STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SAM GUTHRIE, Complainant, v. 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-F

ORDER REVISING EXAMINER'S FINDINGS OF FACT, AMENDING EXAMINER'S CONCLUSIONS OF LAW, AND AMENDING EXAMINER'S REMEDIAL ORDER

Examiner Marvin L. Schurke on December 23, 1975, having issued Findings of Fact, Conclusions of Law, Orders, and a Memorandum accompanying the same in the above-entitled matter; and the above-named respondents having timely petitioned for review thereof pursuant to sec. 111.07(5), Stats.; and the commission having reviewed the examiner's said decision, the entire record, and being fully advised in the premises, now makes and files its Revised Findings of Fact, Amended Conclusions of Law and Amended Order, together with its accompanying Memorandum.

REVISED 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 held office as a chief steward he held office as a steward of the same union; and that complainant was either a steward or chief steward at the time of his discharge.

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; 1/ that, at all times pertinent hereto, Lawrence Grennier was

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

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; 2/ 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 in his capacity as a representative of the respondent union took issue with certain orders issued by Ed Wolta, a supervisory employe of respondent employer; that those orders concerned an assignment of work to members of the bargaining unit; that Sturm became involved and other workers joined the discussions; and that complainant was discharged but on May 26, 1972, the discharge was changed to a twelve-day suspension and complainant was transferred to the housing department.

7. That, during December 1971 and the months of January, February and March, 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

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

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 complainant told Morris he wanted to take his vacation sometime in December 1972; that Morris at that time wrote "Sometime In Dec Dates?" on a sheet of paper which contained the vacation preferences of other employes, and gave said sheet of paper to Hiegert who transferred the information thereon to another record showing "Dec (72)" as complainant's vacation choice.

8. 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 requested Teague to authorize complainant's vacation, but Teague refused to do so; that complainant then became angry and left the premises of the respondent employer; that on July 10 and 11, 1972, complainant knowingly absented himself from work, without permission, to take a vacation; that on July 14, 1972, respondent employer discharged complainant; and that said discharge was for just cause.

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; 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 engaged in minimal participation in the processing of complainant's discharge grievance, and that the reasons for such departure were that he believed complainant thought the case had racial overtones which better could be handled by another black, Hattush Alexander, with whom complainant worked well, and that Grennier believed the case adequately could be handled by the chief steward and steward in the housing department; 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 continued again to process 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 21, 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 an appeal of 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 its executive board; 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, inferring the existence of racial overtones with respect to the complainant's discharge, instructed the complainant to contact Alexander; that Grennier gave such instructions on the basis of the fact that both the complainant and Alexander are blacks, and a belief that the complainant and Alexander would be able to work better together than could the complainant and Grennier, who is white; that Osowski asked Grennier about 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 authorize 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 not required by 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, Osowski nor Alexander made any recommendation to the executive board of the respondent union in respect to the further processing of the complainant's discharge grievance, although Grennier spoke to Osowski and Weiland about the grievance prior to a meeting of the executive board, but neither Weiland, Osowski nor Alexander attended any meeting of the executive board which discussed complainant's discharge grievance or his request that it proceed to arbitration; that the respondent union failed to make a considered decision on complainant's

request that his grievance be appealed to arbitration; that the respondent union took no action to notify the complainant of any action of the executive board relative to complainant's request that his discharge grievance be appealed to arbitration; that the respondent union took no action to appeal the discharge grievance of the complainant to arbitration during the time period for such an appeal; and that after the limitations period for a timely appeal to arbitration had passed complainant learned of the respondent union's inaction on his request that his grievance be appealed to arbitration.

13. That respondent union's failure to make a considered decision regarding complainant's request that his discharge grievance be appealed to arbitration was arbitrary and constituted a lack of fair representation.

Based upon the above and foregoing Revised Findings of Fact, the commission makes and files its

AMENDED CONCLUSIONS OF LAW

1. That the respondent union, Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, has breached its duty of fair representation by arbitrary conduct which consists in the failure to make a considered decision on the request of complainant Sam Guthrie that his discharge grievance be appealed to arbitration and thereby has violated sec. 111.84(2)(a), Stats.

2. That the commission has jurisdiction over the allegations in the complaint that the respondent employer, by discharging complainant on July 14, 1972, violated the collective bargaining agreement and therefore violated sec. 111.84(1)(e), Stats.

3. That since the respondent employer, University of Wisconsin-Milwaukee had just cause to discharge complainant on July 14, 1972, within the meaning of the collective bargaining agreement, the respondent employer, by said discharge, did not violate said agreement or sec. 111.84(1)(e), Stats.

Based upon the above and foregoing Revised Findings of Fact and Amended Conclusions of Law the commission makes and files its

AMENDED REMEDIAL ORDER

1. Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, its officers and agents, shall immediately cease and desist from failing to make a considered decision on requests that grievances be taken to arbitration.

2. Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, its officers and agents, shall immediately pay complainant's reasonable attorney's fees in the amount of One Thousand Dollars ($1,000.00) and shall deliver said amount to Attorney Thomas M. Jacobson, Milwaukee, Wisconsin.

3. Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, its officers and agents, shall, within twenty days of the date of this order, advise the commission in writing as to what steps it has taken to comply with said order.

4. The complaint, except insofar as it alleges that the respondent union has violated its duty of fair representation, is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 16th day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Charles D. Hoornstra
Charles D. Hoornstra, Commissioner

UNIVERSITY OF WISCONSIN-MILWAUKEE, HOUSING DEPARTMENT, XLI, Decision No. 11457-F

MEMORANDUM ACCOMPANYING ORDER REVISING EXAMINER'S FINDINGS OF FACT, AMENDING EXAMINER'S CONCLUSIONS OF LAW, AND AMENDING EXAMINER'S REMEDIAL ORDER

On December 23, 1975, the examiner made and filed his Findings of Fact, Conclusions of Law, Orders and Memorandum accompanying the same. Essentially he found and concluded that the respondent union breached its duty of fair representation in processing complainant's grievance in an arbitrary, discriminatory and perfunctory manner. He also concluded that, as a result of the union's breach of its duty, the commission enjoyed jurisdiction to adjudicate the merits of the complaint in respect to whether the employer's discharge of the complainant on July 14, 1972, violated the collective bargaining agreement's requirement that discharges be for just cause. He further concluded that the discharge was not for just cause and, therefore, that it violated sec. 111.84(1)(e), Stats. The examiner's order required the employer to make complainant whole for his wage losses and to reinstate him. He also ordered certain other relief, including reasonable attorney's fees to be paid by the union.

Both the union and the employer timely petitioned the commission to review the examiner's decision and filed supporting briefs. Complainant rested on his briefs to the examiner, but submitted a letter of clarification on January 25, 1977. The commission has entered its Revised Findings of Fact, Amended Conclusions of Law, Amended Remedial Order and this Memorandum accompanying the same. Essentially the commission has concluded that the union did breach its duty of fair representation by failing to make a considered decision of the complainant's request that his grievance proceed to arbitration. While the commission agrees with the examiner that it enjoys jurisdiction over the just cause question, it has concluded, contrary to the examiner, that there was just cause for the discharge. The commission modifies the remedial order in respect to attorney's fees; orders the union to cease and desist from failing to make a considered decision on whether to honor a request that a grievance be appealed to arbitration, and dismisses the complaint in all other respects. The specific arguments of the parties and the reasoning of the examiner are treated throughout this Memorandum.

DISCUSSION OF THE EXAMINER'S FINDINGS OF FACT AND THE COMMISSION'S REVISED FINDINGS OF FACT.

A. Finding #1.

The examiner found that complainant Sam Guthrie was chief steward for about a year preceding May 30, 1972. The employer assigns error, contending Guthrie was chief steward at the time of his discharge on July 14, 1972.

Guthrie testified that he was chief steward in July of 1972 (4). 3/ Later in the hearing, the examiner questioned Guthrie as to whether he continued to be a steward or a chief steward after he transferred to the housing department in May 1972, and Guthrie replied, "I did." (153)

3/ Numbers in parenthesis refer to transcript pagination.

At the second hearing, however, which was held more than two years after the first hearing, 4/ dialogue between the examiner and Guthrie went as follows (187):

> "Q Then, according to Exhibit 10 here, in May of 1972 you were transferred over to the Housing department. Now were you still a chief steward or a steward while you were over at Housing, or did you shed that responsibility when you made the transfer?
>
> "A I did, I shed that responsibility."

Two matters hang on this issue: (1) if Guthrie was a steward in July of 1972, he would have superseniority rights to a vacation pick, see contract, ex. 3, pp. 19-20, par. 52; and (2) conceivably the level of his role in union officialdom would give him knowledge of his rights relative to arbitration, thereby arguably reducing his dependence on the union for help in that regard.

We conclude that Guthrie was either a steward or chief steward at the time of his discharge. Ordinarily we would not reverse an examiner in deciding which of two directly conflicting versions to accept. Here, however, Guthrie testified that he suffered a memory loss due to epilepsy intervening between the first and second hearings (166), thereby lending greater reliability to his answers in the first hearing where he twice testified that he continued his stewardship after the transfer to housing.

Rather than delete from the findings that Guthrie was chief steward for about a year preceding May 30, 1972, however, we add:

> "that complainant was either a steward or chief steward at the time of his discharge"

since the examiner's finding in this respect is substantially correct and his error is merely one of omission.

B. Finding #2.

The examiner found:

> "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."

This means that under the applicable union rules, Council 24's field representative, Hattush Alexander, could not become involved in the processing of Guthrie's grievance until and unless the president of Local 82, Lawrence Grennier, requested such involvement. The employer assigns error, saying such a request is necessary only as to the third step of the grievance procedure.

We affirm the examiner. The employer cites an isolated passage where Alexander testified that his job was "to handle the Third Step of the grievance if I am requested by the Local's President . . . ."

4/ The cause for this time lapse was the employer's court actions on a procedural point. See State v. WERC (1974), 65 Wis. 2d 624, 223 N.W. 2d 543.

(100) That passage, however, does not limit the areas where a request is required. Other portions of the record support the examiner. Thus, Alexander testified that he conducted an investigation after the third step at the request of Grennier (92); that he told Guthrie that "it wasn't my judgment" whether the case went to arbitration (95); that, with respect to arranging the ad hoc meeting with Cottrell after the third step, "They called me in on the thing" (97); that his job is to recommend arbitration to the Council, not to handle arbitrations (99); that Cottrell did not have to grant the ad hoc meeting because "that was purely out of my jurisdiction" (101); and that at the material times he no longer was affiliated with Local 82 but that he "came back" at the request of Jerry Osowski, a steward of the local (109). Thus, the challenged finding enjoys substantial record support.

C. Finding #3.

The examiner found that George Sturm was an agent of the employer with authority to act on its behalf in respect to employe relations. The employer, on the other hand, asserts that the complaint identifies Sturm only as assistant director of physical plant.

We affirm the examiner. What the record shows, of course, is more important than what the complaint alleges. Andy Morris, a steward, testified that George Sturm, "one of the top men of Management," said he would get even with Guthrie if it was the last thing he did. (65) Later, Morris testified that Sturm "instructed" him to attend a certain meeting which dealt with whether Guthrie had led a work stoppage and had struck another supervisor. (70) Guthrie identified Sturm as one of the superintendents who called a meeting of workers relative to employes staying in their work areas and, after Guthrie had asserted what he thought were the employes' rights in the matter, stated, "Sam . . . it looks as though you're running the university, or something . . . I'll get you no matter what." (170-171) See also the testimony of Ed Taylor, a co-worker which is in substantial accord (194), and Henry Reynolds, another co-worker, who said of Sturm "I think he was a supervisor or top man anyway out there." (203)

Thus, the record provides ample support for the examiner's finding that George Sturm was an agent of the employer with authority to act on its behalf in labor relations matters.

D. Finding #4.

The examiner treated Local 82 as the respondent union. The employer asserts that the examiner confused Local 82 and Council 24 and that the agreement is between the employer and Council 24.

The collective bargaining agreement, however, states that it is between the employer and

> ". . . the Wisconsin State Employees Association, Council 24, AFSCME, AFL-CIO, and its appropriate affiliated Local 82 . . . ."

The examiner identified the union in Finding #2 as

> ". . . Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO . . . ."

The complaint names Local 82 and Council 48 as respondents. The notice of appearance states counsel appeared for Local 82 and Council 24 as respondents. The amended complaint treats the local and the council as a single respondent, as does the answer thereto.

At the first hearing, counsel stated: "Council 24 and Local 82" appeared (2).

Although the record is far from clear whether the local and the council appeared as separate entities, and although the commission has no doubt that each is suable here as a labor organization, the examiner's treatment of Local 82 as the respondent union invites no confusion on the issues herein. Further, the examiner's focus on the local is appropriate under the facts of this case. Given the ambiguity, the absence of confusion or misunderstanding, the propriety of the examiner's focus and the fatuity of a resolution, we decline to reverse the examiner.

E. Finding #5.

The examiner found that stewards and chief stewards had responsibility for the resolution of problems through the third step of the grievance procedure only, and that sometime during or about 1971 George Sturm told Guthrie, who was acting as a union representative, that he would get him no matter what.

1. The employer argues that "steward" and "chief steward" are union labels only, that the labor agreement speaks of grievance representatives, and that the agreement does not limit union grievance representatives to stewards or chief stewards to the first three steps of the grievance procedure.

The examiner recognized the employer's point that stewards and chief stewards are grievance representatives under the collective bargaining agreement. See his Memorandum, pp. 14-15. We agree with the employer that the jurisdictional restraints on stewards and chief stewards originate within the union and not from the collective bargaining agreement. Nevertheless, the examiner committeed no error. The union-imposed jurisdictional restraints go to the question whether the union breached its duty by abandoning Guthrie's grievance after the third step in the hands of those laboring under those restraints, and the examiner properly made a finding that those restraints exist. Since the employer must defend its discharge only if the union-imposed restraints under all the facts and circumstances establish that the union breached its duty of fair representation, the employer's assertion that the restraints are union-imposed is irrelevant.

2. The employer argues that nothing in the record shows that Guthrie was acting as a union representative during the Sturm incident.

We affirm the examiner. There is record evidence that Guthrie was acting as a steward, and therefore as a union representative, in the meeting with Sturm which included Sturm's threat to get even with Guthrie (171, 201).

3. The employer contends that Morris' information that Sturm threatened to get even with Guthrie was hearsay.

To the contrary, Morris testified as follows (70):

> ". . . Mr. Sturm told me that he was -- he intended to get even with Sam Guthrie, if it was the last thing he did."

F. Finding #6.

The examiner found that on May 3, 1972, Guthrie, as a union representative, took issue with certain orders made by an employer's

agent, that Sturm then became involved, that Guthrie was discharged, that Sturm told Andy Morris that he intended to get even with Guthrie, that Guthrie then was reinstated and transferred to the housing department, and that the employer's actions in discharging, reinstating and transferring were based, at least in part, upon anti-union animus.

1. The employer argues that the May 3, 1972, incident involved a supervisor named Ed Wolta, that Sturm did not at that time threaten to get even with Guthrie, and that the examiner has confused the fall 1971 incident involving Sturm and the May 3, 1972, incident involving Wolta.

We agree with the employer. Exhibit 10 is the report of Allen Cottrell, the employer's employment relations manager. It summarizes Cottrell's investigation of the May 3, 1972, incident, and concludes that Guthrie should be transferred from physical plant to housing. This exhibit also establishes that the incident involved Wolta and Sturm and the question whether Guthrie's conduct led to a work stoppage. Wolta's involvement also is supported by the testimony of Guthrie and other employes that the issue in dispute was whether Guthrie had led a work stoppage at about the time he inquired of Wolta about the assignment of cleaning up rubbish. See Tr. 169-171, 193, 201-202.

The testimony is in hopeless conflict as to the dates and details. Guthrie tied together the Sturm threat, the Wolta confrontation, the dispute as to the use of break time to obtain food and his transfer to housing, and he placed the date in 1971 (169-171, 188). Andy Morris placed the Wolta-work stoppage and Sturm-threat incidents in the fall of 1971, which he said was followed by a meeting in George Berry's office, and he testified that this event did not precipitate Guthrie's transfer to housing. (65, 70) In fact, Morris was on vacation the first week of May, 1972 (67; exs. 1, 8, 9); therefore, the examiner's finding that it was in May that Sturm told Morris he was going to get even with Guthrie clearly is error. Grennier said the May, 1972, incident arose over an alleged work stoppage and involved a meeting with Morris in Berry's office (80), an impossibility because of Morris' absence. Co-worker Ed Taylor tied the Wolta-work stoppage incident, the Sturm threat, the Berry meeting and the transfer of Guthrie to housing together, and, in the second hearing, placed them in April or May, 1972 (193-195, 197), although in the first hearing he placed the Berry meeting subsequent to his own July, 1972, vacation (61). Co-worker James Taylor in the first hearing placed the Berry event in September, 1972, and said that Morris was present (46). Co-worker Henry Reynolds placed the Berry meeting in September, 1972, and said Morris was present (53-55).

The Berry meeting could not have occurred in September, 1972, since Guthrie had been discharged the previous July. It is probable that these witnesses meant to refer to September, 1971. 5/ This coincides with Morris' placement of the Berry meeting in the fall of 1971 and also fits Guthrie's date, although it conflicts with Grennier's.

One of the reasons for the confusion is that there appear to have been two alleged work stoppages involving Wolta and Sturm. As to the 1971 event involving the employes' claim through Guthrie of a right to leave their work area during break time to get food, Morris said

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5/ The possibility of a one year error is accountable in part by the fact that the first hearing was held January 30, 1973, shortly after the start of a new year.

the underlying issue was whether Guthrie had struck Wolta and the subsequent "curiosity of the men" which Berry characterized as a work stoppage (70). Exhibit 10, Cottrell's report, clearly places an alleged work stoppage on May 3, 1972. The Sturm threat, however, appears confined to the fall of 1971, especially since Guthrie testified that in 1971 Sturm made his threat after Guthrie had said the employes could leave their work area to get food (171), Morris was on vacation on May 3, 1972, and testified that about September, 1971, Sturm told him he was going to get even with Guthrie (70).

Distilling all this contradictory testimony, the most reasonable construction is that in the fall of 1971 Guthrie engaged in an argument with Wolta and Sturm relative to whether employes could leave their work areas to get food, that in his excitement Guthrie had physical contact with Wolta, which the latter took to be deliberate, that Sturm threatened Guthrie to get even with him, that a number of workers showed interest in the event, and that in a later meeting Berry characterized the incident as involving a work stoppage. We also conclude that on May 3, 1972, Guthrie complained to Wolta that rubbish work was not properly assignable to the bargaining unit, that a number of workers joined Guthrie in his conversation with Wolta, that Sturm was involved but made no threat, that the employer's representatives disciplined Guthrie for the stated reasons that he had led a work stoppage and was insubordinate in his discussions, and that on May 26, 1972, the discharge was changed to a twelve-day suspension and Guthrie was transferred from physical plant to housing. The examiner substantially agreed except that he also found a Sturm threat relative to the May 3, 1972, incident. See his Memorandum, pp. 27-28.

2. The employer argues that there is no evidence supporting the examiner's findings that the suspension and transfer in May 1972 were motivated in part on anti-union animus.

We reverse the examiner. He based his conclusion on: (a) the putative Sturm statement to Morris in May 1972 that he intended to get even with Guthrie if it was the last thing he did; (b) Sturm's involvement and his previous threat in the fall of 1971 to get even with Guthrie, showing that his 1972 statement to Morris was not an isolated incident; (c) the absence of record evidence that Guthrie did lead a work stoppage or that the employes refused an order to return to work; and (d) Guthrie's decision to accept the suspension and transfer because he perceived that he was being harassed by management: "I had been told they were going to get me." (188)

The examiner's first reason fails because Sturm did not tell Morris in May 1972 that he intended to get even with him; that remark was made in 1971. The examiner's second reason fails for the same reason. Further, although Sturm's 1971 statement may evince animus, the record does not show that he was sufficiently involved in the May 1972 discipline or that he had any animus at that time. For example, the record does not establish who recommended the discipline in the first instance, or whether Sturm supported or opposed the recommendation. Further, the record does not support a finding that Sturm's 1971 animus was any more than a passing pique, or the extent to which Sturm at that time correctly understood Guthrie's reported conduct.

The examiner's third reason was that there was no evidence that Guthrie led a work stoppage or that workers refused to return to work. This consideration would have much force if there were other evidence of animus. Absent that evidence, it is an insufficient basis for finding animus. Similarly, the examiner's fourth reason - Guthrie's professed perception of hostility as explaining why he accepted the discipline - itself is insufficient to establish animus and, absent other evidence of the same, has no corroborative value thereof.

Accordingly, we reverse the examiner's finding that the May 1972 discipline was tainted with anti-union animus.

3. In conclusion, it is necessary to amend the examiner's Finding of Fact #6 because of his errors with respect to the Sturm statement to Morris and anti-union animus.

G. Finding #7.

The examiner found that in December, 1971, and in January, February and March, 1972, Carl Hiegert was the employer's acting supervisor in the physical plant; that under Hiegert's direction Andy Morris asked the employes their vacation preferences; that Guthrie selected one week beginning July 10, 1972; that Morris wrote this information down and gave it to Hiegert; and that either Morris or Hiegert made an error in recording the information so that Guthrie's selection on Hiegert's records was recorded for an unspecified week in December 1972.

1. The employer contends that Hiegert was a supervisor, not merely an acting supervisor.

Hiegert, however, testified that he was "acting supervisor" until he was "made permanent" in July 1972 (230). The employer's point is that Hiegert meant to say he was on probation until he received permanent in class status in July, and that the examiner incorrectly inferred that Hiegert was saying that he was filling in for another supervisor at the material times.

The employer may be right that Hiegert was in error, but we are confined to the record and our attention has not been drawn to any public records of which we might take official notice to depart from the record testimony. Further, the employer's point is irrelevant to the issues in this case. We affirm the examiner.

2. The employer argues that the examiner erroneously found that Guthrie in late 1971 or early 1972 scheduled his vacation for one week beginning July 10, 1972.

a. Summary of the evidence.

The collective bargaining agreement (ex. 3) provides that employes can choose the time for vacation on a seniority basis, and that employes are to make their choice by March 1. See ex. 3, pp. 22-23. 6/

Hiegert, a supervisor, testified that after receiving the employes' expressed preferences from Andy Morris, a steward, he completed three copies of a form, of which ex. 13 is an example. He took this form to the employes for their signatures, gave a copy to the employe, kept a second copy, and sent the third copy to the office (231, 233, 234, 237). An employe was to make his request at least two weeks in advance, and the request was to have been made by April 1 (234). Morris testified that he prepares a list of employes' choices and a supervisor reviews them to determine that the seniority principle has been followed (68).

6/ Paragraph 64 of the contract says the choice shall be made within work units. Physical plant and housing are different work units. See paragraph 48. We construe this to mean that Guthrie's relative seniority rank did not transfer from one unit to another, although his right to assert seniority rights relative to timing continued in force.

Ed Taylor and Henry Reynolds testified that they believed Morris' decision was final and that they had no contact with Hiegert (51-52, 58, 271-274).

Guthrie testified that in the winter of 1971, or the early part of 1972, he told Morris his vacation choice was for one week beginning July 10, that Morris wrote said choice on a sheet of paper and gave him a copy, and that exhibit 1 is that copy (10 - 12). Morris testified that in late 1971 or early 1972 Guthrie asked for the week of July 10 and that he wrote it down on ex. 1 (63-64), which exhibit states: "Sam Guthrie - July 10th 1 wk." Exhibit 8 also is a list of vacation dates; it lists Guthrie's as sometime in December.

Morris wrote both exhibits. He said he wrote ex. 1 sometime in late 1971 or early 1972 (63-64). Exhibit 8 was written after Guthrie had transferred from physical plant to housing (69), which was May 29 (159; see ex. 10), and was written, Morris said,

> ". . . to give to Mr. Weiland [chief steward] and the Steward so they could make a comparison of the vacation dates during the time of the grievance procedure." (69)

Although he wrote it, Morris said the reference on ex. 8 to December as Guthrie's vacation pick "must be an error. I must have made an error myself." (69)

> "It had to be an error because of writing so fast and making the list out to present to Mr. Weiland and Mr. Osowski, who were handling his case -- grievance case at the time. They compared notes and they were all identical. I don't know how I made the error." (72)

There is another schedule, ex. 9, 7/ which places Guthrie's vacation pick in December. Hiegert wrote this one, and said he copied it from ex. 8 which he received from Morris before April 1; in fact, he said he did not recall seeing ex. 1 (230-232, 235). Further, Hiegert said he consulted Guthrie like all the other employes and that Guthrie was vague and indefinite about his pick, placing it probably in December (231, 233).

b. The examiner's reasoning.

In concluding that Guthrie did schedule the week beginning July 10, the examiner did an exhaustive analysis of the exhibits and the testimony. See his Memorandum, pp. 34-37. Without repeating each step in his reasoning, we note the highlights.

1. The examiner rejected the possibility that ex. 1 is a forgery, emphasizing the unlikelihood that Guthrie, having been warned in May that future misconduct could result in discharge, and aware of conflicting employer records, knowingly would claim July 10 on the spur of the moment and then purjure himself in the hearing below; or that Morris, who was about to retire, would jeopardize his financial interests by falsifying evidence and perjuring himself.

7/ Exhibit 9 was not offered in the first hearing. It was offered in the second hearing, but the examiner did not expressly rule on the offer (237). The parties appear to have proceeded as though it was received; the examiner discussed it at great length in his memorandum; no objection has been raised before the commission as to the propriety of considering exhibit 9; it has been well identified in the testimony; and, therefore, the commission treats it as received.

2. He rejected as unsupported by the evidence the possibility that exhibits 8 and 9 resulted from an employer instigated forgery conspiracy with Morris and Hiegert as participants.

3. The examiner postulated a third hypothesis which he concluded easily could have occurred. He supposed that Guthrie did ask Morris for the week beginning July 10, that Morris correctly recorded it on exhibit 1 and correctly reported it to Hiegert who made an error on exhibit 9, and that Morris repeated that error when he subsequently wrote exhibit 8. This the examiner found consistent with the evidence and noted that Hiegert's testimony was not to be credited because of his demeanor and answers and because his testimony that he personally made the rounds among the employes prior to April 1, 1972, was contradicted by all employes who testified on the point.

4. Another possibility the examiner found plausible was that Guthrie asked Morris for July, Morris correctly wrote it on exhibit 1, then incorrectly inserted December on exhibit 8, and that Hiegert perpetuated the error in preparing exhibit 9 from exhibit 8.

5. The examiner rejected as unlikely, but not impossible, the inference that Guthrie told Morris he would vacation sometime in December and that Morris erroneously recorded on exhibit 1 a specific date in July, but correctly recorded it on exhibit 8, which he then gave to Hiegert for copying on to exhibit 9. This inference was unsatisfactory to the examiner because: (1) two other hypotheses, described above, were more probable; (2) it would be an anomaly to move from the detailed list of dates in almost all cases on exhibit 8 to the more vague "week" dates in some of those cases on exhibit 1 and, at the same time, to move from a vague reference in Guthrie's case on exhibit 8 to a specific date on exhibit 1; and (3) the identical specificity on exhibits 1 and 9 in the case of Ed Taylor and the blank after his name on exhibit 8, creating the anomaly that the supposed erroneous document, exhibit 1, was more correct in one respect than the supposed correct document, exhibit 8, since the latter was supposed to have been copied from the former.

The examiner then concluded that either the third or fourth hypothesis was correct, i.e., that either Hiegert or Morris made a mistake in recording information.

c. The employer's version.

The employer thinks the more reasonable hypothesis is that exhibit 8 preceded exhibit 1 in time; that exhibit 1, not exhibit 8, was written by Morris to give to the stewards while the grievance was being processed; that it was at that time Morris gave Guthrie a copy; that Morris inserted the week of July 10 on exhibit 1 because Guthrie said that was the correct date; and that Morris was unaware that exhibit 8, which he in fact prepared in the spring of 1972, had been retained.

The employer believes this version of the facts is more reasonable and notes that Morris was flabbergasted on seeing exhibit 8, as evidenced by the following (68):

"Q Can you tell me when you prepared it?

"A Well, it was -- it might be right after -- well, it was previous to my vacation and it was in the early part of the -- there was a copy of vacations from this original here -- I don't remember exactly when he decided to change, if he had changed it at all.

"Q Whom are you referring to when you say 'he'?

"A I am referring to Mr. Guthrie. I do not remember exactly when he decided on his date, but this was the original date that he gave me here.". (Emphasis added.)

Finally, the employer contends a close examination of the exhibits supports its version, since exhibit 8 has question marks, blanks, and dates written over more general terms, exhibit 9 is almost identical and includes a specific date for Ed Taylor, which is blank on exhibit 8, and that exhibit 1 has no check marks, has smooth writing and lists vacation picks in more general terms such as "first two weeks in July" for Ed Taylor.

d. Discussion of the employer's version.

We agree with the employer that exhibit 9 was prepared from exhibit 8 because each of them is nearly identical as to dates and each is far more specific as to dates as compared to exhibit 1. Further, the presence of check marks on exhibit 8 and their absence on exhibit 1 supports this conclusion. Moreover, exhibit 8 has no date for Ed Taylor; as to the latter exhibit 1 indicates "1st wk in July," and exhibit 9 says the same as exhibit 1, showing that exhibit 8 preceded exhibits 1 and 9 in time. 8/ We believe with the employer, then, that exhibit 1 was prepared during the processing of the grievance, that exhibit 8 was prepared probably in late 1971 or early 1972, and that exhibit 9 was prepared from exhibit 8, except for Ed Taylor. This one exception itself is insufficient to overcome the otherwise clear pattern.

In arriving at this conclusion we discredit Morris' testimony that Guthrie told him in late 1971 or early 1972 he wanted his vacation to begin July 10 and that he (Morris) wrote it down on exhibit 1 and gave it to Hiegert to copy (63-65). Only exhibit 8, not exhibit 1, could have provided Hiegert with the specific dates recorded for other employes on exhibit 9. In discrediting Morris, in addition to relying on the exhibits, we rely on the above quoted answer to the question as to when he prepared exhibit 8. First, he placed it prior to his own vacation, which was the first week in May (see exs. 1, 8 and 9) and three months prior to the grievance process. Second, he said he did not remember "exactly when he [Guthrie] decided to change,

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8/ Complainant, in his first brief to the examiner, p. 18, n. 6, argues that the corresponding dates for Ed Taylor on exhibits 1 and 9 supports the integrity of exhibit 1 as the document showing complainant's vacation pick. That argument has some merit because Taylor's dates on exhibits 1 and 9 are identical. However, greater significance is attached to the fact that exhibit 9, like exhibit 8, is more specific on vacation dates, the Taylor date on exhibit 8 being the only exception, and that exhibit 1 is general only, thereby highlighting the unlikelihood that exhibit 1 was the source for exhibit 9.

Complainant also argues that the presence on exhibit 9 of the names Braasch, Hamill and Atkins, and their absence from exhibit 8, diminishes the integrity of exhibit 8 as the document showing Guthrie's vacation pick. Complainant, however, overlooks the fact, which is obvious on the face of the exhibits, that exhibit 9 was a composite from other vacation pick lists and contains numerous names not contained on exhibit 8 or exhibit 1. (Besides, Atkins' name appears on exhibit 8.)

if he had changed it at all," but that Guthrie did indicate the date on exhibit 8 - December. This vacillation is inconsistent with confidence that Guthrie specified July. We also consider Morris' explanation as to how Guthrie's vacation pick on exhibit 8, which Morris wrote, was designated in December: that he must have made an error because of writing so fast (72). That error is extremely unlikely if, as Morris claimed, exhibit 8 was prepared in connection with the very grievance concerning Guthrie's entitlement to a July 10 vacation. Finally, we note that Morris appears to have had a special affinity for Guthrie. Both Guthrie and Morris were suspended for a night on some unidentified occasion (67). He described Guthrie as a good union man who would fight with much vigor (72). Further, while all other union representatives testified that they did not know of Guthrie's desire that his grievance proceed to arbitration, Morris testified that he knew of Guthrie's intention (66), as the examiner elsewhere put it (Memorandum, pp. 19), "[b]reaking with the solidarity of other Union witnesses," although the record otherwise is barren of any evidence that Morris had talked to Guthrie about his grievance and going to arbitration.

Thus, in light of the nature of the exhibits and the foregoing considerations of Morris' testimony, we believe that Guthrie in late 1971 or early 1972 told Morris his vacation pick was December, that Morris recorded this request on exhibit 8, gave it to Hiegert, and that Hiegert copied exhibit 9 from exhibit 8.

e. Discussion of the examiner's rejection of the first hypothesis.

Essentially the employer urges and we accept what the examiner identified as the first of five hypotheses. He rejected it as imputting forgery and perjury to Morris, Morris would not likely engage in such misconduct because of his approaching retirement, Guthrie would not be so foolhardy as to procure a false document, exhibit 1, knowing that it easily could be disproved by other employer records, nor would he take a vacation on the spur of the moment in view of his recent discipline and admonition that discharge would follow further misconduct.

Whatever the source and weight to the examiner's belief that Morris was approaching retirement, 9/ we do not impute forgery or perjury to him. The preparation of a vacation schedule, exhibit 1, for use in the grievance proceedings was good case preparation. It is consistent with our analysis of the exhibits and other testimony to believe that Guthrie persuaded Morris earnestly to believe, or simply to take Guthrie's word for it, that he had asked for July. There is no reason to suppose that Morris in fact had a specific memory in July, August or September, whenever exhibit 1 was prepared, of what Guthrie, who was only one of twelve names on exhibit 1, had said three to nine months earlier. In fact, Morris was fuzzy on dates. At first, he said he prepared exhibit 1 in late 1972, then changed it to 1971 when it was observed the exhibit must have preceded Guthrie's July 1972 discharge (63). In addition, by his own testimony on first reading, exhibit 8, Morris said that, although he wrote it, he could

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9/ Nothing in the record supports the examiner's conclusion that Morris was approaching retirement or that he had any retirement benefits that might be sacrificed by misconduct. Perhaps the examiner presumed Morris' pending retirement from his physical appearance. The basis of the examiner's assumption that Morris had been a state employe long enough to have some vested retirement benefits and that they might be jeopardized by his testimony is not known.

not remember inserting "sometime in December" after Guthrie's name, and concluded that he must have made a mistake (69). In preparing exhibit 1 for the grievance process, obviously Morris was not working from exhibit 9; otherwise, the dates would have been specific rather than general. Whether various employes were asked what dates they had taken for purposes of preparing exhibit 1 or whether Morris and others prepared it from memory, or by a combination of both, is not known. In any event, our version is consistent with Morris' good faith belief at the time of the hearing that Guthrie had asked for a July vacation.

Guthrie's credibility, on the other hand, must be measured against his interest in the outcome of this case. The examiner could not believe that Guthrie would assert a baseless claim to a July vacation having so recently been disciplined and forewarned of discharge. It is evident, however, that Guthrie did not heed the warning contained in the May 26 letter from the employer (ex. 10), that in the future Guthrie utilize the grievance procedure rather than self-help to express disagreements with management, inasmuch as he left work even after Teague advised him that, so far as management in the housing department was concerned, he was not then entitled to a vacation. Moreover, while the reasonable prudent man would indeed have exercised more caution, it is not uncommon in our experience in discharge cases to find employes who have been similarly imprudent. Similarly, while foresight might have persuaded Guthrie that exhibit 1's showing a July vacation pick could be contradicted by other employer records, Guthrie was making his decisions as to the contents of exhibit 1 after he had been discharged when the stakes were at their highest, and it is not at all improbable that Guthrie felt that if he could persuade his union representatives of the truth of his story he could proceed confident that error would be placed elsewhere. Here, the error that was exposed beyond cavil was Morris' insertion of December on exhibit 8, which he first could not remember making, and his insertion of July on exhibit 1.

In the course of his Memorandum, p. 31, the examiner confessed to a gnawing question as to why Guthrie had appeared at his work place on the evening of July 10 if his vacation had been scheduled, and why his car evidently remained in a driveway overnight. In rejecting the first hypothesis, the examiner also noted that it is inferrable from the testimony of Henry Reynolds and Ed Taylor to the effect that Guthrie made a spur of the moment decision to take a vacation. The examiner said he would not make that inference, but did not explain why. We believe, contrariwise, that Guthrie's presence on campus that evening and the next, and the testimony of Taylor and Reynolds, are supportive of our above analysis of the exhibits and, together with those exhibits, demonstrate that Guthrie did make a spur of the moment decision to take his vacation.

As to his car being on campus over night, the examiner noted that Guthrie was part of a car pool in which he was the driver. The examiner concluded, p. 30:

> "* * * 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."

We disagree. It is somewhat a strained inference that although he was on vacation Guthrie would be willing to continue his obligations as a member of a car pool. That inference, however, only would explain why he was on campus. It would not explain why he entered to see Teague about his vacation, While it is possible that he approached Teague

as a precautionary measure to assure that his earlier vacation request in physical plant had been transferred to housing, such inference is tenuous since he had transferred effective May 29, some six weeks earlier, thereby providing ample opportunity to have assured his alleged vacation choice.

The inference loses even more force when the testimony of others is considered. Teague testified that Guthrie said he "wanted" his vacation (207). Although Ed Taylor said that during the ride in to work Guthrie said "his vacation was supposed to be coming up," Taylor also said Guthrie added that he was going to "find out" that night. (195) Both Taylor and Reynolds testified that on the morning of the 11th and 12th 10/ Guthrie told them he could not take his vacation (195-197, 199-200).

Accordingly, we believe the presence of Guthrie on campus, his decision to talk to Teague about taking a vacation, and his statements to Taylor and Reynolds are supportive of our analysis of the exhibits that Guthrie had not requested that his vacation begin July 10, and, considering all these factors together, establishes that his decision to take his vacation at that time in fact was a spur of the moment decision.

f. Discussion of the examiner's treatment of the other hypotheses.

The commission agrees with the examiner's rejection of the second hypothesis for the reasons set forth by him.

The examiner's treatment of the third and fourth hypotheses, however, is unconvincing. Essentially he postulated a simple recording error by Hiegert or Morris. Had there been other recording errors or some general mix-up, there would be little difficulty in chalking this up to human error. There are no other errors, however, as a comparison of the exhibits shows. Further, no one else sought a December vacation, so the cause of the error, as by eyes dropping down a line, is totally unfathomable. Finally, a confusion between a July or December vacation pick is a very unlikely human error to reasonably expect.

The examiner's rejection of the fifth hypothesis, that exhibit 1 was in error, postulates human error by Morris, which is subject to the infirmities noted above. Further, it presumes Guthrie "forgot" that he had asked for a December vacation, a presumption not warranted by the evidence. Finally, the anomalies the examiner noted that result, based on the relative specificity as to dates, effectively show the unreasonableness of the fifth hypothesis, and, more importantly, strongly demonstrate that exhibit 8 preceded exhibit 1 in time.

As shown above, we have concluded that Hiegert copied exhibit 9 from exhibit 8 by an examination of the contents of exhibits 1, 8 and 9, and the testimony of various witnesses, especially Morris and Guthrie, and without regard to the testimony of Hiegert. Hiegert's lack of credibility as a witness, therefore, does not undermine our conclusion.

Although it is unnecessary to the support of our conclusion, we proceed to discuss the examiner's reasons for discrediting Hiegert and to reveal some shortcomings in his analysis.

a. Demeanor credibility.

10/ We adopt the examiner's dates of July 10 and 11 despite testimony placing the events on July 11 and 12, respectively. See examiner's Memorandum, pp. 30, n. 31.

The examiner noted that Hiegert was tense and inconsistent during his testimony, was unwavering as to crucial facts occuring three years earlier, examined documents cursorily, denied without hesitation contradictory testimony of other witnesses, and "retreated to a position of claiming no recall of Exhibit 1 rather than an outright denial of having seen it," and is the only witness to testify that he made the rounds of the employes to determine their vacation picks with all other witnesses stating they had discussed the matter with Morris. Memorandum, pp. 36.

Certainly we are in no position to upset the examiner's assessment of Hiegert's demeanor. We do note, however, that we find no testimonial inconsistency on his part. He did not "retreat", as the examiner said, from a denial of having seen exhibit 1 to a no-recall posture. He consistently took the latter position (232, 239).

b. Lack of corroborating documents.

The examiner cited Hiegert's failure to bring with him any documents which would show what he worked from in preparing exhibit 9 and his failure to bring the office copies of the vacation slips with respect to which he testified he had the employes sign to indicate their vacation pick, especially since no other witness mentioned such slips.

The failure to bring corroborating documents, of course, weakens any case. The examiner is mistaken, however, in suggesting that the record is barren of testimony that such slips were used. See testimony of Ed Taylor (59) referring to slips and to talking about his vacation pick with the supervisor, although he does not mention Hiegert by name.

c. Hiegert's interest in the outcome.

The examiner said that Hiegert, as a lower echelon supervisory employe, could not be regarded as detached from the results of this case which could include a substantial monetary liability against his employer.

This point has some merit but it diminishes as one moves down the supervisory level. More importantly, Hiegert's interest in the outcome pales in comparison to Guthrie's. There is no hint in this record that Hiegert might have a reason to alter Guthrie's vacation pick, and the examiner's suggestion of a human error on the part of Hiegert or Morris cannot account for the fact that no other employe chose a December vacation and there are no other errors on the three exhibits.

4. In conclusion, we must amend the examiner's Finding of Fact #7. We affirm the examiner in that Finding to the extent of the first nine and a half lines and we change the remainder beginning after the semicolon on line 10 to provide as follows:

> "that complainant told Morris he wanted to take his vacation sometime in December, 1972; that Morris at that time wrote 'sometime in Dec Dates?' on a sheet of paper, exhibit 8 in this record, which contained the vacation preferences of other employes, and gave said sheet of paper to Hiegert who transferred the information thereon to another record, exhibit 9 herein, showing 'Dec (72)' as complainant's vacation choice."

H. Finding #8.

The examiner found that Hiegert's recording error was perpetuated so that after Guthrie was transferred to housing that department did not know he had selected his vacation to begin July 10, 1972; that on July 10, 1972, Guthrie made a claim of right to begin his vacation that evening; and that Guthrie began his vacation that night.

1. The employer argues that no error respecting Guthrie's vacation pick was perpetuated since Hiegert's record was correct.

We agree, and that portion of the examiner's Finding must be reversed. Our reasons have been set forth above in discussing exhibits 1, 8 and 9 and the testimony of Guthrie, Morris and Hiegert.

2. The employer says Guthrie did not make a claim of right to vacation on July 10.

We affirm the examiner. Nathaniel Teague, a lead worker on duty that night, testified that Guthrie said he "wanted" his vacation (207). Guthrie testified that on July 10 he went to the housing department for the purpose of telling Teague his vacation had started (10). The employer's own discharge letter of July 14, ex. 2, states:

> "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."

Guthrie testified to the accuracy of that sentence (163).

A comment about the significance of this issue is in order. A claim of right on July 10 to vacation supports Guthrie's testimony that he had earlier requested a vacation to begin July 10. A determination that Guthrie had not made such an earlier request, however, requires the conclusion that his claim of right on July 10 was recklessly audacious, thereby affecting the merits of the issue of just cause for discharge.

3. The employer argues that the examiner erred in finding that Guthrie went on vacation on the night of July 10.

The employer's apparent basis for this objection is concern that implicit in such a finding is the conclusion that Guthrie properly went on vacation that night. Although we affirm the examiner we do not find that Guthrie's taking his vacation on that night was proper.

The record is clear that Guthrie did go on vacation rather than work on July 10 whether or not he was entitled to do so (10-11, 163-164).

4. Finally the employer argues that the examiner erred in not finding that Guthrie took his vacation on July 10 without permission.

We agree. This follows as of course from our conclusion that Guthrie had asked for a December and not a July vacation.

We come to the same conclusion even if Guthrie had properly scheduled a July vacation. On this assumption, which the examiner engaged, the employer was wrong in not recognizing Guthrie's vacation right. However mistaken the employer may have been, Guthrie was told by Nathaniel Teague, the evening lead worker, that Guthrie could not take a vacation that night because under the housing department's practice it was first necessary to fill out various forms and to give at least a week's notice (207). Guthrie agreed that he was so told (163).

The next morning at breakfast with co-workers Ed Taylor and Henry Reynolds, Guthrie advised that he could not take his vacation (196, 200). Thus, Guthrie was aware that it was management's view that he was not entitled to begin his vacation on July 10.

We conclude that Guthrie knew the employer was not consenting to his leaving work on July 10 even though he learned this through Teague, a non-supervisory lead worker. While Teague's status as an employe, and not a supervisor, might be relevant in the context of whether Guthrie's anger toward him amounts to insubordination, see the examiner's Memorandum, pp. 30, it is irrelevant in this context, i.e., whether he understood the employer thought he was not entitled to a vacation that night under the applicable rules in the housing department. There is no reason to doubt that Teague correctly conveyed management's position to Guthrie.

Although it is clear that Guthrie left work without the employer's permission on July 10, the situation is not as clear on July 11. That evening, Guthrie asked Teague for the forms he was to complete. He completed the forms incorrectly and left in anger. Teague testified that he told Guthrie he was unable to sign his vacation card, since a higher level supervisor's permission was necessary, and that Guthrie became angry and left without having received the necessary approval (208). Guthrie testified, on the other hand, that on signing the card Teague told him it was sufficient for starting his vacation (11, 164). The following morning, however, both Ed Taylor and Henry Reynolds testified Guthrie told them he still could not take his vacation (196, 200). The examiner credited Teague's version in Finding #8, and we have no reason to upset it.

Therefore, it is necessary to add a finding that on July 10 and 11 Guthrie knowingly absented himself from work without permission.

5. The commission also has reduced the length of this paragraph by deleting redundant and unnecessary findings.

6. In conclusion, the commission reverses the examiner's finding in the first clause of Finding #8 that Hiegert's error was perpetuated and adds a finding that on July 10 and 11 Guthrie knowingly absented himself from work without permission to take a vacation. Finally, the commission has deleted certain unnecessary material in this finding.

I. Finding #9.

The examiner found that Guthrie, with the aid of union representatives, timely processed his grievance through the first three steps of the contractual grievance procedure; that Larry Grennier, respondent union's president, "breaking with his usual and customary practice . . . absented himself completely from the processing" of the grievance; and that the 30-day period for the union to invoke the arbitration provisions of the collective bargaining agreement began on August 31, 1972, which is the date the third step was completed.

1. The employer contends that the 30-day period applied to Guthrie as well as to the union.

We agree. The examiner no doubt omitted reference to the time period as applying to employes because he felt the employes did not have the right to proceed to arbitration independent of the union. Whether or not there was such an independent right, however, the time period applies across the board to all who otherwise would benefit from the right to go to arbitration.

Therefore, although not material to our ultimate disposition of the issues, we amend the examiner's finding by adding that the time period applied to complainant as well as to the respondent union.

2. The employer argues that Grennier did not completely absent himself from the processing of the grievance.

We must modify the examiner's finding that Grennier absented himself completely. First, he did talk to Guthrie and, on detecting racial overtones, referred him to Hattush Alexander, a field representative for Council 24 (79, 80, 83, 90). Second, Alexander testified that Grennier told him to set up a meeting (92). Third, Grennier spoke to stewards Weiland and Osowski about the case in connection with the executive board's discussion about the case (86). Grennier characterized his involvement as "very little." (81) Thus, this finding must be modified to show that Grennier's involvement was minimal.

3. The employer argues that Grennier's minor involvement was for legitimate, not discriminatory, reasons.

Since the examiner made no finding here that Grennier's reasons were inappropriate we defer treatment of the employer's argument to our discussion of the examiner's other findings more closely in point. However, since the examiner's ultimate conclusion of fact in Finding #13 is that the union handled Guthrie's grievance differently than other grievances, and that this difference was based on irrelevant and invidious considerations having to do with Guthrie's race, it is appropriate at this point to treat the examiner's finding here that Grennier broke with his usual and customary practice of involving himself in the processing of the grievance.

First, Grennier did not testify that he always involved himself in the processing of grievances. He said there were very few cases from which he detached himself (81). Second, Grennier testified, without contradiction, to the uniqueness of the instant matter in that the housing department had a steward and chief steward who could handle same (81). Third, according to Grennier's testimony, which the examiner rejected, Guthrie did not ask Grennier that his case be taken to arbitration (79, 82-83). Fourth, Grennier testified that he referred Guthrie to Alexander since Guthrie's conversation implied racial overtones, Guthrie and Alexander both were black, and both worked well together (80, 83, 85, 90).

Finding #9 must be further amended to reflect that the reasons Grennier did not involve himself in the processing of Guthrie's grievance were that he believed that the case could be handled at that point in time by the stewards in the housing department, and that he believed Guthrie felt he was suffering from racial discrimination and that Alexander better could deal with such an allegation. In arriving at this conclusion we do not upset the examiner's credibility determination that Guthrie did tell Grennier that he desired to proceed to arbitration. That credibility resolution is consistent with Grennier's belief that the presence of two stewards in the same department and the involvement of Alexander might help resolve the grievance short of arbitration. Further, this conclusion need not affect a determination whether the union improperly put this case in the hands of stewards and Alexander who were without power within the union to invoke the arbitration provisions of the collective bargaining agreement.

4. In conclusion, we affirm the examiner's Finding #9 with the foregoing noted modifications.

J. Finding #10.

The examiner found that only the executive board of Local 82 could determine whether to proceed to arbitration; that field representatives, such as Alexander, did not have that power; that the local's president, Grennier, did not properly invoke Alexander's jurisdiction to act on Guthrie's discharge grievance; that after step three Guthrie expressed both to the steward Weiland and the president Grennier that he desired the union to continue to process his grievance; and that Grennier, having inferred racial overtones in the matter, referred Guthrie to Alexander since both were black and he thought they could work better together.

1. The employer argues that either Council 24, its field representative or Local 82 can take a grievance to arbitration, although it is after an investigation that the executive board of the local decides whether to so proceed.

The collective bargaining agreement, ex. 3, provides that "either party" may appeal a grievance to arbitration. Par. 34, pp. 14. Notwithstanding the use of the singular "party" here, the agreement is between the employer, Local 82 and Council 24. Par. 1, pp. 3. Also see pp. 41-42. Grennier testified that within the local the executive board decides whether a case goes to arbitration and that Alexander did not have that power (84). Alexander testified that he had power to handle a third step grievance and to recommend to the council whether a grievance should go to arbitration, but that he did not handle arbitrations (99-100).

We affirm the examiner's finding that only the local's executive board could decide to proceed to arbitration. Certainly the employer is mistaken in saying that the field representative could make that decision. While it is arguable that Council 24 is a party to the contract which could invoke arbitration without the concurrence of the local, both the testimony and the examiner's finding must be understood within the context of internal union rules since it is those rules which materially affected the result that no arbitration occurred. Under those rules, according to the testimony, the local's executive board had to act, and the council's field representative was without power to determine whether to proceed to arbitration.

2. The employer contends that Guthrie did not ask that his grievance go to arbitration, and that he only asked the union representatives about the case.

Guthrie testified that he expressed his desire that his grievance be arbitrated to Grennier, Weiland and Alexander (5-6, 28, 152). Receipt of such a request was denied by Grennier (79, 82-83), Weiland (121-123), and Alexander (95).

The commission affirms the examiner. While discrediting three union witnesses (Grennier, Weiland and Alexander) in favor of Guthrie, whose testimony is suspect in many respects, 11/ is facially disconcerting, the examiner's resolution of this point is not itself inherently incredible. Further, there is no documentary evidence, such as was the case with the exhibits reflecting the vacation picks, which enable the commission to make an independent determination. Finally, the

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11/ For example, in the first hearing Guthrie said his wife underwent heart surgery in July 1972 (152). In the second hearing he denied that his wife ever underwent open heart surgery (189-190).

examiner's analysis is otherwise well reasoned, see his Memorandum, pp. 17-19, especially with respect to the conduct of the union representatives in taking some action subsequent to the third step, thereby implying that the union representatives understood something more was expected of them.

3. The employer argues that Grennier's referral of Guthrie to Alexander because of the racial overtones was a higher degree of effort than the normal procedure and was not arbitrary, capricious or invidious discrimination on the basis of race. The union joins the employer in this argument.

We agree with the union and the employer. We believe the union is to be commended when, upon hearing that racial discrimination might be involved, it referred the matter to a member of the same race who might be more sensitive and appreciative of this element of the case. Such care does not taint the union's motive or conduct because it has its roots in a racial consideration.

We treat this issue here, rather than in Finding #13 where the examiner concluded that the union's conduct was based on an invidious racial consideration, since that Finding is conclusory and rests on the material findings contained in Finding #10.

K. Finding #11.

The parties take no exception to the examiner's Finding #11.

L. Finding #12.

The examiner found that neither Weiland, Osowski nor Alexander made any recommendation to the executive board relative to processing the grievance further; that none of those three was present at any executive board meeting; and that any decision not to arbitrate was not communicated to Guthrie until after the time for doing so had passed.

1. The employer and the union argue that the decision not to arbitrate was communicated to Guthrie prior to the expiration of the 30-day period.

We affirm the examiner. Guthrie testified that a month and a half after the third step Andy Morris advised him that the union had turned down his right to arbitration. (31) Although Morris twice placed the conversation sometime in September, which would be within the 30-day period (65, 71), each time the date was included in the question, not Morris' answer, and on the earlier occasion (65) it is not at all clear that Morris' answer was responsive.

2. The employer argues that although neither Weiland, Alexander nor Osowski attended the executive board meeting, they did give a report to Grennier.

Grennier testified that he talked to Weiland and Osowski before the executive meeting but received no recommendation from them, and that he did not talk with Alexander (86-87).

We believe Finding #12 must be amended by adding a finding that Grennier talked to Osowski and Weiland prior to the executive board meeting.

3. For reasons discussed in connection with Finding #13, the commission concludes that the material fact on the question of fair

representation is that the union did not make a considered decision on Guthrie's request for arbitration, and this finding is incorporated into Finding #12.

The record does not show that the union considered the impact of a no-arbitration decision on Guthrie or that it weighed that factor with other relevant considerations, such as union finances and the merits of the grievance. See our discussion below relative to the conclusion of law that the union breached its duty of fair representation.

4. In conclusion, Finding #12 must be revised to indicate that Grennier spoke to Osowski and Weiland prior to the executive board meeting and that the union failed to make a considered decision of Guthrie's request to arbitrate.

M. Finding #13.

The examiner found that the union handled Guthrie's grievance differently than other grievances and that the difference was based, at least in part, on irrelevant and invidious considerations and classifications having to do with Guthrie's race.

The employer calls this conclusion ridiculous. The commission believes it is error, as indicated above, to conclude that the union's conduct was improperly tainted by racial considerations. The examiner's conclusion, therefore, must be reversed.

The commission substitutes its ultimate conclusion of fact that the union's failure to make a considered decision on Guthrie's request that his grievance be appealed to arbitration was arbitrary and a lack of fair representation.

DISCUSSION OF CONCLUSION THAT THE UNION BREACHED ITS DUTY OF FAIR REPRESENTATION

Since the employer interposed the defense of failure to exhaust contractual remedies, the commission must decide whether the union breached its duty of fair representation to the complainant before it can adjudicate complainant's allegation that his discharge was in violation of the collective bargaining agreement. 12/ The union and the employer argue that this general rule is inapplicable where, as here, the employe had the right to take his own case to arbitration and the union's concurrence was not required.

Discussion of argument that employe had the right to take his own case to arbitration.

The respondents argue that the supreme court in this case already has ruled that Guthrie may take his own case to arbitration. The court said: 13/

> "* * * Article IV of the agreement sets out a four-step grievance procedure in which the fourth step is final and binding arbitration. An employee can present his own grievances or he may choose to have his union represent him." (Emphasis added.)

12/ Mahnke v. WERC (1975), 66 Wis. 2d 524, 533, 225 N.W. 2d 617. State v. WERC (1974), 65 Wis. 2d 624, 636-637, 223 N.W. 2d 543.

13/ State v. WERC, supra, 65 Wis. 2d at 627.

We have studied the examiner's Memorandum, pp. 13-14, and adopt his reasoning and conclusion that this language is not a holding binding on this agency that Guthrie could take his own case to arbitration. The court's language was in the nature of presuppositions of fact for purposes of deciding the reviewability of interim orders of an examiner. Further, the court's remand for further proceedings to determine whether the union breached its obligation and whether there was just cause for the discharge only shows the irrelevance of the respondent's defense that the employe could arbitrate alone. In any event, the court's language does not say that the employe can arbitrate alone; it only summarizes the contractual language that an employe can present his own grievance or elect to have the union represent him.

The examiner noted various difficulties in the smooth functioning of labor relations if the respondents' construction were upheld. In addition to his considerations, we also note that the union's construction would mean that an employe could arbitrate a grievance against the union's wishes. A number of adverse consequences follow. First, in such an arbitration the employe could make admissions and concessions against the interests of the majority of the employes respecting the meaning of the agreement. All employes, however, equally share as beneficiaries of the agreement, and the union, not an individual employe, owes them all the duty of fair representation. Second, the orderly resolution of differences between employer and union is impaired if the union's representations to an employer as to how the agreement is to be applied later can be upset in a single employe's arbitration which is inconsistent with the union-employer bargain. The majority representative, therefore, would have little credibility in trying to resolve matters for the bargaining unit employes. Finally, since paragraph 37, p. 15, of the agreement requires that the "parties" to the agreement share the costs of arbitration, and since the union, not an employe is a party to the agreement, a dissident employe could present one or a series of frivolous claims perhaps to the great financial detriment of the union.

In light of these immensely practical difficulties, the commission will construe a collective bargaining agreement as authorizing the individual employe to invoke the arbitration process only under the most compelling language.

The collective bargaining agreement provides, ex. 3, par. 35, p. 14:

> "Step Four. Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) days of the date of the Employer answer in Step Three * * *"

The agreement at par. 47, pp. 17, provides:

> "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." (Emphasis added.)

The union argues that these paragraphs together show that an employe may take his own case to arbitration. Arbitration is the

fourth step of the grievance procedure and an employe may present his own grievance "at any step" of the grievance procedure.

We adopt the examiner's rationale in rejecting this argument. See his Memorandum, pp. 12-13. In addition, we note that the union's construction would create irreconcilable conflicts within the collective bargaining agreement itself. First, that construction effectively repeals the language in step four, paragraph 35, that "either party" may appeal an unsettled grievance to arbitration. The union, not an employe, is a party to the agreement. Second, the construction makes meaningless the provision in paragraph 47 that the "settlement reached" not be "inconsistent with the provisions" of the agreement. Only the steps of the grievance procedure prior to arbitration were contemplated as capable of being settled. Step four states that "Grievances which have not been settled . . ." may be arbitrated. Arbitration does not involve settling a grievance; rather, it is a quasi-judicial disposition of an unsettled grievance. Further, the arbitral disposition cannot be "inconsistent" with the provisions of the agreement since definitionally the arbitral award is the resolution as to what the agreement means.

One of the sources of the above-noted adverse consequences and construction difficulties is that the respondents have placed different parts of the agreement side by side to erect its otherwise impeccable syllogism. The resultant problems can be avoided by concluding that paragraph 35 is the more specific provision that prevails over the general provision in paragraph 47 and, therefore, that only a party to the agreement can invoke the fourth step of arbitration.

The second source of the difficulties arising from the respondents' construction is that the language in paragraph 47 is not designed to give employes any right to present a grievance. Rather, it is designed to excuse the employer from its duty to deal only with the union if the employe elsewhere is given the right, or merely claims the right, to present a grievance.

Section 111.83(1), Stats., whence paragraph 47 obviously was derived, provides:

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

The United States Supreme Court, in construing the parallel federal provision, has said: 14/

> "* * * The intendment of the proviso is to permit employees to present grievances and to authorize the

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14/ Emporium Capwell Co. v. Western Addition Commun. Org. (1975), 420 U.S. 50, 95 S.Ct. 977, 984, 43 L.Ed. 2d 12, n. 12. Also see Greenfield Education Association (14026-B) 11/77.

employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative. . . . * * * The [Labor Management Relations] Act nowhere protects this 'right' by making it an unfair labor practice for an employer to refuse to entertain such a presentation, nor can it be read to authorize resort to economic coercion."

The employer joins the union's argument and points to paragraph 92, pp. 28, of the agreement. That paragraph gives the employe the right to elect whether to utilize the grievance procedure of the collective bargaining agreement after step three or to take an appeal to the state personnel board. It provides that "an employee must choose either the grievance procedure or the Sec. 16.24(1)(a) appeal procedure." The right to an alternative procedure and the imposition on the employe of the duty of electing however, do not empower the employe to arbitrate without the union's concurrence. 15/

In light of the foregoing considerations, therefore, we construe the agreement to empower the union exclusively to invoke the arbitration procedure and as not empowering an individual employe to invoke the arbitration procedure without the union's concurrence.

Even if the employe could arbitrate without the union's concurrence, neither the union nor the employer is helped thereby in the circumstances of this case. Complainant reasonably relied to his detriment on the union's representation that it would process his grievance and protect him against the running of the limitations period. The employe's rights should not be less secure where the union, not having the exclusive right to arbitrate, nevertheless assumes full responsibility for the case and proceeds without affording fair representation. The employer's expectancy interest in finality is not greater in these circumstances. Thus, in this case the union's duty of fair representation exists whether or not it has the exclusive power to invoke arbitration, and the employe is not to be left remediless where that duty is breached even if he could have arbitrated alone. 16/

Consequently, we conclude that the complainant did not have a right under the collective bargaining agreement to invoke the fourth step of arbitration and that, even if he enjoyed such right, the union owed him a duty of fair representation in any event, which, if breached, removes the bar to the commission's jurisdiction over the merits of the alleged contract violation.

Discussion of the legal tests for breach of the duty of fair representation.

The examiner stated that although the formulations of the test for fair representation have varied, the Supreme Court in Vaca v. Sipes 17/

15/ Ordinarily the commission would defer to a union-employer agreement as to the meaning of their collective agreement. Such deference would be singularly inappropriate, however, in the context of this adversary proceeding where the employe is pitted on the one side against both his union and employer on the other over the disputed construction of the agreement.

16/ Accord: Conley v. Gibson (1957), 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed. 2d 80.

17/ (1967), 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed. 2d 842.

focused on whether the union's conduct was arbitrary, discriminatory or in bad faith, but he noted that the Court also spoke of "perfunctory" conduct as a breach of the duty. Further, the examiner felt the trend of the cases was to emphasize the union's affirmative obligations. See his Memorandum, p. 21-22.

We agree that the case law has enhanced the required level of union conduct. The Court's most recent pronouncement is Hines v. Anchor Motor Freight, Inc., 18/ wherein the Court held that disappointed grievants could upset a final and binding arbitration award in an action against their employer upon a showing that the arbitral process failed because of union misconduct. The Court reiterated its holding in Vaca v. Sipes that a union may not arbitrarily ignore a meritorious grievance "or process it in a perfunctory fashion." 19/

In Mahnke v. WERC 20/ the Wisconsin supreme court particularized the union's duty in deciding whether to arbitrate a grievance. The Court said:

> "* * * [S]uch decision should take into account at least the monetary value of [the employe's] claim, the effect of the breach of [sic. on] the employee and the likelihood of success in arbitration.
>
> "This is not to suggest that every grievance must go to arbitration, but at least that the union must in good faith weigh the relevant factors before making such determination." 66 Wis. 2d at 534.

The court in Mahnke noted its previous holding that a union has great discretion in processing grievances and that only "in extreme cases of abuse of discretion" would the courts interfere. The court said probably that holding was too broad. 21/ It also recited a previous holding "that a union occupies a fiduciary relationship to members." 22/

Mahnke, therefore, requires that, upon a proper challenge, the union's exercise of discretion must be put on the record in sufficient detail to enable the commission, and the courts on review, to determine whether the union has made a considered decision by reviewing the relevant factors of the monetary value of the employe's claim, the effect of a breach of contract on the employe, and the likelihood of success in arbitration. Although the commission may not sit in judgment on the wisdom of union policies, the record must establish that the union went through the required weighing process and the factors it considered in reaching its conclusion.

18/ (1976), _____ U.S. _____, 96 S.Ct. 1048.

19/ 96 S.Ct. at 1059.

20/ (1975), 66 Wis. 2d 524, 225 N.W. 2d 617.

21/ Mahnke, 66 Wis. 2d at 532.

22/ Id., at 532-533. There is no reason to believe the court meant to upset the long-standing principle that the union must equally represent non-members and members. See Steelworkers, Local 937 (Magma Copper Co.) (1972), 200 NLRB No. 8, 81 LRRM 1445. Cf. Madison Jt. School Dist. No. 8 v. WERC, (1975), 69 Wis. 2d 200, 208-209, 231 N.W. 2d 206, reversed on other grounds, 97 S.Ct. 421.

Application of the tests respecting the duty of fair representation to the evidence.

The testimony is very sparse. Osowski and Weiland gave Grennier a report on their investigation of the grievance prior to the executive board meeting. They gave no recommendation. They did not attend. Guthrie did not attend, nor apparently was he invited to attend. It is not known what facts were reported to Grennier or the other members at the executive board meeting. It is not known what facts they supposed were true or what specific facts and policies they discussed. The terse record on point shows (86-87):

"Q All right. Tell me now about the Executive Board meeting . . . .

" * * *.

"A We had to talk it over with our Executive Board about the finances.

"Q You had reviewed the evidence?

"A Right.

"Q What evidence did you review?

"A The grievance procedure, the answer, and what we knew, and we investigated.

"Q All right. Did you talk to Weiland about it?

"A Yes, sir.

"Q Before the Executive Board meeting? Before that meeting?

"A Sure.

"Q What did he tell you?

"A He told me what the indication --

"Q -- Did he make a recommendation?

"A No.

"Q You didn't ask him?

"A He didn't make a recommendation?

"Q You didn't ask him?

"A No."

This testimony is but a litany that finances and evidence were considered. There is no showing which of the two factors was considered dispositive or how they were weighed. Further, there is no showing that any consideration was given to the impact on Guthrie of the alleged breach of contract or the monetary value of the claim. Thus, the Mahnke criteria were not met.

The absence of evidence showing compliance with Mahnke, however, does not show a breach of the duty of fair representation. The employe

has the burden of proof. 23/ Therefore, complainant had the burden of proving that the union did not weigh the relevant factors of the monetary value of the employe's claim, the effect of a breach of contract on him, and the likelihood of success in arbitration, or that its decision otherwise was improper. The burden is to prove these elements "by a clear and satisfactory preponderance of the evidence." 24/ Complainant has proved that he asked the union to arbitrate, the union did not arbitrate, and in deciding not to arbitrate the union considered only its finances and the "evidence," whatever that may mean.

Clearly, the facts that complainant asked the union to arbitrate and that the union did not arbitrate raise no presumptions of wrong doing which the union must explain away, since the union has a right not to arbitrate even a meritorious grievance. 25/ Further, a showing that the union did consider union finances and the evidence does not in itself raise a presumption that the union did not weigh these factors properly and in accord with the other requirements of Mahnke and Vaca v. Sipes.

However, two other facts of record must be considered in determining whether the complainant made out a prima facie case. First, until this grievance, the union never had refused an arbitration request (78). Second, nothing in the record shows that the union decided not to proceed to arbitration. For all the record shows, the executive board discussed the matter and let it drop without taking any action on the request. 26/ The absence of a considered decision is further evidenced by the fact that Guthrie learned of the disposition of his arbitration request from Andy Morris who was reporting the feelings of Hattush Alexander after the Cottrell meeting, not any action of the executive board. There is no evidence that the union to this day has told complainant what the executive board's decision was.

We believe complainant made out a prima facie case of lack of fair representation from the following facts: (1) complainant requested arbitration; (2) the union never before had refused a request for arbitration; (3) although the union discussed the financial aspects and the facts surrounding the grievance, it did not consider the impact on complainant of a decision not to arbitrate; and (4) the union made no decision whether to arbitrate. This prima facie case shifted the burden of going forward with the evidence to the union to demonstrate compliance with the weighing requirement of Mahnke or other defensive matter. Since there is no evidence showing such compliance or defensive

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23/ Mahnke, 66 Wis. 2d at 533; Vaca v. Sipes (1967), 386 U.S. 171, 186, 87 S.Ct. 903, 17 L.Ed. 2d 842; Amalgamated Ass'n of St., E.R. & M.C. Emp. v. Lockridge (1971), 403 U.S. 274, 299, 91 S.Ct. 1909, 29 L.Ed. 2d 473.

24/ Section 111.07(3), Stats.

25/ Mahnke, 66 Wis. 2d at 534; Cheese v. Afram Brothers Co. (1966) 32 Wis. 2d 320, 326, 145 N.W. 2d 716; Vaca v. Sipes, 386 U.S. at 192, 194-195; Moore v. Sunbeam Corporation (7th Cir. 1972), 459 F.2d 811, 820.

26/ The union has argued throughout that the fair representation and just cause questions must be tried together because the union relied on the merits of the discharge in reaching its decision not to arbitrate. Argument, however, cannot substitute for evidence.

matter, 27/ the union breached its duty of fair representation to complainant by failing to make a considered decision under the Mahnke criteria. 28/

Discussion of the arguments of the parties and the reasoning of the examiner.

The employer argues that the examiner was less than clear as to the basis of his conclusion that the union breached its duty. As seen from the following discussion, however, the commission has no trouble understanding what the examiner said.

The union insists there was no bad faith representation. It points to the absence of evidence of intent not to fulfill the duty of representation, the fact that on prior occasions the union fairly and successfully represented the complainant, the fact that here it represented the complainant vigorously through the first three steps of the grievance procedure and into the Cottrell meeting, and the fact that the ad hoc meeting with Cottrell itself was an exercise above and beyond the normal call of duty. The union earnestly argues that its attempts to communicate with Guthrie after the Cottrell meeting should not be turned against it because those attempts were unsuccessful. Such failure, the union says, is not an index of bad faith.

We agree with the union that there is no reason to believe the union proceeded in this case other than in subjective good faith. Further, there is no issue of the quality of its representation through the third step and the Cottrell meeting. That leaves, however, the quality of its conduct after the third step and apart from the ad hoc meeting which resulted in no arbitration and no considered decision whether to arbitrate.

Essentially the examiner posited four bases for his conclusion that the union breached its duty: (1) union president Grennier, absenting himself from the grievance process, turned the matter over to Osowski and Alexander without invoking their jurisdiction, with the consequence that Guthrie's grievance was in the hands of persons without power to initiate arbitration; (2) the grievance was handled differently than other grievances due to racial considerations; (3) there is no evidence that the union undertook a good faith determination on the merits of the case; and (4) having assumed an affirmative obligation to give a grievant notice of its disposition of a grievance, the union was negligent, arbitrary and perfunctory in manner when it let the matter die without attempting to invoke the arbitration process.

As to the first basis - Grennier's absence and Osowski's and Alexander's lack of jurisdiction - the union argues there is no requirement that Grennier process all grievances. We do not, however, understand the examiner to have said that Grennier must involve himself

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27/ The union argues that Grennier's statement of general policy (78, 84), that the union looks at the merits of each grievance in deciding whether to arbitrate, shows it discharged its obligation. Grennier's statement of general policy does not show compliance with all the Mahnke standards. Further, proof of general practice is not proof that it in fact was followed in a particular case.

28/ Mahnke was decided between the first and second hearings below. The testimony relative to fair representation largely comprised the first hearing. There was no motion at the second hearing for leave to adduce further evidence in light of Mahnke.

in all grievances in order for the union to discharge its duty of fair representation. He said that Grennier's absence together with the substitution of persons without power to invoke arbitration constituted a failure to fulfill that duty.

We disagree with the examiner. His reasoning would have force had the grievance been given to Osowski and Alexander for the purpose of proceeding to arbitration. We believe the purpose of the delegation was to make additional efforts at resolving the dispute prior to arbitration, especially in light of the possible racial bias involved. The subsequent ad hoc meeting with Cottrell confirms this inference. Although arbitration was the next formal step, the record does not support the inference that Grennier or the executive board attempted an ultra vires delegation of power to decide whether to arbitrate.

It may well be that Grennier's absence from the grievance process prior to arbitration, a departure from ordinary practice, was the genesis of the union's failure to make a considered decision on whether to arbitrate. That departure in and of itself, however, does not show bad faith, arbitrariness or discrimination. Grennier's testimony that he felt the matter was in good hands because a steward and chief steward were within Guthrie's work unit and the desirability of soliciting the aid of a black, Alexander, because of racial overtones, were reasonable bases for such departure.

The second basis for the examiner's decision - that this grievance was treated differently due to racial considerations - ties to the first. If Grennier referred the matter to Osowski and Alexander for a racially discriminatory purpose, then such departure from ordinary practice would show bad faith and be arbitrary and discriminatory. Referring the matter to Alexander, himself a black, negates such a purpose. Recognition of a racial element within a problem and trying to treat it are not invidious acts of racial discrimination. 29/

The examiner's third basis - that there is no evidence the union undertook a good faith determination on the merits - essentially states the basis for our conclusion above that the union breached its duty by failing to make a considered decision.

The examiner's fourth basis for finding a breach of the duty of fair representation was that the union permitted the matter to die after the Cottrell meeting without giving complainant notice of its decision. We believe this is an inadequate basis for finding a breach, even if the union ordinarily gave such notice. Since only the union can arbitrate, any breach of duty in not arbitrating hangs on the reasons for not arbitrating, not whether it communicated its reasons or decision to the grievant. As the employer's brief to the commission observes, "notice or lack of notice would not have changed anything." Brief, pp. 14.

We would come to a different conclusion if the union did not have the exclusive right to arbitrate. On that hypothesis, the complainant relied to his detriment on the union's active representation that it

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29/ Employers and unions must give special attention to racial minorities even to the extent of granting retroactive seniority rights to blacks, at the expense of the seniority standing of the white majority, in order to cure the effect of past racial discrimination. See Franks v. Bowman Transp. Co., Inc. (1976), 96 S.Ct. 1251. Even the Constitution is not color blind. See Swann v. Charlotte-Mecklenburg Board of Education (1971), 402 U.S. 1, 19, 91 S.Ct. 1267, 28 L.Ed. 2d 554.

was representing him in processing his grievance. Since the union unreasonably failed to notify complainant before the running of the limitations period that it would not represent him further, complainant was injured by lack of such notice, whether or not the union customarily gave such notice. The union's observation that several attempts were made to contact complainant is wide of the mark. First, those attempts related to contacting Guthrie after the Cottrell meeting. Second, there is no record evidence of an attempt by the union to contact Guthrie relative to the action or inaction of the executive board. Third, a simple post card would have sufficed. While negligence in weighing and analyzing the evidence may not amount to unfair representation 30/ the inexplicable failure to give a timely notice with the result of aborting any further proceedings is such non-representation as to amount to unfair representation. 31/

Consequently, the commission agrees with the examiner that the union breached its duty of fair representation by its failure to make a considered decision whether to proceed to arbitration on the merits of the grievance. Accordingly, the commission has affirmed the examiner's first conclusion of law, that there was a breach, as well as his second conclusion of law that complainant's failure to exhaust the contractual remedies is no defense to the commission's exercise of jurisdiction over the merits of the discharge grievance.

Discussion of union's argument that it did not receive proper notice of fair representation issue.

The union argues that it did not have fair notice of the issues on which the examiner based his decision of lack of fair representation. Since the commission has sustained the examiner only on the point that the union failed to make a considered decision, the question becomes whether the union had fair notice of this issue.

Section 227.09, Stats., as it read at the time of the proceedings below, provided:

> "Notification of issues. Every party to a contested case shall be given a clear and concise statement of the issues involved."

The legislature subsequently amended ch. 227, Stats., and reference to the amendment is appropriate in determining the legislature's view

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30/ See Bazarte v. United Transporation Union (3rd Cir. 1970), 429 F.2d 868, 75 LRRM 2017, 2018, and Brough v. Steelworkers (1st Cir. 1971), 437 F.2d 748, 76 LRRM 2430, 2431.

31/ In Ruzicka v. General Motors Corp. (6th Cir. 1975), _____ F.2d _____, 90 LRRM 2497, 2500, the court said:

> "* * * [W]hen a union makes no decision as to the merit of an individual's grievance but merely allows it to expire by negligently failing to take a basic and required step towards resolving it, the union has acted arbitrarily and is liable for a breach of its duty of fair representation."

Also, compare the pre-Harper rule in criminal law that a defendant's right to representation was secured unless the representation was such "as to amount to no representation." State v. Harper (1973), 57 Wis. 2d 543, 551, 205 N.W. 2d 1.

of the notice to which a party is entitled. Section 227.07(2), Stats. 1975, provides:

> "Contested cases; notice; hearing; records. (1) * * *
>
> "(2) The notice shall include:
>
> "* * *.
>
> "(c) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters with specificity at the time the notice is served, the notice may be limited to a statement of the issues involved.
>
> "* * *."

The amended complaint, as served on respondents, fairly alleged that (a) complainant timely asked for arbitration, (b) the union gave him no notice of the status of his case, (c) the union did not set up a meeting with him to discuss it, (d) the union did not want to represent him properly, and (e) the union did not arbitrate. We conclude that said allegations put the union on notice that the propriety of its decision not to arbitrate was in issue. The union prior to hearing did not move to make more definite and certain. The union raised no objection at the hearing relative to the testimony as to the basis for the executive board's considerations in deciding whether to proceed to arbitration. Further, the union had full opportunity to expand on the evidence that in fact was produced on this point. Finally, although Mahnke was decided between the first and second hearings, the union did not ask for leave to adduce evidence to show compliance with the Mahnke standards. Accordingly, the union had fair notice of the issues to be litigated.

Discussion of the question whether breach of the duty of fair representation is an unfair labor practice.

The determination that the union breached its duty of fair representation permits the commission to determine whether the discharge violated the contract. 32/ Whether the breach of the duty of fair representation constitutes an unfair labor practice, however, is a different matter. 33/ It is necessary to decide this issue in order to determine whether a remedial order can issue against the union since the commission can issue remedial orders only against persons found to have committed unfair labor practices. 34/

The existence of a duty fairly to represent bargaining unit members implies the existence of a right in the bargaining unit members to be represented fairly. Furthermore, that right is enforceable in the courts whether or not there also is an available administrative remedy, 35/

32/ See Mahnke v. WERC (1975), 66 Wis. 2d 524, 533, 225 N.W. 2d 617.

33/ The Supreme Court recognized the point in Humphrey v. Moore (1964), 375 U.S. 335, 55 LRRM 2031, 2035, when, after acknowledging the existence of the duty of fair representation, it said: "Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice . . ., it is not necessary for us to resolve that difference here."

34/ See sec. 111.07(4), Stats.

35/ Cf. Vaca v. Sipes (1967), 386 U.S. 171, 64 LRRM 2369.

even though judicial enforcement first was recognized because of the unavailability of administrative remedies. 36/

The National Labor Relations Board (NLRB), in construing the parallel federal legislation, has held that breach of the duty of fair representation constitutes an unfair labor practice. It has rested on three theoretical bases: (1) that the breach violates the duty to bargain; (2) that the breach induces employer discrimination on the basis of union membership; and (3) that the breach constitutes interference and restraint of the right to fair representation. 37/

Argument that breach of the duty of fair representation is a refusal to bargain.

It is an unfair labor practice for a union to "refuse to bargain collectively . . . with the duly authorized officer or agent of the employer. . . ." Section 111.84(2)(c), Stats. Collective bargaining consists in meeting with the employer and conferring with it "in good faith . . . with the intention of reaching an agreement, or to resolve questions arising under such an agreement." Section 111.81(2), Stats. State employes have the right "to bargain collectively through representatives of their own choosing." Section 111.82, Stats. The union is the exclusive representative, sec. 111.83(1), Stats., meaning that the employer can deal with no other. 38/ From this the NLRB reasoned that breach of the duty to represent fairly is breach of the duty to bargain.

Arguably the union's duty to bargain in good faith with the employer implies an obligation, during the course of such bargaining, to act in good faith, and therefore consistent with its duty of fair representation. The commission, however, need not decide the merits of this argument on the facts of this case, since the union's failure to make a considered decision whether to arbitrate was not part of collectively bargaining with the employer. It was during the processing of the grievance through the first three steps of the grievance procedure that the union was engaged in collective bargaining with the employer.

Argument that breach of the duty of fair representation is inducement of employer discrimination.

It is an unfair labor practice under sec. 111.84(2)(b), Stats., for a union to "coerce, intimidate or induce" an employer to, inter alia, "encourage or discourage membership" in any union by discrimination in violation of sec. 111.84(1)(c), Stats. In Miranda Fuel and Hughes Tool, supra, the NLRB reasoned that since union membership is encouraged or discouraged whenever a union causes an employer to "affect an individual's employment status," any union derogation of employment status for arbitrary or irrelevant reasons or upon the basis of an unfair classification constitutes the unfair labor practice of inducing

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36/ Steele v. Louisville & Nashville Railroad Company (1944), 323 U.S. 192, 15 LRRM 708.

37/ Miranda Fuel Co. (1962), 140 NLRB No. 7, 51 LRRM 1584, enforcement denied, (2nd Cir. 1963), 326 F.2d 172, 54 LRRM 2175. Metal Workers Union (Hughes Tool Co.) (1964), 147 NLRB No. 166, 56 LRRM 1289.

38/ See: Madison Jt. School Dist. No. 8 v. WERC (1975), 69 Wis. 2d 200, 211-212, 231 N.W. 2d 206, reversed on other grounds 97 S.Ct. 421 (1976).

employer encouragement or discouragement of union membership by discrimination.

We find this construction too strained to be attributed to our legislature, and we would need less equivocal statutory language before adopting this theory. The essence of the employer's statutory violation is encouragement or discouragement of union membership, although the statute also embraces protected activity incipient to union membership. 39/ Undoubtedly, in some circumstances the employer's motive to encourage or discourage union membership by discrimination can be inferred from conduct which is inherently destructive of protected employe rights, and which has such results as its naturally foreseeable consequence, 40/ but it is an entirely different matter to conclude that any unfairness of a union toward the persons it represents induces the employer consciously to fashion the motive to encourage or discourage union membership by discrimination, or that in all cases of union unfairness the employer's acquiescence so inherently destroys protected activity that its requisite ill-motive can be inferred. Of course, in certain cases a union's breach of its duty of fair representation might consist in inducing an employer to encourage or discourage union membership by discrimination, but it is strained to conclude that any breach of that duty induces an employer to engage in such misconduct. Accordingly, we reject the theory that any union breach of its duty of fair representation constitutes the unfair labor practice of inducing employer discrimination.

Argument that breach of the duty of fair representation is coercion of employes in the exercise of protected rights.

It is an unfair labor practice for a union to "coerce" an employe "in the enjoyment of his legal rights, including those guaranteed under s. 111.82." Section 111.84(2)(a), Stats. We construe "legal rights" to include the right to be represented fairly. 41/

The processing of grievances through a grievance procedure is part of the collective bargaining process itself, 42/ and employes have the right to bargain collectively through representatives of their own choosing. Section 111.82, Stats. Although the arbitration stage of a grievance-arbitration procedure is not within the collective bargaining process itself, due to the wholly contractual nature of arbitration, 43/ the duty of fair representation, as noted above, implies the existence of a legal right to be represented fairly in the arbitration process. 44/ The phrase "legal rights" within sec. 111.84(2)(a), Stats., standing alone, could imply employes' legal rights not related to labor relations, but we do not construe it that broadly. 45/

39/ AFSCME v. Juneau County (12593-B) 1/77.

40/ Ibid.

41/ Compare Racine Policemen's Professional and Benevolent Corporation (12637, Fleischli) 4/74.

42/ City of Clintonville (12186-B, C) 8/74, Enforced, WERC v. Clintonville No. 12723, Waupaca Circuit Court, June 16, 1975.

43/ City of Greenfield School District No. 6 (14026-B), 11/77.

44/ See footnotes 35 and 36, supra, and related text.

45/ See Racine Policemen, supra, note 41.

We do, however, construe "legal rights" as embracing an employe's right to fair representation by the collective bargaining representative in respect to arbitration.

The question remaining is whether the union's conduct was coercive within the meaning of sec. 111.84(2)(a), Stats. We conclude that it was. The right involved was the right to have the union make a considered decision on complainant's request for arbitration. Only the union could discharge that duty. Complainant was not himself at fault for the union's failure to make the requisite considered decision. Accordingly, the union's breach in that regard was such a total denial of the right as to be coercive in respect thereto.

Discussion of the amended conclusion of law.

The commission's amended conclusion of law deletes the examiner's reference to the union's conduct being arbitrary, discriminatory and perfunctory, and substitutes the conclusion that it breached its duty of fair representation by failing to make a considered decision on the request to arbitrate. The examiner found that such breach was in violation of "Sections [sic] 111.82(2)(a) and (c)", Stats. We construe the examiner to have meant to refer to sec. 111.84(2)(a) and (c), Stats.

DISCUSSION AS TO WHETHER THE DISCHARGE WAS FOR JUST CAUSE

Since the union breached its duty of fair representation relative to complainant's request that his grievance be arbitrated, the commission has jurisdiction to adjudicate the allegation that the discharge violated the collective bargaining agreement as not being for just cause.

The collective bargaining agreement provides (ex. 3, Article III, par. 27, pp. 11):

> "* * * [M]anagement rights include, but are not limited to, the following:
>
> "* * *.
>
> "5. To suspend, demote, discharge, or take other appropriate disciplinary action against employes for just cause;
>
> "* * *."

The letter of discharge (ex. 2) after noting the May 26 letter regarding the disciplinary action taken in response to the May 3, 1972, incident, contained the following as the basis for the discharge:

> "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."

Statement of the examiner's reasons.

In finding there was not just cause for the discharge the examiner reasoned as follows:

1. The May 3, 1972, incident and the subsequent discipline cannot be considered as a proper basis for discharge since (a) the evidence supported the complainant's version of the May 3 incident and (b) the discipline itself was tainted by anti-union animus.

2. Since Teague was a lead worker and not a supervisor, the employer's claim that Guthrie was insubordinate toward Teague is undermined.

3. Complainant was not loud or abusive on the evening of July 10, contrary to the employer's assertion.

4. Although on July 11 complainant became pretty worked up, complainant "perhaps" understandably was upset because he was caught in the shuffle between Teague acting as mere postman and supervision relative to his taking a vacation. Further, any altercation with Teague pales in comparison to the gravity of the alleged absence from work without leave.

5. Since complainant was entitled to be on vacation the week of July 10 he committed no wrong in being absent during that week.

Discussion of the examiner's first reason, that the discipline for the May 3 incident must be disregarded.

As to the examiner's discounting the May 3 incident as tainted by animus, the employer takes exception for the following reasons: (1) the conclusion is infested with an erroneous finding of fact that in May Sturm issued a threat to get even with complainant; (2) such a threat does not support a finding of animus; (3) the statute of limitations had run on the 1971 threat; and (4) there is no proof that Sturm played any significant role in the May 1972 discipline.

We agree that the May discipline was not tainted by anti-union animus for reasons already expressed. Thus, we agree with the employer that the examiner erred in discounting the alleged May misconduct on the ground that the discipline was tainted with animus. Accordingly, it is unnecessary to discuss the other of the employer's arguments relative to this ground of the examiner's decision.

As to the examiner's discounting the May 3 incident on the ground that the evidence supported the complainant's version, the employer argues that, since that discipline was grieved and disposed of, res judicata precludes examination of the underlying merits.

The collective bargaining agreement provides (ex. 3, par. 35, pp. 14):

> "Step Four. Grievances which have not been settled under the foregoing procedure may be appealed to arbitration by either party within thirty (30) days of the date of the Employer answer in Step Three, or the grievance will be considered ineligible for appeal to arbitration. If an unresolved grievance is not appealed to arbitration it shall be considered terminated on the basis of the Third Step answers of the parties without prejudice or precedent in the resolution of future grievances. * * *"

It is unnecessary to rule on the res judicata argument because the employer and the union have waived the right to object to considerations of the underlying merits by their failure to object below. 46/ Thus, the merits properly were before the examiner. The commission agrees with him that the uncontradicted testimony of the complainant and other witnesses for his case shows no leading of a work stoppage. There is no evidence of insubordination. Thus, the employer could not rely on the May events as establishing complainant's culpability for leading a work stoppage or insubordination. We affirm the examiner in this respect.

The examiner, however, failed to consider that the May 26 letter (ex. 10) warned complainant to use the grievance procedure rather than self-help. 47/ The employer based its discharge in part on complainant's failure to heed this notice. 48/ Since complainant had specific notice, the employer properly considered his failure to heed the principle to work now and grieve later.

Discussion of the examiner's second reason, that Teague's non-supervisory status undermines any insubordination of the complainant toward him.

The employer's discharge letter is somewhat ambiguous as to whether the offensive insubordination was complainant's conduct toward Teague, his absence without leave, or both. The letter's reference to the July 11 [sic 10] evening by itself suggests that both factors were considered insubordinate. On the other hand, the reference to the July 12 [sic 11] evening indicates that walking off the job constituted the insubordination.

46/ The union objected on statute of limitations grounds (174), an insufficient basis for preserving the right to object here on the ground of the finality of the settlement agreement. The employer did not object at all.

47/ The letter said: "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."

48/ The discharge letter (ex. 2) quotes most of the matter quoted in the immediately preceding footnote.

Conduct which is insubordinate when directed at a supervisor is not necessarily insubordinate when directed at a lead worker. Nevertheless, Teague was management's only representative on hand on the evenings in question. Whether or not Teague was a mere postman, nothing in the record casts doubt as to whether he was correctly relaying the position of his supervision, which was complainant's supervision as well.

Under these circumstances, we cannot accept the examiner's second reason to the extent it might mean there could be no insubordination toward management through Teague.

Discussion of the examiner's third reason, that complainant was not loud or abusive on the evening of July 10.

We agree that no record evidence supports the employer's allegation in its discharge letter that complainant was loud or abusive on the evening of July 10.

Discussion of the examiner's fourth reason, that complainant's behavior perhaps is understandable and is less important than the alleged absence without leave.

We agree with the examiner. There is evidence that complainant became angry and scattered some keys about the room. Whether or not his upset was understandable, this conduct does not constitute just cause for discharge.

Discussion of the examiner's fifth reason, that complainant was not absent without leave.

The examiner agreed that if complainant was absent without leave during the week of July 10 the discharge was for just cause. He found, however, that complainant had properly scheduled his vacation for that week. Further, as a chief steward, complainant was entitled to his vacation pick anyway and management's approval was merely pro forma. Therefore, the examiner reasoned, he was permitted to be absent and his discharge therefor was not for just cause.

The commission has reversed the examiner's finding that complainant had scheduled a vacation for July 10. We have found that complainant knowingly absented himself from work without permission. That finding has two alternative bases: (1) complainant never scheduled the July 10 vacation and knew it at all times; and (2) even if he had scheduled such vacation, supervision, through Teague, had told complainant that he was not entitled to vacation, but he left work.

Since we have rested on the first basis, the commission believes the discharge was for just cause. This conclusion is independent of the merits of the May events. Complainant's superseniority, entitling him to a first vacation pick, did not excuse scheduling it for December, claiming it on an evening in July, and leaving without permission. 49/

Had we rested on the second alternative, the commission would have sustained the grievance and remanded it to the employer with the recommendation that the discharge be changed to a 30-day suspension. 50/

49/ Superseniority or not, complainant was to have made his pick the previous March or April (ex. 3, pars. 66, 67, 23).

50/ The examiner declined to exercise the remand discretion granted by paragraph 90 of the agreement as being counter-productive to the goal of terminating the litigation. The value of that goal, however, should not displace the function of providing an appropriate remedy.

In that event, complainant's misconduct constituted in self-help in violation of the principle to work now and grieve later, contrary to the recent warning of May 26.

DISCUSSION OF OTHER ARGUMENTS OF THE PARTIES

Argument that complainant rested on an absolute right to arbitrate.

Respondents contend that the complaint must be dismissed because in testimony complainant said his only objection to the union's conduct was that it did not arbitrate. Since an employe does not have an absolute right to have his grievance arbitrated, respondents urge dismissal.

Unquestionably, had the complainant bottomed his case on the failure of the union to have arbitrated, without more, the commission would be required to dismiss the complaint. Further, had complainant's attorney stated that was the basis of his cause, the commission would have dismissed the complaint. However, reliance on complainant's own testimony as to the theory of the cause of action is inappropriate. Notwithstanding his testimony exalting himself to the status of a pre-medical student, the testimony of legal theory by a non-attorney janitor is scant basis for dismissal, especially since the parties in fact had full opportunity to litigate the issues.

Argument that examiner committed error in admitting testimony of racial discrimination.

Both respondents contend that, since the examiner sustained an objection to complainant's inquiries into matters relating to racial discrimination (39-41), it was prejudicial for him to base his decision in part on the alleged presence of racial discrimination.

The examiner committed no error. He sustained the objection because the proferred testimony concerned the employer's alleged racial discrimination respecting the discharge. He used race as an element of the breach of fair representation only in treating the union witnesses' testimony that the president of the union referred the matter to others, in departure from his ordinary policy, in part because he detected racial overtones in the matter.

REMEDY

Since there was just cause for the discharge, the commission has reversed the examiner's order of reinstatement with backpay. It follows that no extended discussion is required of his conclusion that the employer is not entitled to reimbursement from the union for any back pay. 51/

Since the union breached its duty of fair representation, in violation of sec. 111.84(2)(a), Stats., by failing to make a considered decision on the complainant's request for arbitration, the commission has entered a cease and desist order against such a failure. The examiner's cease and desist order did not focus on the particular violation.

51/ As to the power of the commission to require unions to share in backpay awards, see International Union, etc., v. Wisconsin E.R. Board (1944), 245 Wis. 417, 14 N.W. 2d 872, 15 N.W. 2d 873, and International B. of P.M. v. Wisconsin E.R. Board (1946), 249 Wis. 362, 24 N.W. 2d 672; and Wisconsin E.R. Board v. Algoma P. & V. Co. (1948), 252 Wis. 549, 561, 32 N.W. 2d 417, aff'd. 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691.

2/ See Carley Ford, Lincoln, Mercury v. Bosgnette (1976), 72 Wis. 2d

below resigned from the commission in April 1976 and now is located in the state of Washington. In order to discharge its duty of consultation, therefore, the commission by a telephone conference call discussed his personal impressions of the witnesses.

Dated at Madison, Wisconsin this 16th day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Charles D. Hoornstra
Charles D. Hoornstra, Commissioner

...Wis. 2d 715, and Madison B. & C.T. Council v. WERB (1960), 11 Wis. 2d 337, 105 N.W. 2d 556.