

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GERHARDT STEINKE,

Complainant,

vs.

AFT LOCAL 212 and MILWAUKEE AREA
TECHNICAL COLLEGE BOARD, ET AL.,

Respondents.

Case 459

No. 53647 MP-3118

Decision No. 28664-A

Appearances:

Mr. Gerhardt Steinke, 4662 West Bernhard Place, Milwaukee, Wisconsin 53216, appearing pro se.

Michael, Best & Friedrich, Attorneys at Law, by Mr. John A. Busch, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, appearing on behalf of certain named Respondents.

Shneidman, Myers, Dowling & Blumenfield, Attorneys at Law, by Mr. Timothy E. Hawks, P. O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of certain named Respondents.

ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS THE COMPLAINT
AND DENYING COMPLAINANT'S MOTION TO AMEND THE COMPLAINT

On December 26, 1995, Gerhardt Steinke, hereafter Complainant, filed a complaint with the Wisconsin Employment Relations Commission alleging that AFT Local 212, MATC Board, Lauren Baker, Anne Channell, Sheila Cochran, Marie Dupuis, William Hegge, Julian Jasper, Mae Killebrew, Elliott Moeser, Edgardo Ocasio, A. Paul Pedersen, Joseph Rice, Ernst Schnook, and Franklin Shansky had committed "ongoing Prohibited Practice violations that continue unabated AFTER December 23, 1994." MATC Board, Lauren Baker, Sheila D. Cochran, William Hegge, Julian E. Jasper, Mae D. Killebrew, Elliott L. Moeser, Edgardo Ocasio, A. Paul Pedersen and Joseph A. Rice, hereafter MATC Respondents, by Counsel, filed an Answer and Motion to Dismiss Complaint, as well as other motions, on February 28, 1996. AFT Local 212, Anne Channell, Marie Dupuis, Ernst Schnook, and Franklin Shansky, hereafter Union Respondents, by Counsel, filed an

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Answer and Motion to Dismiss Complaint, as well as other Motions, on March 1, 1996. On March 5, 1996, the Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07(5), Stats. On March 29, 1996, Complainant filed a response to Respondents' Motions. On April 1, 1996, Complainant filed a Motion to Amend the Complaint. On April 24, 1996, MATC Respondents filed a Response to Complainant's Motion to Amend the Complaint. The Examiner, having considered the record and the arguments of the parties, grants Respondents' Motions to Dismiss the Complaint and denies Complainant's Motion to Amend the Complaint.

NOW, THEREFORE, it is

ORDERED 1/

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

1. Complainant's Motion to Amend the Complaint is denied.
2. Respondents' Motions to Dismiss the Complaint are granted and the complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 16th day of May, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner

1/ (footnote continued from page 2)

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

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

(footnote continued on Page 3)

exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

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

MILWAUKEE AREA VOCATIONAL, TECHNICAL & ADULT EDUCATION DISTRICT

MEMORANDUM ACCOMPANYING
ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS THE COMPLAINT
AND DENYING COMPLAINANT'S MOTION TO AMEND THE COMPLAINT

The complaint filed on December 26, 1995, alleges that Complainant is an "MATC municipal employee" within the meaning of Sec. 111.70(1)(i) of MERA; that Local 212 is a Union and a labor organization within the meaning of Sec. 111.70(1)(h) of MERA; and that the MATC Board is a municipal employer within the meaning of Sec. 111.70(1)(j) of MERA. The complaint further alleges that Union Respondents and MATC Respondents have engaged in "ongoing Prohibited Practice violations that continue unabated AFTER December 23, 1994."

Respondents' Motions to Dismiss are based on a lack of timeliness, res judicata and collateral estoppel, failure to state a claim upon which relief may be granted and lack of subject matter jurisdiction. Complainant opposes the Motions to Dismiss.

As Examiner McLaughlin stated in Oneida County: 2/

Chapter 227 does not provide a summary judgement procedure. The right to hearing is explicit, and the dismissal of a contested case prior to evidentiary hearing is not. Pre-hearing dismissal of a contested case is, then, an uncommon result:

Dismissal prior to evidentiary hearing would be proper if based on lack of jurisdiction, lack of timeliness and in certain other cases . . . (I)t would be a rare case where circumstances would permit dismissal of the proceedings prior to the conclusion of a meaningful evidentiary hearing on other than jurisdictional grounds or failure of the complaint to state a cause of action. 1/ (footnote omitted)

The Commission has reflected this reluctance to deny hearing in its own case law:

2/ Dec. No. 28240-A (8/95).

Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. 2/
(footnote omitted)

A review of the complaint and the attachments to the complaint reveals the following allegations:

1. MATC has ignored repeated good faith requests to review Complainant's personnel file;
2. MATC Board members have violated their sworn oaths of office because they have ignored clearly established and well understood law;
3. MATC has ignored suborned perjury and fraud;
4. MATC has been a party to the distribution of a false and defamatory "Steinke update" in a Union newsletter and has refused to permit Complainant to respond to the update;
5. MATC Board members have a statutory duty to follow their own policies and procedures and have violated Sec. 946.12(3), Misconduct in Public Office.
6. The Union has ignored Complainant's requests to review Union files on the Complainant and has not assisted Complainant with the requests to review Complainant's personnel file which were made to MATC;
7. The Union has ignored Complainant's requests to address the Union Board of Trustees;
8. The Union has ignored suborned perjury and fraud;
9. The Union has distributed a false and defamatory "Steinke update" in a Union newsletter and the Union has not permitted the Complainant to answer the update;

10. The Union and named Union officers have violated their duty of fair representation.

On March 29, 1996, Complainant filed a response to the Respondents' Answers and Motions. In this response, Complainant alleges that Respondents have impeded the due course of justice, have deprived Complainant of his rights to equal protection of the U.S. and Wisconsin Constitutions, and that certain Attorney representatives have engaged in ethical violations.

In a prior complaint proceeding before Examiner Crowley, Complainant raised similar allegations. 3/ In dismissing the complaint, Examiner Crowley concluded, inter alia, that "the Commission's jurisdiction is limited to enforcement of the statutes arising under the Municipal Employment Relations Act"; that "any allegations with respect to crimes such as perjury, subornation of perjury and misconduct in public office are not violations of Sec. 111.07(3)(a), Stats., or any other provision found in MERA."; and that the Commission does not have jurisdiction over alleged legal ethics violations. 4/

As Respondents argue, the Complainant cannot use this forum to relitigate the allegations which were the subject of the complaint which was dismissed by Examiner Crowley. To the extent that Complainant is raising new allegations of (1) legal ethics violations; (2) public records law violations; and (3) criminal violations such as misconduct in office, subornation of perjury, fraud, and defamation, the Examiner agrees with the analysis of Examiner Crowley and concludes that the Commission does not have jurisdiction to determine such allegations.

On March 29, 1996, Complainant filed documents which clarify that Complainant is also claiming that the alleged conduct of MATC Respondents violates a collective bargaining agreement. These documents also clarify that Complainant is claiming that the alleged conduct of Union Respondents breaches their duty of fair representation and/or violates a collective bargaining agreement.

MERA does provide the Commission with jurisdiction over allegations that a municipal employer or labor organization has violated a collective bargaining agreement. 5/ MERA also provides the Commission with jurisdiction over allegations that a labor organization has violated its

3/ Milwaukee Area Technical College, et al., Dec. No. 28562-B (12/95), currently on appeal before the Commission.

4/ Id. at p. 7.

5/ Sec. 111.70(3)(a)5, Stats., and Sec. 111.70(3)(b)4, Stats., respectively. Complainant is alleging that provisions of the collective bargaining agreement, such as Article II, impose a contractual duty upon Respondents' to obey external law and the federal and state constitutions.

duty of fair representation. 6/

Sec. 111.07(14), Stats., which is made applicable to these proceedings by Sec. 111.70(4)(a), Stats., provides:

The right of any person to proceed under this section shall not exceed beyond one year from the date of the specific act or unfair labor practice alleged.

6/ Sec. 111.70(3)(b)1, Stats.

As Examiner Crowley stated in the prior complaint proceeding involving the Complainant 7/, this section is strictly construed. As Examiner Crowley further stated:

The Commission has adopted the principles of Bryan Mfg. Co. to address the significance of events falling outside of a statutory limitations period. 5/ In that case, the United States Supreme Court addressed two situations which pose the relevant considerations. The Court addressed those situations thus:

. . . The first is one where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose (the statute of limitations) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in revising a legally defunct unfair labor practice. 6/ (footnotes omitted)

As Examiner McLaughlin stated in Moraine Park Technical College, Dec. No. 25747-C (8/89):

7/ Dec. No. 28562-B.

The Bryan analysis, read in light of the provisions of Secs. 111.70(4)(a) and 111.07(14), Stats., requires two determinations. The first is to isolate the "specific act alleged" to constitute the prohibited practice. The second is to determine whether that act "in and of (itself) may constitute, as a substantive matter" a prohibited practice.

Applying this analysis, the Examiner concludes that the Complainant must allege a "specific act" within the one-year statute of limitations which constitutes "in and of itself" a prohibited practice. Absent such an allegation, evidence of the Complainant's prior employment history and prior acts of Respondents are time barred.

Alleged Violation of a Collective Bargaining Agreement

Complainant alleges that, after December 23, 1994, MATC Respondents and Union Respondents engaged in conduct which violated provisions of a collective bargaining agreement between the "Milwaukee Area District BOARD of Vocational, Technical and Adult Education," hereafter MATC, and the "American Federation of Teachers, Local 212, WFT, AFL-CIO," hereafter Local 212. 8/ Documents filed by Complainant establish that, on January 3, 1996, Arbitrator Richard Ulric Miller issued the following Award:

The College has good cause when it nonrenewed the Grievant on March 15, 1990.

The "College" referenced in the Award is MATC and the "Grievant" referenced in the Award is the Complainant.

The Arbitration Award of January 3, 1996, confirms that Complainant was non-renewed in 1990. As a result of this non-renewal, Complainant was not an MATC municipal employee, as alleged in Attachment R of the complaint, at any time within the one year statutory limitations period.

The collective bargaining agreement relied upon by the Complainant covers employees of MATC who are represented by Local 212. Given the fact that Complainant has not been an

8/ See Complaint and Attachment R.

employee of MATC since his 1990 non-renewal, he was not covered by the collective bargaining agreement between MATC and Local 212 at any time within the one year statutory limitations period. 9/ Accordingly, Complainant's claim that the alleged conduct of MATC Respondents and Union Respondents has violated a collective bargaining agreement does not state a timely cause of action upon which the Commission can grant relief.

Alleged Violation of the Duty of Fair Representation

Sec. 111.70(3)(b)1, Stats., provides:

It is a prohibited practice for a municipal employee, individually or in concert with others:

1. To coerce or intimidate a municipal employee in the enjoyment of his legal rights, including those guaranteed in sub. (2).

Subsection 2 provides:

(2) RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through

9/ In a breach of contract claim, the one year statute of limitations period may be tolled pending exhaustion of the grievance procedure. However, exhaustion of the grievance procedure is not an issue in this complaint. The grievance on Complainant's 1990 non-renewal culminated in the Arbitration Award of January 3, 1996. Complainant's right to file a grievance on the 1990 non-renewal and Complainant's right to proceed to grievance arbitration on the non-renewal was the subject of a prior complaint proceeding. See Milwaukee Area Vocational, Technical and Adult Education District, Dec. No. 26943-A (Crowley, 2/92).

representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employees shall have the right to refrain from any and all such activities except that employees may be required to pay dues in the manner provided in a fair-share agreement. . . . (hereinafter follows provision for fair-share agreements, not pertinent to the instant case.)

The Commission and the courts have interpreted this provision to mean that a union must treat a member of the collective bargaining unit which the union represents in a way which is not arbitrary, discriminatory or in bad faith. 10/

10/ Vaca v. Sipes 386 U.S. 171 (1967); Mahnke v. WERC, 66 Wis.2d 524 (1975); Oneida County, Dec. No. 28240-A (McLaughlin, 8/95).

As discussed above, the Complainant was non-renewed in 1990. Thus, he was not a member of the collective bargaining unit of MATC employees represented by Local 212 during the one year statute of limitations period which is applicable to this complaint. Since he was not a member of the collective bargaining unit represented by Local 212, Union Respondents did not owe the Complainant a duty of fair representation for conduct alleged to have occurred within the one year statute of limitations period. 11/ Complainant's claim that the Union Respondents have breached their duty of fair representation does not state a timely cause of action upon which the Commission can grant relief.

Motion to Amend Complaint

ERC 12.02(5) provides as follows:

(5) AMENDMENT. (a) **Who may amend.** Any complainant may amend the complaint upon motion, prior to the hearing by the commission; during the hearing by the commission if it is conducting the hearing, or by the commission member or examiner authorized by the board to conduct the hearing; and at any time prior to the issuance of an order based thereon by the commission, or commission member or examiner authorized to issue and make findings and orders.

Complainant's Motion to Amend the complaint alleges that "since my filing of above 12/23/95 Complaint, RELATED BUT NEW Sunday 12/24/95 - Sunday 3/31/96 events have

11/ Where a complainant alleges a breach of contract claim against an employer and a duty of fair representation claim against a union, the one year statute of limitations may be tolled pending complainant's exhaustion of the contractual grievance procedure. As discussed in Footnote 6, supra, exhaustion of the contractual grievance procedure is not an issue in this complaint.

Complainant exercised his contractual right to appeal his grievance on the 1990 non-renewal to arbitration and appeared pro se at the arbitration hearing. Local 212 did not represent the grievant at hearing, but did intervene at the hearing on the sole question of whether student complaints dated more than two years prior to Complainant's non-renewal are properly considered. Since the arbitration hearing commenced in 1992, this complaint can not present a timely claim that Local 212 breached its duty of fair representation by not representing the complainant at hearing. Allegations concerning the arbitrator's conduct at hearing were presented to Examiner Crowley and cannot be relitigated here.

transpired that are Sec. 111.70(3) Prohibited Practices." On April 24, 1996, MATC Respondents' filed a Response to Complainant's Motion to Amend, arguing, inter alia, that Complainant has not been an MATC employe since his March 1990 non-renewal and, thus, cannot raise any prohibited practices that would have occurred within the one-year limitation period set forth in Sec. 111.07(14), Stats.

Complainant's Motion to Amend the complaint does not provide the Examiner with any reasonable basis to conclude that an amended complaint would state a timely cause of action upon which the Commission can grant relief. Accordingly, the Examiner has denied Complainant's Motion to Amend the Complaint.

Summary

Complainant's allegations against MATC Respondents and Union Respondents do not state a timely cause of action upon which the Commission can grant relief. The Examiner has denied Complainant's request to amend the complaint and has dismissed the complaint in its entirety.

Attorney's Fees and Costs

Respondents request attorney's fees and costs. To grant this request, the Examiner must find that each of the Union's allegations is frivolous and not debatable. 12/ At the time that the complaint was filed, Complainant had not received the Arbitration Award which upheld his 1990 nonrenewal. Had Complainant prevailed in his arbitration proceeding, his breach of contract and breach of the duty of fair representation claims would have been "debatable." Accordingly, it is not appropriate for the Examiner to order Complainant to pay attorney's fees or costs. 13/

12/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90).

13/ MATC Respondents argue that the Complainant be required to submit any new or amended complaint to the General Counsel of the Commission, for review and approval as to form and non-frivolousness, before such item is deemed "filed" with the WERC, and before MATC, the MATC Board or any other individual associated with MATC, is required to answer such complaint, or appear at a hearing to give testimony regarding such complaint. The Examiner does not have authority to order the General Counsel to review and approve

complaints as to form and non-frivolousness.

Dated at Madison, Wisconsin, this 16th day of May, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner