STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARK J. BENZING,

Complainant,

vs.

WISCONSIN EDUCATION ASSOCIATION COUNCIL, LOCAL UNION EXECUTIVE COMM. BTC/PARAPROFESSIONAL TECH. COUNCIL,

Respondents.

Case 55
No. 50418 MP-2851
Decision No. 28543-A

Appearances:

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

Ms. Mary E. Pitassi, Associate Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P. O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Wisconsin Education Association Council and Local Union Executive Comm. BTC/Paraprofessional Tech. Council.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 28, 1994, Mark J. Benzing, hereinafter Complainant, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that Wisconsin Education Association Council, hereinafter WEAC, along with its local union affiliate, had failed to respond to his request to review a work study committee's findings because of a complaint he had filed with the Commission. On June 20, 1995, Complainant filed an "Amendment to Complaint" alleging, in addition to the above, that WEAC and "Local Union Executive Comm. BTC/Paraprofessional Tech. Council" had committed prohibited practices within the meaning of the Municipal Employment Relations Act by settling a grievance without his consent. On September 27, 1995, the Commission appointed Dennis P. McGilligan, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Secs. 111.70(4)(a) and 111.07, Stats. On the same date, hearing in the matter was scheduled for Tuesday, January 9, 1996, in Janesville, Wisconsin.

Thereafter, after Complainant Benzing requested that this matter not be immediately scheduled, hearing was conducted on June 25, June 26, July 17, and September 23, 1996.

Hearing was completed on March 25, 1997. The hearing was transcribed, and the parties completed their briefing schedule on August 18, 1997.

FINDINGS OF FACT

1. Mark J. Benzing, hereinafter referred to as Benzing or Complainant, is an individual whose address is 2022 Dewey Avenue, Beloit, Wisconsin 53511. Complainant is a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

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

3. Wisconsin Education Association Council, hereinafter referred to as WEAC or the Association, is a labor organization within the meaning of Sec. 111.70(1)(h) and its offices are located at 33 Nob Hill Drive, P. O. Box 8003, Madison, Wisconsin 53708-8003.

4. Leigh Barker, hereinafter Barker, is the Wisconsin Technical College System (WTCS) Consultant at WEAC.

5. Blackhawk Technical College/Paraprofessional Technical Council, hereinafter referred to as BTC/PTC, is a local union affiliated with WEAC that represents certain custodians and secretaries employed by the College including the Complainant, who, at all times material herein, has been employed as a custodian by the College.

The 1991 "Work Study"

6. On August 8, 1991, Jesus Barbary, a custodian for the College, and Mark J. Benzing filed a complaint with the WERC, claiming that WEAC had committed prohibited practices in violation of Sec. 111.70(3), Stats., by violating its duty of fair representation toward the Complainants. Specifically, the aforesaid Complainants claimed that WEAC violated its duty of fair representation to them by failing to request a time study on their jobs, by failing to use neutral parties to conduct the time study and by the aforesaid work study committee's rendering an unjust decision. On January 8, 1992, the Complainants amended their complaint to include prohibited practice claims against the College as well, claiming that the College had failed and refused "to

negotiate the matter of a time study in good faith."

7. On July 17, 1992, Examiner Lionel L. Crowley issued Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in Wisconsin Education Association Council and Blackhawk Technical College, Decision No. 27140-C, wherein he concluded in relevant part that the Wisconsin Education Association Council had not committed any prohibited practices within the meaning of the Municipal Employment Relations Act because WEAC had not violated its duty of fair representation toward the Complainants. Examiner Crowley found, in relevant part, that WEAC and its local union had not violated its duty of fair representation with respect to the Complainants either by its participation in the 1991 work study committee as well as the result produced by said committee or by its decision not to process a grievance on behalf of the Complainants challenging the committee's results. (Benzing's request that WEAC file a grievance on his behalf regarding the aforesaid committee's report was his attempt to get a second work study done because the first one "was not done fairly and wasn't right.") Examiner Crowley also found that, far from denying the Complainants their contractual rights, the Union, in successfully obtaining a work study of the custodial areas from the College, had actually obtained a benefit for the Complainants that the contract and statutes did not provide. He further found that the record failed to demonstrate that the Union and/or committee members acted in any manner other than in good faith with honesty of purpose. In conclusion, he noted there was no evidence that any conduct on the part of the Union was arbitrary, discriminatory or in bad faith. Therefore, he dismissed the complaint in its entirety.

8. Thereafter, Complainants Barbary and Benzing filed a petition with the WERC seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. During the period in which the parties were filing written argument, Complainant Barbary made a request to the Commission that his complaint be dismissed. The remaining parties thereafter engaged in ultimately unsuccessful settlement negotiations. The matter became ripe for Commission consideration on December 10, 1992, when the Commission was advised that settlement efforts had been unsuccessful. On February 8, 1993, the Commission affirmed in Decision No. 27140-D the aforesaid Examiner's Findings of Fact, Conclusions of Law and Order as they related to Complainant Benzing.

9. On or about January 29, 1993, Benzing requested from the Union "another study" of the custodial work areas. By letter dated February 23, 1993, Barker expressed to Benzing her understanding that Beverly Biermeier, President of the local, had earlier (in the previous summer) told him that no action would be taken on his request while the issue of his complaint against the Union regarding the first time study was pending. Barker's letter also stated that, since the Commission had recently rendered a "final decision," his request was now in order, and Barker had recently requested that Biermeier place it on the agenda of the next Executive Committee meeting for consideration and action. The letter further stated "Please be clear that the union does not have the authority to require such a study; as they did last time, the union can ask the District to form a joint committee or otherwise study the issue." In letters dated March 15 and May 17, 1993, Barker reiterated the Union's position on the appropriateness of another work study while a decision on the prohibited practice complaint was pending as stated in her February 23 letter. Barker added in her May 17, 1993 letter relating to Benzing's attempt to have another time study of custodial work

areas:

> I understand that the union, via Bev Biermeier, is supporting you in this grievance and that the grievance is currently in process. I, too, agree that if work areas have changed and/or significant duties have been added, the job has been changed and needs to be looked at.
>
> If I can be of further assistance, don't hesitate to contact me.

10. Meanwhile, sometime during the spring of 1993 (possibly on or about February 22), Benzing asked for a time study of the custodial work areas from College Administrator Robert Borremans. Borremans denied Benzing's request, and Benzing subsequently filed a grievance on or about March 28, 1993. The grievance alleged that the custodial work areas were not equal in either size or difficulty, and requested as a remedy, "equal assigned work area" and the "same amount of work duties as the custodians assigned to smaller areas." According to Barker's May 17, 1993 letter to Benzing noted above, Benzing filed the grievance before the Union could take action on his request for another time study.

11. In the fall of 1993, the College and the Association agreed to commission a new study on the custodial work areas. The College and Association entered into an agreement specifying that the new study fully settled two grievances including the grievance filed by Benzing regarding custodial work areas. According to the terms of the work study proposal signed by Benzing on September 10, 1993, the consultant mutually agreed upon by the College and the Association would "spend time with each custodian individually, . . . examine each current work area, with the custodian accompanying him, and may recommend adjustments to existing work areas/assignments to make the work areas/assignments as uniform and equitable as possible." The proposal further provided that "[t]he union and custodians agree to abide by the results of this work study, providing, of course, that it is done as per our mutual direction, and is done fairly and without bias." The Association and College hired Jack Dudley to conduct the study.

12. Dudley conducted the work study, and presented his findings in a meeting on March 28, 1994, that included custodians as well as representatives from the College and the Association. Dudley found, among other things, that the custodians were "overextended" to do the amount of work expected of them at that time, and in the areas as they were then configured. Dudley suggested reconfigurations of the areas based on his study, and his recommended changes were implemented on August 15, 1994.

13. After it appeared that the reconfigured areas proposed by Dudley themselves contained inequities, the College and the Association worked together during the fall and early winter of 1993-94 to eliminate them. Changes in the reconfigured areas were implemented on or around February 22, 1995. Since then, additional changes were discussed by the Association and the College as necessary.

14. On January 28, 1994, Benzing filed a complaint of prohibited practices with the Commission alleging that Wisconsin Education Association Council had failed to respond affirmatively to his request to review the aforesaid work study committee's findings because of the aforesaid complaint that he had filed in the matter. Benzing also alleged that WEAC had violated its duty of fair representation by failing to pursue a second (another) time study to correct the inequities of the first work study committee's findings noted above. In particular, Benzing noted that on July 21, 1992, he sent a request for review of the work study committee's findings to the President of the local union. Benzing also sent a copy of this request to WEAC's representative, Leigh Barker. Benzing complained that thereafter he "received a response from the local's President which informed me that the Union would not do a review because of a complaint I filed with WERC." Benzing noted he "then wrote WEAC representative Ms. Barker for the same request." Benzing complained: "On February 23, 1993, I received a letter (sic) Ms. Barker which stated that a review would not be done because the complaint I filed was still pending."

15. On June 20, 1995, Benzing filed an "Amendment to Complaint" alleging, in addition to the aforesaid complaint allegations, that WEAC and its local union affiliate had committed prohibited practices by setting a grievance without his consent.

16. At the first day of hearing on July 25, 1996, a lengthy colloquy occurred on the record between Benzing, counsel for Respondents, and the Examiner, upon the Respondents' motion to dismiss Benzing's complaint in its entirety on the grounds that it was "moot." This colloquy included a disagreement between the Respondents and the Complainant regarding whether the Complainant had requested a review of the 1991 work study or an entirely new work study in his complaint.

The Settlement of Grievance 93-05: Six-Day Suspension and Disciplinary Letter

Genesis of the Grievance

17. In late spring or early summer of 1993, the College held a "mandatory" training session for its custodial/maintenance staff on "group dynamics, getting along, and race relations." Benzing had learned that he had to attend the training about two weeks before it actually occurred. However, he notified his supervisor only the night before the training that he would not be able to attend. He did not give a reason for his failure to attend, nor did his supervisor ask for one at the time.

18. Thereafter, the College conducted an investigation of Benzing's failure to attend the aforesaid training. During the investigation Benzing told his supervisor that he was unable to attend the training because he was on medication and because he believed his health and safety would be endangered under Article 5, Section 2.8 of the collective bargaining agreement. The

investigation marked the first time that Benzing told anyone from either the Association or the College that he had not attended the training because he was taking medication.

19. By letter dated June 7, 1993, the College suspended Benzing for six days for failing to attend the aforesaid training, and placed a letter of reprimand in his personnel file.

Early Stages of the Grievance Processing and the Beginning of Settlement Negotiations

20. On or about June 10, 1993, Benzing filed a grievance over this discipline. Step 4 of Benzing's grievance states the issue as: "The investigation and the final decision to discipline me, at no time ever considered the reasons for my actions. Since my health and safety was in danger." Benzing claimed at this step that the College had violated Article 9 of the collective bargaining agreement (Fair Discipline and Dismissal), the "purpose of the agreement," and Article 5, Section 2-H. At Step 4, Benzing requested the rescinding of the discipline issued against him noted above as his desired remedy. Benzing testified that his main reasons for filing this grievance were his concerns for his health and safety, his belief that he had been disciplined unfairly relative to other bargaining unit members, and his opinion that the College had not followed progressive discipline.

21. WTCS Consultant Barker became involved in Benzing's six-day suspension grievance after the Step 4 or "District Director" step, but before the Board step (5) of the collective bargaining agreement. At this time, Barker began "talking to local people" about the grievance. Within the same time frame, then-local President Biermeier contacted Barker for advice about whether the local should proceed to arbitration with this grievance. In her letter of September 30, 1993, Barker responded, pointing out that several issues, such as whether the College could impose "mandatory" overtime in this situation and whether the level of discipline imposed upon Benzing was appropriate, had merit. Barker advised Biermeier that, if the grievance was not settled, it should be arbitrated because the discipline imposed, if allowed to stand, brought "Benzing one step closer to more severe discipline, leading to dismissal." Barker's letter specified, however, that her opinion assumed no new facts or evidence coming to light at the next level. Barker emphasized "that new evidence brought to light at the Board level could change this assessment."

22. The BTC/PTC Executive Committee then authorized proceeding to arbitration with WTCS Consultant Barker present at the meeting at which that decision was made.

23. WTCS Consultant Barker served as Benzing's advocate in the Step 5 hearing on the grievance before the College's Board in December, 1993. Barker made a presentation to the Board which emphasized the strong points of Benzing's grievance, rather than any weaknesses she may have felt were part of the case. Barker used the notes she had prepared for the date in November on which the hearing had been originally scheduled, but did not significantly revise them for the new date. Barker met with Benzing on "a number of different occasions" to prepare for the Board level. Barker's presentation to the Board also included Benzing's health and safety concerns which

precluded him from attending the training session. Barker further questioned the College's right to require Benzing to attend this training, whether

the College treated Benzing the same as other employes when it imposed the aforesaid discipline on him and whether the District followed progressive discipline. The Board denied Benzing's grievance at Step 5, and the matter proceeded to arbitration.

24. After at least one rescheduling at Benzing's request, the grievance was scheduled to be heard before Arbitrator Gil Vernon on October 24, 1994. Barker engaged in "intense preparation" for the arbitration hearing in "September, early October," which included "interviewing people, talking to people in the local, making notes [and] preparing my questions." Barker's preparation was "piecemeal," but "certainly added up to hours."

25. In spite of the above, Barker did not believe that Benzing's case was without serious weaknesses or that it would be an open-and-shut case for the Association before an arbitrator. Rather, she believed that the Association's odds for winning the grievance in arbitration to be about "50/50." Consequently, at least in part because the case "was not a sure, 100 percent winner," Barker seriously considered the idea of settlement when she was first approached by the College's Administrator of Human Resources, Valerie Gallaway, in early October, 1994. At that time, Gallaway put forward an initial proposal which included dropping two WERC cases that Benzing had filed and "splitting the difference" on the six days of suspension. Barker then consulted with Benzing. During the discussion when Barker first raised a possibility with him of settling the grievance, Benzing never instructed her that she should not proceed with settlement discussions. Following this discussion, Barker reported back to Gallaway that tying any settlement to Benzing's WERC cases was not an option. Thereafter, Barker was contacted by Jon Anderson, attorney for the College. All further negotiations took place between Anderson and Barker.

Settlement Negotiations During the Week of October 17, 1994

26. During the week of October 17 to 21, Barker and Anderson were in contact at least once a day, and sometimes more often. They exchanged settlement proposals by fax and through the mail. Barker also faxed Benzing settlement proposals throughout the aforesaid period of time and discussed specific issues with him in detail. In the context of these settlement negotiations, Barker and Benzing talked about the reasons for and against settlement. Throughout these negotiations, Benzing was "very firm" about not including action on the aforementioned WERC cases as part of any potential settlement. Benzing also, on at least one occasion, described his "bottom line" in settling the grievance as: the WERC cases against the College would have to proceed separately, the letter of reprimand would have to be rewritten, and there had to be no more than two days of suspension. During the course of the aforesaid settlement discussions, Benzing discussed the College's settlement offers with Barker, made suggestions, for example, to improve the letter of reprimand, and gave Barker "instances" that might form the basis for a settlement.

27. Barker contacted Benzing on Monday, October 17, 1994, to discuss the possibility of settling his grievance. During that conversation, Benzing informed Barker that he had no reason at that time to settle the grievance, but that, if Barker wanted to, she could look into the possibility of settling the grievance with the College.

28. On Wednesday, October 19, 1994, at approximately 11:00 p.m. Barker had a one-hour phone conversation with Benzing that began by Benzing stating that he wanted to proceed to arbitration. However, at the conclusion of said conversation, Barker felt that Benzing wanted her to continue settlement negotiations.

29. Also, on or about October 19, Barker made a settlement proposal to Benzing that she believed he would accept, based on what she had believed to be Benzing's "bottom line" from her prior conversations with him. The proposal included a two-day suspension, reduced from the original six days. However, when she communicated the proposal to Benzing, he told her that two-day suspension was no longer acceptable: the suspension could not be longer than one day. Benzing rejected this proposed settlement. Barker and Anderson both testified that Benzing's rejection of this proposal affected the way Barker and Anderson went about negotiating a possible settlement for the duration of the week, with each wanting to make sure Benzing was even more involved than he had been previously, so that a similar circumstance did not occur again.

30. Late in the afternoon on Thursday, October 20, Barker again believed that she had achieved a proposal that Benzing would accept. The proposal involved Benzing receiving a three-day rather than a six-day suspension as a result of not attending the training. The proposal also altered the letter of reprimand to be placed in Benzing's personnel file to add references to Benzing's health and safety concerns relative to the fact that he had been taking prescription medication at the time of the underlying incident, and guidelines for what to do in the future should he have similar concerns about the possible effect of medication on his ability to attend an assigned event. Finally, the October 20 proposal contained a provision, suggested as new "Paragraph 4," that, if Benzing was not involved in any other incidents of insubordination for a period of three years after June 7, 1993 (June 7, 1993 to June 7, 1996), the letter of reprimand would be removed from Benzing's file, and his record regarding the training would be "cleared."

31. Barker spoke to Anderson at some point after 5:00 p.m. that afternoon. In that conversation, Barker told Anderson that she would be meeting with Benzing the next morning, and Anderson agreed to call the College on Friday morning as well. After speaking with Anderson, Barker faxed Benzing a copy of the latest version of the agreement worked out with Anderson, and left a phone message for him. On the cover sheet of the proposal she faxed to Benzing, Barker wrote, "Mark: This will settle it--It's close - what do you say? LB"

Meeting Between Barker and Benzing on Friday, October 21, and Settlement

32. On October 21, Barker met with Benzing at the College at approximately 7:30 a.m. The meeting was scheduled for when Benzing would be getting off his third shift assignment at the College. This meeting had previously been scheduled to prepare for the arbitration which was scheduled for the following Monday. Barker and Benzing instead used this meeting to discuss the proposed settlement. They both went through the latest settlement proposal. Their discussion lasted approximately half an hour, during which time they discussed the wording of the letter of reprimand, "things that had been added," and the aforesaid proposed paragraph 4 of the agreement. At the end of their discussion, Benzing stated that he would accept the settlement. Barker had had the opportunity to observe Benzing communicating in a variety of circumstances over the years, and believes that she could tell the difference between whether he approved or disapproved of a suggested course of action from his responses and his non-verbal behavior. On the morning of Friday, October 21, neither Benzing's manner nor words seemed tentative to Barker, and she believed that he had agreed to settle the grievance.

33. Thereafter, Barker participated in a telephone call with Jon Anderson, with Benzing present. This call in which a settlement was reached was not a conference call, and only Barker spoke with Anderson. After some initial discussion about some previously unresolved issues relating to the case, Anderson said "Then do we have an agreement?" Barker responded, "I believe we have an agreement." Anderson then asked whether the parties would need an arbitrator to "write up" the settlement, as a consent award, and Barker responded that she did not think so. She then turned to Benzing and said: "Mark, Jon wants to make sure that you agree with this, you know. This settles this, right? You agree with this settlement?" Benzing said, "I do agree," or "yes," I agree and Anderson said "I heard him."

34. At this point in their conversation, Barker and Anderson began discussing arrangements for canceling the arbitration hearing scheduled for Monday, October 24. Barker agreed to notify Arbitrator Vernon that his services would not be required the following Monday. Benzing was in the room with Barker for this portion of her conversation with Anderson, but did not give her any indication that he did not want her to cancel the hearing. To the contrary, Benzing commented, "This means we will not have the hearing on Monday. We will not be having the hearing, period."

35. After Benzing left their meeting on October 21, he later caught up with Barker in the hallway or the cafeteria. Benzing expressed concern that his personal day for Monday, October 24 had been denied before a settlement had even been reached. Barker explained to Benzing that she believed that Gallaway had "jumped the gun" in stating that the hearing had been cancelled when it wasn't cancelled until Barker called Vernon on Friday, October 21. Benzing was upset but Barker thought he understood and accepted her explanation.

36. Benzing did not call either Barker or Anderson at any time on Friday, October 21 to

indicate that he did not intend to go through with the settlement to which he had agreed.

37. Over the weekend, Benzing went home, "rested up," clarified his thinking, reviewed the settlement, reviewed the evidence he wished to have presented at the arbitration hearing, and re-evaluated his position concerning proceeding to arbitration. He then decided that, with the documents he had previously submitted to Barker, he "could come out with a better chance" in arbitration. At this point, he wrote to Gallaway and informed her that he wished to proceed to arbitration, sending a copy of this correspondence to Barker. Gallaway received Benzing's correspondence sometime in the afternoon of Monday, October 24. Benzing's note to Gallaway read as follows:

> After thoroughly reading the proposed settlement agreement, presented to me by Mrs. Leigh Barker on Friday Oct. 21, 1994, I have decided to proceed to step six (arbitration hearing) instead of settling this matter as indicated to you by Mrs. Leigh Barker. Please inform me of a proposed date for this step of the grievance process, so I can submit a personal leave form. Thank you.

38. Gallaway was both surprised and dismayed to receive Benzing's note repudiating the settlement, and instead requesting to proceed to arbitration. By letter dated October 24, 1994, Gallaway wrote:

> Please be advised that both Blackhawk Technical College (BTC) and the Blackhawk Technical College/Paraprofessional Technical Council/Wisconsin Education Association Council/National Education Association (BTC/PTC) negotiated a settlement agreement in good faith with regard to Grievance #93-05. It was, and still is, my understanding that after considerable deliberation you gave your verbal agreement to both Leigh Barker, WEAC Consultant, and Attorney Jon Anderson, acting on BTC's behalf, to accept the terms of the proposed settlement on Friday, October 21, 1994. On that basis, both parties contacted Mr. Gil Vernon, the arbitrator who had been selected to hear this case, and cancelled the arbitration originally scheduled for Monday, October 24, 1994 at 10:00 a.m. As a result, both BTC and BTC/PTC will be incurring cancellation costs imposed by Mr. Vernon.
>
> Although the settlement agreement had not yet been signed by all parties, it was my further understanding that you, Ms. Barker and

> Mr. Anderson would be signing this document and forwarding a fully executed agreement to our office for inclusion in the official grievance file. Therefore, I would strongly encourage you to discuss this matter further with Leigh Barker so that you understand your obligation and responsibility in honoring your verbal commitments in such matters. As far as BTC and BTC/PTC are concerned, this matter has been resolved.

39. Also on October 24, 1994, Benzing called Barker, because he did not want things to get "too far ahead" before contacting her. When Barker arrived at work on Monday, October 24, she received a phone message indicating that Benzing had called in on Monday, changed his mind, and wanted to go to arbitration.

40. After being contacted by Benzing on October 24, Barker and Gallaway spoke to one another about the positions of their respective organizations regarding Benzing's request for arbitration, with both agreeing that the matter had been resolved, and that the parties could implement the agreement. Barker was particularly concerned about the implications of the Association's repudiation of an agreement that had been negotiated in good faith on the long-term, continuing relationship between the Association and the College, believing that such an action would harm the Association's credibility in future negotiations. Barker also felt "that Mr. Benzing had some money coming back and that we should abide by it and proceed with it."

41. The final settlement agreement between the parties was hand-delivered to Barker already signed by Anderson, and awaiting the signatures of Barker and Benzing. In a memorandum from Benzing to Gallaway, dated October 25, 1994, Benzing indicated that he would not be signing the agreement; and in fact, he never did so. Barker did, however, sign the agreement.

42. By letter dated October 26, 1994, Barker wrote to Benzing as follows:

> Mark, we negotiated in good faith and agreed on a settlement to grievance 93-05 on Friday, October 21, 1994. You were a party to this settlement, informing me in person and the district's attorney via the telephone that you agreed to the settlement. In fact, this was done because the parties had thought we had an earlier settlement, which you said you had not agreed to. Consequently, we made sure you were a party to and agreed to this settlement.
>
> Based on your word, my word and the district's word, we reached an agreement. Both parties then contacted the arbitrator and informed him that the matter was settled.

> As far as the BTC/PTC is concerned, the issue is resolved. We made a binding commitment. We do not and will not agree to settle an issue and then go back on our word. You, as a member of the BTC/PTC also have an obligation and responsibility to honor your verbal commitment.
>
> To that end, I will be forwarding the settlement agreement, signed by the district and the BTC/PTC to you for your signature.

43. During the week of October 24 through 29, the College took steps to implement the settlement agreement reached on Friday, October 21. These steps included arranging with financial services personnel for the restoration of three days of pay to Benzing, removing the original suspension letter from his personnel file, and replacing it with the revised document.

Benzing's Grievance Claiming Failure by the College to Arbitrate His Prior Grievance

44. On or about November 17, 1994, Benzing filed a grievance against the College for failing to arbitrate the aforesaid grievance involving his six-day suspension and June 7, 1993 letter of reprimand. According to the grievance, the College failed to arbitrate after being informed by Benzing "on two different occasions" that he was "totaly (sic) against settling" the grievance. For relief, Benzing requested "proceeding throughout the arbitration stage, thus terminating the settlement agreement named above." Gallaway received a copy of this grievance in her office on November 8, 1994. A copy of the grievance was also sent to "WEAC Rep. BTC/PTC grievance steward, Nea (sic) and WEAC."

45. On November 23, 1994, Gallaway responded to Benzing's grievance as follows:

> We do not recognize your November 17, 1994 communication as a grievance and, therefore, we will not be processing it. Please be advised that the previous grievance is indeed settled by agreement between the Union and the College. That agreement was reached after oral confirmation of your concurrence with the settlement terms. Further, the parties have acted in reliance upon those settlement terms; namely, the College has already substituted the revised suspension letter in your personnel file and has reimbursed you for three (3) days of pay, which you received on your November 15, 1994 paycheck.

This matter is resolved and we do not choose to reopen it. Therefore, I will not be taking any further action on this matter.

46. Gallaway responded similarly on December 12, 1994, apparently after receiving a copy of what purported to be a Step 5 grievance in the same matter. Gallaway's December 12 communication to Benzing also mentions that Dr. Catania, President of the College, had confirmed the College's position to Benzing in a memo dated December 1, 1994. Gallaway's memo to Benzing stated that she would not be processing the purported grievance before the BTC Board, and was returning the "paperwork" to him.

47. In the meantime, Barker had received copies of the purported grievance. It was her understanding that these documents purported to be "a grievance to go back on the settlement and proceed to arbitration with the issue involving the 6-day suspension." Barker recognized these documents as being on the grievance form, but not as a valid grievance, because the underlying issue had been settled. Barker spoke to the grievance chair, the local president, and the Executive Committee at some point about Benzing's purported grievance. She advised the Executive Committee that the Association had reached a settlement with the College, that Benzing had been "a party" to that settlement in good faith, that Benzing had agreed to the settlement, that it would not be in the Union's best interests to proceed with the purported grievance, and that the committee should state that it did not recognize the purported grievance as valid. Barker also helped BTC/PTC President Cheryl Ford compose a memo to Benzing which stated as follows:

> In response to your memo dated January 3, 1995, the BTC/PTC Executive Committee met and discussed the issue. Our response is as follows:
>
> You mentioned several times in your memo that the issue was "not resolved satisfactorily"; we must remind you that while we strive to help the grievant, it is also the BTC/PTC's right to enter into or choose to carry (or not carry) a grievance to arbitration.
>
> In this situation we feel the union did not deliberately settle this issue over your objections. We recognize you later changed your mind, but the settlement had already been agreed to.
>
> Therefore, the BTC/PTC is not in a position to carry 93-05 to Step 6 because it has been settled.

48. WEAC and BTC/PTC and its aforesaid agents' and representatives' handling of Benzing's grievance regarding his six-day suspension and letter of reprimand was not arbitrary, discriminatory or in bad faith. The Union at all times material herein fairly represented Benzing.

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

CONCLUSIONS OF LAW

1. That Respondents' alleged refusal to seek a review of a work study completed in 1991, or a completely new work study following the 1991 study, is now moot.

2. That because Examiner Lionel L. Crowley's Findings of Fact, Conclusions of Law and Order in Decision No. 27150-C (7/92), which was affirmed by the Commission in Decision No. 27140-D (2/93) dealt specifically with the issue of WEAC's duty of fair representation to Benzing regarding his effort to get a review of the work study committee's findings, said decision, pursuant to the doctrine of "claim preclusion," precludes the Examiner from taking jurisdiction over the merits of Benzing's complaint.

3. That Wisconsin Education Association Council and Blackhawk Technical College/Paraprofessional Technical Council, and their agents and representatives, met their obligation to fairly represent Complainant herein with respect to the settlement of his grievance involving a six-day suspension and disciplinary letter which he received for failing to attend a training that Blackhawk Technical College held in late spring or early summer of 1993; and, therefore, said Respondents did not commit prohibited practices within the meaning of Secs. 111.70(3)(b)1, 2(c) and 4, Stats.

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

ORDER 1/

IT IS ORDERED that the complaints filed herein be, and the same hereby are, dismissed in their entirety.

Dated at Madison, Wisconsin, this 16th day of September, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan /s/

1/ See footnote on Page 15.

Dennis P. McGilligan, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

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

BLACKHAWK TECHNICAL COLLEGE

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

COMPLAINANT'S POSITION:

Complainant, in his brief, argues that the Commission has jurisdiction to address the allegations contained in his complaint and that Respondents acted improperly and in violation of their duty of fair representation by failing to seek a review of the 1991 work area study committee's findings; by failing to support Complainant's request to have the aforesaid findings reviewed, or reevaluated; and by failing to respond to his request to have a review done as noted above until after a complaint of prohibited practices filed by Benzing addressing the same issues had been determined by the Commission. Contrary to Respondents' assertions, Complainant argues that there is a remedy available to him, i.e. "a review/reevaluation of the" 1991 study, and, therefore, his complaint is not moot. Complainant adds that his request for a review, as noted above, is proper since the only limitation on such a request, which he followed, is that such a review must be requested after one year.

Complainant, in his reply brief, first argues that Barker's responsibilities/duties in servicing various locals is not relevant to the instant dispute. Complainant next argues that the decision not to proceed to arbitration with the grievance should have been submitted to the local executive committee since said committee had originally approved arbitration of the grievance. (Emphasis supplied) Complainant also argues that Barker failed to discuss the merits of his grievance at any time material during the settlement negotiations and failed to "indicate that the alleged tentative settlement struck on October 21, 1994, was a binding settlement, before the signing of the settlement." (Emphasis supplied) Finally, Complainant argues that it is "quite obvious" that Barker improperly represented him in the settlement of his grievance based "only on the grounds that her long term relationship with the College, was more important." (Emphasis supplied)

Responding to Respondents' arguments in their brief that Complainant's complaint is "moot," Complainant in his reply brief argues that said complaint is not "moot" because Complainant seeks to have a real controversy decided by the Commission, not a pretend one, and because the Complainant has a right to a Commission decision on whether the conduct complained of violated the applicable statutes.

Based on all of the above, the Complainant requests that the Examiner find the Respondents violated the applicable statutes and order the appropriate remedy.

RESPONDENTS' POSITION:

In their brief, Respondents first argue that Benzing's complaint should be dismissed because it is not properly before the Commission based on the fact that it is moot and that the essential

issues raised in his complaint have already been decided by the Commission.

Respondents next argue that well-established federal and Wisconsin case law, as well as Commission decisional precedent, provide the parameters for the Examiner's consideration of the Complainant's amended claim. In this regard, Respondents note to prevail in said claim, the Complainant must prove that the Association treated him arbitrarily, discriminatorily or in bad faith. Respondents also believe that the Examiner should seriously consider that the crux of Benzing's amended complaint is that the Association violated its duty of fair representation to him in settling his grievance and that the U. S. Supreme Court and the Commission have historically treated grievance settlement negotiations with great deference.

Finally, Respondents argue that Benzing has failed to prove that they acted arbitrarily, discriminatorily or in bad faith toward him in settling his disciplinary grievance with the College. Respondents add that the Association's handling of Benzing's "Hepatitis B" grievance is irrelevant and/or does not advance his claim.

In their reply brief, Respondents moved to strike "Exhibit D" because it did not previously appear in the record.

Respondents also argue that Complainant inappropriately argued the merits of his complaint in his brief, and reassert their claim said complaint is moot, and has already been decided by a previous Commission decision.

Respondents further argue that since Complainant failed to address in his brief his amended complaint the Examiner should not consider any argument he may raise on the settlement issue in his reply brief.

Finally, Respondents make two additional arguments regarding Complainant's "Hepatitis B" grievance. One, Respondents request that the Examiner take administrative notice of Decision No. 28449-B, issued by Examiner Daniel Nielsen on July 24, 1997, and resulting from a complaint filed by Jesus Barbary against Respondents BTC/PTC, WEAC and the NEA wherein Nielsen stated that the Association did not violate its duty of fair representation in processing Benzing's "Hepatitis B" grievance. By letter dated August 18, 1997, Respondents advised the Examiner that Barbary had appealed Nielsen's decision to the Commission. Two, Respondents also request that the Examiner not consider the issue of whether it violated its duty of fair representation to Benzing in the processing of the "Hepatitis B" grievance, even as "background" to his amended complaint, under the theory of issue preclusion.

Respondents, based on the foregoing, ask that both of the aforesaid complaints be dismissed.

DISCUSSION:

Complaint

1. Mootness:

As pointed out by Respondents, the Commission, following the lead of the Wisconsin Supreme Court, has defined a "moot" case as:

> . . . one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretended controversy when in reality there is none, or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment about some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy. 2/

The portion of the Supreme Court's definition which has been the subject of much litigation before the Commission is that specifying that resolution of a controversy must have a "practical legal effect." Addressing this very point, one examiner found moot a controversy in which a union requested a written summary of a meeting concerning misconduct charges against a teacher, and the District complied with the request, albeit four months later. 3/ The Commission has also dismissed a petition where, since an employee was no longer employed by the school district, the WERC's decision in a unit clarification proceeding regarding the inclusion or exclusion of the employe in the unit would have no practical effect. 4/

In the instant case, Benzing, through his complaint, has requested a review and/or reevaluation of the work study completed in 1991. However, the record is clear that the 1991 work study has long been superseded by a study conducted by Jack Dudley in the 1993-1994 school year, at the request of the union, in full settlement of a grievance filed by Benzing on the subject of custodial work areas. Contrary to assertions by Benzing, the very thing he sought, a review of the aforesaid 1991 study, was undertaken as a result of his efforts, in particular, the filing of a grievance.

As pointed out by the Respondents, practically speaking then, "there is no longer a 1991 study to 'review,' in the sense that such a review would have any concrete impact whatsoever on the work areas of custodians." (Emphasis supplied) The results of the 1991 study have not been followed for years, that study having been superseded by the Dudley study and other changes in custodial work areas which followed.

2/ Local 150, Service Employees International Union, Dec. No. 16277-C (10/80, Henningsen), at 15, aff'd by operation of law, Dec. No. 16277-D (WERC, 12/80), citing WERB v. Allis-Chalmers Workers Union, Local 248, USWA, CIO, 252 Wis. 436, 32 N.W.2d 190 (1948).

3/ Board of School Directors of Milwaukee, Dec. No. 15825-B (Yaeger, 6/79), aff'd by operation of law, Dec. No. 15825-C (WERC, 7/79).

4/ Washburn School District, Dec. No. 26780 (WERC, 2/91).

Based on the above, the Examiner finds that resolution of Benzing's complaint as requested would have no "practical legal effect," because he already has received what he requested from the Association, the Dudley study as well as other changes in the custodial work areas. Resolution of his complaint, in the opinion of the Examiner, cannot afford Benzing anything he has not already been granted.

It is true, as noted by Respondents, that the Commission has also determined that, where a union claimed that its alleged expulsion of a member without a hearing, its involuntary "withdrawal" of the member from the organization, and its successive rejections of his tendered dues payments had all been remedied, the Complainant still had the legal right to know whether the union's conduct against him had been unlawful, as well as the right to ask that Respondents be directed to cease engaging in any unlawful conduct and to take whatever affirmative action as might be appropriate to insure against its recurrence. 5/ And, as pointed out by Complainant in his reply brief, a determination as to whether his statutory rights were violated because of Respondents' conduct in response to his attempts to have the 1991 work study reviewed are a part of his complaint. Consequently, the allegations contained in Benzing's complaint of discriminatory treatment by Respondents against him in connection with his efforts to obtain a review/reevaluation of the 1991 work study will be addressed below.

2. Claim Preclusion:

Respondents also argue that the essential issues raised in Benzing's complaint have already been decided by Examiner Lionel Crowley and the Commission. Complainant takes the opposite position.

The Commission has applied the doctrine of res judicata since at least 1957. 6/ The Wisconsin Supreme Court has determined this doctrine is more aptly stated as "claim preclusion." 7/ The Commission has applied the doctrine of claim preclusion in cases arising under the Wisconsin Employment Peace Act, the Municipal Employment Relations Act 8/ and the State Employment Labor Relations Act. 9/

5/ Local 150, Service Employees International Union, supra, at 16. See also School District of Webster, Dec. No. 21312-A at 9 (Crowley, 6/84); reversed on the merits, Dec. No. 21312-B (WERC, 9/85).

6/ Wisconsin Telephone Company, Dec. No. 4471 (WERC, 3/57).

7/ Northern States Power Co. v. Bugher, 189 Wis.2d 541 (1995).

8/ See, for example, Moraine Park VTAE et al., Dec. No. 22009-B (WERC, 11/85).

9/ See, for example, State of Wisconsin, Department of Employment Relations, Dec. No. 23885-D (WERC, 2/88).

The Commission applies claim preclusion thus:

> (T)he dispute which was the subject of the award and the dispute for which the application of the res judicata principle is sought (must) share an identity of parties, issue and remedy. In addition, no material discrepancy of fact may exist between the dispute governed by the award and the subsequent dispute. 10/

10/ State of Wisconsin, Dec. No. 20145-A (Burns, 5/83) at 6, citations omitted; aff'd by operation of law, Dec. No. 20145-B (WERC, 6/83), and cited with approval at Dec. No. 22009-B at 8.

Applying the above standard to the facts of the instant case, the Examiner finds that Benzing's complaint and the aforesaid prior Commission decision share an identity of parties, issue and remedy. In both the prior Commission decision and the instant complaint Benzing was/is a moving party. In both of these cases Benzing attacked the validity of the 1991 work study; sought a review/reevaluation of said study; and alleged that the Association discriminated and/or violated its duty of fair representation and other statutes against him regarding his failure to obtain same. The earlier Commission decision found that Respondents did not violate their duty of fair representation by any of its conduct toward Complainant relating to the 1991 work study. The only major difference between the prior dispute and the instant complaint is Benzing's allegation that the Association failed to support his efforts to supplant the 1991 work study because of a complaint of prohibited practices that he filed with the Commission. However, Benzing could have raised this issue in the prior case. In this regard, the Examiner notes that Benzing in his complaint states: "On July 21, 1992, I the Complainant, sent a request for a review to the President of the local union" with a copy to Barker. Benzing also stated in his initial complaint that he "recieved (sic) a response from the locals Pres. which informed me that the Union would not do a review because of a complaint I filed with WERC." The Commission did not issue a final decision in the matter until February 8, 1993. Despite knowing the Union's position in the matter for almost seven months, Benzing failed to raise the issue in his prior case when he had every opportunity to do so. 11/ In a court proceeding, claim preclusion establishes that a final judgment between parties is conclusive for all subsequent actions between those same parties, as to all matters which were, or which could have been, litigated in the proceeding from which the judgment arose. 12/ (Emphasis added) Based on same, and all of the foregoing, the Examiner finds that the doctrine of "claim preclusion" also precludes consideration of Benzing's complaint.

Amended Complaint

In his amended complaint, Benzing basically claims that Respondents discriminated against him and violated their duty of fair representation by settling his aforesaid grievance involving a six-day suspension and letter of reprimand without his consent. Respondents argue that they did not violate any provisions of MERA by their conduct herein.

The primary issue presented herein is whether the Union violated its duty to fairly represent Complainant. The duty of fair representation obligates a Union to represent the interests of its members without hostility or discrimination, to exercise its discretion with good faith and honesty, and to eschew arbitrary conduct. 13/ The Union's duty to fairly represent its members is only

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11/ ERC 22.02(5)(a) provides that Benzing had the opportunity to amend his earlier complaint any time prior to issuance of the final Commission decision in the matter.

12/ Munchow v. Goding, 198 Wis.2d 609, 622, 544 N.W.2d 218, 223 (CtApp 1995).

13/ Vaca v. Sipes, 386 U.S. 171, 177 64 LRRM 2369, 2371 (1967); Mahnke v. WERC, 66 Wis.2d 524 (1974).

breached when the Union's actions are arbitrary, discriminatory, or taken in bad faith. 14/ In addition, as pointed out by Respondents, both the U.S. Supreme Court 15/ and the WERC have historically treated with great deference the Union's broad discretion in deciding whether or not to settle a grievance 16/ or to pursue it to arbitration 17/ as part of the contractual grievance/arbitration process.

The thrust of Complainant's case is that Respondents violated their duty of fair representation when they settled his aforesaid grievance without his consent and refused to process same to arbitration. However, the record does not support a finding regarding same. To the contrary, the record indicates that the Complainant voluntarily agreed to settle the grievance 18/ and

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14/ Vaca v. Sipes, supra; Coleman v. Outboard Marine Corp., 92 Wis.2d 565 (1979).

15/ Vaca v. Sipes, supra.

16/ In City of Greenfield, Dec. No. 24776-C (WERC, 2/89), Hempe dissenting, a majority of the Commission found the union's conduct consisting of consideration of the merits of the grievance, the likelihood of success in arbitration, the impact on the grievant of dropping her grievance and then concluding that the grievance should be dropped as part of a negotiation strategy designed to gain contractual concessions from the City favoring a majority of the employes was "not arbitrary, discriminatory or in bad faith and instead well within the range of discretion which a union is granted when it seeks to fairly represent all members of the unit. (Emphasis added) Likewise, in Marinette County, Dec. No. 19127-C (Houlihan, 11/82); aff'd by operation of law, Dec. No. 19127-D (WERC, 12/82) the Commission found that the union had not violated its duty of fair representation toward the grievant, but rather, "acted well within the sphere of discretion available to it" in settling two grievances, and declining to reconsider its action after learning that the grievant opposed the settlement. Finally, in Teamsters Local 695, Dec. No. 24251-A (Schiavoni, 1/88), aff'd by operation of law, Dec. No. 24251-B (WERC, 2/88), the Examiner found that, although the Union settled the grievance with a ten-day suspension and indefinite medical leave without the grievant's consent, the Complainant did not prove that the Union acted arbitrarily, discriminatorily or in bad faith; in fact, the Union's actions fell within "the broad latitude afforded to a union in the performance of its representational duties." In said case, the grievant disapproved both of the Union's strategy in prosecuting the grievance on his behalf and, ultimately, of the Union's actions in settling the grievance.

17/ Mahnke v. Werc, supra; Humphrey v. Moore, 375 U.S. 335 (1975).

18/ In making this finding, the Examiner has been presented with conflicting testimony regarding certain material facts. As a result, it has been necessary to make credibility findings, based in part on such factors as the demeanor of the witnesses, material inconsistencies and inherent probability of testimony, as well as the totality of the evidence. Benzing's testimony is replete with examples of inconsistent, vague, contradictory, confusing and unresponsive statements. In contract, Barker and Anderson provided clear and persuasive testimony regarding the events which led up to and included Benzing's

then changed his mind and attempted to persuade Respondents to repudiate that settlement and instead process a grievance regarding same to arbitration. In addition, contrary to Complainant's assertions, the record indicates that Respondents, particularly Barker, did everything they could to resolve Benzing's grievance to his satisfaction including comprehensive preparation for the Board

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settlement of his grievance, and then his attempts to undue same. Their testimony is generally corroborated by other witnesses, particularly Beverly Biermeier, Charles Stokes and Valerie Gallaway all who were called as witnesses by the Complainant. Therefore, based on the foregoing, the Examiner credits the testimony of Barker and Anderson regarding all material facts involving the negotiation and settlement of Benzing's grievance, and Respondents' failure to process same to arbitration.

and arbitration hearings, 19/ incorporating Benzing's concerns and wishes into Barker's negotiations toward the best possible settlement on his behalf, 20/ involving Benzing himself in the negotiations process, 21/ and scheduling a meeting on Friday, October 21, 1994, to finalize the settlement agreement with Benzing present. 22/ There is absolutely no persuasive evidence in the record that

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19/ T. 9/23/96, at 15-16, 20 and 23. (Hearing dates of June 25, 26 and July 17, 1996, will be cited as "T. [page #]." Citations to the transcripts of the September 23, 1996, and March 25, 1997 hearings will be cited using the following method: "T. [hearing date], [page #]."

20/ T. 9/23/96 at 25, 28, 30, 33, 34 and 104-105.

21/ T. 9/23/96, at 30, 31, 39, 40 and 41-44.

22/ At hearing on June 26, 1996, Benzing suggested that the above meeting was scheduled without his knowledge, at a time inconvenient to him, and stated when he was "pretty tired" after putting 13 hours in at his two jobs. T. at 139. Benzing implied as a result of the foregoing he was in no position to carefully consider the settlement agreement. However, the record indicates that said meeting was scheduled for Benzing's convenience at the end of his shift. T. 9/23/96 at 38. In addition, Barker was in contact with Benzing numerous times

Respondents used coercion or undue influence or acted in bad faith at any time material herein in order to force Benzing to accept the disputed settlement agreement. 23/ Finally, the record is clear, contrary to Complainant's assertions, that Respondents considered the merits of his grievance while pursuing settlement of same and that Complainant understood that this was a final, not tentative, settlement.

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in the days leading up to the Friday settlement conference regarding the progress in the negotiations including faxing him a copy of the proposed settlement agreement the night before. T. 9/23/96 at 37. Contrary to Benzing's assertions, there is no persuasive evidence in the record that Respondents did anything other than fully prepare him for the final settlement discussions on Friday, October 21.

23/ Benzing never told Barker to stop pursuing settlement talks or that he didn't want to settle. T. 9/23/96 at 113. At one point in the negotiations, Benzing did state: "No, I want to take this to arbitration," which was followed by a one-hour discussion, at the end of which Benzing and Barker were back on track talking about settlement. T. 9/23/96 at 32-33. In fact, the record in its entirety indicates that Barker worked closely with, supportive of, and responsive to Benzing's concerns at all times during the settlement negotiations.

As noted above, Benzing agreed to the settlement of his grievance on the aforesaid date, only to change his mind over the weekend. 24/ Benzing then attempted unsuccessfully to persuade Respondents to repudiate the agreement, and to arbitrate his grievance. However, contrary to the Complainant's assertions, Respondents did not act improperly by refusing same. To the contrary, the record indicates that there were many valid policy reasons for Respondents' conduct which fall well within the broad discretion afforded Respondents in carrying out their representational duties. These include: a desire to live up to an agreement which the parties had reached in good faith and which provided concrete benefits to Benzing; 25/ a need to consider the long-term relationship between the Association and the College which would have been harmed by refusing to implement the settlement agreement; 26/ and a need for Barker to maintain her long-term professional relationship with representatives of the College which also would have been harmed if she had agreed to refuse to implement said agreement as requested by Benzing. 27/ There is simply no persuasive evidence in the record that Barker acted at any time material herein on the basis that her long-term relationship with the College was more important than her duty to the Complainant.

24/ Benzing more or less admitted same at hearing when he testified that he went home for the weekend, reviewed his material, "rested up," and "got (his) thinking more clearly." T. at 142. Benzing's own witness, Charles Stokes, testified persuasively that Benzing told him he had agreed to the settlement, and also that he had changed his mind over the weekend. T. at 194. (Emphasis supplied) Finally, in his January 3, 1995 letter to Barker, Benzing states, "after re-evaluating my position going through alot (sic) of my evidence to be presented at hearing, the weekend of 11/22/94 I realiezed (sic) that I would be making a mistake by settling grievance #93-05 before arbitration." Respondent Exh. No. 4.

25/ T. 9/23/96, at 46.

26/ T. 9/23/96, at 47.

27/ T. 9/23/96, at 46-47.

The record is also clear, contrary to the Complainant's assertion, that the local executive committee did have an opportunity to review the decision not to proceed to arbitration on his grievance. Said committee declined to process a grievance over same.

Finally, the Complainant also claimed at hearing that the Association's handling of his "Hepatitis B" grievance, and its handling of grievances and other matters involving himself and Jesus Barbary in the past are further evidence of Respondent's failure to fairly represent him in the instant case. However, Complainant offered no persuasive evidence of same. To the contrary, the record evidence supports the Respondents' position that it acted properly toward Complainant at all times material herein. 28/ Therefore, the Examiner rejects this claim of Complainant as well.

In view of the above, the Examiner finds it reasonable to conclude that the record conclusively shows that it is Benzing, not Respondents, who has acted in bad faith by trying to repudiate the very settlement he had agreed to. If a union or employer engaged in such conduct, it could well violate their duty to bargain. Benzing's own actions here were just as egregious.

Given Benzing's own actions, it is all the more remarkable that Barker and the Respondents faithfully represented Benzing's legitimate interests to the very best of their ability. In the face of their extensive efforts, it is most unfortunate that Benzing does not understand this fundamental point.

I am also of the opinion that Benzing's complaint regarding the October 21 settlement is utterly without merit and that it is frivolous. I point this out so that Benzing is hereby put on express notice in this proceeding that he can be subjected to attorneys' fees and costs in another proceeding if he ever again engages in such baseless litigation.

Based on all of the foregoing, and the record as a whole, the Examiner finds it reasonable to conclude that the Respondents' actions toward Complainant herein, were not arbitrary, discriminatory or taken in bad faith. Having concluded that the Respondents (and its agents) did not breach its duty of fair representation toward Complainant, the Examiner has dismissed the complaint in its entirety.

Dated at Madison, Wisconsin, this 16th day of September, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

28/ Joint Exhibit Nos. 3 and 4; Respondent Exhibit No. 7. T. 9/23/96, at 14, 56, 58, 60-69, 79, 81, 86, 94, 99, 136. T. 3/25/97, at 23, 34-39, 41-43, 45, 90-93, 127-128.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Examiner