STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SAM GUTHRIE, Complainant, vs. LOCAL 82, COUNCIL 24, AFSCME, AFL-CIO, and UNIVERSITY OF WISCONSIN-MILWAUKEE, HOUSING DEPARTMENT, Respondents.	Case XLI No. 16265 PP(S)-14 Decision No. 11457-E

Appearances:

Jacobson, Sodos & Melnick, S.C., Attorneys at Law, by Mr. Thomas M. Jacobson, appearing on behalf of the Complainant and joined on briefs by Mr. Alan S. Brostoff, Attorney at Law.

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, appearing on behalf of the Respondent Local 82, WSEU, AFSCME, AFL-CIO.

Mr. Lionel L. Crowley, Attorney at Law, Department of Administration, appearing on behalf of the University of Wisconsin-Milwaukee.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

The above-named Complainant having filed a complaint and amended complaint with the Wisconsin Employment Relations Commission, wherein it alleged that the above-named Respondents had committed unfair labor practices within the meaning of the Wisconsin State Employment Labor Relations Act; and the Commission having appointed Marvin L. Schurke, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing having been held in the matter on January 30, 1973 and March 12, 1975, before the Examiner; 1/ 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 Samuel E. Guthrie, hereinafter referred to as the Complainant, is an individual residing at 1024 West Hadley Street, Milwaukee, Wisconsin; that, for a period commencing on May 20, 1968 and continuing until his discharge on July 14, 1972, the Complainant was employed in the classified service of the State of Wisconsin, as a Building Maintenance Helper 2 at the University of Wisconsin - Milwaukee; that, for a period of approximately one year preceding May 30, 1972, the Complainant held office as a Chief Steward of the labor organization which is made a Respondent in these proceedings; and that, for a period of approximately two years immediately prior to the period during which the Complainant

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1/ The full procedures followed in the case, including appeals of interlocutory orders to the Commission, the Circuit Court and the Supreme Court, are detailed in the accompanying memorandum.

held office as a Chief Steward, the Complainant held office as a Steward of the same union.

2. That Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, hereinafter referred to as Respondent Union, was, at all times pertinent hereto, a labor organization engaged in the representation of certain employes of the State of Wisconsin, University of Wisconsin - Milwaukee, under a certification of representatives issued by the Wisconsin Employment Relations Commission on February 9, 1968; 2/ that, at all times pertinent hereto, Lawrence Grennier was the President of Respondent Union and Jerry Osowski, Andy J. Morris and Robert Weiland were Stewards of Respondent Union; that, at all times pertinent hereto, Hattush Alexander was employed by the Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, as a Field Representative assigned to service, among other locals, the Respondent Union; and that the procedures of the Respondent Union and its affiliate were such that a request of the President of a local union was required to properly invoke the jurisdiction and authority of the assigned Field Representative.

3. That the University of Wisconsin - Milwaukee, hereinafter referred to as Respondent Employer, is an agency of the State of Wisconsin operating and maintaining an educational facility at Milwaukee, Wisconsin; 3/ and that, at all times pertinent hereto, Alan C. Cottrell and George Sturm were agents of Respondent Employer authorized to act on behalf of Respondent Employer in matters and relationships involving Respondent Employer and its employes.

4. That the Respondent Employer recognized the Respondent Union as the exclusive collective bargaining representative in a bargaining unit which included, among others, the classification of Building Maintenance Helper 2; that Respondent Employer and Respondent Union were parties to a collective bargaining agreement made effective on March 16, 1970; that said agreement was continued in effect beyond its stated expiration date and remained in effect as of July 14, 1972; that said collective bargaining agreement provides that employes may be discharged for just cause; that said collective bargaining agreement makes provision for the processing of grievances arising as to its interpretation or application under a four-step grievance procedure ending with final and binding arbitration; and, further, that said collective bargaining agreement contains provisions for the establishment and exercise of seniority, for vacation selections, and for transfer of vacation selections upon transfers of employes within the bargaining unit.

5. That stewards and chief stewards of Respondent Union had responsibility for the resolution of problems arising within their jurisdictional areas, and for the processing of grievances under the grievance procedure contained in the aforesaid collective bargaining agreement only at the first three steps of such grievance procedure; that, on an unspecified date during or about the year 1971, the Complainant, acting in his capacity as a representative of Respondent Union in the Physical Plant Department of Respondent Employer, took issue with certain orders issued by Sturm and engaged in discussions thereof with Sturm, at the conclusion of which Sturm made a statement to the effect: "Sam, it looks as though you're running the University; I'll get you no matter what".

6. That, on or about May 3, 1972, the Complainant, again acting in his capacity as a representative of the Respondent Union, took issue with

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2/ Case III No. 11269 SE-3 (8296-C) 2/68.

3/ Case VI No. 11557 PP(S)-1 (8383) 2/68 aff'd. Mil. Co. Cir. Ct. 11/69.

certain orders issued by an agent of Respondent Employer, after which Sturm became involved, the Complainant was discharged from his employment, Sturm made a statement to Morris to the effect that he: intended to get even with the Complainant, and the Complainant was reinstated to his employment with a suspension and a transfer to the Housing Department of Respondent Employer; and that the actions of Respondent Employer in connection with such discharge, reinstatement and transfer were based, at least in part, upon an anti-union animus directed by an agent of Respondent Employer against the Complainant because of the Complainant's activity in and on behalf of Respondent Union.

7. That, during December, 1971 and the months of January, February and March of 1972, Respondent Employer had no regularly classified supervisor assigned to the area of the Physical Plant Department in which the Complainant was then assigned; that Respondent Employer had assigned Carl Hiegert as an acting supervisor in that area; that, under Hiegert's direction and on behalf of Respondent Employer, certain lead workers employed by Respondent Employer in the classification of Building Maintenance Helper 3, including Andy J. Morris, made the rounds among bargaining unit employes to obtain their preferences as to the dates for vacations to be taken during 1972; that Morris obtained the Complainant's vacation selection and returned to the Complainant a copy of the vacation schedule for the particular unit in which the Complainant then worked, on which the Complainant's vacation selection was recorded as: July 10th - 1 week; that Morris submitted the vacation selection information which he had obtained to Hiegert; and that either Morris or Hiegert committed an error in recording, so that the Complainant's vacation selection on Hiegert's records came to be shown as being for an unspecified week in December, 1972.

8. That the error contained in Hiegert's records was perpetuated so that, upon the transfer of the Complainant to the Housing Department, no information was transmitted pursuant to the provisions of the collective bargaining agreement to preserve the Complainant's vacation selection in his transfer; that, on July 10, 1972, the Complainant engaged in a conversation with his lead worker, Teague, at which time the Complainant indicated a claim of right to be on vacation beginning on that date; that Teague disputed the Complainant's claim and instructed the Complainant to return on the following evening to execute a vacation request form; that the Complainant went on vacation on the night of July 10, 1972, and did not work on the shift which began on that date; that the Complainant returned to his place of employment on the evening of July 11, 1972, pursuant to the directive of Teague, and attempted to fill out and execute the vacation request form which Teague had available for him; that the Complainant made a request of Teague that Teague then authorize the Complainant's vacation, which Teague refused to do; that the Complainant then became angered and left the premises of the Respondent Employer; that the Complainant did not work on the shift which began on July 11, 1972, nor on any other date during the week of July 10, 1972; and that, on July 14, 1972, the Respondent Employer discharged the Complainant from his employment, effective on the same date, in a letter making reference to the past record of the Complainant and specifying as reasons for discharge an alleged altercation between the Complainant and Teague on July 11, 1972 in which the Complainant allegedly became loud and abusive, an alleged altercation between the Complainant and Teague on July 12, 1972 in which the Complainant allegedly engaged in an outburst and walked off the job, and the absence of the Complainant from work for three consecutive days without leave.

9. That the Complainant, with the concurrence of Chief Steward Osowski and Steward Weiland, timely filed a grievance protesting said discharge at Step One of the grievance procedure contained in the aforesaid collective bargaining agreement; that Osowski and Weiland processed the grievance for the Complainant; that, breaking with his usual and customary practice with regard to the processing of grievances, Grennier absented himself completely from the processing of the Complainant's dis-

charge grievance; that Respondent Employer denied the grievance at Step One and the grievance was timely advanced to Step Two of the grievance procedure; that Osowski and Weiland again processed the grievance for the Complainant; that Respondent Employer denied the grievance at Step Two and the grievance was timely advanced to Step Three of the grievance procedure; that Osowski and Weiland again processed the grievance for the Complainant; that a hearing was held at Step Three before Cottrell; and that, on August 31, 1972, Cottrell issued the answer of the Respondent Employer at Step Three, denying the grievance and marking the beginning of a period of ten days for appeal of the denial of said grievance to the State Personnel Board and also marking the beginning of a period of 30 days for the Respondent Union to appeal the denial of said grievance to arbitration.

10. That the authority within the Respondent Union for making a determination as to whether a particular grievance should be processed to arbitration under the collective bargaining agreement lies with the Executive Board of the Respondent Union; that stewards of the Respondent Union and the Field Representative of the Council affiliate of the Respondent Union do not have the authority to independently invoke the arbitration process; that, previous to the occurrence of the Complainant's discharge grievance, it was the practice of the Respondent Union to have its Executive Board examine the evidence with respect to a grievance and make a determination thereon, after which Respondent Union would undertake the affirmative obligation of informing the individual grievant of the action taken by the Executive Board on his or her grievance; that, previous to the occurrence of the Complainant's discharge grievance, Respondent Union had never refused the request of an employe to pursue a grievance to arbitration under the collective bargaining agreement; that, subsequent to the issuance of the answer of Respondent Employer at Step Three of the grievance procedure, the Complainant contacted Weiland and indicated to Weiland his continued interest in reinstatement to his employment with Respondent Employer and his desire that the Respondent Union proceed with the processing of his grievance; that Weiland indicated to the Complainant that the stewards had reached the limit of their authority and referred the Complainant to Grennier; that the Complainant contacted Grennier and indicated to Grennier his continued interest in reinstatement to his employment with Respondent Employer and his desire that the Respondent Union proceed with the processing of his grievance; that Grennier inferred the existence of racial overtones with respect to the Complainant's discharge, and instructed the Complainant to contact Alexander; that Grennier gave such instructions on the basis of the fact that both the Complainant and Alexander are members of the black race, and a belief that the Complainant and Alexander would be able to work better together than could the Complainant and Grennier, who is a member of the white race; that Osowski made inquiry to Grennier concerning the processing of the Complainant's discharge grievance; that Grennier also referred Osowski to Alexander; but that Grennier did not contact Alexander to notify Alexander of the referral of the grievance, and did not properly invoke the jurisdiction of Alexander to act on the Complainant's discharge grievance.

11. That Osowski contacted Alexander concerning the Complainant's discharge grievance; that Alexander indicated to Osowski that the jurisdiction of the Field Representative had not been properly invoked, but agreed to pursue the matter; that Alexander thereafter attempted to contact the Complainant, but was unable to do so; that the Complainant was simultaneously attempting to contact Alexander, but was unable to do so until a period of approximately three weeks had elapsed following the issuance of the answer of Respondent Employer at Step Three of the grievance procedure; that, when the Complainant contacted Alexander, the Complainant indicated to Alexander his continued interest in reinstatement to his employment with Respondent Employer and his desire that the Respondent Union proceed with the processing of his grievance; that

Alexander then advised the Complainant that the jurisdiction of the Field Representative had not been properly invoked, but agreed to pursue the matter; that Osowski made arrangements with Cottrell for an ad hoc meeting outside of the contractual grievance procedure, for the purpose of further discussion of the Complainant's discharge grievance; that such a meeting was held on or about September 23, 1972, at which time Cottrell, Osowski, Alexander, Morris and Teague were in attendance; that, although notified to attend, the Complainant did not attend such meeting; that, on or about September 23, 1972, following the failure of the Complainant to attend the aforesaid meeting, Osowski and Alexander each attempted to contact the Complainant, by telephone, but were unable to do so, after which they took no further action on the Complainant's discharge grievance.

12. That neither Weiland, nor Osowski, nor Alexander made any recommendation to the Executive Board of the Respondent Union for or against the further processing of the Complainant's discharge grievance; that any meeting of the Executive Board of Respondent Union at which the discharge grievance of the Complainant was considered was held at a time when neither Weiland, nor Osowski nor Alexander was in attendance; that the Respondent Union took no action to notify the Complainant of any action of the Executive Board of Respondent Union in which the Respondent Union declined to further process the Complainant's discharge grievance; that the Respondent Union took no action to appeal the discharge grievance of the Complainant to arbitration during the timely period for such an appeal; and that the Complainant was only made aware of the Respondent Union's inaction when advised of same subsequent to the expiration of the period for timely appeal of the Complainant's discharge grievance to arbitration.

13. That Respondent Union handled the discharge grievance of the Complainant in a manner different from other grievances filed by employes in the aforesaid collective bargaining unit; and that such difference was based, at least in part, on irrelevant and invidious considerations and classifications having to do with the race of the Complainant.

Based upon the above and foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSIONS OF LAW

1. That Respondent Union, Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, has breached its duty of fair representation with respect to its processing of the Complainant's discharge grievance, by taking action or inaction in an arbitrary, discriminatory and perfunctory manner, and has thereby engaged in unfair labor practices within the meaning of Sections 111.82(2)(a) and (c) of the State Employment Labor Relations Act.

2. That the failure of the Complainant, Samuel E. Guthrie, to exhaust the grievance procedures contained in the collective bargaining agreement between Respondent Union and Respondent Employer is attributable to the breach by Respondent Union of its duty of fair representation; and that the Examiner therefore asserts the jurisdiction of the Wisconsin Employment Relations Commission to determine whether there has been a violation of the collective bargaining agreement with respect to the discharge of the Complainant.

3. That the Respondent Employer, University of Wisconsin - Milwaukee, has not demonstrated, by a clear and satisfactory preponderance of the evidence, that it had just cause to discharge the Complainant, Samuel E. Guthrie, on July 14, 1972; that, absent such showing of just cause for such discharge, such discharge violates the collective bargaining agreement subsisting between the Respondent Employer and the Respondent Union; and that, by such violation of a collective bargaining agreement, Respon-

dent Employer has violated and is violating Section 111.84(1)(e) of the State Employment Labor Relations Act.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDERS

IT IS ORDERED THAT:

1. The State of Wisconsin, University of Wisconsin - Milwaukee, its officers and agents shall immediately:

   (a) Cease and desist from violating the collective bargaining agreement between said Respondent and Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, covering employes of the University of Wisconsin - Milwaukee.

   (b) Take the following affirmative action which the Examiner finds will effectuate the policies of the State Employment Labor Relations Act:

      (1) Offer to Samuel E. Guthrie immediate and full reinstatement to his former position or to a substantially equivalent position, without prejudice to his seniority or other rights or benefits previously enjoyed by him, and make him whole for any loss of pay and benefits he may have suffered by reason of the unlawful discharge of Samuel E. Guthrie, by payment to him of the sum of money equal to that which he would normally have earned or received as an employe of the State of Wisconsin, University of Wisconsin - Milwaukee, from the date of his termination by said Respondent to the date of the unconditional offer of reinstatement made pursuant to this Order, less any earnings he may have received during said period from employments obtained subsequent to said termination and in substitution for such terminated employment, and less the amount of Unemployment Compensation benefits, if any, received by him during said period.

      (2) Notify the Wisconsin Employment Relations Commission, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

2. Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, its officers and agents, shall immediately:

   (a) Cease and desist from processing grievances filed by employes in the bargaining unit in which said Respondent is the statutory representative in an arbitrary, discriminatory or perfunctory manner or in any other manner acting in breach of its duty of fair representation to such employes.

   (b) Take the following affirmative action which the Examiner finds will effectuate the policies of the State Employment Labor Relations Act:

      (1) Make Samuel E. Guthrie whole for expenses incurred by him because of the failure of Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, to provide Samuel E. Guthrie with proper and fair

representation in the processing of the instant case, by payment to him, upon presentation of a verified claim therefor, of the sum of money equal to his reasonable attorneys fees and costs incurred in the prosecution of the instant complaint proceeding.

(2) Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 23rd day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

STATE OF WISCONSIN, UNIVERSITY OF WISCONSIN - MILWAUKEE, XLI,
Decision No. 11457-E.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDERS

PLEADINGS, PROCEDURE AND THE NATURE OF THE CASE:

The instant matter first came before the Commission on November 13, 1972, when counsel for the Complainant filed a complaint which recited a number of factual allegations and alleged violation of "Wisconsin Statutes 111.84(1)(a) and (c) for a discriminatory discharge for union activity" and further alleged that the discharge was "in violation of the union contract and constitutes an unfair labor practice pursuant to 111.84(1)(a) and (c)". On the same date, the Chairman of the Commission directed correspondence to counsel for the Complainant wherein it was pointed out that a discharge in violation of a collective bargaining agreement would constitute a violation of Section 111.84(1)(e), Wisconsin Statutes. The Complainant was, at the same time, put on notice of the potential existence of an issue concerning fair representation. On November 30, 1972, the Complainant filed the same pleading in "corrected" form, in which all references to Sections 111.84(1)(a) and (c) are deleted and allegations of violation of Section 111.84(1)(e) are substituted therefor. An amended complaint was filed on January 4, 1973, wherein it is alleged that the Complainant was discharged without just cause, in violation of a collective bargaining agreement, and that the Union which represented the Complainant breached its duty of fair representation.

An appearance was made on behalf of Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, and its affiliated Local 82, wherein it is indicated that the Union Respondent was originally mistakenly identified as "Council 48". An appearance was made on behalf of the State of Wisconsin, University of Wisconsin - Milwaukee, by the Department of Administration. Both Respondents filed preliminary motions to dismiss which were denied by the Examiner, and hearing was opened in the matter on January 30, 1973. The Complainant undertook at that time to show a breach of the duty of fair representation by the Union, and the nature of the case at that time and throughout subsequent court proceedings was that of an alleged contractual violation by the Employer over which the Complainant seeks to have the jurisdiction of the Commission asserted because of an alleged breach of the duty of fair representation by the Union. At the close of the hearing on January 30, 1973, the Employer requested that a separate ruling be made on the fair representation issue before evidence was taken on the merits of the discharge. Both the Complainant and the Union objected to that procedure, and the hearing was adjourned pending a ruling on the Employer's request. On March 12, 1973, the Examiner denied the Employer's request for a separate determination on the fair representation question, and ordered further hearing in the matter. The Employer's separate motion for summary judgment was denied by the Examiner as being premature. The Employer sought review by the full Commission, the Commission dismissed that petition for review as being premature, the Employer appealed from the denial of its motion for summary judgment, and the Commission dismissed that appeal. The Employer then petitioned for review of the Commission's decision in the Circuit Court for Dane County, where the Commission's motion to dismiss was granted on August 10, 1973. An appeal was taken in the Supreme Court, where the Complainant and the Union joined the Commission in opposition to the position asserted by the Employer. On November 26, 1974, the Wisconsin Supreme Court affirmed the order of the Circuit Court. The case was returned to the Circuit Court on December 19, 1974, and was returned by the Circuit Court to the Commission on January 28, 1975. Notice was issued on February 3, 1975 setting March 12, 1975 as the date for resumption of the hearing. The hearing was completed and closed on March 12, 1975. The transcript

of the March 12, 1975 hearing was issued to the parties on April 17, 1975. Briefs and reply briefs were filed and exchanged until July 31, 1975.

In his brief, the Complainant strongly asserts that the Employer discharged the Complainant because of his lawful union activities, thus reverting to the theory of the case implied in the original complaint but abandoned in the "corrected" complaint which was the first pleading served on the other parties and in the amended complaint. The Complainant, in his brief, reduces the discharge in violation of contract argument to a secondary level of importance. It is evident from its brief that the Employer was responding to violation of contract allegations and to an allegation of violation of Section 111.84(1)(e), alone. The Union, in reply brief, points out the change of theory made by the Complainant. It is readily apparent to anyone familiar with the decisions of the Commission that proceedings of an entirely different nature, with different burdens of proof and different issues, are involved in the Complainant's two distinct theories of the case. As a discriminatory dischargee, the Complainant would prevail before the Commission if he were to show that any part of the Employer's motivation for his discharge was anti-union animus. 4/ The existence or potential existence of a parallel contractual remedy does not deprive the Commission of jurisdiction 5/, and there would thus be no occasion for an allegation, let alone proof, of a breach of the duty of fair representation by the Union. On the other hand, as a complainant alleging a discharge in violation of a collective bargaining agreement, the Complainant was required under the precedents existing at the time the complaint was filed to clear the multiple hurdles of showing an attempt to exhaust contract remedies, a breach by the Union of its duty of fair representation and a discharge in violation of the agreement. 6/ The Complainant, rather than proceeding with both of his alternate theories of the case or withdrawing from the violation of contract theory, abandoned his discriminatory discharge theory at the outset of the proceedings. Indeed, there would have been no basis for the two-year delay of the case in the courts except for the existence in this case of the separation question and other issues arising out of the violation of contract/fair representation nature of the case. A significant change in the nature of the case at this late stage of the proceedings would be totally inappropriate, as it would deny at least the Employer, and likely both Respondents, due process of law. It is thus the determination of the Examiner that evidence of anti-union animus can appropriately be considered in this case only as it relates to the question of just cause for discharge, and only if that issue is reached following determination of the fair representation question.

ISSUES AND BURDENS OF PROOF:

The leading federal cases cited by the parties are Republic Steel Corporation v. Maddox 379 U.S. 650, 58 LRRM 2193 (1965) and Vaca v. Sipes 386 U.S. 171, 64 LRRM 2369 (1967), both decided under the federal Labor-Management Relations Act, as amended. Those cases, and other federal cases in the subject area, are noted and discussed in various decisions of the Wisconsin Employment Relations Commission and in the decision of our Supreme Court in Mahnke v. Wisconsin Employment Relations Commission (Louis Allis Co.) 66 Wis. 2d 524 (1975). As recited in the various cases, it is recognized that there exists a normal scheme of things. The Vaca, Republic Steel and Mahnke cases cited above, and the instant case, arise out of situations in which the normal process breaks down and a contractual claim comes to be processed under a different scheme of things. Dif-

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4/ City of Wisconsin Dells (11646) 3/73.

5/ Wood County (9437-A) 1/71; City of Milwaukee (13093) 10/74.

6/ Northwest General Hospital (10599-B, 10600-B) 1/73.

ferent issues and specific burdens of proof then arise and must be met.

In his amended complaint, the Complainant herein has affirmatively alleged both a discharge by the Employer Respondent in violation of a collective bargaining agreement and a breach by the Union Respondent of its duty of fair representation. Based on the subsequent decision of our Supreme Court in Mahnke, we now know that the Complainant has pleade more than he was required to, and that a claimant so situated need only allege in his complaint that he was discharged in violation of a collective bargaining agreement; thus leaving to the employer the obligatic to allege, in the first instance and by way of affirmative defense, that the contractual grievance procedure has not been exhausted. It is readi apparent from Mahnke that the burden of proof on the question of exhaust of contract remedies is on the employer and that, if that burden is not met, the defense fails and the employer is obligated to proceed with the merits of the alleged contract violation. In addition to the allegation of the amended complaint which indicate that the Union did not proceed with the Complainant's grievance beyond the third step of the grievance procedure to an available arbitration procedure, the Employer Respondent has, by its answer and various motions, contended that the contractual grievance procedures have not been exhausted. Thus, while perhaps not pleaded and proved up precisely in line with the scenario subsequently outlined by the Supreme Court, the exhaustion of contract remedies issue has been joined in this case.

As stated by the Court in Mahnke: "If [the failure to exhaust the contract grievance procedure] has been established by proof, admission c stipulation, the employe cannot prosecute his claim [against the employe unless he proves the union breached its duty of fair representation to him." While it may be difficult for an employe to sustain that burden c proof, the employe can, at least in theory, overcome any failure to exha contract remedies and, thereby, any procedural defense which might be asserted by the employer, by proving that the failure is attributable to a breach by the union of its duty of fair representation.

Only following a conclusion that the Complainant has met his burder of proof on the question of fair representation does the focus of the case turn to the merits of the discharge and the question of just cause for discharge, where another shifting of burdens is to be found. There the burden is initially on the Complainant to establish a prima facie violation of the collective bargaining agreement; after which the employer has the burden of establishing, by a clear and satisfactory preponderance of the evidence, that it had just cause for its discharge action. Stolper Industries, Inc. (Examiner Decision) (12626-A) 10/74, citing Reinke v. Personnel Board 53 Wis. 2d 123 (1971), affirmed with modifications (12626-B) 10/75.

EXHAUSTION OF CONTRACT REMEDIES:

Contract Procedure and Their Pursuit

The collective bargaining agreement at hand defines a grievance as

a "thirty (30) day" period for appeal to arbitration. 7/ The letter of dismissal described the Employer's action as one within the purview of Section 16.24(1)(a), Wisconsin Statutes, and held out the alternative of an appeal to the State Personnel Board. The collective bargaining agreement, at paragraph 92, establishes alternative procedures which would permit commencement of the grievance procedure at Step 3. A right of appeal to the State Personnel Board is also provided there following the disposition of the grievance at Step 3. Under this contractual setting, the burden of proof is reduced to a simple, factual question as to whether the alternative final resolution procedures, or any of them, have been completed. The record here clearly establishes that the Complainant did not appeal his discharge to the State Personnel Board at either of his opportunities to do so, and that no timely demand for arbitration under the grievance procedure has been made on the Employer.

Right to Arbitration Independent of the Union

The collective bargaining agreement at hand is a contract between two clearly identified parties, the State and the Union. However, the collective bargaining agreement also provides, at paragraph 30, for the presentation of a grievance by an individual employe without the assistance of the Union. The exercise of such individual rights is clearly conditioned by the requirement that the management take no action on a grievance so filed until the Union has had notice and an opportunity to be present. Step 1 of the grievance procedure contemplates that the management representative could receive the written grievance from either an employe or a representative of an employe. Steps 2 and 3 of the grievance procedure also provide for a meeting between the management, the employe and his representative. In support of the contention that the Complainant here could have appealed his discharge grievance to arbitration under the terms of the contract, independent of the Union, the Employer relies on the language of paragraph 47 of the contract, as follows:

> "47 Section 8. Individual employes or minority groups of employes shall have the right to present grievances in person or through other representatives of their own choosing at any step of the grievance procedure, provided that the appropriate Union representative has been afforded the opportunity to be present at any discussions and that any settlement reached is not inconsistent with the provisions of this Agreement."

The Union's position on this particular issue has been equivocal, with certain Union witnesses taking the position during the first day of hearing that an independent right to arbitration existed, with the Union joining the Complainant and the Commission in briefs to the Supreme Court on the argument that it is not clear that the employe can initiate and complete the arbitration without the controlling influence of the Union, and with the Union returning in final briefs before the Examiner to the position that the Complainant failed to exercise an available independent right to arbitration.

The Examiner's conclusion that the Complainant had no independent right to arbitration is premised on precedents which indicate the impossibility of fulfilling the conditions which would apply if the Employer's position were to be adopted, as well as on the language of the agreement itself.

7/ The grievance form used by the Union Respondent in this case provides for appeal to arbitration "within 30 workdays" from the date of the management answer at Step 3.

The language of paragraph 47 of the agreement is obviously very similar to the "individual rights" language of Section 111.83(1) of the State Employment Labor Relations Act, as it existed when that contract was negotiated and as it exists now. Interpreting the similar language of Section 111.70(4)(d)1 of the Municipal Employment Relations Act, the Commission has held that such statutory provisions implement the statutory right of employes to refrain from engaging in concerted activity, and do not grant employes contractual rights with respect to the processing of grievances under grievance procedures negotiated in a collective bargaining agreement between a management and a union. Milwaukee Board of School Directors (11280-A, B) 12/72. The Commission there recognized, in essence, two different meanings of the word "grievance", one being as the word is used in the individual rights provisions of various labor relations statutes 8/ and the other being as the word is used in a collective bargaining agreement with reference to the resolution of disputes arising between the parties to such agreement as to its interpretation and application. Accord for that view is found in Emporium Capwell Co. v. Western Addition Community Organization, ____ U.S. ____, 88 LRRM 2660 (1975) at 88 LRRM 2665, footnote 12, narrowly confining the rights accorded by the first proviso to Section 9(a) of the NLRA. Here, the Employer and the Union have included in their collective bargaining agreement a statement of rights which parallels those narrowly construed statutory provisions. While their inclusion in the collective bargaining agreement would give rise to some independent contractual rights for employes, it is not clear that the rights so granted would be as all-pervasive as the Employer would have us find. 9/

By contrast to the right provided by statute for the presentation of grievances, no provision of the statutes provides a right to final and binding arbitration. Although endorsed by the statutes, the Courts and the Commission as a preferable means for the resolution of contract disputes, the arbitration process is entirely a matter of contract between a union and a management. Paragraph 47 of the instant collective bargaining agreement does not specifically state a right to "arbitration" and such a right would have to be inferred from the use of the terminology which permits individuals to present grievances "at any step of the grievance procedure". It is noted that the arbitration provisions of the instant collective bargaining agreement are to be found in Article IV of that agreement, which is entitled "GRIEVANCE PROCEDURE", and that the time period for appeal of a grievance to arbitration is stated in paragraph 35 of the agreement, which is headed as "Step Four" of the grievance procedure. However, the mechanics for the selection of an

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8/ See also: First proviso to Section 9(a), National Labor Relations Act; and Section 111.05(1)(proviso) of the Wisconsin Employment Peace Act.

9/ The prospect of free access for individual employes to the higher steps of a contractual grievance procedure was also looked upon with disfavor by the Supreme Court in Vaca:

> "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully." 64 LRRM 2369 at 2377.

arbitrator, the agreed upon arrangements for the conduct of the arbitra proceeding, the limitations on the jurisdiction of the arbitrator and t agreement to accept the decision of the arbitrator as final and binding are stated separately in paragraphs 36 through 38 of the collective bar- gaining agreement.

Paragraph 47 of the collective bargaining agreement, like the stat provisions which it parallels, does not provide a clear and unequivocal right for individuals to act on their own behalf, but is severely condi by language which is more consistent with the orthodox view that it is union which owns the collective bargaining agreement and, as between th union and one of the employes covered by that agreement, controls its interpretation and enforcement. Any settlement reached must be consist with the provisions of the agreement! Several decisions of the Commiss under Sections 111.06(1)(f) and (g) of the Wisconsin Employment Peace A establish the principle that an arbitration award interpreting a col- lective bargaining agreement in one case will be enforced by the Commis as binding on a similar grievance under the same contract, and even on similar grievance under a subsequent contract containing the same contr language. 10/ The arguments favoring a finding of an independent right prosecute grievances fit comfortably within the limitations imposed in the last clause of paragraph 47 while the grievance is being processed in the first, second and third steps of the grievance procedure. There the Union would be able to announce its disagreement with the interpret espoused by the individual grievant or even its agreement with the posi being taken by the Employer, and the Employer would be able to act accordingly in making any settlement of the individual claim. However, those arguments break down in the context of a final and binding arbitr proceeding, where the ultimate result of settlement is taken out of the hands of the immediate parties to the proceeding (and would be even farther out of the hands of the Union sitting in a third party capacity limited to notice and an opportunity to be present) and placed in the hands of the impartial arbitrator. Thus, the logical extension of the argument asserted by the Employer here leads to the anomalous result th the Union could, by force of an arbitration award issued in a proceedin between the Employer and an individual employe, find itself in a situat in which its collective bargaining agreement has been interpreted in a manner with which it does not agree and on which it has not had its day in court. Under the cases cited, such an interpretation might live on to haunt the Union until the contract language could be changed through negotiations.

Interpretation of the "any step" language of paragraph 47 as giving individual employes the right to arbitrate grievances independen of the Union comes directly into conflict with the language of paragrap 35 through 38 of the agreement. Unlike the paragraphs concerning the early steps of the grievance procedure, all of which make reference to both "employe" and "representative", the paragraphs of the agreement concerned with the arbitration process place that process in the hands of the "parties". The Complainant herein cannot, by any stretch of the imagination, be described as a "party" to this collective bargaining agreement.

another. As it relates to the issue at hand, the Court stated at 65 Wis. 2d 627 that: "An employee can present his own grievances or he may choose to have his union represent him." It is essential to keep in mind that the Court also recognized that the order being reviewed did not include findings of fact and did not rule on the validity of defenses being asserted. 65 Wis. 2d 624 at 632. The issues before the Supreme Court involved administrative law and procedure, and the case clearly did not turn on the validity of defenses or findings of particular facts. For a judgment to operate as res judicata and be conclusive evidence of a fact sought to be established by it, it must appear that the fact was a material and essential one, and that the judgment could not have been rendered without deciding the matter. Keller v. Schuster 54 Wis 2d 738 (1972). The Supreme Court's recitation of facts could as easily have begun with the paragraph, also found at 65 Wis. 2d 627, in which the filing of the complaint and the disposition of preliminary motions are described, and the Examiner thus concludes that he is not bound here by any of the characterizations of facts made by the Court on the exhaustion of contract remedies, fair representation and just cause issues.

Under Mahnke, supra, the burden of proof on exhaustion of contract remedies is on the Employer. The Employer has not established, by a clear and satisfactory preponderance of the evidence, that the Complainant had a right to arbitrate his grievance under the instant collective bargaining agreement independent of (and, if the position of the Union Respondent here is to be accepted as to its analysis and determination on the facts, in opposition to) the desires of the Union party to that collective bargaining agreement.

FAIR REPRESENTATION:

Factual Background

From the testimony of its incumbent President at the time of the first day of hearing in the instant case, it would appear that Local 82 has been in existence since at least sometime during or prior to 1965. The first State Employment Labor Relations Act was enacted effective January 1, 1967. 11/The Union traces its status as the exclusive collective bargaining representative in the bargaining unit involved to a Certification of Representatives issued by the Commission on February 9, 1968. 12/ The collective bargaining agreement under which the instant case arises was executed on April 14, 1970 and was made effective, according to its terms, on March 16, 1970. That agreement was to expire on March 15, 1972, subject to an automatic renewal for one additional year. The discharge involved in this case occurred on July 14, 1972, but all parties have taken the position (in the pleadings here, in their briefs to the Supreme Court and elsewhere in the record) that the agreement dated March 16, 1970 was in effect at the time of the discharge. 13/

The collective bargaining agreement provides at several points, and notably in paragraph 44, for the recognition of "grievance representatives". Those Union officials are granted, at paragraph 52 of the agreement, superseniority for certain purposes. The Union allocated its complement of grievance representatives to two ranks, namely: "stewards", who provided the first level of Union representation in defined jurisdictional

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11/ Chapter 612, Laws of 1965.

12/ Case III, No. 11269, SE-3, Decision No. 8296-C.

13/ Note the effect here of Section 111.96(2), Wisconsin Statutes, as effective April 30, 1972, Chapter 270, Laws of 1971.

areas, and "chief stewards", who had jurisdiction in larger areas encompassing multiple "steward" jurisdictions. These Union officials participate in the processing of employe grievances in steps one, two and three of the contractual grievance procedure and, it is inferred from questions asked by Union counsel on cross-examination of the Complainant at page 20 of the transcript, had an affirmative obligation to assist bargaining unit members in advancing grievances from one step to another. The Union's stewards and chief stewards did not process cases through the arbitration procedures provided in the collective bargaining agreement, nor did they have authority to invoke those arbitration procedures.

A reading of the testimony of the then-President of the Local Union, Grennier, fairly indicates there were "very few" instances in which he did not personally participate in the investigation and prosecution of a grievance. Comments attributed to and made by Weiland, another Union official who participated in the processing of the Complainant's discharge grievance, indicate that Grennier was at least a key figure within the Union with respect to the processing of grievances, if not the focal point of authority with respect to processing of grievances beyond the third step of the grievance procedure. Testifying on direct examination by Union counsel, Grennier outlined the following procedure:

"Q How long have you been President of Local 82?

A About nine years.

Q Now, in that regard, have you had an opportunity to formulate a general policy with respect to arbitrating cases on behalf of Local 82?

A Yes, sir.

Q Sir, for the record, would you please restate what that general policy is?

A The general policy is, sir, that we take the case under advisement, then look at the evidence at hand, make a determination, tell the employe what our determination is and also let him know that he can take the case to arbitration on his own.

Q Mr. Grennier, have you ever in the past--let's exclude the Sam Guthrie matter here temporarily--prior to the Guthrie matter have you ever denied any employe's request to go to arbitration?

A No, sir.

Q And have these employes generally made a written request to you?

A Generally verbal.

Q And then you act upon this and recommend arbitration?

A Yes, sir." 14/

Although it might appear to be so, Grennier was not necessarily making use of the "royal we" in that testimony. Other testimony does indicate that it is the Executive Board of the Union, on which Grennier sits,

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14/ Transcript of Testimony at pages 78-79.

which technically holds the reins of authority with respect to the invoki of the arbitration process.

Into the setting of the collective bargaining relationship and internal union procedures described here came the Complainant in this case, Samuel E. Guthrie. He had begun work in the bargaining unit on May 20, 1968 and, at the time of his discharge, held the classification of Building Maintenance Helper 2. Guthrie, a member of the black race, was initially assigned to work in the Physical Plant Department, where there was a substantial number of employes of his own race. Records allegedly generated in the Physical Plant Department at the end of 1971 or early in 1972 indicate that, after only approximately thre and one-half years of employment, Guthrie had risen to a position of eigh most senior employe among 31 bargaining unit employes listed on those records. 15/ During his tenure of employment Guthrie had been active in Union affairs, serving for two years as a Steward for the Union Respondent herein, after which he was appointed by Grennier as a Chief Steward and served in that capacity for one additional year. He had acquired a reputation as a vigorous advocate on behalf of the employes he represented, both in the eyes of those employes and in the eyes of other Union officials. Guthrie had been through at least two courses on grievance processing and, as would seem to be expected of a person holdir such offices, was familiar with the forms and procedures used for the processing of grievances under the collective bargaining agreement. Alsc consistent with the limits of his jurisdiction as a steward and chief steward, Guthrie was aware of the existence of an arbitration procedure in the agreement, but had no direct experience with processing of cases in arbitration. The Respondents base arguments on his claimed level of sophistication concerning the law and lore of labor relations, but those claims are contra-indicated by some of Guthrie's answers on the witness stand, such as that given at page 27 of the transcript where, on cross-examination by Union counsel, Guthrie answered an inquiry as to whether he had made a written request for arbitration, as follows:

> "Not a written request. We follow the procedure by which--if there is evidence--we saw there was evidence, why the Union would automatically take it to protect the Chief Steward--or a member that is a member in good standing in the union." (Emphasis supplied). 16/

Guthrie himself had been a grievant in a number of incidents, some of which are traceable to his role as a Union official. One such incident, which occurred in May of 1972, was resolved on the basis that Guthrie be transferred from the Physical Plant Department to the Housing Department. With that transfer, Guthrie shed his office and authority as a representative of the Union and resumed the role of a rank and file empl working under the representation jurisdiction of Steward Weiland and Chi Steward Osowski, both of whom are members of the white race.

Approximately one and one-half months following his transfer to the Housing Department, on July 14, 1972, the Employer directed a letter to Guthrie informing him of his discharge. A copy of that correspondence was directed to Grennier. The discharge letter informed Guthrie of alternative rights of appeal to the State Personnel Board or through the grievance procedure contained in the collective bargaining agreement. Guthrie chose to proceed under the collective bargaining agreement and, with Weiland and Osowski, filed a grievance at Step One of the grievance procedure on July 26, 1972. The discharge was based, in part, on an alleged altercation between Guthrie and his lead man, Teague, but the grievance was not filed with Teague, who was also a member of the bargaining unit. Instead, the grievance was filed with Guthrie's supervisor, Miller, and was answered by Miller and the Assistant Director of Operations for the Housing Department, Bradley, on July 31, 1972. Weiland and Osowski handled the processing of the grievance through Step One, the appeal of the grievance to Step Two and the processing of the grievance through Step Two. 17/ The management answer at Step Two denied the grievance.

Guthrie, Weiland and Osowski joined in the filing of the appeal of the grievance to Step Three on August 21, 1972. No explanation is given in this record for the decision to process the grievance through Steps One and Two rather than to initiate the grievance at Step Three pursuant to paragraph 92 of the collective bargaining agreement. That provision, found within the article of the agreement dealing with the application and interpretation of work rules, appears to have provided an expedited procedure for cases of this type. Guthrie attended a Step Three hearing on August 28, 1972. Weiland and Osowski represented Guthrie at that hearing, and Osowski vigorously supported Guthrie's claim that he should be entitled to face his primary accuser, the lead man. The Employer's representative refused that request and the grievance hearing was closed (as contrasted to adjourned) on the same date. The Employer's answer denying the grievance at Step Three was issued under date of August 31, 1972. The record clearly establishes that this was one of those "very few" grievance cases from which Grennier absented himself, thereby leaving the matter entirely in the hands of Weiland and Osowski.

Paragraph 92 of the collective bargaining agreement also provides for an employe choice of forum for the further pursuit of a case of this type following the issuance of the Employer's answer at Step Three, one of those being an appeal to the State Personnel Board and the other being an appeal to arbitration under the collective bargaining agreement. Although there is some conflict in the testimony concerning transactions at that time between Guthrie and the Union, it is clear that Guthrie continued with his intention to have his claim processed under the collective bargaining agreement. Guthrie did not exercise the option of taking his case to the State Personnel Board under the statutes.

Request to Union for Arbitration

The first of several significant conflicts in testimony arises with respect to Guthrie's request that the Union proceed with his case. Guthrie testified that he asked Weiland "for an arbitration" during a conversation which occurred one or two days after the Employer's answer to the grievance

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17/ Guthrie normally worked on the night shift, while the supervisory personnel and stewards normally worked on the day shift. In addition, Guthrie had been working on a day shift job with another employer simultaneous with his employment with the Employer Respondent here, and he continued that employment following his discharge by the Employer Respondent here.

at Step Three had been received. Guthrie also testified to having at least three contacts with Weiland during the period for appeal of the grievance to arbitration, during which he indicated his continued interest in his grievance. Weiland referred Guthrie to Grennier, and it was Guthrie's testimony that he also asked Grennier for arbitration of the discharge grievance. Grennier referred Guthrie to a Field Representative of the Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, the parent Union of the Union Respondent herein, and it was Guthrie's testimony that he also made a request for arbitration at that level. Contradicting Guthrie's testimony, Weiland acknowledged only two conversations with Guthrie during the period for appeal of the grievance to arbitration and denied that Guthrie had requested that the Union process the discharge grievance to arbitration. However, Weiland did testify that he referred Guthrie to Grennier for advice concerning the further processing of the discharge grievance. Grennier vehemently denied that Guthrie made a request for arbitration, but he acknowledged that he had a conversation with Guthrie wherein he detected some "overtones of racial discrimination" in the case, 18/ and that he advised Guthrie to contact the Field Representative, Alexander, for further work on the case. Alexander denied that Guthrie made a request for arbitration, but he testified concerning the limits on his authority and indications given to Guthrie concerning those limitations. For a number of reasons, the Examiner had concluded that the specific denials made by Weiland, Grennier and Alexander should not be credited.

Grennier was the first witness called by the Union. He had not been present during all of Guthrie's testimony and, when some of that testimony was characterized by counsel on direct examination, he made an emphatic denial of a request by Guthrie for arbitration. However, Grennier also testified concerning general procedures within the Union and other specifics concerning the processing of Guthrie's discharge grievance. The Examiner's observation of Grennier's demeanor while on the witness stand and while being examined and cross-examined on various subjects indicates that Grennier's emphatic denial of any request for arbitration should not be credited.

Testifying following the completion of Grennier's testimony, Weiland contradicted statements attributed to him in the testimony of previous witnesses and also placed certain events at points in time significantly different than as related by other witnesses. There is no question that Guthrie and Weiland had a conversation shortly after the return of the answer to the grievance at Step Three. It is also evident from a comparison of the testimony of Weiland with that of Guthrie that, although Weiland disputes some of the words attributed to him by Guthrie, the essence of that conversation was that Guthrie was concerned about the further processing of his grievance, that Weiland and Osowski had reached the limit of their authority with respect to the grievance and that Guthrie would have to contact Grennier for a decision at some higher level within the Union concerning the further processing of the grievance. Weiland's recall must be faulted because of his insistence that he notified Guthrie approximately one week after the receipt of the Step Three answer that an ad hoc investigatory meeting had been scheduled. The testimony of Alexander establishes that the ad hoc meeting was held on or about September 23, 1972, and it also appears from the testimony of Alexander and that of Osowski, who made the arrangements, that the ad hoc meeting was not set up until closer to three weeks after the Step Three answer was received.

When viewed in the context of Grennier's testimony concerning the acceptability of an oral request for arbitration, the Union's consistent practice of taking cases to arbitration if requested, and the awareness (common to all concerned) that arbitration was the next and only procedure

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18/ Transcript of Testimony, page 80 and page 83.

available which arises out of the collective bargaining relationship and agreement and in which the Union would become directly involved as the representative of the employe, the actions taken by Weiland, Grennier and Alexander belie and are logically inconsistent with any claim on their part that Guthrie made no request for such further processing by the Union. Thus, if Guthrie's reaction to the denial of his discharge grievance at Step Three had been one of acceptance, he might not have made any contact with Weiland. Having once made contact with Weiland and expressed an attitude of acceptance with respect to the denial of the grievance, Guthrie would have had little or no need for further advice and there would have been no reason for Weiland to refer Guthrie to Grennier for advice. Weiland's action in this regard is only explainable as being responsive to an indication by Guthrie of continued interest in having his grievance processed by the Union. Similarly, faced with a member who was accepting the denial of his grievance, Grennier would have had no reason for making what turns out to be a highly irregular referral of the grievant to an official of the parent union. Grennier's own explanation for that referral is that he hoped that Guthrie and Alexander would work better together than Guthrie and himself, which necessarily implies that Grennier realized that there was something further to be worked on. Alexander recognized that the referral of the case to him was unorthodox, but he ultimately agreed to take action on Guthrie's request for help. The very essence of collective bargaining lies in the concept of representation of employes by the union and, regardless of whether Guthrie used the word "arbitration" in his inquiries to Weiland, Grennier and Alexander, it is concluded that he in fact expressed continued interest in having his grievance processed by the Union under the collective bargaining agreement and that such expressions of interest were sufficiently clear to actually motivate their Union-official recipients to make referrals and take action towards that end.

Finally, it is concluded that there was an effective request for processing of Guthrie's discharge grievance to arbitration because of testimony given by another Chief Steward of the Union, Morris. He replaced Guthrie as the Chief Steward in the Physical Plant Department upon Guthrie's transfer, and was not involved in the initial processing of the grievance, but was among the Union representatives who attended the ad hoc meeting held during the period for appeal of the discharge grievance to arbitration. Breaking with the solidarity of other Union witnesses on this particular issue, Morris testified that he had been aware of Guthrie's intention to proceed to arbitration on the case.

Union Response to "Overtones of Racial Discrimination"

Hattush Alexander was once an employe of the Employer Respondent here and, while so employed, was a steward, chief steward and vice president of the Union Respondent here. Alexander is also a member of the black race. Prior to his involvement in this case, Alexander had become a full-time Field Representative employed by the Wisconsin State Employees Union, Council 24, AFSCME. In that capacity, Alexander serviced some 25 local unions, the Union Respondent here being one of those locals. As described by him, his job is to handle the Third Step of the grievance procedure if requested by the local's president to do so; with a secondary function of making a recommendation to the Council officers as to whether a case should go to arbitration or not. Alexander and Guthrie had known one another and had worked together during Guthrie's tenure as a Union official.

On direct examination by counsel for the Union, Grennier (who is a member of the white race) made a statement which, upon review of the entire record, is found to be a significant admission against interest. After testifying concerning the normal procedures followed by the Union in the processing of a grievance, Grennier went into the specific details of the processing of Guthrie's discharge grievance, indicated that he was contacted by Guthrie and thereupon testified that he referred Guthrie to Alexander

because there were "overtones of racial discrimination" in the case and he hoped that Guthrie would be able to work better with Alexander. Grennier made no contemporaneous effort to bring Alexander into the case or to notify Alexander of his referral of Guthrie. Osowski left the function of contact between the Union and Guthrie to Weiland, but he did make contact with Grennier about the case. Grennier also referred Osowski to Alexander, and it was Osowski who made the first direct contact between the local Union and Alexander concerning the Guthrie grievance. It appears that the one contact between Grennier and Alexander was initiated by Alexander, and that Grennier then referred Alexander to Osowski again.

After being contacted by Osowski, Alexander began attempting to contact Guthrie, but was unable to do so. In fairness to Alexander and others who attempted to contact Guthrie at or about this time, it is recognized by the Examiner that it was difficult to make contact with Guthrie and that messages left for him at his home were not always effective in eliciting a response. Following his referral by Grennier, Guthrie was simultaneously attempting during that two-week period to contact Alexander. In fairness to Guthrie, it is established in the record that Alexander has both home and office telephone numbers and that one of those numbers was changed. This coincides with Guthrie's claim that he had to try three different telephone numbers before reaching Alexander.

Guthrie finally made contact with Alexander, by telephone, approximately three weeks after he had received the Employer's answer to the grievance at Step Three. A comparison of the testimony again reveals variance in choice of words, but it is the Examiner's conclusion that the essence of the conversation comes out the same in both versions. Alexander indicated to Guthrie what his rights were (including the then-expired right to take the case to the State Personnel Board) and also indicated to Guthrie, as he indicated in testimony before the Examiner, that the matter was technically outside of his jurisdiction because he had not been properly called into the case at a lower step of the grievance procedure. Nevertheless, Alexander received from Guthrie sufficient indication of a request for help to cause Alexander to promise action and subsequently take action on the case. Alexander assumed an investigatory role and attended the ad hoc meeting held on September 23, 1972. Guthrie did not appear at that meeting to face his accuser, as contemplated when the meeting was set up. Morris testified that Alexander gave an indication that he saw no merit in Guthrie's case following that meeting, but Alexander made it very clear in his testimony he made no recommendation on the case because he felt unable to do so after hearing only one side of the story. Comparison of their testimony indicates that Alexander made some comment about the case which Morris, who was not officially responsible for the processing of the case, took to be a ruling when, in fact, Alexander made no recommendation at all after the ad hoc meeting. Alexander tried to reach Guthrie but was unable to do so, after which he simply let the matter drop. Osowski made an attempt to reach Guthrie again, but also failed and let the matter drop. Weiland was aware of Osowski's attempt to reach Guthrie and took no further action on the grievance.

Determination by the Union on the Merits of the Grievance

In its answer to the amended complaint, the Union Respondent alleged, as an affirmative defense, that "any and all action or inaction by it was based on a good faith investigation of the facts presented by any given situation". The responsibility for making such a determination has been disclaimed by Weiland, Osowski and Alexander, who participated in the investigation and processing of the grievance. Teague's testimony at page 224 of the transcript raises some doubts as to even that investigation. Grennier testified at page 86 of the transcript that Guthrie's discharge grievance was considered at a meeting of the Executive Board of the Union held following the Employer's answer at Step Three of the grievance procedure, at which time the "evidence" which resulted from

the Union's investigation was considered. On further cross-examination, however, it comes out that neither Weiland, Osowski nor Alexander attended that meeting and that none of them had made a recommendation on the grievance. No reports concerning the results of the investigation nor even any minutes of the Executive Board meeting are in evidence in this record. Thus, there is nothing which would give any indication whatever of the depth with which the matter was considered or the source of the information on which any determination would have been based. Grennier testified that he obtained some information from Weiland, but any role for Grennier as investigator clearly conflicts with the established fact that Grennier deliberately kept at a distance from Guthrie's case from its inception.

Notice of the Union's Determination

While the statutes and the case law may not impose such a requirement, the Union's witnesses here have established that this Union did in fact establish procedures under which the Union undertook the obligation to notify a grievant of the Union's disposition of the grievant's request for the processing of a grievance to arbitration. The record herein is glaringly free of any evidence of even any attempt by the Union to notify Guthrie of the alleged formal action of the Executive Board. As noted above, some communications difficulties had previously been experienced and it appears that Osowski and Alexander let the matter drop after being unable to reach Guthrie by telephone. However, that occurred while Osowski and Alexander were still attempting to investigate the case, and those witnesses made it distinctly clear that they were not attempting to communicate any decision of the Executive Board. Despite the continued difficulties in telephone communication, there is no evidence whatever of any attempt to notify Guthrie by mail that the Union was not going to proceed to arbitration on the grievance, nor is there any evidence of any attempt to convey a message to Guthrie through any of his friends in the Physical Plant Department.

Nature of Duty and Conclusion of Breach

No single statement adequately characterizes the duty of fair representation, and alternate statements of the duty abound in the decisions of the Commission and the courts. The duty of fair representation is most often recited, as in Vaca, Mahnke and numerous WERC cases, as follows:

> "A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the bargaining unit is arbitrary, discriminatory or in bad faith." 19/

19/ Vaca v. Sipes, 64 LRRM 2369 at 2376. However, the following alternate statements of the duty also appear within the Supreme Court decision in Vaca:

> ". . . we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion. . ." 64 LRRM 2369 at 2377. (Emphasis added).
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> "Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration." 64 LRRM 2369 at 2377. (Emphasis added).
>
> "[the plaintiff] must also have proved arbitrary or bad-faith conduct on the part of the Union in processing his grievance." 64 LRRM 2369 at 2378.
>
> "In administering the grievance and arbitration machinery . . . a union must, in good faith and in a non-arbitrary manner, make decisions as to the merits of particular grievances." 64 LRRM 2369 at 2378.
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> ". . . the Union might well have breached its duty had it ignored Owens' complaint or had it processed the grievance in a perfunctory manner." 64 LRRM 2369 at 2378.

If there is a trend to be found in the cases handed down since Vaca, it is in the direction of a greater emphasis on the affirmative obligations imposed upon the union. True, a union's negative attitudes towards an employe have led to a conclusion of a breach of the duty of fair representation, 20/ but the duty of fair representation is more than an absence of bad faith or hostile motivation. 21/ Picking up on the investigatory obligation imposed upon unions in Vaca, the Commission has stated that a union "must investigate and prosecute each grievance in a manner that is untainted by arbitrary, discriminatory or bad faith motives"; 22/ and the Supreme Court in Mahnke imposed on the union the affirmative obligation to "weigh the relevant factors" before making the determination required by Vaca. 23/ The Commission and the courts have also recognized an affirmative responsibility with regard to the allocation of benefits the Union has secured for the employes in a collective bargaining agreement. 24/ As the affirmative duties receive greater emphasis, the negative statements of the duty are given reduced importance, as in Ruzicka v. General Motors 90 LRRM 2497 (CA 6, 1975) where the Court reversed a decision of a District Court in which a finding of bad faith was considered to be a necessary ingredient to a finding of a violation of the duty of fair representation. The Ruzicka Court ruled that a union's total failure to act on a grievance, for reasons not related to the merits of the case, is behavior so egregious that, as in the case of bad faith, hostile discrimination, arbitrariness or prefunctoriness, the union should be held responsible. Since it entered the field in 1962, the National Labor Relations Board has stated the duty in terms of a right of employes to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment. 25/ Without attempting to formulate some new concise statement of the nature of the duty, it is the conclusion of the Examiner that the duty of fair representation has been breached by the Union Respondent in this case under several of the existing tests.

The Employer contends that Guthrie was, on the basis of his past offices in the Union, familiar with the procedures of the contract and that he, himself, was negligent in the processing of his grievance. The superficial appeal of that argument runs afoul of the well-established principle that a union is obligated to give equal representation to all bargaining unit employes without regard to union membership or affiliation. Is the former active unionist entitled to some lesser quantum of fair representation because of his former union activity and the knowledge and experience gleaned therefrom? The Examiner thinks not. Guthrie was standing here in the shoes of a rank and file member of the bargaining unit. After his discharge he had no reason to be on the University campus daily, or even regularly, and the processing of his grievance was left in the hands of the Union. Contrary to the suggestion that the former Chief Steward should have acted for himself, it is somewhat more predictable that the loyal unionist would place his faith in the Union which had represented him and which he had served in the past than that he would

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20/ Northwest General Hospital (10599-B, C; 10600-B, C) 2/73.

21/ Eagleknit, Inc. (13501-A, B) 8/75, citing Retana v. Local No. 14 79 LRRM 2272 (CA 9, 1972) and Griffin v. UAW 81 LRRM 2485 (CA 4, 1972).

22/ Badger Lumber Co. (12451-A, B) 5/74; C & J Transport Company (11558-A, B) 8/73; and Eagleknit, supra. (Emphasis added).

23/ Mahnke v. WERC 66 Wis 2d 524 at 534.

24/ Eagleknit, supra, citing Teamsters, Local 317 (Rhodes & Jamieson, Ltd.) 89 LRRM 1049 (1975) at 1051.

25/ Miranda Fuel Co. 51 LRRM 1584 (1962).

break with the Union and the benefits of representation by the Union in favor of independent action.

The question thus turns to whether the Union's action fell short of fair representation in the early stages of the grievance procedure. Again, the Examiner thinks not. The Union is open to some criticism for lapses into poor judgment in situations such as the detour of the discharge grievance through Steps One and Two of the grievance procedure, when an expedited procedure was available under paragraph 92 of the collective bargaining agreement; Weiland's attitude that Guthrie, rather than the Union's stewards, should have been the one to initiate the arrangements if the grievant was to face his accuser during a grievance hearing; and Weiland's failure to advise Guthrie of certain of his rights because he was presumed to have known them. However, these lapses do not form the basis for a conclusion here that there has been a breach of the duty of fair representation, because it is clear from the record that Weiland's superior within the Union, Osowski, was actively pursuing Guthrie's rights and that no prejudice to Guthrie's rights occurred prior to the completion of Step Three of the grievance procedure.

The breakdown in the Union's representation of Guthrie had its roots in Grennier's decision to absent himself from the processing of the grievance and Grennier's failure to substitute someone for himself who had the knowledge and authority to take up the reins of power and proceed with the case. However, that breakdown did not surface until after the completion of Step Three of the grievance procedure, when Osowski reached the limit of his jurisdiction and authority. Even assuming that Grennier had no discriminatory or bad faith motive when he made the referral of Guthrie to Alexander, and that he genuinely held the hope that two blacks could work together better than a black and a white, this does not fully explain or excuse the summary referral of Osowski to Alexander and the failure to properly invoke Alexander's jurisdiction in the case. The Union's internal procedures for grievance handling at the arbitration stage were thus thrown completely out of focus and it becomes clear that Guthrie's discharge grievance was handled by the Union Respondent in a manner different from other grievances because, at least in part, of Grennier's perception of overtones of racial discrimination in connection with the case. The Union's conduct of the case is tainted by invidious discrimination and arbitrary classifications, so as to place the Union in breach of its duty of fair representation.

Alexander's participation in the case does not overcome the effects of Grennier's absence or otherwise absolve the Union of responsibility for its conduct. With time running out on the 30-day period for appeal of the grievance to arbitration, Alexander came into the case fully aware that he was not authorized to invoke the arbitration procedure, that any role he might play in the case at that time would be on an ad hoc basis outside of the rights and requirements conferred by the collective bargaining agreement, and that any results from his involvement in the case would have to go back to the local Union. After his contact with Alexander, Guthrie was still in a situation of having the Union involved in the processing of his case but having nobody within the Union actually holding the reins of authority. The situation would perhaps be different if Alexander had gone farther and actually taken control of the case, but his own testimony indicates that he did not.

The evidence clearly does not sustain the Union's defense that its action or inaction was based on a good faith determination on the merits of the case. It appears that the Executive Board meeting at which the case was allegedly considered was actually called for some other purpose. It is clear that none of the Union officials who had participated in the processing of the discharge grievance made an appearance before the Executive Board or a recommendation on the case. There is no evidence whatever to indicate that Guthrie himself was notified of the meeting of

the Executive Board or of any obligation on his part to appear and support his request for further processing of his grievance. The Examiner thus concludes that the Union has not fulfilled its affirmative obligations in this regard, and that it has thereby breached its duty of fair representation.

Having assumed an affirmative obligation to give a grievant notice of the Union's disposition of a grievance, the Union is found to have acted in a negligent, arbitrary and perfunctory manner when it let the grievance die after the extra-contracutal investigatory meeting without any attempt to either invoke the arbitration process 26/ or to seek an extension of the deadline for doing so pending contact with Guthrie and fulfillment of its notice obligations. The Union's failure, in the alternative, to either preserve Guthrie's appeal rights or notify Guthrie of the Union's refusal to take the case to arbitration prejudiced any independent rights Guthrie could possibly have had, and, assuming, arguendo, that the conclusion were to have been reached above that Guthrie had an independent right to invoke and proceed with arbitration under the collective bargaining agreement, the conclusion would be reached here that his failure to do so is attributable to the Union's breach of its duty of fair representation. Grennier testified that he informed Guthrie of an independent right to arbitration. However, Grennier did not testify to having told Guthrie at any time that the Union would not take the case; nor did he advise Guthrie to file for arbitration independently to preserve his rights. Instead, Grennier referred Guthrie to Alexander and thereby gave rise to the appearance that the Union was continuing its involvement with the case. Despite his protestations that the matter was outside of his proper jurisdiction and authority, Alexander gave Guthrie indication that he would investigate Guthrie's grievance and thus furthered the appearance that the Union was continuing its prior involvement with the discharge grievance. When Guthrie failed to show up for the ad hoc meeting, it was concluded, without any direct communication with Guthrie to confirm or deny the inference, that the matter could be dropped. Guthrie did not actually receive notice of the Union's failure to appeal the case to arbitration until he happened to meet Morris on a street corner well after the time for him to exercise any independent right to arbitrate would have expired.

Based on the foregoing, the Examiner has found the Union in violation of Sections 111.84(2)(a) and (c) of the State Employment Labor Relations Act 27/ for breach of its duty of fair representation, and will assert the jurisdiction of the Wisconsin Employment Relations Commission to determine the merits of the discharge grievance. The procedural defenses asserted by the Employer are overcome by the Union's breach of its duty of fair representation.

26/ Nothing is found in the collective bargaining agreement or pointed out by the parties which would have barred the Union from later withdrawing the case from arbitration if Guthrie chose to accept the discharge or if the Union's completed investigation indicated that the grievance should not be pursued. On the contrary, the testimony of Alexander and the very existence of the ad hoc meeting held during the period for appeal of the grievance to arbitration indicate that the Union viewed the grievance procedure as an on-going process in which contacts were not confined to the formal steps and the possibility was held out that a settlement could be obtained outside of the formal procedure so long as the grievance was alive.

27/ See: Racine Policemen's Professional & Benevolent Corp. (12637) 4/74, aff. (12637-A) 5/74.

DISCHARGE IN VIOLATION OF COLLECTIVE BARGAINING AGREEMENT:

Existence of Cause Standard and Prima Facie Case

Samuel E. Guthrie, the Complainant herein, was hired by the State on May 20, 1968 and was an employe continuously up to the date of his discharge on July 14, 1972. He was initially assigned to the Physical Plant Department but was, at the time of his discharge, a Building Maintenance Helper 2 in the Employer's Department of Housing. Guthrie's employment was within the bargaining unit covered by the collective bargaining agreement between the State of Wisconsin, University of Wisconsin - Milwaukee, and the Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, and its affiliated Local 82. Said collective bargaining agreement contains a standard of "just cause" for discharge. 28/

Guthrie was discharged from his employment by a letter dated July 14, 1972, wherein references are made to Guthrie's past record, certain alleged altercations between Guthrie and his "supervisor" on "July 11" (sic) and "12" (sic), 1972 and Guthrie's absence from work on July "11", "12" and "13", 1972. Guthrie has alleged and offered evidence to show that his past record was affected by anti-union animus of certain agents of the Employer. Guthrie testified, and adduced documentary evidence and other testimony to corroborate, that he was on a scheduled vacation during the period of absence in question. In view of the Commission's decision in Stolper Industries (12626-A, B) 10/75 concerning the nature of the "just cause" standard and the obligations which flow from the existence of such a standard in a collective bargaining agreement, the Examiner deems the foregoing facts sufficient to constitute a prima facie case by the Complainant. The burden of proof is thus shifted to the Employer to establish that it had just cause to issue the discharge letter dated July 14, 1972.

Stated Reasons for Discharge

The collective bargaining agreement also contains the following provisions pertinent hereto:

"ARTICLE IX
APPLICATION AND INTERPRETATION
OF WORK RULES

86 Section 1. For purposes of this Article, work rules are defined as and limited to:

> Rules promulgated by the Employer within his discretion which regulate the personal conduct of employes during the hours of their employment.

87 Section 2. The Union recognizes the right of the Employer to establish reasonable work rules pursuant to Sec. 111.90(2), Wis. Stats. Copies of newly established work rules or amendments to existing work rules will be furnished the Union at least seven (7) days prior to the effective date of the rules.

88 Section 3. The Employer agrees that established work rules shall not conflict with any provisions of this Agreement.

89 Section 4. Work rules are to be interpreted and applied uniformly to employes under like circumstances. The reasonableness of work rules, which includes both the application

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28/ Article III, paragraph 27, item 5. The existence of a just cause standard for discharge is alleged in paragraph 5 of the Amended Complaint filed on January 4, 1973 and admitted in the Answer filed by the State on January 23, 1973.

and interpretation, may be challenged through the grievance procedure contained in this Agreement. It is agreed that the review of actions taken against an employe for the violation of a work rule is an inseparable part of the application and interpretation of established work rules and is not intended nor does it constitute bargaining with respect to discipline as contained in Sec. 111.91(2), Wis. Stats.

90 In considering grievances under this Article which involve an action taken against an employe by the Employer as a result of the application or interpretation of work rules, the arbitrator shall only have authority to dismiss the grievance or to uphold it in its entirety. If the arbitrator finds the action to be insufficient or excessive, he may remand the grievance with his recommendation to the Employer for reconsideration.

91 Section 5. In the event an action referred to in Sec. 16.24 (1)(a) Wis. Stats., is taken against an employe for violations other than work rule violations or for violations in addition to work rule violations, only the appeal procedure as set forth in Sec. 16.24(1)(a) Wis. Stats., may be utilized.

92 In the event an action referred to in Sec. 16.24(1)(a), Wis. Stats., is taken against an employe solely for violation of work rules, the employe may select either the appeal procedure as set forth in Sec. 16.24(1)(a), Wis. Stats., or the grievance procedure contained in this Agreement, commencing with Step Three. In these cases, the Employer shall notify the employe and the Union in writing of the work rule(s) violated, the action taken, and the choice of appeal procedures available to him. It is expressly understood that an employe must choose either the grievance procedure or the Sec. 16.24(1)(a) appeal procedure. However, an employe shall not be required to make his final selection of appeal routes until ten (10) days after the receipt of the grievance answer in Step Three."

The reasons for the discharge were set forth in the July 14, 1972 letter in the following terms:

"The specific instances are within the period of July 11 through 14, 1972 as follows:

1. On July 11, 1972 your supervisor, Nathanial Teague, indicated that you reported to the Department of Housing, not to work, but to begin your vacation on that night. Mr. Teague indicated that it was a departmental requirement that a signed vacation request form must be completed and approved at least one week in advance. At that point, you became loud and abusive and thereafter could not be found in your work area at any time during the night of July 11, 1972. We consider this type of action to be highly insubordinate on the part of any employee.

2. On the evening of July 12, 1972, Mr. Teague indicated that you reported to the Department of Housing but with no intentions of working. During the ensuing discussion with Mr. Teague you became very upset and began to complain that you would not want to comply with the procedures as they were outlined by your supervisor with respect to both vacation requests and job assignments. Immediately following this outburst, you walked off the job, which is again, the most insubordinate action that you could possibly have taken.

3. On July 13, 1972 you were scheduled to begin your shift at 10:30 p.m.. You did not report for work, nor did you contact the Department of Housing to alert us to any impending absences. You have been previously informed of the proper procedures for reporting absences."

The Employer's work rules are not in evidence in this proceeding, nor is there any evidence of their date or method of promulgation. However, the allegations of insubordination and absence without leave are not met with any contention that those very basic principles of the employment relationship were absent from this situation, and they are presumed to have existed.

There are numerous references in this record to a claim that Guthrie left his car parked illegally in a loading dock area on the University campus on July 11, 1972, July 12, 1972 or both of those dates. The Employer did not choose to make any reference in its discharge letter to a charge of illegal parking, and any consideration of such a charge now as cause for discharge would be in conflict with the portion of paragraph 92 of the collective bargaining agreement which requires the Employer to give the Union and the employe written notice of the rule(s) violated. Accordingly, charges stemming from the illegal parking and any similar charges not specifically set forth in the July 14, 1972 discharge letter are excluded from consideration in determining whether the discharge violated the collective bargaining agreement.

Previous Employment Record

As noted by the Employer in its reply brief, the complaint in this matter lists a "rehash" of grievances, all of which were settled. The Complainant went forward first with the presentation of evidence, and some evidence was adduced concerning some of the previous grievances. The Employer did not attempt to respond during the hearing with any substantial volume of evidence concerning the previous incidents, although it did bring out that Guthrie had once been suspended for five days for sleeping on the job. It is clear from its reply brief that the Employer relies only on the fact that Guthrie was suspended for 12 days in May, 1972 for misconduct, and that the Employer considers all of the other references irrelevant and immaterial.

According to the Complainant, looking to the result of the May, 1972 incident alone is insufficient to form a proper conclusion as to that incident. The Examiner agrees. The evidence establishes that, sometime during 1971, a meeting of Physical Plant Department employes was called during which George Sturm, a supervisory agent of the Employer, announced a rule requiring that the employes remain in their assigned work areas at all times. During the conversation which ensued, Guthrie, acting in his capacity as a representative of the Union, disagreed with Sturm and took the position that the employes had the right to leave their work areas during their break times to get hot food. Guthrie testified in this proceeding that Sturm then addressed the following comments to him: "Sam, it looks as though you're running the University." and "I'll get you no matter what." The comment was overheard, and was confirmed by other testimony. On May 3, 1972, Guthrie became involved in a disagreement with a supervisor concerning assignment of certain work. Some other employes either never went to their work stations or left their work stations to observe the discussion between Guthrie and the supervisor. Although correspondence written at that time alleges that a management investigation disclosed that Guthrie had led a "work stoppage" on that occasion, none of the evidence which would support such a claim was included in this record and Guthrie, when asked if he called upon other employes to leave their jobs, specifically denied having done so. There is no evidence that the others refused a management order to go to their work areas. Sturm became involved in this incident, and Guthrie was

discharged for his alleged leadership in a work stoppage. That Sturm's animus displayed in connection with the previous disagreement between them was not an isolated incident is established by the fact that he repeated his threat to another Union steward, Morris, during May, 1972, in a statement to the effect that he intended to get even with Sam Guthrie if it was the last thing he did. Sturm did not testify in this proceeding and the statements attributed to him by Guthrie, Taylor and Morris are nowhere contradicted in this record. Guthrie filed a grievance concerning the discharge, and a withdrawal of that discharge was obtained. Guthrie was given a 12-day suspension without pay, a warning letter containing the following statement:

> "Finally, it is expected that any future disagreements which Mr. Guthrie may have with the actions of supervisors are to be protested through the orderly procedures of the contractually provided grievance mechanism. Future disregard for this procedure or any insubordinate act on his part will result in his immediate discharge",

and a "voluntary" transfer from the Physical Plant Department to the Housing Department of the Employer. As for Guthrie, the effect of Sturm's threats against him are revealed in his testimony on direct examination at pages 188 and 189 of the transcript, as follows:

> "Q Did you deny that you engaged in a work stoppage?
>
> A Definitely.
>
> Q Why did you accept the twelve day reprimand and the transfer to Housing?
>
> A I was being harassed so much and they were--the way they were operating with the men, the way they were doing things with the men, I decided it would be better for me to give it up and let somebody else have it.
>
> Q So then you agreed to go into Housing?
>
> A I agreed to go because I had been told to do so and so and I had been told they were going to get me; and I was there to work, I wasn't really there to play; I accepted it."

There is no evidence which contradicts Guthrie's view of his own situation. Morris' testimony was given in connection with inquiry about a meeting held between certain Union and management officials in connection with the "work stoppage", and that confirms that the threats made by Sturm were a subject of concern and an ingredient in any resolution reached on that matter.

As previously noted, this case is before the Commission and its Examiner in the nature of a violation of contract claim rather than a statutory interference or discrimination claim. The concepts of just cause and reasonableness have developed in connection with collective bargaining agreements through the eyes of various arbitrators and other tribunals, and a fixed definition nowhere exists which has universal acceptance. In determining the issue at hand, the Examiner is fully cognizant of the fact that the Commission is intolerant of anti-union discrimination regardless of level or degree, and that an employe may not be discriminated against when any of the motivating factors for the employer's action is the employe's concerted activity, no matter how

many other valid reasons exist for such action. 29/ It would be terribly inconsistent for the undersigned Examiner to apply some different or lesser standard in determining just cause or reasonability under a contractual theory. Perceptions of situations by different individuals may differ, and one man's reasonable and legitimate orders may be another man's threats or harassment, but this record contains nothing which would contradict or soften the effect of the evidence of Sturm's announced animus and avowed intentions against Guthrie. That animus is directly related to Guthrie's activity as a representative of and advocate on behalf of the Union. 30/ The Examiner finds that the suspension and warning issued to Guthrie in the Employer's letter of May 26, 1972 are tainted by anti-union animus on the part of one of the management agents directly involved in that incident. The incident was well within the period of limitations provided in Section 111.07(14), Wisconsin Statutes, and the Examiner concludes that the incident should not be given weight as a basis for the subsequent discharge action which is litigated here.

Altercations with the Lead Worker - Insubordination

On the evening of Monday, July 10, 1972, Guthrie appeared on the Employer's premises shortly prior to the scheduled starting time for the third shift crew. He then had a conversation with Nathanial Teague, who is described in the discharge letter as being Guthrie's "supervisor". During their conversation, Guthrie informed Teague that he was going on vacation and Teague advised Guthrie that a vacation request should have been filed a week in advance. Guthrie responded with the claim that he had scheduled his vacation while in the Physical Plant Department and Teague indicated that he would obtain the proper form from his supervisor and have it available for Guthrie the following evening. Teague summarized the incident at the time in the following note which he left for the supervisor, Miller, who works on the day shift:

"7-11-72 [sic]

Mr. Miller,

Sam Guthrie came in tonite [sic] but not to work He didn't punch in, He wanted me to sign him out on vacation right here tonite, [sic] I explained to him that he must fill out a vaction [sic] card and that it should be turned in at least a week in advance and that I didn't have one and would get one in the morning from you. He said he had filled out forms over at the other place he worked, but would be back here tonite [sic] to fill card and leave. He left but left his car in the middle of the receiving drive way I noticed it about 4: A.M. when the morning papers came Thinking he might have returned looking for me I checked around Didn't see him Nobody had, The Milk man complained he barely could back pass [sic] it Bob Weiland came it was still there, He came in and picked it up about 6:30 AM

Nate"

Teague gave some testimony concerning the parked car which is confused or contradictory as to details, but his testimony concerning his conversation with Guthrie on that night squares with his memorandum and with Guthrie's recollection of the events. Guthrie left the building after his conversation with Teague and did not work on that night. Teague asserted that he did not approve Guthrie's vacation and that he did not

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29/ City of Wisconsin Dells (11646) 3/73.

30/ See: City of Oshkosh (8381-D) 10/68.

give Guthrie permission to leave, but acknowledged that he told Guthrie to return the following evening to obtain and fill out a vacation form. At least three questions arise with respect to these events and in relation to the first paragraph of "specifics" set forth in the July 14, 1972 discharge letter: (1) What was Guthrie doing on campus in the first place if he was scheduled to be on vacation? (2) Is Teague a supervisor? and (3) In what manner was Guthrie "loud and abusive"?

The instant case has been before the Examiner for approximately three years and, during much of that time, the strangest circumstance and most difficult anomaly about the Complainant's story has been his presence on the University of Wisconsin - Milwaukee campus at 10:00 or 10:30 p.m. on July 10, 1972. The fact that he was on campus seems on its face to be the very antithesis of Guthrie's claim that he was on a previously scheduled vacation. The explanation is to be found in the fact that Guthrie and at least two other employes of the State who had worked with Guthrie in the Physical Plant Department rode to work in a car pool in which Guthrie was the driver. Guthrie, who had another full-time job and who appears to have had an ill wife at the time, did not leave town during the week he claims to have been on a scheduled vacation. The evidence establishes that Guthrie carried on as the driver for the car pool at least on Monday and Tuesday of the week in question. One of the riders, Taylor, testified that Guthrie mentioned that his vacation was coming up and that he was going in to check on it. This both answers the question of why Guthrie was on campus and explains why he stopped in to see Teague rather than merely returning home after dropping off his riders.

Nathanial C. (Nate) Teague held the classification of Building Maintenance Helper 3 at the time of Guthrie's discharge. This is not one of the classifications listed within the recognition clause of the collective bargaining agreement, but the evidence and positions of the parties lead to the conclusion that the classification was added to the collective bargaining unit at some time prior to the events under scrutiny here. Although it is clear that Teague was not a "supervisor" within the meaning of the statute, the record reveals that the parties use the term somewhat more loosely. Thus, although Teague is not now and was not then a supervisor, the discharge letter refers to him as such. Teague was, in fact, a lead worker who had responsibility with respect to the night shift crew in the Housing Department. There appears to have been no supervisor (in a statutory sense) on duty on the night shift. The clarity of Teague's instructions becomes a factor later in determining whether there was provocation for any insubordinate action by Guthrie against his fellow member of the bargaining unit. What is clear here is that the State's claim of insubordination is undermined by the lack of authority of the offended individual.

The evidence establishes that there was no loud or abusive conduct on Guthrie's part on the evening of Monday, July 10, 1972. Teague wrote a memorandum to his supervisor at or about the end of the shift, at 7:00 a.m. 31/ It does not contain any indication of an acrimonious exchange. Teague's testimony in this proceeding also omits any report of loud or abusive conduct on Guthrie's part on the first of the two nights when

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31/ Teague's memoranda are either typical of or the source of some confusion as to dates which pervades this record. July 10, 1972 fell on a Monday, and Guthrie's third shift crew was scheduled to start work at 10:30 p.m. on a shift which carried over onto July 11. Teague's memorandum was written after events reported therein which occurred at 6:30 a.m. on the morning of the 11th. Guthrie returned on the next evening, which was actually the 11th as well, but those events are reported in the subsequent memorandum dated July 12, 1972.

Guthrie came in about his vacation. Two potential witnesses to that exchange who are still in State employment, Baumann and Grant, were not called by the Employer, and even the Employer's recitation of facts in its brief to the Examiner omits any reference to a loud or abusive exchange on the first of the two nights. Thus, the "loud and abusive" charge as to "July 11, 1972" (sic) in the July 14, 1972 discharge letter is found to be entirely without basis in fact.

On the evening of Tuesday, July 11, 1972, Guthrie again appeared on the Employer's premises at or about the scheduled starting time for the third shift crew. It is clear that, apart from any responsibilities as driver for his car pool, Guthrie was there at that time pursuant to Teague's instructions of the previous evening. As developed here, the facts are that Teague had not made personal contact with his supervisor during the intervening 24 hours, but had left the note set forth above. There is no indication that the day shift personnel of the Employer took any action to verify or make any other response to Guthrie's claim that he had made his vacation arrangements "at the other place he worked", nor does Teague indicate that he was given any supervisory direction as to whether Guthrie's vacation request for the week of July 10, 1972 was or would be approved or disapproved. On the contrary, on the record made here, it would appear that the only response made by the management was to leave for Teague a vacation request card for Guthrie's use. Guthrie attempted with Teague's help, to fill out the vacation card. The form was different from any used in the Physical Plant Department, and Guthrie did not fill it out correctly, although he did affix his signature to it. Guthrie asked Teague to sign the card on behalf of the Employer, but Teague refused to do so. Guthrie testified during the first day of the hearing herein that Teague told him that his card was sufficient before he left the premises to go on vacation, but that testimony conflicts with Teague's account and Teague's contemporaneous memorandum to the supervisor, as follows:

"7-12-72

Mr. Miller,

Sam Guthrie came in tonite [sic] raging and bellowing all over the place as usual, He didn't come to work so he didn't punch in He only wanted to sign his vacation card so I tried to show him how to fill it out, He couldn't see why he had to do all this but he finally goofed it up as you can see. Then as I was trying to show him that he had it wrong he went into another outburst snaching [sic] the card from my hand busting his key ring keys flew all over the place! Rushed out to the timeclock punched the card said that's all he needed to do - (see other side of card) and walked out -
Here are some of his keys he missed scooping up

Nate"

As to this particular issue it is concluded that Guthrie, angered at Teague's refusal to sign the vacation card, became, in Teague's words, "pretty worked up", that he threw down a key chain he had been carrying in his hand, that he collected most but not all of the scattered keys, and that he "punched out" the vacation card before leaving the campus. Teague asserted that he did not give Guthrie permission to leave, but Teague's "run around" instructions provided some provocation for the alleged insubordination.

As already noted, Guthrie's presence on the campus on the first of these two nights was something of an anomaly. However, Guthrie was present on the campus on the second night because of Teague's express

instructions, and is not subject to criticism for being where he was not supposed to be on the second night. Teague distinctly conveyed the attitude of one who was not about to stick his neck out in either direction, and his "orders" thus acquire a touch of ambivalence. Teague may not have told Guthrie that his vacation was approved, but he didn't tell Guthrie that it was disapproved either. Teague acted, it turns out, exclusively in the capacity of a postman carrying the vacation request card back and forth between Guthrie and the day shift supervisor. Guthrie obviously expected more, and was perhaps somewhat understandably upset when caught up in the shuffle. In considering this case, the Examiner has several times reverted back to the lingering question of what the situation would have been if Guthrie had never stopped in to see Teague. This points out that the case at hand turns on the existence or non-existence of a previously scheduled vacation, and that any verbal altercation between Guthrie and Teague under these circumstances pales in comparison to the gravity of an alleged absence from work without leave for three or more consecutive days.

Alleged Absence Without Leave

The 1971 Wisconsin Statutes provided, at Section 16.30, for the grant of annual leave of absence without loss of pay (vacation) to employes in the classified service of the State at the rate of 80 hours each year during the first five years of service. The collective bargaining agreement contained the following provisions pertaining to vacation scheduling:

"ARTICLE V

SENIORITY

. . .

52 Section 3. The President, Vice-President, Secretary, and Treasurer of Local 82, and all grievance representatives representing the Union under the provisions of Article IV, Section 7 who are members of the bargaining unit shall be granted superseniority status on an employing unit basis for the purposes of vacation scheduling and transfers under the provisions of this Agreement. Superseniority is defined as the highest ranking on the applicable seniority lists. The Union shall determine and notify the Employer of the order of seniority for said officers and stewards and report any changes of officers or stewards within fourteen (14) days of the effective date of the change.

. . .

ARTICLE VII

SCHEDUING OF VACATIONS AND

OTHER TIME OFF

64 Section 1. Each employe in seniority order within each work unit shall be given an opportunity to choose the vacation periods desired in accordance with the following system:

65 A. The Employer shall determine the number of employes within each classification and work unit that may be on vacation at any given time, except that no less than the same number of employes shall be allowed off on vacation at any given time during the term of this Agreement than were allowed off at any given time during 1968. In accordance with the foregoing, vacation may be scheduled any time during the year. Where changes in circumstances

justify, the number of employes allowed to be on vacation may be changed.

66 B. Prior to March 1 of the vacation year, employes in work unit seniority order may choose at least two weeks of their vacation.

67 C. Prior to April 1 and after all employes have chosen their first amount of vacation, employes in work unit seniority order may choose any remaining vacation.

68 D. If an employe fails to specify his preference of vacation when given the opportunity to do so prior to April 1, or if he wishes to change his designated preference after April 1, he may not use the seniority factor to upset vacation periods previously scheduled by other employes. Also, employes who transfer shall carry their vacation selection to their new work unit, but no other employe's vacation selection shall be adversely affected by this provision.

69 E. Vacation may also be taken in January or February, with seniority the determining factor in the event conflicts arise."

It is thus evident that there is some contractual basis, in paragraph 68 for Guthrie's oft repeated claim that he was not obligated to make new vacation arrangements in the Housing Department, and that his vacation pick in the Physical Plant Department was supposed to follow him in his transfer to the Housing Department. Paragraph 68 would be rendered inoperative if Guthrie's vacation selection were in conflict with previously established vacation arrangements in the Housing Department, but there is no evidence whatever to indicate that any other employe's vacation selection would have been adversely affected by permitting Guthrie's previous arrangements to follow him in his transfer. The focu of attention is turned to the question of how and when, if at all, a vacation was scheduled for Guthrie for the week of July 10, 1972. Guthr discharge can easily be sustained here if the evidence establishes that such vacation was arranged and that Guthrie was absent without leave during the week in question. On the other hand, if Guthrie had schedule a vacation for the week in question and the information became lost or erroneously recorded through the actions of somebody acting for or on behalf of the management, then Guthrie is not chargeable for an absence without leave and there is no just cause for his discharge.

The resolution of conflicts between three separate articles of documentary evidence in this record must be made. Guthrie's claim that he was on vacation during the week in question is supported by Exhibit 1, a handwritten list containing the names and vacation selections of 12 employes, including Guthrie, who were employed in the Physical Plant Department. That list contains the statement: "Sam Guthrie - July 10th 1 wk". That exhibit is controverted by Exhibit 8

Hiegert, contains the following statement: "Guthrie Samuel 5/20/68 Dec (72)." The reference to "5/20/68" is explained in Hiegert's testimony as being Guthrie's seniority date.

As with the situation prevailing in the Housing Department, the record here indicates that an absence of definitive management actions and orders is attributable to the absence of management personnel in certain crucial situations. Both the Employer and the Union take the position here that Andy Morris had no authority to grant Guthrie a July, 1972 vacation, but the evidence establishes that this is not the case. Hiegert was permanently reclassified in the supervisory position of Building Maintenance Helper 4 as of sometime in July, 1972, long after the occurrences being scrutinized here. Prior to that time Hiegert was classified as a Building Maintenance Helper 3, the same lead worker classification held by Andy Morris and Nate Teague, but was the "acting supervisor" in the particular segment of the Physical Plant Department which is involved here. Morris was one of two or three lead workers working under Hiegert. The term "supervisor" was ambiguous in its usage in this situation, with the term being applied by both management personnel and rank and file employes to individuals who were not supervisors in a statutory sense. The situation is further confused by the simultaneous status of Morris as a lead worker and a Union steward, and this tends to give rise to a suggestion that Morris was acting in his capacity as a Union steward when he made the rounds to ascertain vacation preferences, so that his provision of information to Hiegert was a gratuitous and unsolicited exercise. The evidence, however, does not support such an inference. First, as to the dual status of Morris, it is noted that Guthrie was then the Chief Steward and that Morris did not become the Chief Steward until later, when Guthrie was transferred to the Housing Department. If Morris had been acting within the Union hierarchy, his actions would have been taken as a subordinate to Guthrie in that hierarchy. However, from all indications, Guthrie was merely a rank and file employe being asked about his vacation preferences, and he took no other role in the preparation, copying or forwarding of the information assembled by Morris. Second, all of the BMH 3 lead workers followed the same practice, while there is no evidence whatever that the other unnamed lead workers also coincidently held offices as Union stewards. Finally, it is clear from his own testimony that Hiegert authorized and directed Andy Morris and the other lead workers to help him out by making the rounds among the rank and file employes in the Physical Plant Department to gather their vacation selections for 1972. The Examiner thus concludes that both Hiegert and Morris were acting for and on behalf of the Employer in this matter, and that the Employer must stand responsible for any errors which they committed.

What about the conflicting documents? Every witness who testified on the point, including Morris and Hiegert, was in agreement that Morris went around during the Winter of 1971-1972 and gathered the vacation picks of the employes. Guthrie testified, and there is no evidence to contradict, that Morris gave Guthrie a Xerox copy of the completed list. Guthrie preserved that document and eventually had admitted in evidence in this proceeding as Exhibit 1. Morris identified the document containing a July vacation choice for Guthrie as the correct list and identified Exhibit 8 as being mistaken with respect to Sam Guthrie's vacation selection. Morris also testified that he prepared a copy of the vacation list for Union stewards Weiland and Osowski during the processing of Guthrie's discharge grievance, and it is possible that Exhibit 8 was that list. Hiegert testified that he used Exhibit 8 as the basis for the preparation of Exhibit 9. In attempting to resolve this riddle, the Examiner has started with the various conclusions that various witnesses and parties would suggest and has worked backwards through the chains of events which would reach such conclusions, with the following results:

1. Proposed Conclusion: Exhibit 1 is a forgery. Premises: Guthrie would have told Morris that he wanted his vacation in December; Morris would have correctly transmitted that information to Hiegert; Hiegert would have correctly recorded that information in his records; Guthrie would have absented himself from work on July 10, 1972 after telling Teague that his vacation was previously scheduled for that week in the Physical Plant Department, while knowing full well that the records would prove his claim to be false; Guthrie would have procured Morris to prepare what is now Exhibit 1 as a forgery of the original while knowing that (at best) such a document would merely create a conflict of documentary evidence; and Morris and Guthrie would both have taken the witness stand in this proceeding and perjured themselves in their identification of Exhibit 1 as the correct vacation selection sheet. This possibility is rejected by the Examiner as being both implausible and unsupported by the evidence. Whether the previous warning was legitimate or not, Guthrie knew as of July 10, 1972 that he was under the disciplinary guns of the Employer and that any further misconduct could lead to discharge. Even inferring from the testimony of Henry Reynolds and Ed Taylor that Guthrie had decided on the spur of the moment to go on vacation (an inference which the Examiner does not accept), would any man so situated place his employment at risk by making such an easily disproved claim of rights? It is too strained an interpretation of the facts to believe that Guthrie would dig his own grave by fabricating a story which could easily be discredited, and that Morris, who was close to retirement and has since retired, would jeopardize his position to engage in such a clear falsification of evidence and perjury. Morris' testimony has not been impeached, nor even contradicted to a sufficient extent, so as to warrant a finding of perjurous testimony.

2. Proposed Conclusion: Exhibits 8 and 9 are forgeries. Premises: Guthrie would have told Morris that he wanted one week of his vacation in July; Morris would have correctly transmitted that information to Hiegert and given a copy of the sheet (Exhibit 1) to Guthrie; Guthrie would have properly taken his vacation beginning July 10, 1972; Employer investigation flowing from Guthrie's encounters with Teague would have revealed Guthrie's entitlement to be on vacation; Employer agents would procure both Morris and Hiegert to produce false and conflicting vacation selection lists and testify perjurously in support of those documents. This possibility is rejected as being totally unsupported by the evidence. Again, the evidence does not support such a conclusion about Morris and, though not fully credited by the Examiner, Hiegert's testimony cannot be turned to such a conclusion.

3. Proposed Conclusion: Exhibit 9 is in error. Premises: Guthrie would have told Morris that he wanted one week of his vacation in July; Morris would have made a Xerox copy of his list (Exhibit 1) and returned a copy to Guthrie; Morris would have correctly transmitted Guthrie's July choice to Hiegert; Hiegert would have made an error while transcribing the list generated by Morris into the rank and seniority order of the list maintained by Hiegert; Guthrie would have properly taken his vacation beginning July 10, 1972 in compliance with the list given him by Morris; Exhibit 8 may be the subsequent copy prepared by Morris, which would perpetuate Hiegert's error if transcribed from Hiegert's list. This could easily have occurred, particularly in view of the human error factor inherent in a transcription of information into an entirely different order with additional information. Another possibility not addressed by any of the parties arises out of the fact that, under the statutes which set the level of benefits at that time, Guthrie was entitled to two weeks of vacation in 1972 and neither of the lists purport to schedule him for more than one of those weeks. Omitted from this scenario is Hiegert's claim that he verified Guthrie's vacation selection as being a single unspecified week in December while personally making the rounds among the employes sometime prior to April 1, 1972 and giving the employes copies of individual forms submitted to the "office". Of all of the witnesses who testified concerning the procedure for vacation selection

in 1972, only Hiegert testified that he also made the rounds, with all of the other witnesses testifying that they only gave their vacation choices to Andy Morris on the one and only occasion when Morris made the rounds for that purpose. Most of the other testimony given was during the first day of hearing herein, approximately one year after the events testified to. Hiegert was observed by the Examiner to be tense and insistent during his testimony, and was unwavering in his testimony as to crucial facts three years after their occurrence, to such an extent that documents were identified after only cursory examination and no contradiction pointed out by counsel as against earlier testimony caused the slightest hesitation for thought prior to a denial. Ultimately, Hiegert retreated to a position of claiming no recall of Exhibit 1 rather than an outright denial of having seen it. Neither Exhibit 1 nor Exhibit 8 is traced to Hiegert's records, nor did he produce the source document on which he relied in the preparation of Exhibit 9. It is distinctly possible that Hiegert's error led to an unjustified discharge in 1972 and will lead here to a substantial remedy liability on the Employer, so that Hiegert, who continues to be a lower echelon supervisory employe of the Employer, can hardly be regarded as being detached from an interest in the instant case. Finally, and in addition to the Examiner's assessments based on the demeanor of the witness, the testimony of Hiegert is discredited because alleged corroborating documents were neither produced in evidence nor was their absence accounted for. None of the other witnesses makes any mention of individual vacation slips being used in the Physical Plant Department in 1972, and the individual slip used in the Housing Department was pointed out as being different from anything used in Physical Plant. The failure to produce any of the vacation forms allegedly prepared by Hiegert for 1972 only leaves room for doubt as to whether such documents ever existed or would have supported Hiegert's testimony.

4. Proposed Conclusion: Exhibit 8 is in error. Premises: Guthrie would have told Morris that he wanted one week of his vacation in July; Morris would have returned a copy of his list (Exhibit 1) to Guthrie; Morris would have erroneously recorded Guthrie's vacation selection as being an unspecified week in December while transcribing a copy (Exhibit 8) for Hiegert and adding more specific dates; Hiegert would have perpetuated the error while transcribing the information collected by Morris to his listings maintained in rank and seniority order (Exhibit 9); and Guthrie would have properly taken his vacation beginning July 10, 1972 in compliance with the list given him by Morris. This could have occurred.

5. Proposed Conclusion: Exhibit 1 is in error. Premises: Guthrie would have told Morris that he wanted one week of his vacation during an unspecified week in December; Morris would have correctly transmitted that information to Hiegert (Exhibit 8) but erroneously transcribed a specific date in July on another copy less detailed than Exhibit 8 which was Xeroxed and returned to Guthrie (Exhibit 1); Guthrie, with Exhibit 1 in hand, would have to have forgotten that he had scheduled his vacation for December and gone on vacation in July in reliance on the sheet given him by Morris. This scenario could have happened, but is deemed to be somewhat less likely than those described in paragraphs three and four above, particularly in view of the anomaly of moving from a detailed list as to dates in almost all cases to more vague "week" dates in some of those cases and at the same time moving from a vague reference in Guthrie's case to a specific date. Further, Exhibit 1 contains an entry for Ed Taylor and a specification of his vacation choice in exactly the same words and abbreviations as are found in Exhibit 9, while Exhibit 8 contains Taylor's name but no entry as to his vacation selection, which presents the additional anomaly of the supposedly erroneous document being more correct in one respect than the supposedly accurate document from which it is claimed to be erroneously copied.

The evidence does not support any conclusion that any of the three conflicting vacation schedule documents is a forgery. There is no

evidence that the week in question was closed to employes for vacation purposes because of some legitimate exercise of management rights. Under both the statute which governed the grant of vacations at that time and the collective bargaining agreement under which this case is decided, employe preferences as to vacation dates were to be given consideration. Under the collective bargaining agreement, Guthrie, as the Chief Steward of the Union in that unit, unquestionably had the highest vacation selection priority. The seniority system provided in the agreement and Guthrie's superseniority made any management approval of his vacation selection a pro forma matter in the absence of a conflict with a management closure order of a type not present here. The Examiner concludes that an error has occurred within the management's procedures for the gathering and recording of vacation selection information. Guthrie is found to have been on vacation during the week of July 10, 1972 in compliance with the vacation schedule given him while he was employed in the Physical Plant Department.

Conclusion as to Just Cause

The burden of proof on the question of just cause for the discharge falls upon the Employer. The Complainant's story in this case may seem to have some holes in it, but it is established by Stolper, supra, that it is not to the sufficiency of the employe's story which one looks to ascertain whether there was just cause for a discharge. The Employer's story, too, has serious and unexplained omissions, and the evidence does not persuade the Examiner that there was just cause for the infliction of what is sometimes referred to as the "capital punishment" with regard to an employment relationship. The Employer has not sustained its burden of proof by a clear and satisfactory preponderance of the evidence. Any insubordination and self-help inherent in the encounter between Guthrie and Teague on the night of July 11, 1972 is mitigated by Teague's actual and displayed lack of authority, the lack of clarity in Teague's orders, and the fact that Guthrie was right in the first place about his right to be on vacation during that week, so that the incident is found to be insufficient to warrant that a discharge be sustained.

REMEDY:

The Commission and its Examiner act here in substitution for the arbitration forum created by the parties to the collective bargaining agreement, and some attention to the parties' instructions to the arbitrator is warranted. The Examiner notes that paragraph 90 of the agreement, which is set forth in the discussion of the discharge above, contains an explicit admonition that the arbitrator confine himself to an all or nothing result: "The arbitrator shall only have authority to dismiss the grievance or to uphold it in its entirety". The alternative of a remand to the Employer with recommendations is permissive, but not mandatory. As a discharge cannot be sustained in this case, compliance with the expressed desires of the parties requires that the grievance protesting that discharge be sustained in its entirety. In view of the substantial period of time which has elapsed, any reasonable minor discipline for self-help would be so inconsequential in relation to the period of the discharge as to indicate that any possibility of a remand

out, Vaca, supra, addressed this issue and established that a union which is found guilty of a breach of fair representation should not be held liable for damages resulting from the discharge itself. It was the Employer who unjustly discharged Guthrie. The Employer took its discharge action before the Union ever engaged in any wrongdoing, and the Union did not solicit or enlarge the action of the Employer. Indeed, as to the accumulation of liability with the passage of time, it was the Employer, acting in opposition to the wishes of the Union, which delayed the case by taking appeals to the Circuit and Supreme Courts, both of which were denied. The reinstatement and make-whole order is thus addressed exclusively to the Employer.

In his complaint, amended complaint and brief, the Complainant has requested that the Commission order that the Respondents pay his reasonable attorneys fees incurred in the prosecution of this case. It is to be noted at the outset that such an order would be a departure from the policies followed by the Commission heretofore. As recently as November 4, 1975, the Commission has re-affirmed its policy of not requiring any party to a complaint proceeding to pay fees and costs incurred by another party to that proceeding, except where the parties have agreed in advance that such a remedy is appropriate. 32/ Has there been such an agreement here, or, in the alternative, are there precedents which suggest or require that a different policy should be applied in the narrow circumstances of the instant case and cases of a similar nature?

In Vaca vs. Sipes 64 LRRM 2369 at 2379, the Supreme Court excused unions found to be in breach of the duty of fair representation from liability for the employer's violation of the collective bargaining agreement, but did not altogether excuse a union finding itself in such a situation from all financial liability. Instead, the Supreme Court mandated that a remedy should be fashioned and that: "The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each." The court in Ruzicka vs. General Motors, 90 LRRM 2497 spoke in terms of fashioning a remedy compensating the unfairly represented employe from the union's pocket for those expenses he incurred because of the Union's failure to process his grievance properly. Just as it is clear that the discharge by the Employer has caused Guthrie to incur a loss of wages which can be remedied by a make-whole order directed against the Employer, it is evident that Guthrie has incurred legal fees and costs in the prosecution of this case which he would not have incurred (and which the Union would have incurred out of its treasury) if the Union had not breached its duty of fair representation. Guthrie can be made whole as to the effects of the Union's violation by an order requiring the Union to pay Guthrie's reasonable legal fees and costs. Accord for such a remedy is to be found in Teamsters Local 396 (United Parcel Service) 90 LRRM 1227 (August, 1975), where the National Labor Relations Board ordered a union which had unlawfully refused to process a grievance filed by members against their employer to provide an attorney of the grievants' choice to represent the grievants in a grievance arbitration proceeding on that grievance and to pay reasonable legal fees resulting from that proceeding. On the surface a distinction would seem to be available between that case and the instant case, since the merits were yet to be decided there. However, where, as here, the Union has joined with the Complainant in seeking a full hearing on the merits of the grievance before the determination is made on the fair representation issue, it would be burdensome and redundant to decline a ruling on the merits of the grievance or remand the merits of the case to an arbitrator in a separate proceeding. The Examiner deems it to be more significant that such a remedy was ordered prior to determina-

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32/ White Lake Jt. School Dist. (12623-B) 11/74, affirming an Examiner decision (12623-A) 9/75 which cites Rice Lake Jt. School Dist. (12756-A, B) 12/74.

tion of the merits, thus destroying any inference that the fair representation complainant must be successful against both the union and the employer before any remedy is available against the union. Finally, a substantial argument can be made that the membership relationship between Guthrie and the Union Respondent here gives rise at least to an implied, if not expressed, agreement on the part of the Union that it will fairly represent its member in grievances and matters affecting his wages, hours and conditions of employment and will absorb the expenses of such representation out of its treasury.

The Examiner thus deems the circumstances of a fair representation case sufficiently unique to warrant the issuance of the accompanying Order that the Union remedy its violation of the Complainant's rights by making the Complainant whole for the reasonable attorneys fees and costs incurred in the prosecution of this case.

Dated at Madison, Wisconsin this 23rd day of December, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner