STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MRS. JOHNNIE MAE HOPSON, Complainant, vs. KATAHDIN FOUNDATION, INC., d/b/a NORTHWEST GENERAL HOSPITAL - OSTEOPATHIC, Respondent.	Case VIII No. 15037 Ce-1378 Decision No. 10599-B
MRS. JOHNNIE MAE HOPSON, Complainant, vs. LOCAL 150, SERVICE & HOSPITAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, AND MR. DONALD BEATTY, PRESIDENT, Respondent.	Case IX No. 15038 Cw-326 Decision No. 10600-B

Appearances:

Hayes, Peck, Perry, Gerlach & Mulligan, Attorneys at Law, by Mr. Richard Perry, on behalf of the Complainant.

Petrie, Stocking, Meixner & Zeisig, Attorneys at Law, by Mr. Edmond F. Zeisig, on behalf of the Respondent-Employer.

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Albert J. Goldberg, and Mr. Donald Beatty, President, on behalf of the Respondent-Union.

CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

Complaints of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matters, and the Commission having authorized Howard S. Bellman, a member of the Commission's staff, to act as an Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act, and a consolidated hearing on such complaints having been held at Milwaukee, Wisconsin, on December 2, 1971 and January 10, 1972, before the Examiner, and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Orders.

FINDINGS OF FACT

1. That Mrs. Johnnie Mae Hopson, referred to herein as the Complainant, is an individual residing at 2938 North 21st Street,

Milwaukee, Wisconsin; and that she was employed by the Respondent-Employer from January 1970 to approximately July 5, 1971, on which date she was discharged by Respondent-Employer.

2. That Local 150, Service and Hospital Employees International Union, AFL-CIO, referred to herein as Respondent-Union, is a labor organization having offices at 135 West Wells Street, Milwaukee, Wisconsin; and that Donald Beatty, referred to herein as Respondent Beatty, is an individual who, at all times material herein has been the President of Respondent-Union and has acted as its agent.

3. That Katahdin Foundation, Inc., d/b/a Northwest General Hospital - Osteopathic, referred to herein as the Respondent-Employer, is a nonprofit corporation engaged in the operation of a hospital at 5310 West Capitol Drive, Milwaukee, Wisconsin, and that at all times material herein William P. Babcock has been the Administrator and agent of the Respondent-Employer.

4. That at all times material herein, the Respondent-Employer has recognized the Respondent-Union as the exclusive bargaining representative of certain of its employes; that in said relationship the Respondent-Employer and the Respondent-Union have been parties to a collective bargaining agreement covering the wages, hours and working conditions of such employes, which agreement had as its term October 31, 1970 to October 31, 1972.

5. That said collective bargaining agreement provides at Articles XXIII and XXIV respectively as follows:

"ARTICLE XXIII
Disciplinary Action

Section 1. An employee may not be discharged without just cause; however, discharge for the following offenses may be made without warning or notice; (1) failure to carry out the orders of the Supervisor, (2) insubordination, (3) use of abusive language toward another person, (4) intoxication or drinking on duty, (5) unauthorized possession of narcotics, (6) dishonesty or theft, (7) deliberate misconduct which results in damage to property or person, (8) disclosure of any information relating to the condition, treatment, prognosis or other matters of a nature personal to a patient, physician, or Hospital personnel.

Section 2. For other offenses the Hospital will not discharge an employee without first giving at least one written warning notice stating the nature of the misconduct, and warning the employee that in the event of further misconduct, the employee will be given a disciplinary layoff or will be discharged as the Hospital determines.

Section 3. Any dispute as to whether an employee committed the particular offense or participated therein will be subject to the grievance procedure, provided it is presented in accordance with the outlined grievance procedure. If it is determined that the employee did not commit the alleged offense, or participated therein, the Hospital will reinstate the employee with seniority credit and back pay for actual time lost.

Section 4. Disciplinary slips will be made out in triplicate. One copy will be given to the employee, a copy will be put into the employee file and the third copy will be sent to the Union.

ARTICLE XXIV
Grievance and Arbitration

Section 1. The Hospital agrees to meet with duly accredited officers and committees of the Union upon grievances pertaining to meaning or application of the agreement. For this purpose, an orderly procedure is provided.

Step 1. The employee with a grievance shall discuss his grievance orally with his immediate supervisor. The employee shall present his grievance as soon after occurrence as is reasonably possible.

Step 2. If the grievance is not satisfied at Step 1, the employee may immediately set forth his grievance in writing, date it, sign it, and give it to his immediate supervisor. The supervisor will immediately present the written grievance to the Department Head for investigation and written disposition within five (5) days.

Step 3. Failure to resolve at this step, the grievance is then presented to the Administrator who shall investigate and provide for a meeting of Union and Hospital representatives for negotiation purposes within five (5) working days. The Hospital shall provide written disposition within three (3) working days of the meeting. Failure to resolve at this step, either party may file 'intent to appeal' to arbitration within five (5) working days.

Step 4. It is the responsibility of the appealing party to request a hearing before the Wisconsin Employment Relations Board. Decision of the Wisconsin Employment Relations Board shall be binding on both Hospital and Union.

Section 2. The Hospital or the Union has no obligation to negotiate, or be subjected to retroactive responsibility where time limitations, or the proper steps have not been followed.

Section 3. Either the Union, or the Hospital, may object to, or dismiss the first assigned arbitrator prior to the hearing.

Section 4. Arbitrators shall limit their decisions to interpretation of existing contract; they may not amend, add to, or detract from said contract.

. . ."

6. That during her aforesaid period of employment by the Respondent-Employer, the Complainant was a steward for the Respondent-Union in which capacity she prosecuted grievances, under the aforesaid collective bargaining agreement, against the Respondent-Employer, and was a known critic of the Respondent-Union, which she alleged to be weak and unrepresentative of the employes in the pertinent collective bargaining unit; that both Respondent-Employer and Respondent-Union were hostile toward the Complainant on the bases of her aforesaid conduct; and that, specifically, a few days before the discharge of the Complainant, in response to an instance of her criticism of Respondent-Union, Respondent Beatty stated "We are going to take care of her," implying that Respondent-Union would see to it that Complainant suffered for her aforesaid criticism.

7. That a few days prior to her discharge the Complainant was instructed by Helen Paulson, the Respondent-Employer's Assistant Director of Nursing, and agent, that she should discuss certain procedures with two other members of Respondent-Employer's staff; that while following said instructions during the shift of July 4-5, 1971, Complainant was reprimanded by Edna Hoeller, the Respondent-Employer's night shift supervisor, and agent, and the Complainant's immediate supervisor, for being away from her duty station and for discussing an inappropriate subject; that in response to such reprimand Complainant discussed and argued the matter with Hoeller, suggesting that Hoeller was starting a fight; that Hoeller subsequently asked Complainant to leave the premises, but Complainant refused to so leave; that thereafter, Hoeller telephoned Paulson who determined that Complainant should be discharged forthwith; and that such determination to discharge was entirely based upon Hoeller's version of the aforesaid incident.

8. That on July 6, 1971, Complainant visited the offices of the Equal Rights Division of the Department of Industry, Labor and Human Relations where she discussed her discharge with staff member Jeanne Johnson, who, in turn, arranged a meeting with representatives of Respondent-Employer, including Babcock, for July 7, 1971; that at said meeting which was based upon and inquired into Complainant's contention that her discharge was based upon racial discrimination, no resolution of the matter was achieved.

9. That on approximately July 13, 1971, Babcock received from Complainant a "grievance report" alleging that her discharge was without "just cause" and requesting, inter alia, that she be granted a "hearing" in the matter; that in response to said "grievance report" Babcock, on approximately July 13, 1971 wrote to Complainant stating that he would meet with Complainant or Respondent-Union on the matter, if requested; that on approximately July 20, 1971, Complainant reported her aforesaid "grievance report" and Babcock's aforesaid response thereto to Shirley Day, an official of Respondent-Union, and its agent, and its Chief Steward at the Respondent Employer, requesting that Day prosecute the matter through the contractual grievance procedure; that Day thereupon met with Babcock who denied receiving any grievance from Complainant; and that Day, as well as Respondent Beatty to whom Day reported, chose to believe Babcock and

plainant; and that during said meeting Respondent-Union ostensibly, but insincerely, requested that Respondent-Employer waive its position that no timely grievance had been filed in the matter, and Respondent-Employer refused to do so.

11. That on approximately August 13, 1971, Respondent Beatty wrote to the Wisconsin Employment Relations Commission asking if it would appoint an arbitrator in the matter, asserting that Complainant had failed to "follow the grievance procedure" and to date had not submitted any written grievance; and that replying thereto, the Commission, by Executive Secretary Donald B. Lee, stated, in substance, that the Commission would appoint an arbitrator if both parties to said arbitration intended to participate in and accept said procedure.

12. That on approximately August 27, 1971 Respondent Beatty wrote separate letters to Day and to Executive Secretary Lee, stating to Day, in substance, that he feared that Complainant would bring legal proceedings if arbitration was not pursued, and ostensibly, but insincerely, to Lee that he desired the appointment of an arbitrator by the Commission, if necessary; that in reply thereto Lee wrote to Babcock on August 30, 1971 requesting advice as to whether Respondent-Employer would concur in said request that an arbitrator be appointed in the matter; that Babcock replied to Lee by a letter of September 8, 1971 stating that a meeting between Respondent-Employer and Respondent-Union was presently scheduled for September 9, 1971 to discuss the matter of arbitration and asserting that Respondent-Employer still had not received "any formal grievance" in the matter; that no such meeting was held on September 9, 1971 or thereafter, and that Respondent-Union made no further efforts to bring the matter to arbitration.

13. That throughout the above-described period following Complainant's discharge, the Respondent-Employer's refusal and failure to reinstate her to employment and the Respondent-Union's failure to afford her sincere representation in the prosecution of her grievance over said discharge, to a material extent were motivated by their respective hostile attitudes toward her aforesaid activities as a steward and as a critic of the Respondent-Union.

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

CONCLUSIONS OF LAW

1. That in view of the aforesaid circumstances surrounding and precipitating the discharge of the Complainant on approximately July 5, 1971, the Respondent-Employer did not have "just cause" for said discharge, and therefore, it committed and is committing, unfair labor practices within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

2. That the Complainant, by discussing her discharge with her immediate supervisor on approximately July 5, 1971 and by submitting a written grievance to the Respondent-Employer on approximately July 13, 1971, did make a sufficient attempt at using the grievance procedure of the aforesaid collective bargaining agreement.

3. That the Respondent-Employer by refusing since approximately July 5, 1971, to reinstate the Complainant because she engaged in concerted activities for the purposes of collective bargaining, has

engaged in, and is engaging in, unfair labor practices within the meaning of Section 111.06(1)(a) and (c) of the Wisconsin Employment Peace Act.

4. That the Respondent-Employer, since approximately July 13, 1971, by replying to the grievance filed over the discharge of the Complainant by refusing to reinstate the Complainant, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 111.06(1)(a) and (d) of the Wisconsin Employment Peace Act.

5. That the Respondents Union and Beatty by discriminatorily refusing and failing, since approximately July 20, 1971 to fairly and nondiscriminatorily process the grievance of the Complainant over her discharge, because she had been critical of said Respondents has engaged in, and is engaging in, unfair labor practices within the meaning of Section 111.06(2)(a) and (c) of the Wisconsin Employment Peace Act.

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

ORDERS

IT IS ORDERED that the Respondent-Employer, its officers and agents, shall immediately

1. Cease and desist from:
   (a) Refusing and failing to bargain collectively in good faith over grievances arising within the grievance procedure of its collective bargaining agreement with Respondent-Union.

   (b) Refusing to reinstate its employes for the purpose of discouraging them from engaging in lawful, concerted activities.

   (c) In any manner, interfering with, restraining, or coercing its employes in the exercise of their rights guaranteed in Section 111.04, of the Wisconsin Employment Peace Act.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

   (a) Offer to the Complainant immediate and full reinstatement to her former or a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of pay which she may have suffered by reason of her aforementioned discharge by Respondent-Employer in violation of the collective bargaining agreement existing between it and Respondent Union, by making payment to her of a sum of money equal to that which she would normally have earned as wages from the date of her discharge to the date of the unconditional offer of reinstatement, less any earnings which she may have received during said period, and less the amount of unemployment com-

pensation, if any, received by her during the said period, and in the event that she received unemployment compensation benefits, reimburse the Unemployment Compensation Division of the Wisconsin Department of Industry, Labor and Human Relations in such amounts.

(b) Notify all of its employes by posting in conspicuous places on its premises, where notices to all its employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A". Such copies shall be signed by William P. Babcock and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by Respondent-Employer to insure that said Notice is not altered, defaced or covered by other material.

(c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days of the receipt of a copy of this Order of what steps it has taken to comply herewith.

IT IS ORDERED that the Respondent-Union, its officers and agents, shall immediately,

1. Cease and desist from:

In any manner, coercing or intimidating any employes in the enjoyment of their legal rights under the Wisconsin Employment Peace Act, including by discriminatorily refusing to process grievances in good faith under its collective bargaining agreement with Respondent-Employer.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

(a) Notify all employes of Respondent-Employer who are within the collective bargaining unit represented for the purposes of collective bargaining by the Respondent-Union by mailing to each of their homes a copy of the notice attached hereto and marked "Appendix B". Such Notices shall be signed by Donald Beatty. Reasonable steps shall be taken by Respondent-Union to obtain the addresses of such employes, if necessary.

(b) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days of the receipt of a copy of this Order of what steps it has taken to comply herewith.

Dated at Madison, Wisconsin, this 2nd day of January, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

APPENDIX "A"
NOTICE TO ALL EMPLOYES

Pursuant to an Order by an Examiner of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify our employes that:

1. WE WILL offer to Johnnie Mae Hopson reinstatement to her former, or a substantially equivalent position, without prejudice to her seniority or other rights or privileges, and we will make her whole for any loss of pay suffered by her as a result of our failure to reinstate her following her discharge.

2. WE WILL NOT discharge or refuse to reinstate employes to discourage them from engaging in lawful concerted activities.

3. WE WILL NOT refuse to bargain collectively in good faith over grievances submitted under the terms of the grievance procedure of the collective bargaining agreement with Local 150, Service and Hospital Employees International Union, AFL-CIO.

4. WE WILL NOT in any other manner, interfere with, restrain or coerce our employes in the exercise of their right of self-organizati to form labor organizations, to join or assist Local 150, Service and Hospital Employees International Union, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or any mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 111.06(1)(c) of the Wisconsin Employment Peace Act.

NORTHWEST GENERAL HOSPITAL - OSTEOPATHIC

By_____
William P. Babcock, Administrator

Dated the day of January, 1973.

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

APPENDIX "B"

NOTICE TO EMPLOYES OF NORTHWEST GENERAL HOSPITAL

Pursuant to an Order by an Examiner of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify you that:

WE WILL NOT refuse to process grievances in good faith, or in any manner, coerce or intimidate any employes in the enjoyment of their right to self-organization, to form labor organizations, to join or assist Local 150, Service and Hospital Employees International Union, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or any mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 111.06(1)(c) of the Wisconsin Employment Peace Act.

LOCAL 150, SERVICE & HOSPITAL EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

By_____
Donald Beatty, President

Dated the day of January, 1973.

MEMORANDUM ACCOMPANYING
CONSOLIDATED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

Mrs. Hopson, the Complainant, became an employe of the Employer during January, 1970. She was employed as an aide on the night shift, and for some time prior to her discharge was also the night shift union steward. As a steward Mrs. Hopson achieved a reputation among the night shift bargaining unit members, as well as the management of the hospital, for being very vigorous and even contentious. She prosecuted a substantial number of grievances and was apparently generally regarded as militant in her attitudes. She was also known by all, including other Union officials, as a vocal critic of the Union and the labor agreement, both of which she apparently regarded as weak. The night shift unit members appreciated Mrs. Hopson and held her to be an able spokeswoman. The management, and some Union officials, found her to be an irritation.

Apparently true to form, on June 15, 1971 Mrs. Hopson wrote the following letter to the President of the International Union with which the Union, herein, is affiliated.

> "I am writing you to tell you that I am filing a complaint against Don Beatty our local president with the Wisconsin Employment Relations Board in Madison, Wis. because he is not representing the members at Northwestern General Hospital. I filed a grievance in April against a new policy making 3rd shift workers make-up any weekend day missed for sickness or any other reason. The policy didn't apply to first and second shift workers only to the 3rd shift. Beatty agreed to it and members on the 3rd shift are angry. I am writing to the WERC because the rule isn't right or fair and it discriminates against the 3rd shift. I accuse him of not representing us properly and agreeing to a discriminatory policy.
>
> He also negotiated a bad contract and has made some deal with the Hospital Administrator, Mr. Babcock not to pay us retroactive. The contract is October 1 1970 to October 1, 1972. But the one before was ended July 1970. So the new contract was not retroactive to July 1970. And he cheated us because under this contract we never got paid the raise until January 1971. What happened to July, Aug., September, October, November and December. We never got it because he made a deal with the Hospital that's what the Administrator told me. The contract starts October 1, 1970 but none of us got a raise until January. So since Beatty and the Hospital won't give us the money coming to us, I am filing a complaint with WERC. I know you don't believe all of this and I don't expect you to do anything about it but I thought I'd tell you anyway.
>
> Beatty has tricked us too many times before but this time I'm not going to let him get away with it. I hope some day you do something about Beatty so we can have a better union." (corrections made for typing errors)

William P. Babcock, the Administrator of the hospital, testified that he believed that Mrs. Hopson was responsible for the circulation of rumors and petitions among bargaining unit employes which alluded to alleged "collusion" between the Employer and the Union, and that in response to these, and the above letter to the International President, he wrote the following letter, dated July 2, 1971, to Mr. Beatty, the President of the Union.

> "It has come to my attention that Mrs. Johnnie May Hopson, a union steward at Northwest General Hopsital, has made certain charges of deals between the Union and Management. I resent her implication, and reject her allegations as untrue and not based on fact.
>
> The policy in regard to make up of scheduled weekend work is hospital wide. Any deviation would permit employees to refuse weekend assignment to the point where patient care would suffer and undue hardship on fellow employees would result. This was detailed in Mrs. Hopson's presence with you, your committee, and our management on March 26, 1971. A tape of this meeting indicates this to be the fact.
>
> Mrs. Hopson has either grossly misunderstood, or has chosen to deliberately falsify the actual facts of the 1971 - 1972 contract negotiations. The 1970 contract expired on September 27, 1970, after a term of one year. Negotiations were conducted several months prior to this expiration date where terms of the new contract were discussed. On September 23, 1970, a retroactive day of October 4, 1970 was agreed upon. This date was set because it happened to be the beginning of the pay period closest to the approval date of the new contract and expiration date of the old contract. No retroactive responsibility was accrued as the negotiated raise was included in that payroll -- contrary to Mrs. Hopson's claim, 'that the raise was not paid until January, 1971, per agreement between Mr. Babcock and Mr. Beatty.'
>
> I have never had a discussion with Mrs. Hopson in regard to retroactive pay. Further, I have never had a discussion with Mrs. Hopson where other members of the committee or management were not present. I do not know what Mrs. Hopson's motivation for these charges are, however, I stand ready to challenge her to prove any charge of deals between you and myself. I will be happy to provide the tape recordings of these sessions to refresh her memory."

Roger Jacobson, who was a Vice President of the Union at the time of the letter, but who had been terminated by the Union at the time of the hearing herein, testified that Beatty upon receipt of the letter stated, sarcastically and somewhat ironically, "We are going to take care of her."

A few days prior to her discharge, Mrs. Hopson was telephoned at her home by Mrs. Paulson, the hospital's Assistant Director of Nursing, advising her that she had been the subject of a negative

report regarding an incident involving an enema. After listening to Mrs. Hopson's explanation of the incident, Mrs. Paulson told her to discuss it further with a certain registered nurse and a certain licensed practical nurse who had also been involved, in order to clarify procedures and avoid future confusion as to respective responsibilities.

Apparently the first opportunity for such a discussion occurred during the shift on the night of July 4-5, 1971. According to Mrs. Hopson's testimony, she asked the nurse in charge of her floor, Mrs. Murphy, for permission to leave her floor to approach the other two staff members and received such permission. 1/ Thereafter, Mrs. Hopson approached the other staff members, but during her visit with the second one was interrupted by Mrs. Hopson's immediate superior, Mrs. Hoeller, the night shift supervisor. Mrs. Hoeller, without knowing whether or not Mrs. Hopson had permission to be away from her regular post, and without knowledge of Mrs. Hopson's aforesaid conversation with Mrs. Paulson, ordered Hopson back to her regular duty station. Approaching her there a few minutes later, Hoeller reprimanded Mrs. Hopson for being away from her assigned duty station and for discussing inappropriate subjects during working time. The exchange rather quickly became heated with Mrs. Hoeller pointing her finger provocatively at Mrs. Hopson and telling Mrs. Hopson to "get her hat and coat and go". Mrs. Hopson responded by suggesting, in a manner perceived as a threat, that Mrs. Hoeller was attempting to precipitate a fight and by refusing to leave. (She sat at a table in a hall of the hospital until 7:00 a.m.)

Very shortly after this exchange, which took place at approximately 1:30 a.m., Mrs. Hoeller telephoned Mrs. Paulson and reported her version of it, receiving authorization from Mrs. Paulson to discharge Mrs. Hopson. [At about the same time other night shift aides gathered and stated that they too would leave if Mrs. Hopson did so, but they did not carry out this threat, apparently being dissuaded by Hopson.]

On July 6, 1971, the day after her discharge, Mrs. Hopson visited Mrs. Jeanne Johnson of the Equal Rights Division of the Department of Industry, Labor and Human Relations and indicated that she believed that her discharge had been based upon animosity toward her union-related activities and racial discrimination. Focusing upon the second ground, Mrs. Johnson arranged a meeting with members of the management of the hospital for July 7th. The meeting was arranged as a function of the Equal Rights Division and not of the grievance procedure of the collective bargaining agreement. No resolution of the discharge was achieved and the meeting adjourned with the understanding that the investigation would continue.

On July 9, 1971, Mrs. Hopson filed charges with the Milwaukee Regional Officer of the National Labor Relations Board alleging, inter alia, that her discharge by the Employer was discriminatory in

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1/ Mrs. Murphy testified to the contrary, and her testimony was contradicted by other witnesses who stated that on the night in question she told them she had given Mrs. Hopson permission to leave the floor. Inasmuch as it has been concluded that the discharge in issue was based upon other conduct, it is not necessary to resolve these conflicts.

violation of the Federal Labor-Management Relations Act, and that the Union had committed unfair labor practices in its post-discharge representation of her. The NLRB Regional Director ruled, on July 21, 1971, that the charges should be dismissed on the basis that the hospital was not an "employer" under the Federal statute because of its nonprofit operation.

According to his testimony, on approximately July 13, 1971 Mr. Babcock received a grievance form from Mrs. Hopson. She testified that she mailed the document "when (she) left the meeting" of July 7. It stated as follows:

"BSEIU LOCAL 150
GRIEVANCE REPORT

Date Grievance Reported 7-7-71 Name of Complainant (Mrs.) Johnnie Mae Hopson

Name of Steward Johnnie Mae Hopson
Grievance (include date of occurrence):

In regard to discharge of Johnnie Mae Hopson: In accordance to your request at the meeting on 7-7-71 I am filing a grievance. Since no just cause has been established I would like a hearing as soon as possible. In accordance with contract. I am also requesting severance pay of two weeks.

Date and Action by Steward:

Had meeting on 7-7-71 in an effort to find cause of dismissal and for reinstatement with no accomplishment.

. . ."

In response Mr. Babcock wrote the following letter of July 13, 1971 to Mrs. Hopson:

"I have received your grievance report dated July 7, 1971. At this time, I remind you that the meeting of July 7, 1971 was not a grievance committee meeting, but rather an investigation by a representative of the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations.

I also remind you that I made no request to you to file a grievance in regard to your discharge. My question was 'why had you not taken your contractual recourse through your union?'

We will meet with you and the Union Committee as soon as we receive a request from your Local President to do so, and arrangements be made as to the date and time.

We see no particular need for a meeting prior to that time, however, if you desire to meet with me, please call my office for an appointment. It is your responsibility to process your grievance from one step of the grievance procedure to another."

Mrs. Hopson took up Babcock's July 13, response with the Union's Chief Steward, Mrs. Shirley Day on approximately July 20, 1971, when the latter returned from a vacation, and requested that her "grievance" be processed further by the Union. 1/ Mrs. Day told Hopson that it would not be necessary to prove that she had filed a written grievance and assured her that the grievance would be processed. However, in a meeting with Babcock very shortly thereafter, Day was apparently convinced by him that he had received no such grievance, and shortly thereafter Day communicated this to Beatty.

The next development in the matter was a meeting between Union and hospital officials on August 5, 1971. At this meeting the Union, through Mr. Beatty, put forth a request that the discharge be submitted to arbitration and that the Employer waive its position that the grievance was untimely. Mr. Babcock refused to waive said objection.

The record indicates that in this conference with the Union, Mr. Babcock again denied receiving any written grievance over the discharge from Mrs. Hopson. These statements were apparently based upon his construction of the grievance procedure which construction allowed him to characterize the "grievance report" quoted above as something other than a grievance. The Union, according to the testimony of Mrs. Day, continued to accept these assertions by Mr. Babcock, despite contrary assertions by Mrs. Hopson.

On August 13, 1971 Mr. Beatty wrote the following letter to this Commission.

> "In regard to one of our members who was employed at Northwest General Hospital, a Mrs. Johnnie Mae Hopson is requesting that I contact your commission to ask for arbitration. This employee was discharged for several weeks before I learned of the incident. When I was finally notified, I set up a meeting for Thursday, August 5th, with our grievance committee at Northwest General Hospital. Mrs. Hopson, who was on our negotiating committee, grievance committee, and a steward, did not follow the grievance procedure, in fact, as of this date, the grievance has not been put in writing.
>
> At the above meeting, I asked the employer to waive his rights because the steps were not followed and Mr. Babcock, the Administrator, refused to do so. My question is, will you conduct an arbitration in view of the above situation?"

1/ As is evident from the quoted materials Mr. Babcock and Mrs. Hopson have disparate recollections of his July 7 statements concerning her use of the grievance procedure. Mrs. Day recalls that after the July 7, meeting she asked Mrs. Hopson why she had not used the grievance procedure and was told that the case would be resolved "in Madison" and not through the Union. Thus, Mrs. Hopson's later request of Mrs. Day that her discharge be processed as a grievance reflects a certain change of direction, however, there is no evidence that Hopson's remarks to Day ever reached the Employer.

He was answered by a letter from Executive Secretary Donald B. Lee dated August 16, 1971 which stated as follows:

> "From the contents of your letter it would appear that the Employer is refusing to submit the matter of the discharge of Johnnie Mae Hopson to arbitration. Based upon the representations in your letter it would appear that he is refusing to do so on procedural grounds, i.e. inasmuch as the grievance was not timely filed. As Mr. Babcock certainly knows, threshold issues such as arbitrability may be resolved in arbitration as well as the merits of the case in issue. In answer to your final question, the Commission has some very basic reservations concerning the appointment of an arbitrator to hear matters that may very well result in an ex parte presentation.
>
> Should you have any further questions please feel free to contact me."

On August 27, Mr. Beatty wrote separate letters to Executive Secretary Lee and Chief Steward Day. To Mrs. Day he wrote:

> "Dear Shirley:
>
> I tried to get a hold of William Babcock, but I guess he is still off due to his wife's illness. When you do see Mr. Babcock, would you show him a copy of the letter enclosed. Hopson is pushing and the hospital will be faced with her own attorney if we don't go to arbitration. My feeling is that we would be better off in arbitration than having it go in a different direction."

To Mr. Lee he wrote:

> "Dear Don:
>
> In regard to a discharge grievance which you are familiar with at Northwest General Hospital in Milwaukee, Mrs. Hopson and myself would appreciate it if your commission would set an arbitration to hear the case if we must arbitrate. To see if we can arbitrate the case, I would appreciate such a meeting."

Mr. Lee wrote the following letter to Mr. Babcock on August 30, 1971:

> "The Wisconsin Employment Relations Commission is in receipt of a request filed by Local 150, Service and Hospital Employees' International Union, AFL-CIO that we appoint an arbitrator to hear and decide the subject grievance. Before the Commission can proceed it will be necessary to obtain your concurrence in the matter. We will withhold action until further notice from you."

Mr. Babcock responded with the following letter dated September 8, 1971:

> "In answer to your letter of August 30, 1971 regarding request for arbitration of discharge of Mrs. Johnnie Mae Hopson.

We have requested a meeting with Mr. Beatty and his committee to establish basis for this requested arbitration. This meeting will be held at 2:00 p.m., Thursday, September 9, 1971.

At this time we are not in receipt of any formal grievance. The union has none to present, and agrees the bargaining procedure was not followed.

The discussion at this meeting may, or may not alter our position. If we are to have any semblance of an orderly relationship, we must follow the agreed upon procedures as spelled out in our working agreement. In our opinion, any breakdown or departure from any portion of the agreement would weaken the entire collective bargaining relationship.

We will advise you of our position regarding this request after the meeting."

No copy of this letter was sent to the Union or Mrs. Hopson. In his testimony, Mr. Babcock explained that the September 9, meeting referred to was arranged to discuss the matter further with the Union but it was subsequently cancelled by Mrs. Day who apparently stated that the dispute would be handled by Mrs. Johnson of the Equal Rights Division. Mrs. Johnson's testimony does not explain this situation.

The instant complaints were filed on October 29, 1971. Final arguments were received by the Examiner on June 12, 1972.

The complaint against the Employer alleges, inter alia, that the Employer violated its collective bargaining agreement with the Union by discharging the Complainant contrary to the terms of that agreement, and therefore in violation of Sec. 111.06(1)(f).

This Commission has required that individual complainants bringing such contract violation actions against employers conform to the requirement stated by the U.S. Supreme Court in Republic Steel Corporation v. Maddox (U.S. Sup. Ct., 1965, 58 LRRM 2193) that such complainants "must attempt use of the contract grievance procedure." 1/ The Examiner concludes that the instant Complainant has met this requirement.

The Employer has maintained, in effect, throughout the episode, as well as before the Examiner, that the "grievance report" received by Mr. Babcock, and set forth above, did not constitute a sufficient "attempt" at utilization of the contractual grievance procedure, even in view of the review and discussions of the discharge that preceded the transmittal of that document.

The grievance procedure, which is set forth in the Findings of Fact, requires that first "the employee with a grievance shall discuss his grievance orally with his immediate supervisor . . . as soon after

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1/ American Motors Corp., Dec. No. 7488 (1966); American Motors Corp., Dec. No. 7798 (1966).

occurrence as is reasonably possible." Such a discussion can be said to have occurred on the night of the discharge in the animated interchange between the dischargee and her immediate supervisor who discharged her.

Next, the contractual procedure states that, absent settlement at the aforementioned stage, "the employee may immediately set forth his grievance in writing, date it, sign it, and give it to his immediate supervisor" who will "immediately present the written grievance to the Department Head for investigation and written disposition within five (5) days." Mrs. Hopson's written "grievance" was not absolutely immediate, nor was it transmitted to her immediate supervisor. However, in view of her status as a dischargee it was not unreasonable of her to mail the document to the Employer, in the person of its Administrator, nor would it have been unreasonable if the Administrator had, in turn, transmitted it to the appropriate Department Head for investigation and disposition.

That the document in question was not filed sooner is explained, of course, by Mrs. Hopson's hopes of disposition through the Equal Rights Division. [The reasons for her preference for noncontractual procedures undoubtedly involved her relations with the Union which are discussed fully elsewhere herein and, in the Examiner's opinion, provided ample ground for her doubts regarding obtaining true support therefrom]. The Examiner concludes that in view of the soundness of the grievant's reluctance to use these procedures, the less than precise connotation of the term "immediately" as it is used at Step 2 of the grievance procedure; and the fact that the Employer was never placed in a position to infer that the matter was settled; Mrs. Hopson's attempt at conformity with Step 2 of the procedure was sufficient.

The objective of the required immediacy must have been to keep the Employer apprised of the grievant's intent to continue to pursue the matter. Surely this intent was sufficiently satisfied by the receipt of the "grievance report" which, even according to Babcock's less than precise recollection, occurred approximately eight days after the discharge. Although it is clear that Mrs. Hopson was known at the time to be considering handling the matter by another method, i.e. through the Equal Rights Division, 1/ to hold that somehow this grievant made a fatal error by electing the wrong source of remedy or the wrong forum, without any showing of prejudice suffered by the Employer, would indeed be artificial and overly-technical. There is no contention that the grievance procedure and the Equal Rights Division were mutually exclusive.

Neither is there appeal in Mr. Babcock's assertions that he did not recognize the document that he received as a grievance. It is an exhibit herein and has been examined by the undersigned. It was clearly a "grievance", even if it had been late or misdirected. It is only arguably not a grievance within the meaning of the contract, if one accepts that it was untimely or filed with the wrong Employer representative, and those positions are rejected by the Examiner.

The third step of the grievance procedure, including the "intent to appeal", involves moves by the Union and the Employer and thus does

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1/ The present status of that procedure is not established, although Mrs. Johnson testified that no formal complaint had been made.

not require further attempts by the grievant to exhaust that procedure.

The Examiner has also concluded that the Union violated its contractual duty of fair representation, and therefore Section 111.06 (2)(c), 1/ in its processing of the grievance in issue, and particularly in its decision not to pursue said grievance to arbitration, because its actions in that matter were based upon a discriminatory motive. Specifically, the Union, it is inferred, determined not to make a real effort on behalf of the grievant because of her posture as a critic of the Union and of its collective bargaining agreement with the Employer.

The evidence upon which these conclusions are reached include the unrebutted testimony of a former Union officer that Mr. Beatty stated upon receipt of Mr. Babcock's letter of July 2 that "we are going to take care of her." This statement was proximate in time to the discharge and absolutely no effort to rebut it was made on the record herein despite Mr. Beatty's appearance at the hearing. The former Union officer may be discreditable on the basis of his new-found disenchantment with the Union, or other factors, but no evidence of this nature was introduced and his demeanor as a witness did not detract from his credibility.

Hopson's letter to the President of the International Union, as well as testimony by Shirley Day also support this conclusion. Day, who is an officer of the Respondent-Union as well as its Chief Steward, and who indicated strong allegiance to and rapport with Beatty, stated that she believed Hopson to be "having a hard time getting along with the Union", and "against the Union". Day asserted that "everything that I think we put together she (Hopson) picked apart"; that she "couldn't communicate with Mrs. Hopson"; that Hopson "agitated"; "created situations" and "was making it hard for the employes."

As described above, after Mrs. Hopson mailed her grievance to Mr. Babcock, she told Day of having done so and Babcock denied that he received any grievance. Day, as well as Beatty, 2/ preferred throughout the episode to believe Babcock and discredit Mrs. Hopson, although they made no attempt to investigate the matter.

By Beatty's letter to the Commission of August 13, a copy of which was sent to Babcock, he gratuitously presented the Employer's position, which he eventually "accepted". The second paragraph of that letter nearly asks the Commission to deny access to its arbitration service in the matter. In Beatty's letter of August 27, to Shirley Day he characterized the grievant as "pushing" and threatening a suit. This letter explains his letter of the same date to the Commission which seems to make a more earnest request for arbitration service.

As the events which followed this request developed, the Employer never flatly refused to proceed to arbitration or to concur in the appointment of an arbitrator. In fact, the Employer simply maintained its procedural argument and took a passive role, while the Union apparently determined not to press in the face of that argument. The cancelled meeting of September 9 remains a mystery.

1/ Humphrey v. Moore, U.S. Sup. Ct., 1964, 55 LRRM 2031.

2/ See Beatty's letter to the WERC dated August 13, 1971.

It is not necessarily the case that the Union could have convinced an arbitrator to reject the Employer's aforesaid position, even by a genuine effort. However, the Examiner is convinced, based upon the entirety of the Union's conduct, that its willingness to accept the Employer's position as unbeatable was based upon its negative attitudes toward the grievant, rather than the strength of the Employer's case.

In summary, the Union found Mrs. Hopson to be a thorn in its side; an incident occurred whereby the Union could, by accepting an Employer position, rid itself of her, and it did so. This conduct was such discrimination against the grievant as violated the Union's contractual duty to provide her with fair representation.

Having proven that she made a sufficient attempt to utilize the contractual grievance procedure and that in doing so she encountered a breach by the bargaining agent of its duty of fair representation, the Complainant may urge that the Employer violated the collective bargaining agreement, specifically the requirement of "just cause" of Article XXIII, above, by discharging her, and need not meet defenses of the Employer based upon exhaustion of the grievance procedure. 1/

The Examiner concludes that Mrs. Hopson's responses to being reprimanded and told to leave precipitated her discharge. (There is no contention that she was discharged for engaging in protected union activity.) Apparently, Mrs. Hoeller ordered Hopson to leave as a sort of suspension or "cooling-off" technique, but shortly after that order, and in view of the reported suggestion of a fight, Mrs. Paulson converted the discipline to a discharge. It is argued by the Employer that the decision to discharge was grounded upon a history of insubordination and verbal threats of physical violence, but this contention is rejected. Mrs. Paulson authorized the discharge shortly after having been awakened at approximately 2:00 a.m., without investigation, and upon the version of the precipitating incident given by Mrs. Hoeller over the telephone; and there is considerable evidence that Hoeller was obviously agitated at that time. It is inferred that Paulson simply reacted to the incident as described to her without any real deliberation upon its facts, or its background, by reinforcing Hoeller. It is not convincing to urge that Paulson, upon being called as she was, actually considered all, or even much, of Mrs. Hopson's employment record prior to her determination to terminate the grievant. 2/

Therefore, an issue is, was Hopson's conduct on the night in question "just cause" for discharge? The Examiner believes that Hopson on that night was, as usual, argumentative, excessively so, and therefore to some extent insubordinate. She could have and should have accepted the reprimand. She also should have left the hospital after being ordered to do so and this refusal constituted failure to carry out orders. Redress for these Employer actions could have been sought more appropriately. However, her conduct must be construed in the light of the fact that the reprimand that she was receiving was unjustified because she was acting according to the instructions of a superior.

1/ Vaca v. Sipes, U.S. Sup. Ct., 1967, 64 LRRM 2369.

2/ It is noteworthy that it was Paulson who instructed Hopson to have the discussion for which she was reprimanded - a fact that is uncontroverted although Paulson testified herein.

Article XXIII of the labor agreement, allows discharges without prior warning or notice for insubordination and failure to carry out orders, but it does not require or allow the Employer to do so for any such misconduct, no matter how slight, because that would be discharge without just cause. It simply provides that where insubordination and other offenses are of sufficient magnitude immediate discharge is appropriate, whereas other types of misconduct never warrant immediate discharge.

In view of the aforementioned mitigating factor underlying Hopson's misconduct, as well as the fact that Hopson was not given an opportunity to present her version of the precipitating incident to Paulson prior to the decision to discharge her, the Examiner concludes that her actions although definitely misconduct, did not constitute just cause for discharge, and therefore that the Employer did violate the labor agreement by discharging her.

In reaching these conclusions the Examiner has referred to arbitrators' decisions in similar cases and found that although actually threatening a supervisor with physical violence is regarded as an extremely serious offense - the highest order of insubordination (Huntington Chair Corp., 24 LA 490, 1955) - significant weight is given, in evaluating appropriate discipline, to provocation by the supervisor. Where a supervisor takes unwarranted disciplinary action and an employe responds excessively, the employe should not suffer the consequences of both parties' indiscretions. (Reynolds Metals Co., 17 LA 710, 1951.)

The Examiner holds that viewing this case as an arbitrator, he would reduce the discipline from discharge to such a suspension as would be appropriate to Hopson's misconduct. This, particularly because, although the record includes evidence that apparent threats of physical violence were also made in the past by the Complainant, 1/ there is no indication of any reality to those threats and no disciplinary action stronger than an informal verbal reprimand was ever believed to be warranted by them.

However, full reinstatement and back-pay have been ordered herein because it is also held, as discussed below, that Hopson was not reinstated, at least in part, because of the Employer's discrimination against her on the basis of her protected concerted activities in violation of Section 111.06(a)and (c).

As stated, the aforesaid violation of the labor agreement by the Employer constituted an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act. That subsection is also alleged by the Complainant to have been violated by the Employer's refusal to process the grievance in question and refusal to proceed to arbitration.

These contentions are rejected. The record discloses that the Employer maintained a certain procedural contention during the processing of the grievance which it refused to waive, but not that it refused to arbitrate, or violated the grievance procedure.

Sections 111.06(1)(a) and (c) are also alleged by the Complainant to have been violated by the Employer. The bases for these allegations are not specified except, apparently, by an amendment to the complaint

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1/ Some such evidence, in the form of written reports was rejected at the hearing and regarded as not probative. However, some credible testimony was accepted.

at the hearing which refers to the Employer's conduct in the grievance procedure and its continuing refusal to reinstate Mrs. Hopson. It is the Examiner's conclusion that although the discharge of Mrs. Hopson is neither contended or concluded to have been motivated by the Employer's desire to be rid of her because of her union activities, 1/ said refusal to reinstate her was so motivated; and therefore constituted violations of Section 111.06(1)(a) and (c). 2/

This conclusion is based upon the role of Mr. Babcock which intervened in time between the discharge and the refusal to reinstate. The discharge, as stated, is found to have been precipitated by the incident on the night of July 4-5, and Babcock had no role in the decisions made that night. However, the attitude that he manifest thereafter, as exemplified by his denials that he had received a grievance, in conjunction with the facts that were known to him regarding Mrs. Hopson's Union activities, compel the inference that he utilized the opportunity presented by the discharge to expel the militant steward. This is not to deny that Mrs. Hopson's conduct on the night in question may have justified a disciplinary action, or that it contributed to the Employer's refusal to reinstate her, but to find that Babcock's animosity toward her as a steward contributed significantly to her nonreinstatement.

There are also contentions in the complaint against the Employer, as well as in Complainant's oral argument that the provisions of Section 111.05, which gives an individual employe the right to present grievances, were violated by the Employer herein. These contentions are rejected on the basis that although the Employer would not concede that the grievance form submitted by Hopson satisfied the requirements of the contract's grievance procedure, it did not deny her any opportunity to present her position.

The complaint which names the Union and Beatty as respondents alleges violations of Sections 111.06(2)(a), (b) and (c) by said

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1/ As stated, the record herein discloses that Mrs. Hopson in her conduct as a steward, as well as in her role as a critic of the Union, incurred the hostility of the Employer. Had the pleadings made such a contention - Counsel for the Complainant asserted very directly at the hearing that they did not - the Examiner, in studying the record very well may have reached the conclusion of law that such discrimination as is prohibited by Sections 111.06(1)(a) and (c) were significantly involved in the discharge. Of course, such a conclusion would have added a major new dimension to the instant decision with regard to which the Respondents were led to understand it was not necessary to be concerned. Therefore, it has been concluded that Section 263.28, Wisconsin Statutes, which covers variances between pleadings and proof precludes the Examiner from, in effect, amending the pleadings because doing so would mislead the Respondents to their prejudice.

2/ Correspondingly, to the extent that the Employer's position in the grievance procedure was in support of this illegal refusal, such conduct in the grievance procedure constituted a violation of Sec. 111.06(1)(d) which requires good faith bargaining over contract administration, as well as over contract terms. Of course, a bargaining position which demands an illegal act, or its continuance, constitutes a failure to bargain in good faith.

Respondents. These assertions as to (b) are rejected. Subsection (b) covers Union coercion, intimidation and inducement of an employer "to interfere with any of his rights in the enjoyment of their legal rights . . .". In the instant case there is no evidence that the Union took any measures to cause the Employer to engage the above described conduct. The record indicates that the Union merely acquiesced in the Employer's conduct and took advantage thereof. 1/

It is concluded elsewhere herein that the conduct in which the Union engaged discriminated against the Complainant on the basis of her role as a critic of the Union, and thus violated the Union's contractual duty of fair representation. As stated above, such violation is an unfair labor practice under Section 111.06(2)(c). It is further concluded that said conduct also constituted a violation of Subsection (a) which prohibits Union coercion and intimidation of employes in the enjoyment of their legal rights, including those guaranteed by the Act. (Local 485, IUE, NLRB, 1968, 67 LRRM 1609.)

Apparently, it was the Complainant's intent in framing the complaint to name Mr. Beatty as a Respondent in his capacity as an individual as well as naming him in his capacity as an agent of the Union. However, the record does not disclose that he ever acted in the matter in issue except as an agent of the Union. Therefore, he has not been found to have committed any unfair labor practices, except in such capacity.

Dated at Madison, Wisconsin, this 2nd day of January, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

1/ The back-pay order herein also reflects these factors in requiring that all back-pay be paid by the Employer. (See Vaca v. Sipes, U.S. Sup. Ct., 1967, 64 LRRM 2369, ftnt. 18.)