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-B

APPEARANCES

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

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

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 16, 1997, Examiner Dennis P. McGilligan issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded Respondents had not committed prohibited practices within the meaning of the Municipal Employment Relation Act. He therefore dismissed the complaint.

On October 6, 1997, Complainant filed a petition with the Wisconsin Employment Relations Commission seeking review of Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. On November 13, 1997, Respondents filed a response to the petition.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of December 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/_____
James R. Meier, Chairperson

A. Henry Hempe /s/_____
Henry Hempe, Commissioner

Paul A. Hahn /s/_____
Paul A. Hahn, Commissioner

WISCONSIN EDUCATION ASSOCIATION COUNCIL, ET AL

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Examiner analyzed the issues before him as follows:

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/

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).

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.

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.

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).

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/

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/

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.

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).

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.

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.

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).

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 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.

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

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, (*sic*) supra; Humphrey v. Moore, 375 U.S. 335 (1975).

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 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 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 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.

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 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.

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 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.

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.

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.

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.
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> 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.
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> 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.

In his petition for review, Complainant generally asserts that the Examiner made errors of fact and law and committed procedural errors. He does not specifically identify any such errors. Respondents urge us to affirm the Examiner.

We have reviewed the record and the Examiner's decision and conclude that he conducted himself appropriately in all
respects and that he correctly found the facts and analyzed applicable law. Therefore, we affirm his decision.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of December 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/_____
James R. Meier, Chairperson

A. Henry Hempe /s/_____
Henry Hempe, Commissioner

Paul A. Hahn /s/_____
Paul A. Hahn, Commissioner

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