

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GERHARDT STEINKE, Complainant,

vs.

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

Case 459
No. 53647
MP-3118

Decision No. 28664-C

Appearances:

Mr. Gerhardt J. Steinke, 6415 Bridge Road, Madison, Wisconsin 53713, appearing on his own behalf.

Michael, Best & Friedrich, by **Attorney John A. Busch**, Suite 3300, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, appearing on behalf of certain named Respondents.

Shneidman, Hawks & Ehlke, S.C., by **Attorney Timothy E. Hawks**, 700 West Michigan, Suite 500, P. O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of certain named Respondents.

**ORDER AFFIRMING EXAMINER'S ORDERS, DENYING MOTIONS
TO TAKE JUDICIAL NOTICE AND AMEND COMPLAINT,
AND DENYING MOTIONS FOR COSTS AND ATTORNEYS' FEES**

On May 16 and 22, 1996, Examiner Coleen A. Burns issued orders dismissing the complaint and denying a motion to amend the complaint in the above captioned matter.

Complainant timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties filed written argument in support of and opposition to the petition by January 10, 1997. In their written argument, certain Respondents asked for costs and attorneys' fees.

Dec. No. 28664-C

On December 6, 1996, Complainant filed a motion to take judicial notice.

On May 20, 1997, Complainant filed a motion to amend complaint. Argument as to this motion was received until September 8, 1997.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

The Examiner's Orders are affirmed.

The motion to take judicial notice is denied.

The motion to amend complaint is denied.

Respondents' motions for costs and attorneys' fees are denied.

Given under our hands and seal at the City of Madison, Wisconsin this 4th day of January, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

Commissioner A. Henry Hempe did not participate.

Milwaukee Area Technical College

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S ORDERS, DENYING MOTIONS
TO TAKE JUDICIAL NOTICE AND AMEND COMPLAINT,
AND DENYING MOTIONS FOR COSTS AND ATTORNEYS' FEES

The Examiner's Decision

On May 16 and May 22, 1996, the Examiner dismissed a December 26, 1995 complaint filed by Complainant Steinke and denied an April 1, 1996 motion to amend the complaint.

The Examiner concluded that (1) the Commission did not have jurisdiction over complaint allegations regarding (a) legal ethics violations, (b) public records law violations or (c) violations of criminal law; and (2) alleged violations of a collective bargaining agreement and the duty of fair representation were untimely.

As to the alleged violations of a collective bargaining agreement, the Examiner reasoned as follows:

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 (sic) 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 employe, 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 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.

8/ See Complaint and Attachment R.

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).

As to the alleged violation of the duty of fair representation, the Examiner reasoned as follows:

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.

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.

We find the Examiner's reasoning to be persuasive and thus affirm her dismissal of these complaint allegations. We further affirm her dismissal for lack of jurisdiction of any complaint allegations related to (a) legal ethics violations, (b) public records law violations, and (c) violations of criminal law.

The Examiner denied Complainant's April 1, 1996 motion to amend his complaint. She did so because she concluded that there were no timely complaint allegations that could be raised given his March 1990 non-renewal and the resultant end of his status as a "municipal employee." We find the Examiner's rationale for denying the motion to amend to be persuasive and thus also affirm this portion of her orders.

The December 6, 1996 Motion to Take Judicial Notice

Complainant asks that we take "judicial notice" of certain matters. We deny the request because, as a general matter, review proceedings are limited to the record made before the examiner and we find no persuasive basis for allowing Complainant to supplement the record after the examiner has issued her decision.

The May 20, 1997 Motion to Amend

Complainant asks that he be allowed to amend his complaint to add an additional named Respondent who Complainant asserts played a role in violations of a collective bargaining agreement. We deny the motion to amend on several grounds. First, as a general matter, review proceedings are limited to the record made before the examiner and we find there is no persuasive basis for allowing an amendment after the examiner has issued her decision. Second, as discussed above, Complainant's loss of municipal employee status precludes presentation of a timely violation of contract allegation. Therefore, we have denied the motion.

Motions for Costs and Attorneys' Fees

Respondents have asked for costs and attorneys' fees because they believe the instant complaint proceeding is frivolous litigation. We deny the Respondents' request because we do not have the statutory authority to grant costs and attorneys' fees in a complaint proceeding to responding parties. STATE OF WISCONSIN, DEC. NO. 29177-C (WERC, 5/99)

Dated at Madison, Wisconsin this 4th day of January, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

Commissioner A. Henry Hempe did not participate.