

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

<p>JUDITH D. BERNS,    Complainant,    vs.    MILWAUKEE BOARD OF SCHOOL DIRECTORS,    Respondent,        MILWAUKEE DISTRICT COUNCIL 48 and  ITS AFFILIATED LOCAL NO. 1053,  AFSCME, AFL-CIO,    Intervenor.</p>	<p>Case XLI  No. 15992 MP-168  Decision No. 11280-A</p>
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Appearances:

Attorney Willis B. Ferebee, appearing on behalf of the  
Complainant.  
Mr. Nicholas M. Sigel, Assistant City Attorney for the City of  
Milwaukee, appearing on behalf of the Respondent.  
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S.  
Williamson, Jr., appearing on behalf of the Intervenor.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having authorized Marshall L. Gratz, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.70 (4)(a) of the Wisconsin Municipal Employment Relations Act and Section 111.07(5) of the Wisconsin Employment Peace Act; and a hearing on said Complaint having been held at Milwaukee, Wisconsin, on October 17, 1972, before the Examiner; and the Examiner having considered the evidence and the arguments and briefs of Counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Judith D. Berns, hereinafter referred to as the Complainant, is an individual residing at 1129 North Jackson Street, Milwaukee, Wisconsin;

2. That Milwaukee Board of School Directors, hereinafter referred to as the Respondent, is a Municipal Employer with its principal offices at 5225 West Vliet Street, Milwaukee, Wisconsin;

3. That at all times material hereto, the Respondent has recognized District Council 48 and its affiliated Local No. 1053, AFSCME, AFL-CIO, hereinafter referred to as the Intervenor, as the exclusive bargaining representative of certain of its employes;

4. That at all times material hereto the Respondent and the Intervenor have been signators to a collective bargaining agreement, hereinafter referred to as the Agreement, covering wages, hours and working conditions of said employes, and to an addendum thereto consisting of a fair share agreement;

5. That Part VII of the Agreement includes a six-step grievance procedure which provides for final disposition of unresolved grievances by binding arbitration; that the aforesaid Part VII reads in pertinent part as follows:

"GRIEVANCE AND COMPLAINT PROCEDURE

. . .

D. STEPS OF GRIEVANCE PROCEDURE

Grievances or complaint shall be processed as follows:

First Step - An employe shall, within five working days, submit his grievance or complaint directly to his next higher authority, but he may request next higher authority to send for (a) a representative of the Union, or (b) a fellow employe of his own choosing, for the purpose of joint oral presentation and discussion of the grievance or complaint at a mutually convenient time. In the event a representative is brought in by the employe, a Union representative shall also be present. If the grievance or complaint is not resolved satisfactorily, it shall be reduced to writing and presented to the employe's next higher authority within five working days of the oral presentation. The next higher authority shall give a written answer within five working days of receipt of the written grievance or complaint.

The next higher authority shall advise the Superintendent or the Secretary-Business Manager in writing of his disposition of any grievance or complaint presented without

the presence of a Union representative, with copies for the department head and the Union. All written grievances shall be set forth on a form provided by the Superintendent or Secretary-Business Manager.

Second Step - If the grievance or complaint is not adjusted in a manner satisfactory to the employe or the Union within five working days after receipt of the written answer, then the grievance or complaint may be set forth in writing within five working days by a representative of the Union. The grievant shall sign the grievance or complaint. Thereafter the Union representative shall transmit the written grievance or complaint to the department head. The department head shall, at the Union's request, set a mutually convenient time for discussion of the grievance or complaint. The department head shall advise the Union in writing of his disposition of the grievance or complaint, with a copy for the Superintendent, the Secretary-Business Manager or their designee.

Third Step - If the written grievance is not adjusted in a manner satisfactory to the employe or the Union within five working days after the discussion with the department head, it may be presented within five working days by the Union to the Superintendent, the Secretary-Business Manager, or their designee for discussion. Such discussion shall be held within ten working days at a mutually convenient time fixed by the Superintendent, the Secretary-Business Manager or their designee.

Fourth Step - If the grievance is not satisfactorily adjusted within ten working days after discussion with the Superintendent, Secretary-Business Manager, or their designee, it may be presented within ten working days by the Union to the Rules and Complaints Committee for prompt hearing. The Committee shall forward its recommendation in writing for action by the Board.

Fifth Step - The Board shall promptly pass upon the grievance and notify the Union in writing of its decision. If the grievance is not certified to the Impartial Referee in accordance with the Impartial Referee procedure within twenty working days after notification of the Board's decision, the decision of the Board shall become final.

Sixth Step - The decision of the Board upon a grievance shall be subject to hearing by the Impartial Referee upon certification to him by the Union.

The final decision of the Impartial Referee, made within the scope of his jurisdictional authority, shall be binding upon the parties and the employes covered by this agreement.

. . .

G.                    PROCEDURE FOR GRIEVANCES WHICH  
ARE NOT UNDER THE JURISDICTION OF  
FIRST AUTHORITY

Any grievance or complaint, based upon action of authority higher than the first higher authority, shall be initiated

directly with the person having such jurisdiction of the matter.

. . ."

6. That at all times material hereto, Complainant has been employed by Respondent at its aforesaid principal offices in a classification covered by the Agreement;

7. That on March 1, 1972, Complainant personally handed a written grievance, hereinafter referred to as the Grievance, to Thomas A. Linton, Secretary-Business Manager of the Respondent; that the Grievance was entitled "GRIEVANCE INITIATION FORM - Step 3"; that Complainant grieved therein on behalf of herself "and others similarly situated" that on ". . . March 1, 1972, [the] School Board caused \$5 to be taken from [her] earnings for payment to District Council 48 without authorization by [her] to do so as required by Part II, Paragraph C, Section 2."; that Complainant also asked therein that ". . . no deductions for this purpose be made by the School Board in violation of the Collective Bargaining Agreement, during the term of such Agreement."; and that Complainant noted therein that she had not discussed the Grievance with any supervisor or any other person, explaining that "School Board representatives in Steps 1 and 2 would have no jurisdiction or authority in [sic] this contract violation which occurs by action of the Milwaukee Board of School Directors.";

8. That the aforesaid Linton took the Grievance from Complainant at or about 9:00 a.m. and caused a response thereto to be prepared (by the then Chief Negotiator for Respondent, John F. Kitzke) and delivered to Complainant at or about 3:00 p.m. on the same day, March 1, 1972; and that the aforesaid response denied the Grievance;

9. That at no time has Complainant requested or otherwise sought an oral discussion or conference with the Secretary-Business Manager or with the Chief Negotiator concerning the Grievance; and that such an oral discussion or conference has never been scheduled or conducted although, at coffee breaks, Complainant has exchanged views with the aforesaid Chief Negotiator Kitzke concerning the merits of Fair Share arrangements in general;

10. That on March 3, 1972, Complainant filed an appeal of the aforesaid disposition of her Grievance with the Rules and Complaints

Committee of the Respondent wherein Complainant requested a hearing before that Committee;

11. That subsequent to March 3, 1972, Grievant has not received a formal disposition of the aforesaid appeal;

12. That subsequent to March 3, 1972, Grievant has not been offered any opportunity to have a hearing concerning the Grievance before the Rules and Complaints Committee or before any other authorized agent of the Respondent;

13. That approximately two months after her March 3, 1972 filing of the aforesaid appeal, Complainant made inquiry of Respondent's Chief Negotiator Kitzke as to the status of her appeal; and that the Chief Negotiator, after investigation, informed Complainant that Local 1053 had taken the position that the Appeal was without merit and ought not be considered at Step 4 of the grievance procedure.

14. That at no time did the Complainant seek the Union's assistance or participation in the processing of her Grievance or appeal.

15. That by its failure to provide a "prompt hearing" concerning Complainant's Grievance, the Respondent did not violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes.

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

#### CONCLUSION OF LAW

That by its failure to provide a "prompt hearing" concerning Complainant's Grievance, the Respondent did not commit a prohibited practice under the provisions of Section 111.70(3)(a)(5) of the Wisconsin Municipal Employment Relations Act.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

#### ORDER

IT IS ORDERED that the complaint of prohibited practices filed

herein be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 27th day of November, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

*Marshall L. Gratz*

Marshall L. Gratz, Examiner

MILWAUKEE BOARD OF SCHOOL DIRECTORS

Case XLI Decision No. 11280-A

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complainant in her Complaint alleged that Respondent failed to provide her with a "prompt hearing" before its Rules and Complaints Committee after she had filed a grievance 1/ and an appeal to a denial of that grievance 2/ pursuant to the grievance procedure in the collective bargaining agreement between the Respondent and the Intervenor which agreement 3/ covered her job classification. Complainant further alleged that by such action, the Respondent had violated Part VII, Paragraph D, Fourth Step of the Agreement and committed a prohibited practice within the meaning of Sec. 111.70 (3)(a)(5) of the Wisconsin Municipal Employment Relations Act. 4/

The Respondent, in its Answer, denied that the Rules and Complaints Committee is required by any law to afford Complainant, upon her request, a hearing pursuant to the Fourth Step of the grievance procedure in the Agreement.

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1/ In general, Complainant's grievance contained an assertion that the Respondent had deducted union dues from her pay check without her authorization and in violation of the Agreement described in the text accompanying note 3 infra. Complainant initiated her grievance at the Third Step of the grievance procedure in said Agreement because of the requirement in Part VII. G. thereof to the effect that "Any grievance . . . based upon action of authority higher than the first higher authority, shall be initiated directly with the person having such jurisdiction of the matter." The Secretary-Business Manager has jurisdiction over pay-check deductions, and his position first appears in the Third Step.

2/ Respondent's Secretary-Business Manager, Thomas A. Linton, designated Respondent's Chief Negotiator, John F. Kitzke, to reply in writing to Complainant's grievance. Kitzke denied the grievance on the grounds that the specific Agreement provision relied upon by Complainant in her grievance had been modified by a subsequent agreement between Respondent and the Intervenor which subsequent agreement had been ratified by the membership of Intervenor and by action of the Respondent; and that the Agreement as so modified requires the deduction complained of in the grievance.

3/ Herein referred to as the "Agreement".

4/ Unless otherwise noted, all references hereinafter to numerical sections refer to the Wisconsin Municipal Employment Relations Act.

A hearing was held in the matter on October 17, 1972. <sup>5/</sup>  
Section 111.70(3)(a)(5) provides in pertinent part as follows:

"It is a prohibited practice for a municipal employer individually or in concert with others . . . [t]o violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes . . .".

It is clear to the Examiner that Respondent's failure to provide Complainant with a "prompt hearing" before its Rules and Complaints Committee did not violate the language in Part VII, Paragraph D, Fourth Step. For that language expressly indicates that grievances may be presented to that Committee "by the Union" while it makes no mention of such presentation by an individual grievant. The Union (Intervenor) did not participate in the processing of Complainant's grievance in any way, however. <sup>6/</sup> On the contrary, the Intervenor sent a letter to Respondent's Secretary-Business Manager on March 6, 1972 asserting that Complainant's grievance was without merit and that it ". . . cannot be brought before the Rules and Complaints Committee as a grievance".

Complainant argues however that the Union's control of the grievance in the Fourth Step of Part VII. D of the Agreement ". . . cannot prevail against the overriding provisions of Sec. 111.70(4)(d) of the Wisconsin Statutes which provides that any employee shall have the right to present grievances to the municipal employer in person and that the municipal employer shall confer with said employe in

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<sup>5/</sup> At that hearing, the Examiner permitted the Intervenor to intervene upon Motion (over the objections of the Respondent) on the grounds that the Intervenor was a party to the Agreement, portions of which would likely be interpreted by the Examiner in the course of a determination of the issues raised by the Complaint. Intervenor and Respondent both entered a Motion to Dismiss at the close of Complainant's case. The Examiner reserved ruling on said Motion.

The parties waived transcription of the Reporter's notes and agreed that briefs would be exchanged through the Examiner. Original briefs on behalf of the Complainant and the Intervenor were exchanged pursuant to the parties' stipulation at the hearing. Though there had been no mention at the hearing of an intent to file reply briefs, such briefs were filed on behalf of the Respondent and the Complainant. Since there had been no agreement at the hearing which would preclude such reply briefs, the Examiner has included same as a part of the record and has considered them in reaching a determination of the issues herein.

<sup>6/</sup> Complainant stipulated that she had at no time sought the Union's assistance or participation in the processing of the grievance in question.



relation to such grievance." 7/

With that position, the Examiner cannot agree. For although Sec. 111.70(4)(d)(1) affords a "right" to individual employes, nothing in that Section suggests that such "right" is enforceable as an implied term of a collective bargaining agreement covering the individual. The Examiner concludes that it is not so enforceable. At most, the Complainant might have alleged that Respondent discriminated against Complainant (and thereby interfered with, restrained or coerced her in the exercise of a right guaranteed in Sec. 111.70[2] in violation of Sec. 111.70[3][a][1]), by agreeing to or applying a grievance procedure which denies to Complainant the right to refrain from collective representation during a presentation of or conference with Respondent concerning her grievance at the lowest available step of that procedure. 8/ However, since the discrimination issue has not

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7/ Brief of Complainant, at page 5.

The referent of Complainant's citation appears in Sec. 111.70(4)(d)(1) which reads as follows:

"(4) POWERS OF THE COMMISSION. The commission shall be governed by the following provisions relating to bargaining in municipal employment in addition to other powers and duties provided in this subchapter.

. . .

(d) Selection of representatives and determination of appropriate units for collective bargaining.

1. A representative chosen for the purposes of collective bargaining by a majority of the municipal employes voting in a collective bargaining unit shall be the exclusive representative of all employes in the unit for the purpose of collective bargaining. Any individual employe, or any minority group of employes in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing, and the municipal employer shall confer with said employe in relation thereto, if the majority representative has been afforded the opportunity to be present at the conferences. Any adjustment resulting from these conferences shall not be inconsistent with the conditions of employment established by the majority representative and the municipal employer."

8/ See, Milwaukee Board of School Directors, Dec. No. 9665-A (3/66), at pages 17-19.

Note, however, that nothing in this Memorandum is intended to imply that the Examiner has concluded that Respondent has either violated or not violated Sec. 111.70(3)(a)(1) with respect to Complainant's instant grievance.

been joined by the pleadings before the Examiner in the instant case, the principles of fair play prevent the Examiner from making any Findings, Conclusions or Orders upon that issue. 9/

For the foregoing reasons, the Examiner has dismissed the Complaint.

Dated at Milwaukee, Wisconsin, this 27th day of November, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz  
Marshall L. Gratz, Examiner

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9/ See, General Electric Co. v. Wisconsin Employment Relations Commission, 3 Wis. 2d. 227, 242-245 (1957); Secs. 227.07 and 227.09 of the Wisconsin Administrative Procedure Act; Secs. 111.07(1) and (4) of the Wisconsin Employment Peace Act (made applicable to municipal employment relations situations by Sec. 111.70(4)(a) of the Wisconsin Municipal Employment Relations Act.)