement and sustained protest by Barker to the second request for a postponement would have led to having a portion of the College's cases heard on July 31st, with a second day for the rest of the case when Gallaway was available to appear. There would have been no practical benefit to the grievant or the Association in pursuing this strategy, but there would have been considerable cost. Additional hearing dates mean additional expense, and resisting a request for a postponement for no particular purpose would likely carry a cost in terms of goodwill and cooperation in future cases. These are legitimate considerations for an advocate to weigh in deciding whether to accept a postponement. 21/

Finally, the Complainant has criticized WEAC's interactions with him and decision making in litigating his various discipline grievances. The Complainant believes that WEAC legal counsel Stephen Pieroni should have pursued an appeal of Arbitrator McAlpin's Award or a suit against McAlpin personally. Aside from unhappiness with the result, the Complainant has not offered any basis for thinking the Award could be challenged. Pieroni advised him that challenges to awards are difficult and that there was no legal defect in the McAlpin Award. When he complained about that, WEAC hired outside legal counsel to provide a second opinion, which confirmed Pieroni's view. A labor organization does not have to do whatever a disgruntled member wants it to do in order to avoid being sued. With respect to the McAlpin Award, WEAC expended considerable resources in evaluating the chances of overturning the decision, and concluded that it could not be attacked. The Complainant does not agree with that result, but he has not identified any defect in the process that WEAC used to arrive at its decision.

The Complainant also believes that WEAC violated its duty to fairly represent him because Pieroni allegedly tried to persuade him to explore a settlement of his grievances, with him agreeing to resign in return for a cash payment from the College. When he refused, he alleges that Pieroni brought pressure to bear on him, using street language and leaving him with the impression he had been threatened "Mafia" style. Aside from the bare allegation, there is absolutely no proof of any misconduct by Mr. Pieroni. Any competent legal counsel might be expected to discuss settlement options with a client, and by itself this is clearly not a breach of any duty. As for the pressure the Complainant says he felt, this may be a matter of perception. It was evident throughout the hearing that the Complainant's mental health ailments tend to influence his perceptions, and lead him to

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21/ The Complainant seeks an "Order of Default" in the suspension arbitration, based in part on his belief that WERC law requires a hearing on arbitration cases within 40 days. In addition to the fact that the record shows no misconduct associated with the suspension arbitration, I note that there is no such provision of law, and that the Examiner has no authority to order a default in an arbitration case.

strong emotional responses that do not seem warranted by the situation. In any event, he could not give any specifics on his charge against Pieroni. It rests on his generalized perception of what he was told and there is no basis on this record for finding that Mr. Pieroni did anything wrong.

The Examiner also notes that the Complainant's arbitration cases were not handled by Mr. Pieroni. They were transferred to Mr. Garnier, with whom the Complainant has expressed no dissatisfaction, and were placed on hold at the Complainant's request, pending the outcome of this proceeding. To this point, there is no evidence that WEAC or the Association has failed to adequately represent the Complainant in these cases. The Examiner therefore concludes that appropriate course of action is for the Complainant to pursue his grievances in the proper forum, which is grievance arbitration. The Examiner further concludes that there is no reason for any retention of supervisory jurisdiction over those cases.

In summary, while he was almost continuously engaged in protected activity over his tenure with the College, there is no evidence that any of the adverse employment decisions made by the College were motivated by hostility to his activities. Neither is there any basis for a reasonable person to have felt restrained or coerced in their exercise of protected rights by the actions taken by the College. As for the representation afforded the Complainant by the Association and WEAC, the record reflects that it has been vigorous and that where a grievance or other claim has not been pursued to the Complainant's liking, the labor organizations' decisions have been carefully considered and reasonable. Thus, having heard the Complainant's entire case over the course of ten days, the Examiner concludes that the Complainant has failed to prove that he is entitled to any relief. Accordingly, his complaints of prohibited practices have been dismissed in their entirety.

Dated at Racine, Wisconsin this 24th day of July, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

APPENDIX "A"
INDEX TO PLEADINGS AND CORRESPONDENCE

INDEX OF PLEADINGS, MOTIONS, ORDERS

1. 02/03/95 - Complaint of Prohibited Practices - Barbary v. Blackhawk Technical College;
2. 02/03/95 - Complaint of Prohibited Practices - Barbary v. BTC/PTC, WEAC and NEA;
3. 03/10/95 - Amended Complaint - Barbary v. Blackhawk Technical College;
4. 03/10/95 - Amended Complaint - Barbary v. BTC/PTC, WEAC and NEA;
5. 05/02/95 - Amended Complaint - Barbary v. Blackhawk Technical College;
6. 05/02/95 - Amended Complaint - Barbary v. BTC/PTC, WEAC and NEA;
7. 06/27/95 - Order Consolidating Complaints and Appointing Examiner (Gratz);
8. 08/29/95 - Order to Make the Complaints More Definite and Certain (Nielsen);
9. 08/29/95 - Order to Make the Complaints More Definite and Certain (Nielsen);
10. 08/31/95 - Amended Complaint - Adds allegations re: A/P M-95-184 and request for default;
11. 10/03/95 - Amended Complaint - Adds allegations of surveillance, challenges 3 day suspension, 5 day suspension and discharge;
12. 10/11/95 - Clarified Complaint in Response to 08/29/95 Order;
13. 10/30/95 - Amended Complaint - Adds allegations re: various contract violations, unfair representation in default request on A/P M-95-184 and in attempt to obtain review or inquiry re: McAlpin Award in A/P M-95-183;
14. 11/01/95 - Answer and Affirmative Defenses on Behalf of Respondent BTC Paraprofessional Council, WEA, NEA ("Association");
15. 11/01/95 - Answer and Affirmative Defenses on Behalf of Respondent Blackhawk Technical College ("College");
16. 11/16/95 - Request for Recusal/Removal of Examiner;
17. 11/20/95 - Examiner's Order Denying Request for Recusal/Removal;
18. 11/24/95 - Motion to WERC Seeking Removal of Examiner;
19. 12/04/95 - Order Substituting Examiner Nielsen for Examiner Gratz;
20. 12/04/95 - Notice of Hearing for January 18 and 19, 1996;
21. 12/11/95 - Corrected Notice of Hearing (Wrong Address);
22. 12/28/95 - WERC Denial of Motion Seeking Removal of Examiner;
23. 12/30/95 - Amended Complaint - Alleges that Association and College violated statutory 40 day limit for holding hearings in connection with arbitration;
24. 02/02/96 - Notice of Continued Hearing for April 22, 23, 24, 29, 1996;
25. 05/09/96 - Notice of Continued Hearing for August 12, 13, 14, 15, 16, 1996.

APPENDIX "A" - Continued

INDEX OF CORRESPONDENCE

(Numbering continues from the Index to the Pleadings)

26. 02/07/95 - Letter from Peter G. Davis to President of Blackhawk Technical College transmitting complaint;
27. 02/10/95 - Letter from Peter G. Davis to President of Blackhawk Technical College correcting 2/7 letter;
28. 02/10/95 - Letter from Peter G. Davis to Presidents of NEA, WEAC, and Blackhawk Technical College Paraprofessional Technical Council transmitting complaint;
29. 02/14/95 - Letter from Attorney Jon Anderson to Peter G. Davis - Notice of Retainer and request for hearing;
30. 03/07/95 - Letter from Amedeo Greco to Jon Anderson and Jesus Barbary terminating settlement efforts;
31. 03/17/95 - Letter from Peter G. Davis to Presidents of NEA, WEAC, and Blackhawk Technical College Paraprofessional Technical Council transmitting amended complaint;
32. 03/17/95 - Letter from Peter G. Davis to Jon Anderson transmitting amended complaint;
33. 03/28/95 - Letter from Association Attorney Bruce Meredith requesting dismissal of the complaint against the Association;
34. 04/17/95 - Letter from Examiner Gratz to Barbary, Anderson and Meredith, advising them of his designation and proposing consolidation of the complaints;
35. 04/20/95 - Letter from Examiner Gratz to Barbary, Anderson and Meredith, advising them of his discussion with Mr. Barbary relative to consolidation;
36. 04/24/95 - Letter from Jon Anderson to Examiner Gratz in support of consolidation;
37. 04/25/95 - Letter from Examiner Gratz to Barbary, Anderson and Meredith, advising them of his conversation with Mr. Barbary relative to consolidation, and extending the time for arguments on the issue;
38. 04/24/95 - Letter from Bruce Meredith to Examiner Gratz in support of consolidation;
39. 05/08/95 - Letter from Jesus Barbary to Examiner Gratz requesting waiver of witness fees due to pauper status;
40. 05/11/95 - Letter from Examiner Gratz to Barbary, Anderson and Meredith, transmitting amendments to the complaints, advising them of his conversation with Mr. Barbary relative to waiver of witness fees, denying the request, and agreeing to facilitate the appearance of witnesses without the need for subpoenas;
41. 05/15/95 - Letter from Jesus Barbary to Examiner Gratz stating his reasons for opposing consolidation of the cases, with three accompanying medical slips;
42. 05/20/95 - Letter from Examiner Gratz to Barbary, Anderson and Meredith, transmitting Complainant's reasons for opposing consolidation of the cases, with supporting medical slips and correspondence;
43. 06/27/95 - Letter from WERC, transmitting Order Consolidating Complaints;

44. 06/29/95 - Letter from WERC, transmitting corrected Order Consolidating Complaints;

APPENDIX "A" - Continued

45. 07/05/95 - Notice of Objection to Order Consolidating Complaints, submitted by Mr. Barbary to the WERC;
46. 07/07/95 - Letter from Examiner Gratz to Barbary, Anderson and Meredith, transmitting Complainant's Notice of Objection;
47. Letter from Jesus Barbary to WERC requesting removal of Examiner Gratz;
48. 08/01/95 - Letter from WERC reaffirming consolidation and refunding $25.00 filing fee;
49. 08/07/95 - Letter from A. Henry Hempe to Jesus Barbary, referring the request for a new Examiner to Examiner Gratz;
50. 08/09/95 - Letter from Examiner Gratz to Barbary, Anderson and Meredith denying Mr. Barbary's assertions but removing himself from the case;
51. 08/26/95 - Letter from Examiner Nielsen to Barbary, Anderson and Meredith advising them of his designation to succeed Examiner Gratz;
52. 09/08/95 - Letter from Examiner Nielsen to Barbary, Anderson and Meredith advising them of his conversation with Mr. Barbary relative to the Order to Make More Definite and Certain, the August 31st Amendment to the Complaints and the procedures for communicating with the Examiner;
53. 09/08/95 - Letter from Examiner Nielsen to Peter G. Davis, transmitting the request for default in A/P M-95-184;
54. 09/09/95 - Letter from Examiner Nielsen to Barbary, Anderson and Meredith correcting a typographical error in the 9/8 letter;
55. 09/13/95 - Letter from Peter G. Davis to Jesus Barbary responding to Mr. Barbary's inquiry about how examiners are appointed to cases;
56. 09/13/95 - Letter from Peter G. Davis to Jesus Barbary responding to Mr. Barbary's inquiry about how the WERC would dispose of his request for a default in A/P M-95-184, and by copy requesting responses from the Respondents;
57. 09/18/95 - Letter from Examiner Nielsen to Barbary, Anderson and Meredith extending the time for clarification of the complaint;
58. 10/13/95 - Letter from Examiner Nielsen to Barbary, Anderson and Meredith transmitting Mr. Barbary's comprehensive clarification of the complaint, and proposing hearing dates;
59. 10/23/95 - Letter from Jesus Barbary to Examiner Nielsen, regarding scheduling and requesting clarification of witness procedures;
60. 10/24/95 - Letter from Examiner Nielsen to Barbary, Anderson and Association Attorney Mary Pitassi, noting Ms. Pitassi's substitution for Mr. Meredith, and regarding scheduling and requesting clarification of witness procedures;
61. 10/31/95 - Letter from Jesus Barbary to Examiner Nielsen proposing mutual exchange of witness lists by all parties and indicating his availability for hearing;
62. 11/01/95 - Letter from Mary Pitassi to Examiner Nielsen transmitting the Respondent Associations' Answer and Affirmative Defenses;
63. 11/01/95 - Letter from Jon Anderson to Examiner Nielsen transmitting the Respondent College's Answer and Affirmative Defenses;

APPENDIX "A" - Continued

64. 11/06/95 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi, regarding scheduling, transmitting amended complaints and reiterating procedures for communicating with the Examiner;
65. 11/15/95 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi, confirming January 18 and 19 for the hearing;
66. 11/22/95 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi, correcting two typographical errors in his November 20th Order Denying Request for Recusal/Removal;
67. 11/28/95 - Letter from Peter G. Davis to Mr. Barbary indicating a timeline for responding to the request for a default in A/P M-184, other action in A/P M-183, and removal of the Examiner in the two complaint cases;
68. 12/04/95 - Letter from Examiner's secretary to Barbary, Anderson and Pitassi, transmitting Notice of Hearing and Order Substituting Examiner Nielsen for Examiner Gratz;
69. 12/04/95 - Letter from Examiner's secretary to Barbary, Anderson and Pitassi, correcting error in Notice of Hearing;
70. 12/28/95 - Letter from Peter G. Davis to Mr. Barbary advising that the WERC rejects the request for vacation or setting aside of McAlpin Award on the basis of Chapter 788's exclusive remedies, and declines to make inquiries into Arbitrator McAlpin's ethics or conduct, as it is satisfied with both in A/P M-183;
71. 12/28/95 - Letter from Peter G. Davis to Mr. Barbary advising that the WERC has no authority to grant a default in a pending arbitration case (A/P M-95-184) where no complaint of prohibited practices had been filed;
72. 01/02/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi, noting a telephone message from Mr. Barbary requesting a prompt ruling that the Respondents had defaulted by not having a hearing within 40 days; advises that the 40 day limit is the WERC's responsibility, not the Respondents', and that the delay in hearing this case has been due to the Complainant's actions;
73. 01/04/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi, noting receipt of the 12/28/95 correspondence from Davis to Barbary, and treating the default request in the arbitration case as an amendment to the complaint;
74. 01/08/96 - Letter from Jesus Barbary to Nielsen, Anderson and Pitassi transmitting witness list for hearing;
75. 01/08/96 - Letter from Anderson to Examiner noting concerns about witness list;
76. 01/10/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi, outlining general procedures for hearing;
77. 01/19/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi, confirming continuation of hearing in April and cautioning against recalling witnesses;
78. 01/23/96 - Letter from Examiner Nielsen to Jesus Barbary transmitting subpoenas for April hearing;

APPENDIX "A" - Continued

79. 03/08/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi, confirming receipt of transcript, returning two pieces of ex parte correspondence to Complainant, and reiterating procedures for communicating with the Examiner;
80. 04/10/96 - Letter from Jesus Barbary to Nielsen, Anderson and Pitassi transmitting witness list for hearing;
81. 04/14/96 - Letter from Jesus Barbary to Nielsen, Anderson and Pitassi correcting witness list for hearing;
82. 04/17/96 - Letter from Mary Pitassi to Examiner Nielsen noting concerns about scheduling of witnesses;
83. 05/04/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi confirming August hearing dates;
84. 07/10/96 - Letter from Jon Anderson to Examiner Nielsen regarding availability of Jeff Amundson for August hearing;
85. 08/02/96 - Letter from Jesus Barbary to Nielsen, Anderson and Pitassi correcting witness list for hearing;
86. 08/07/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi regarding attempt to recall Biermeier and Barker to the stand;
87. 08/07/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi regarding attempt to recall Borremans to the stand;
88. 08/16/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi regarding schedule for arguments on Motions, and confirming December hearing dates;
89. 08/16/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi advising them that the Examiner may take administrative notice of the file and providing an index to the contents of the Examiner's file;
90. 08/16/96 - Letter from Anderson indicating that there are two items labeled Complainant Exhibit 68, and proposing to mark them as 68A and 68B;
91. 08/19/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi agreeing to the re-marking of Exhibits 68A and 68B;
92. 09/25/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi extending the briefing schedule on the pending Motions;
93. 09/25/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi requesting that the parties directly exchange their written arguments;
94. 09/26/96 - Note to the file summarizing telephone conversation with Jesus Barbary;
95. 10/25/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi extending the briefing schedule on the pending Motions;
96. 10/25/96 - Letter from Examiner Nielsen to Barbary, with copies to Anderson and Pitassi, responding to Barbary's claim that the Examiner has acted unfairly in granting extensions to the briefing schedule;
97. 11/11/96 - Note to the file summarizing two telephone conversations with Mr. Barbary;

APPENDIX "A" - Continued

98. 11/14/96 - Letter to Anderson and Pitassi advising them of telephone request by Barbary for an extension of time based upon health problems;
99. 11/14/96 - Letter from Barbary requesting extension of briefing schedule and postponement of hearings due to health problems, with attached medical documents;
100. 11/16/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi transmitting Barbary's letter and medical documents and inviting statements of position by the Respondents;
101. 11/18/96 - Letter from Anderson objecting to the request for an extension;
102. 11/19/96 - Letter from Pitassi objecting to an indefinite extension;
103. 11/19/96 - Letter from Examiner Nielsen to Barbary, Anderson and Pitassi granting an extension to 12/13/96, setting conditions for any further requests for an extension, and proposing dates for continued hearings;
104. 11/21/96 - Letter from Barbary seeking an extension to 2/20/97 based upon a psychiatric and physical difficulties, with attached note from his psychiatrist;
105. 11/27/96 - Letter from Anderson advising the Examiner that the College is holding dates for a continued hearing;
106. 11/27/96 - Letter from Anderson advising the Examiner that the College is holding dates for a continued hearing;
107. 12/02/96 - Letter from Examiner to Dr. Sullivan describing the information that must be provided by the doctor in order for Mr. Barbary to receive an extension;
108. 12/02/96 - Letter from Examiner to Barbary, Anderson and Pitassi, advising them that the note from Dr. Sullivan does not meet the criteria for an extension, and forwarding a copy of the Examiner's letter to Dr. Sullivan;
109. 12/10/96 - Letter from Examiner to Barbary, Anderson and Pitassi, advising them that Dr. Sullivan has not yet responded to the Examiner, and directing Mr. Barbary to submit his argument by January 3rd;
110. 12/15/96 - Letter from Barbary to the Examiner protesting the Examiner's December 10th letter, alleging disparate treatment and promising a clear medical report within a few days;
111. 12/17/96 - Letter from the Examiner to Anderson and Pitassi, forwarding copies of Barbary's 12/15/96 letter;
112. 01/02/97 - Letter from Dr. Sullivan to the Examiner indicating that Barbary is disabled and should be able to proceed by February;
113. 01/06/97 - Letter from the Examiner to Barbary, Anderson and Pitassi, canceling additional hearings and setting a February 17th due date for Barbary's argument;
114. 02/11/97 - Letter from the Examiner to Barbary, Anderson and Pitassi, informing them that EEOC Investigator Rita Burns would be examining the Examiner's copy of the transcripts;
115. 02/25/97 - Letter from Anderson to the Examiner, seeking to have portions of Barbary's written argument stricken;

APPENDIX "A" - Continued

116. 03/02/97 - Letter from the Examiner to Barbary, Anderson and Pitassi striking portions of Barbary's written argument;
117. 03/07/97 - Letter from the Examiner to Barbary, Anderson and Pitassi summarizing telephone conversation with Barbary and reaffirming decision to strike portions of Barbary's written argument;
118. 05/22/97 - Letter from Pitassi requesting an approximate date for the issuance of the Examiner's decision, so that pending grievance arbitrations can be scheduled;
119. 05/26/97 - Letter from the Examiner to Barbary, Anderson and Pitassi advising them that the decision will be issued in the first part of July;

INDEX OF PLEADINGS, MOTIONS, ORDERS (Continued)

120. 10/29/96 - College's Motion to Dismiss;
121. 10/29/96 - Respondent Labor Organizations' Brief in Support of Motion to Dismiss;
122. 02/21/97 - Complainant's Proposed Findings of Fact, Conclusions of Law, and Brief in Support of Motion for Summary Judgment.