STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

Jacobson, Sodos & Krings, S.C., Attorneys at Law, Suite 316, 152 West Wisconsin Avenue, Milwaukee, Wisconsin 53203, by Mr. Thomas M. Jacobson, appearing on behalf of the Complainant and joined on briefs by Mr. Alan S. Brostoff, Attorney at Law, 606 West Wisconsin Avenue, Milwaukee, Wisconsin 53203.

Lawton & Cates, Attorneys at Law, 110 East Main Street, Madison, Wisconsin 53703, by Mr. Richard V. Graylow, appearing on behalf of the Respondent Local 82, WSEU, AFSCME, AFL-CIO.

Mr. Sanford N. Cogas, Legal Counsel, Department of Employment Relations, 149 East Wilson Street, P. O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the University of Wisconsin-Milwaukee.

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

Examiner Marvin L. Schurke, on December 23, 1975, having issued Findings of Fact, Conclusions of Law, Orders and a Memorandum accompanying same wherein he found Respondent Local 82 to have breached its duty of fair representation, and thereby to have committed unfair labor practices under Secs. 111.82(a) and (c), Stats., when processing Complainant Guthrie's discharge grievance and wherein he further found Respondent University of Wisconsin - Milwaukee to have discharged Complainant Guthrie without just cause and thereby to have committed an unfair labor practice under Sec. 111.84(1)(e), Stats.; and the above-named Respondents having timely petitioned for review thereof pursuant to Sec. 111.07(5), Stats.; and the Commission, by Commissioner Hoornstra and Chairman Slavney, on December 16, 1977, after having reviewed the Examiner's decision and the entire record, having issued its Order Revising Examiner's Findings of Fact, Amending Examiner's Conclusions of Law, and Amending Examiner's Remedial Order wherein it found Respondent Local 82 to have breached its duty of fair representation in violation of Sec. 111.84(2)(a), Stats., and wherein it further found that Respondent University of Wisconsin - Milwaukee had discharged Complainant Guthrie for just cause and had not violated Sec. 111.84(1)(e), Stats.; and pursuant to a decision of the Wisconsin Supreme Court issued March 29, 1983, which affirmed a decision of the Court of Appeals which in turn had affirmed an order of the Circuit Court for Dane County, this case having been remanded to the Commission for further consideration; 1/ and the Commission, by Chairman Torosian and Commissioner Covelli, having reviewed de novo the Examiner's December 23, 1975 decision, the entire record, and being fully advised in the premises, now makes and files these Revised Findings of Fact, Conclusions of Law and Order, together with its Accompanying Memorandum.

1/ The full procedures followed in the case, including appeals of interlocutory orders to the Commission, appeals to the Circuit Court and the Supreme Court, are detailed in the 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 July 14, 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, the Complainant held office as a steward of the same union.

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

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

4. That the Respondent Employer recognized the Respondent Union as the exclusive collective bargaining representative in a bargaining unit which included, among others, the classification of Building Maintenance Helper 2; that Respondent Employer and Respondent Union were parties to a collective bargaining agreement made effective on March 16, 1970; that said agreement continued in effect beyond its stated expiration date and remained in effect as of July 14, 1972; that said collective bargaining agreement provided that employes may be discharged for just cause; that said collective bargaining agreement made 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 contained 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 stated: "Sam, it looks as though you're running the University; I'll get you no matter what".

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

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

6. That, on May 3, 1972, the Complainant, acting 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, concerning Wolta's assignment of certain work to unit employes; that Sturm and employes became involved; and that the Complainant was discharged from his employment, but was later reinstated with a 12-day suspension and a transfer 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 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 some time in December 1972; and 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, because he believed the Complainant, who is black, thought the case had racial overtones which could better be handled by another black, Field Representative Hattush Alexander, with whom Complainant worked well; that Grennier believed the case could be adequately 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 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 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 processing 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 processing 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 Field Representative Alexander due to his continuing belief that Field Representative Alexander could best handle the matter; that Osowski asked Grennier about the processing of the Complainant's discharge grievance; that Grennier also referred Osowski to Alexander; 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; and that Alexander contacted Grennier who authorized Alexander to act concerning Complainant's discharge grievance, and that Grennier secured approval for an extra-contractual meeting with Respondent Employer on Complainant's grievance.

11. 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 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; and 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; that although Grennier spoke to Osowski and Weiland about the grievance prior to a meeting of the Executive Board, neither Weiland, Osowski nor Alexander attended any meeting of the Executive Board which discussed Complainant's discharge grievance or his desire to proceed to arbitration; that the Executive Board of Respondent Union never made a considered decision on whether to pursue Complainant's grievance 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; that the Respondent Union took no action to notify the Complainant that his discharge grievance had not been appealed to arbitration; 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.

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

REVISED CONCLUSIONS OF LAW

1. That the Respondent Union, Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, by arbitrarily failing to make a considered decision on whether to pursue Complainant Sam Guthrie's discharge grievance to arbitration, breached its duty of fair representation 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 University of Wisconsin - Milwaukee, by discharging Complainant on July 14, 1972, breached the parties' collective bargaining agreement and thereby violated Sec. 111.84(1)(e), Stats.

3. That as Respondent Union Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, breached its duty of fair representation, the Commission will exercise its jurisdiction to determine whether Respondent University of Wisconsin - Milwaukee violated the parties' collective bargaining agreement and thereby violated Sec. 111.84(1)(e), Stats., by discharging Complainant Guthrie.

4. That since the Respondent Employer, University of Wisconsin - Milwaukee had just cause, within the meaning of the collective bargaining agreement, to discharge Complainant Guthrie on July 14, 1972, Respondent University of Wisconsin - Milwaukee, 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 Revised Conclusions of Law, the Commission makes and files its

REVISED ORDER 4/

IT IS ORDERED THAT:

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

(a) Cease and desist from breaching its duty to fairly represent employes by failing to make considered decisions as to whether to pursue grievances to arbitration;

4/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the

(Continued on page 6)

(b) Pay Complainant Samuel E. Guthrie an amount of money equal to the cost, including reasonable attorney's fees, incurred by him when litigating the merits of his discharge during the hearing before Examiner Schurke.

(c) Notify the Wisconsin Employment Relations Commission within twenty (20) days of the date of this Order as to what steps it has taken to comply herewith.

2. The complaint, except as to the violation of Sec. 111.84(2)(a), Stats., is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 30th day of May, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

4/ (Continued)

decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

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

The initial hearing in this matter before Examiner Schurke was held on January 30, 1973. At the close of that hearing, the Respondent Employer requested that Examiner Schurke make an initial ruling on the fair representation issue. The Complainant and Respondent Union objected and on March 12, 1973, the Examiner denied the Respondent Employer's request. Respondent Employer then moved for summary judgment and the Examiner denied that motion. Respondent Employer then successfully sought discretionary Commission review of the Examiner's denial of its motion. The Commission affirmed the Examiner, and Respondent Employer petitioned the Circuit Court of Dane County for review of the Commission's decision. The Circuit Court granted the Commission's motion to dismiss, and Respondent Employer appealed to the Wisconsin Supreme Court. The Supreme Court affirmed the decision of the Circuit Court, and the case was returned to the Commission for further hearings. 65 Wis. 2d 624 (1974).

On December 23, 1975, following additional hearing, the Examiner made and filed his Findings of Fact, Conclusions of Law, Orders and Accompanying Memorandum. 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; that as a result of the Union's breach of its duty, the Commission had jurisdiction to adjudicate the merits of the complaint in respect to whether the Respondent Employer's discharge of the Complainant on July 14, 1972, violated the collective bargaining agreement's requirement that discharges be for just cause; and that the discharge was not for just cause and, therefore, that it violated Sec. 111.84(1)(e), Stats. The Examiner's Order required Respondent 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 Respondent Union and Respondent 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. On December 16, 1977, the Commission (Chairman Slavney and then-Commissioner Charles Hoornstra) entered its Revised Findings of Fact, Amended Conclusions of Law, and Amended Remedial Order and Accompanying Memorandum.

The Commission concluded that the Respondent Union breached its duty of fair representation; that the Commission had jurisdiction over the just cause question; and that there was just cause for the discharge. The Commission modified the Examiner's remedial order with respect to attorney's fees; ordered the Respondent Union to cease and desist from failing to fairly represent employes; and dismissed the complaint in all other respects. The Complainant then sought review in the Circuit Court for Dane County, alleging that Commissioner Hoornstra improperly represented the Commission's and Complainant's positions in the case on the procedural issue before the Wisconsin Supreme Court and then later acted as a Commissioner reviewing the Examiner's decision. The Circuit Court ruled that there was no factual basis to sustain the inference that Hoornstra stood to profit in any way from his decision as a Commissioner in the Guthrie case, but that an impression of impropriety had been created by Commissioner Hoornstra's participation in the case and the case should therefore be remanded to the Commission for further consideration. Upon appeal the Court of Appeals affirmed the Circuit Court, 107 Wis. 2d 306 (1982) and the Supreme Court affirmed the Court of Appeals, 111 Wis. 2d 447 (1983).

Upon full reconsideration and review of this case, the Commission has entered its Revised Findings of Fact, Conclusions of Law and Order and Accompanying Memorandum. As detailed below, we affirm the Examiner's conclusions that the Respondent Union breached its duty of fair representation, but find that Respondent Employer had just cause to discharge Complainant Guthrie.

Discussion of the Examiner's Findings of Fact and the Commission's Revised Findings of Fact:

Finding No. 1

The Examiner found that for approximately one year prior to Guthrie's May 30, 1972 transfer from the Physical Plant to the Housing Department, Guthrie served as a chief steward for Respondent Union and that for the two year period prior to his term as chief steward, Guthrie served as a steward in the Physical Plant.

The Respondent Employer assigns error, contending that the record indicates that Guthrie was chief steward at the time of his discharge.

At the initial hearing, Guthrie testified that he served as a steward for approximately two years and that during this stewardship he was appointed chief steward and served in that capacity for approximately one year (19, 20, 33, 39); 5/ that he continued to serve as chief steward after his transfer to the Housing Department on or about May 29, 1972 (28, 153); and that he was chief steward on the date of his discharge (4). However, Guthrie also testified, without contradiction, that at some time between the initial hearing herein (held January 30, 1973) and the second hearing (held March 27, 1975), Guthrie was diagnosed as suffering from epilepsy and Guthrie admitted that since contracting epilepsy he suffered from a loss of memory (166).

There is a conflict in Guthrie's testimony at the first and second hearings concerning his status as a Union official on the date of his discharge (compare 187 and 4, 28, 153). However, we find that Guthrie's testimony at the first hearing is more reliable than his testimony at the second hearing which occurred two years after the first hearing and after Guthrie's intervening illness which caused a loss of memory.

We conclude that Guthrie was a chief steward at the time of his July 14, 1972, discharge and we hereby delete the words "May 30, 1972" in the Examiner's decision and add: "July 14, 1972".

Finding No. 2

The Examiner found that the Union's procedures required a local union president's request before a Council 24 field representative could become involved in local Union affairs.

The Respondent Employer assigns error, contending that such a request is not generally necessary but is only required before a field representative may become involved in the Third Step of the grievance procedure.

We affirm the Examiner and conclude that his finding is substantially supported by the record. The Respondent Employer's contention is based on a single out-of-context passage from Field Representative Hattush Alexander's testimony (100). Examination of Alexander's entire testimony on this point fully supports our conclusion.

Alexander testified that his primary responsibility as Union field representative was to handle Third Step grievance meetings if requested to do so by a local union president; that his secondary responsibility was to recommend arbitration to the Council which recommendation the Council could reject (99, 100). Alexander stated he had no authority and did not arbitrate grievances (100).

However, Alexander also testified that he became involved in Guthrie's case when Union Steward Osowski called him about Guthrie's grievance during the week following the Union's receipt of the Employer's Third Step answer. Osowski gave Alexander the facts surrounding the discharge and asked Alexander to investigate, "to come in on the thing" (97, 91) because "it wasn't clear to him (Osowski) what had happened" (100). Alexander then called the local union president out of concern about Guthrie's situation although he was "strictly out of my realm"

5/ Numbers in parentheses refer to transcript pages.

(100). Grennier then "told" Alexander to get in touch with Osowski and to "try to set up a meeting" (92). Grennier then "okayed" this meeting "through the Personnel office" (92). After he talked to Grennier, Alexander called Employer representative Cottrell who did not have to grant such a meeting because Alexander was "purely out of my jurisdiction" (101). The meeting which then occurred was a fact-finding extra-contractual meeting and not a Third Step meeting since the latter had already occurred (92, 98-99).

It is clear that Grennier requested Alexander's involvement: only after Grennier gave the "okay" did Alexander proceed with the extra-contractual meeting on Guthrie's behalf. Furthermore, the passage cited by the Respondent Employer (100) does not actually limit the areas where a local president's request is required. The Examiner's finding is supported by substantial record evidence and will stand.

Finding No. 3

The Examiner found George Sturm to be the Respondent Employer's agent, authorized to act on the Employer's behalf with regard to employe relations.

The Respondent Employer contends that Sturm (who was identified in the complaint as an Assistant Director of Physical Plant) was not authorized to act "in the same capacity as Mr. Cottrell", then Director of Employee Relations.

We affirm the Examiner. The question here is not whether Sturm had ultimate authority over labor relations. Rather, the question is whether Sturm was an agent of the Respondent Employer who could bind the Employer concerning labor relations. Thus, the record indicates that Sturm had authority to direct that employes attend meetings concerning employe relations (70, 170-171, 194). Witnesses testified that Sturm was "one of the superintendents" (170); that he was "a supervisor or top man" (203). Furthermore, Exhibit 10, (the Employer's own document) refers to Mr. Wolta as Guthrie's immediate supervisor and to Sturm as Wolta's "supervisor".

Thus, the record amply supports the Examiner's finding that George Sturm was Respondent Employer's agent with authority to act on its behalf regarding labor relations. No error has been committed. The fact that Sturm was lower in the management hierarchy than Cottrell is irrelevant.

Finding No. 4

The Examiner treated Local 82 as the Respondent Union.

The Respondent Employer asserts that the collective bargaining agreement is between the State of Wisconsin and AFSCME Council 24 and that under the contract Local 82 represents UW - Milwaukee unit employes and UW-M represents the State. Therefore, the Employer contends, Council 24 alone should be treated as Respondent Union.

The parties to the collective bargaining agreement are:

> State of Wisconsin, The University of Wisconsin - Milwaukee and Wisconsin State Employees Association Council 24, AFSCME, AFL-CIO, Its Appropriate Affiliated Local 82. (Exhibit 3)

In his Finding of Fact No. 2, the Examiner identifies Respondent Union as "Local 82, Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO". The complaint, however, names Local 82 and Council 48 as Respondents. The notice of appearance states the same counsel appeared for Local 82 and Council 24. The amended complaint treats Council 24 and the Local as a single Respondent as does the answer thereto. At the first hearing, Respondent Unions' counsel stated his appearance for "Council 24 and Local 82" (2).

At hearing, Complainant's counsel stated that Complainant's cause of action was against Local 82 and its officers and that Council 24 was merely named as Respondent "for descriptive purposes" (75). The Examiner acknowledged Complainant's statement and made clear that Council 24, not Council 48 was the proper "descriptive" party (75-76). Following this exchange, Mr. Graylow (counsel for Council 24 and Local 82) made his opening statement on behalf of both Union entities (76).

Thus, based upon the pleadings and the record herein, we conclude that the Examiner's finding was substantially correct and that the Examiner's finding has not prejudiced the Respondent Employer in any way. In this regard we note that Complainant agreed to look to Local 82 alone concerning Complainant's duty of fair representation claims; and that Respondent Unions were represented throughout these hearings by the same counsel without objection by either Union entity. Thus, even though the Examiner's finding of the name of Respondent Union in his Finding of Fact No. 4 was not strictly the legal or contractual name, the name used by the Examiner did not confuse or mislead any party. The Examiner's finding of Respondent Union's name herein was clearly in line with Complainant's acknowledgement at hearing of the true Union party in interest and the facts adduced herein. Finally, and without commenting here on the Examiner's decision on the merits of the just cause case, the Examiner dealt completely with the Respondent Employer's request for indemnification in his Memorandum (pp. 37-38). We refuse to reverse the Examiner concerning his Finding of Fact No. 4.

Finding No. 5

The Examiner found that stewards and chief stewards have contractual responsibility for the resolution of problems arising within their jurisdictional areas and the processing of grievances only at the first three steps of the grievance procedure. The Examiner also found that some time during 1971, George Sturm threatened to "get" Guthrie while Guthrie was acting in his capacity as a Union official in the Physical Plant.

The Respondent Employer, relying on the collective bargaining agreement, asserts that the Examiner erred in using the steward/chief steward terminology, in finding that the contract limits grievance processing to stewards and chief stewards, and in finding that such Union officials may only process grievances through Step Three.

Respondent Employer is correct that the contract uses the terms "grievance representatives" and "grievance representative-at-large" (see Exhibit 3, p. 17). Respondent Employer is also correct in its assertion that the terms "steward" and "chief steward" appear to be based upon customary usage within the Union and are Union-imposed (see, 4, 62-63, 110, 118). However, we affirm the Examiner.

Clearly, the contractual grievance procedure envisions that an employe may choose one who is not a Union official to present the employe's grievance and that such presentation is not specifically limited to Steps One through Three of the grievance procedure (Exh. 3, p. 17-18). However, substantial testimony herein concerning the powers of the stewards and chief stewards supports the Examiner's findings that stewards and chief stewards are not empowered to take grievances beyond Step Three (See, Weiland: 122-123; Osowski: 117; Guthrie: 4-6, 17; see also Examiner's Memorandum, pp. 14-15).

Indeed, it is irrelevant to the merits of a duty of fair representation case whether the Union has imposed internal limitations on the power of its representatives and has changed its representatives' officials titles. The real question here is not dependent upon Union-imposed terminology and limits of power. Rather, the inquiry here must be whether Union officials (regardless of their titles and any limitations on their power) fairly represented Guthrie in processing his discharge grievance. We affirm the Examiner. He committed no reversible error.

Second, Respondent Employer argues that nothing in the record proves that Guthrie was acting as a Union representative during the incident involving Sturm's threat, and that the Examiner erred thereon.

We affirm the Examiner. There is substantial evidence from all witnesses to the Sturm incident that at the time Sturm threatened Guthrie, Guthrie was acting as a steward (Morris: 65, 70; James Taylor: 47; Guthrie: 170; Henry Reynolds: 200-201; Edward Taylor: 192-194).

Respondent Employer contends that Morris testified to hearsay concerning the Sturm threat. We disagree and affirm the Examiner. Morris testified:

> . . . Mr. Sturm told me that he was--he intended to get even with Sam Guthrie if it was the last thing he did." (70)

Finding No. 6

The Examiner found that on May 3, 1972, while acting as a Union representative, Guthrie took issue with the orders of an agent of Respondent Employer; that Sturm then became involved; that Guthrie was discharged; that Sturm told Morris that Sturm would "get" Guthrie; that Guthrie was reinstated with a transfer to the Housing Department; and that Respondent Employer's actions in discharging, reinstating and transferring Guthrie were based, at least in part, upon anti-union animus.

Respondent Employer contends that the May 3, 1972, incident involved supervisor Wolta and that Guthrie was threatened by Sturm, not on May 3, 1972, but in the fall of 1971.

The record is confused concerning when Sturm threatened Guthrie. This confusion is based upon the fact that (1) Guthrie was discharged twice (May 1972 and July 1972) and (2) it appears that Guthrie was involved in two "work stoppages" in 1971 which involved Wolta -- one incident involved Guthrie's leaving his work area on his break time to get hot food (167, 170) and the other work stoppage concerned Wolta's orders regarding rubbish removal by unit employes (See, 167, 169-171 and 187-188). We agree with Respondent Employer that it is more likely that Sturm threatened Guthrie in the fall of 1971 and that during that time Sturm repeated that threat to Andy Morris and that Sturm did not threaten Guthrie in 1972.

Analyzing the conflicting evidence, we conclude that in 1971 Guthrie was reprimanded for leaving his work station during his break time to get hot food. Guthrie filed a grievance concerning this matter. Also in 1971, at about the same time as the hot food incident, Guthrie confronted supervisor Wolta concerning Wolta's orders that a unit employe perform non-unit work -- rubbish removal. Employes either left their work stations or did not start work on time in order to observe the latter Wolta-Guthrie confrontation. Thereafter, Sturm called an employe meeting to inform employes that they must remain at their work stations even while on break. At this employe meeting, Guthrie insisted that employes had the right to leave their work stations on break time to get hot food. Sturm threatened "to get" Guthrie after Guthrie took this postiion. After the employe meeting, Morris (and Grennier) became involved, in large part, because Sturm had threatened Guthrie at the employe meeting. A meeting was set up with Mr. Berry, head of the Physical Plant, to discuss Sturm's threat and the Wolta-Guthrie confrontation. Prior to the Berry meeting, Sturm repeated the threat he had made to Guthrie to Morris. The Berry meeting was held and Berry described the events surrounding the Guthrie-Wolta confrontation as a "work stoppage". Thus, we have concluded that the Sturm threat occurred in 1971.

We further find that the events surrounding Guthrie's May 30, 1972 transfer from the Physical Plant to the Housing Department are as follows. On May 3, 1972 Guthrie twice confronted Wolta and in some manner questioned his authority as a supervisor. A number of workers either never started work or stopped working to join Guthrie in this confrontation. Sturm then became involved but made no threats. On May 5, 1972, the Employer discharged Guthrie for the reasons stated in Exhibit 10 -- insubordination and leading a work stoppage. On May 26 the Respondent Employer converted the discharge to a twelve-day suspension and a transfer to the Housing Department.

The evidence herein supports our conclusions. Various witnesses testified to a meeting with Mr. Berry which occurred following one of the work stoppages described above. The Berry meeting is the only detail that every witness appeared to recall was connected in time to the Sturm threat.

James Taylor testified that a meeting in Berry's office occurred in September, 1972, and pertained to Guthrie being "drunk" and "calling a strike" and that after this meeting Guthrie was transferred from the Physical Plant to Housing (46-47). Henry Reynolds testified that Sturm accused Guthrie of leading a work stoppage and threatened Guthrie at an employe meeting which occurred after the work stoppage concerning Wolta and the rubbish removal issue (200-202); that the Berry meeting occurred after Sturm threatened Guthrie at this employe meeting (203); and the Berry meeting was called to discuss Guthrie's discharge (52-54). Edward Taylor also linked Sturm's threat to the rubbish removal work stoppage, the Berry meeting and a discharge grievance filed by Guthrie (see, 59-60 and 193-194). Initially Edward Taylor stated that the Berry meeting occurred in the summer of 1972 (60, 61) and later he placed it in the fall of 1971 (193-194). Andy Morris testified that the Berry meeting occurred in the fall of 1971 (before Guthrie's

July 1972 discharge) (65). Morris stated that the Berry meeting occurred in the fall of 1971 and concerned "health hazards", whether Guthrie had had physical contact with Wolta and whether the employes' curiosity about this confrontation between Wolta and Guthrie constituted a work stoppage (65, 70). Morris testified that probably in the fall of 1971 Sturm told Morris of the threat Sturm had made to Guthrie (70). Morris also stated that he was unaware of, and did not attend any meetings concerning the incident of May 3, 1972 and Guthrie's termination from the Physical Plant and that he had been on vacation during the first week of May 1972 (67). Grennier testified that a May 3, 1972, work stoppage led to the Berry meeting (80-81) and that as a result of the Berry meeting Guthrie was given "a choice to go to Housing" or be terminated (81). Finally, Guthrie connected Sturm's threat, his "discharge" from the Physical Plant, the hot food incident, the rubbish removal work stoppage and the employe meeting with Sturm concerning breaks (167, 169-170, 171, 187-188). Guthrie stated that all of these incidents occurred in 1971 (169, 170, 171).

All witnesses who testified on the point agreed that the Berry meeting was held after Sturm threatened Guthrie in the presence of employe witnesses. All witnesses who testified on the point were certain that Andy Morris was present at the Berry meeting (Reynolds: 55; James Taylor: 46; Grennier: 80-81). None of the witnesses who testified to a 1972 date (except Grennier) were certain of their answers (Edward Taylor: "I couldn't tell you the exact time. I don't know the exact time." (59 and 193); James Taylor: "I don't recall the date . . ." (49); Henry Reynolds: "I just thought it was September but all I know is it was in the time he had got fired and I wasn't trying to remember the date." (55) and "I don't know. All I know is it was a cold month . . ." (56)). Yet, Andy Morris stated that he was on vacation during the first week of May, 1972 and was unaware of and not involved in any meetings concerning the May 3, 1972 incident (see Exhibits 1 and 8). In addition, Guthrie was transferred from the Physical Plant to Housing, at the end of May, 1972. Thus, it is very unlikely that Berry would be involved in any meeting concerning Guthrie's behavior after May 30, 1972. Indeed, there is no evidence that Berry was involved in the meetings which lead to Guthrie's July 1972 discharge.

Finally, we note that Guthrie himself placed the Sturm threat in 1971 at about the same time as the work stoppages concerning hot food and rubbish removal. Guthrie stated that Sturm threatened him at a meeting concerning the proper use of break times and employes staying at their work stations (170). Exhibit 10, although potentially self-serving, does not refer to any threats, but does indicate that there were two Wolta-Guthrie confrontations which led to the creation of this exhibit. Neither the complaint, amended complaint, Guthrie's testimony, nor the Respondent Employer's testimony establishes that Sturm threatened to "get" Guthrie in 1972. As detailed above, we conclude no such threat was made in 1972.

Accordingly, it is necessary to revise the Examiner's finding herein in the areas in which the Examiner's finding conflicts with our findings.

Second, the Respondent Employer argues that there is no evidence to support the Examiner's finding that Guthrie's suspension and transfer of May, 1972, were motivated in part by anti-union animus.

We agree with the Respondent Employer and reverse the Examiner. We note that the Examiner based his conclusions on: (1) Sturm's 1971 threat to "get" Guthrie and Sturm's May, 1972, repetition of that threat to Morris which the Examiner felt indicated Sturm's continued animus; (2) the absence of evidence to show that Guthrie had led a work stoppage on May 3, 1972; and (3) the fact that Guthrie accepted a transfer to Housing, in part, because he perceived he had been threatened by management (188). As we have found that no threat was made to Guthrie or repeated to Morris in 1972, Sturm's threat is far removed from the instant discharge. Furthermore, there is no evidence on this record to prove whether or not Sturm was involved in the initial decision and/or recommendation in May, 1972, to discharge Guthrie from the Physical Plant. Thus, there is no record evidence to connect Sturm's 1971 animus to Guthrie's May, 1972, discipline. Finally, Guthrie's perception of the threat and the lack of evidence that Guthrie led a work stoppage on May 3, 1972, are irrelevant since the Complainant has failed to prove the necessary causal connection between Sturm's threats and Guthrie's May, 1972, discipline. Thus, the bases for the Examiner's conclusion thereon fail.

Accordingly, we reverse the Examiner's finding that the May, 1972, discipline was tainted with anti-union animus. It is necessary to amend the Examiner's Finding of Fact No. 6 because of the Examiner's errors.

Finding No. 7

The Examiner found that in December, 1971 and in January through March 1972 Carl Hiegert was acting supervisor in the physical plant; that at Hiegert's direction Andy Morris asked employes their vacation preferences; that Guthrie selected the week of July 10, 1972; that Morris wrote down employes' choices and gave the information to Hiegert; that either Morris or Hiegert erred in recording the information so that Guthrie's choice was incorrectly recorded as an unspecified week in December, 1972.

Respondent Employer first contends that Hiegert was a supervisor, not an acting supervisor. Respondent Employer may be correct that Hiegert was a probationary supervisor during the pertinent period and that Hiegert simply misstated when he testified that he was "acting supervisor" (230, but compare 229-230). However, whether Hiegert was acting as a probationary or a full supervisor is irrelevant to the issues here. In any event, Hiegert was a supervisor (see Cottrell's testimony at 252). We affirm the Examiner.

Respondent Employer contends that the Examiner erred in finding that in late 1971 or early 1972, Guthrie scheduled his vacation for the week of July 10, 1972. The evidence can be summarized as follows.

Without extensive citation, we note, as did the Examiner, that Article VII, Section 1 governs the vacation scheduling procedure and Article V, Section 3 grants superseniority for transfers and vacation scheduling to all grievance representatives (Exhibit 3). In particular, Article VII, Section 1 states in part:

> A. . . . In accordance with the foregoing, vacation may be scheduled any time during the year. Where changes in circumstances justify, the number of employes allowed to be on vacation may be changed.
>
> B. Prior to March 1 of the vacation year, employes in work unit seniority order may choose at least two weeks of their vacation.
>
> C. Prior to April 1 and after all employes have chosen their first amount of vacation, employes in work unit seniority order may choose any remaining vacation.
>
> D. If an employe fails to specify his preference of vacation when given the opportunity to do so prior to April 1, or if he wishes to change his designated preference after April 1, he may not use the seniority factor to upset vacation periods previously scheduled by other employes. Also, employes who transfer shall carry their vacation selection to their new work unit, but no other employe's vacation selection shall be adversely affected by this provision.
>
> E. Vacation may also be taken in January or February, with seniority the determining factor in the event conflicts arise. (Emphasis supplied)

Numerous witnesses testified to the actual vacation policy. For example, Morris testified that the policy concerning vacation scheduling is that upon Morris' turning in the preference list to his supervisor, the supervisor would look over the list, check the employes' seniority against their preferences and, if two employes preferences conflicted, the most senior employe would be given his preference (68).

Hiegert stated that under policy, vacation preferences in the form of vacation "slips" similar to Exhibit 13 had to be submitted to the Physical Plant Office by April 1st each year (234, 236); that until April 1st, seniority governed preferences (231, 234, 236); and that if an employe does not submit a preference in the form of a vacation slip by April 1st, the employe must take his vacation on an open date without reference to seniority (236). Hiegert also stated that it is

policy for employes to give fourteen days' notice of their intent to take vacation unless it is an emergency (234); and that the employe receives one copy of his vacation slip, one copy goes to "the office" and Hiegert retains one copy (234).

Numerous witnesses testified to vacation scheduling in the Physical Plant in 1971. Guthrie testified that in the winter of 1971 (12), Andy Morris asked him for his vacation preference; that Guthrie told Morris he preferred the week of July 11th; that Morris wrote down his preference on a list, in evidence as Exhibit 1 (10). Guthrie stated that (at some unspecified time) Morris made a copy of Exhibit 1 and gave it to Guthrie (11).

Morris testified that he wrote Exhibit 1 in late 1971 or early 1972 (63); that on one occasion Morris spoke to Guthrie about Guthrie's preference and Guthrie indicated he preferred the week of July 10th; that Morris so listed Guthrie's preference on Exhibit 1 (63-64, 72); that Morris then gave "a copy" of Exhibit 1 to Carl Hiegert, Physical Plant Supervisor (64). Morris did not state that he gave Guthrie a copy of Exhibit 1.

Morris was uncertain as to the reason and the date on which he prepared Exhibit 8. Initially, Morris testified that he prepared Exhibit 8 prior to his vacation (the first week of May, 1972) (68). Then Morris testified that he prepared Exhibit 8 after Guthrie was transferred to Housing (May 29, 1972) (69, 72), and that Exhibit 8 was prepared after Exhibit 1 (68-69, 72). Under questioning concerning the date that Morris created Exhibit 8, Morris testified that Guthrie possibly changed his vacation preference at an unspecified time:

> . . . I don't remember exactly when he decided to change, if he had changed it at all . . . I do not remember when he decided on his date but this is the original date that he gave me here. (68)

Morris also stated that the reason he prepared Exhibit 8 was:

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

Later, Morris stated that he had erred (69) in recording Guthrie's vacation preference on Exhibit 8:

> 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 that time. They compared notes they were all identical. I don't know how I made the error. (72)

Hiegert testified that in late March, 1972, he requested that Morris and three other lead persons under Hiegert's direction ask Physical Plant employes for their vacation preferences and give Hiegert a list thereof (231-232, 238). Thereafter, Morris gave Hiegert Exhibit 8 (231). Hiegert stated that he "copied" from Exhibit 8 in making out vacation "slips" for employes for whom specific vacation dates were listed on Exhibit 8; that he then spoke to each employe to have them verify their vacation dates and sign their slips (231, 232, 233). (These "slips" are identical to blank Exhibit 13's (see, 232, 235, 241, 242)). Copies of the signed forms were given to the employe, the Physical Plant Office and one was retained by Hiegert (231-233, 236). Hiegert stated that he wrote Exhibit 9 after Morris brought him Exhibit 8 and (presumably) after Hiegert had gotten all of the slips filled out and signed (232).

Hiegert stated that on one occasion prior to April 1, he asked Guthrie about Guthrie's vacation choice; that Guthrie told Hiegert he would let Hiegert know specifically later, but he thought he would take his vacation some time in December (231, 233). Hiegert stated that he never made out a "slip" (Exhibit 13) for Guthrie since Guthrie never specified dates for his vacation (233).

Hiegert repeatedly denied seeing Exhibit 1 before the hearing (231-232, 239). Hiegert insisted that Morris gave him Exhibit 8 which he used to fill out vacation

slips for Physical Plant employes (232, 234, 241). Hiegert identified Exhibit 9, 6/, as a "schedule for vacations" which he had written (at some unspecified time) (230). Exhibit 9 shows Guthrie's vacation selection as "Dec. (72)."

Owen Bradley, Assistant Director of Operations for the Housing Department, testified that he did not receive a vacation slip for Guthrie until July 13 or 14, 1972 (242-3, 247) in evidence as Exhibit 13; that Exhibit 13 was incomplete; and that he told his subordinates to get clarification thereon from Guthrie (243-244). Bradley also stated that there was no evidence in the Respondent Employer's files (Physical Plant or Personnel) that Guthrie had requested July, 1972 vacation dates; Bradley stated that personnel files are not "transferred" with an employe but remain in the Personnel office at all times after an employe is transferred (247).

Cottrell, Director of Employee Relations, generally corroborated Hiegert's testimony (255). Cottrell also corroborated Bradley in regard to the lack of documentation in the Employer's files to show Guthrie had stated a July, 1972 vacation preference (253).

Two employe witnesses 7/ also testified concerning vacation scheduling for 1972 and vacation policy. Henry Reynolds initially testified that (in general) the "supervisor-steward" asks the employes for their vacation dates according to seniority (51). Specifically, Reynolds stated that in the winter ("around December") of 1971, Morris asked him his preference--the month of August--and Morris wrote down that preference (52). However, Reynolds stated that he actually took only three weeks vacation in August 1972 (52). Although Reynolds was shown Exhibit 1, Reynolds was not asked and did not state whether Exhibit 1 was the list on which Morris wrote his preference in the winter of 1971 or whether Morris gave Reynolds a copy of Exhibit 1 (52).

At the second hearing, Reynolds stated that in the latter part of 1971 or the beginning of 1972, Morris came around with a "list" on which Morris wrote his and other employe vacation preferences (271). Reynolds also stated that in early 1972 Morris came around with a "slip" which had Reynolds' name on it saying his vacation had been approved (272) and that Morris' name was also on that slip (272, 273). Reynolds stated that Heigert never spoke to him concerning his 1972 vacation preference (272); that he had never seen a blank Exhibit 13 prior to the hearing (273); and that he did not remember seeing Hiegert's name on the "slip" he received approving his vacation (273). Respondent Employer's counsel questioned Reynolds concerning his vacation approval "slip" but did not offer any documentary evidence on this point (273).

At the first hearing, Edward Taylor testified concerning vacation policy:

> . . . (t)hey come around and they ask you when you want your vacation and then you -- they write you up and they tell you if you can have that week or not. (58)

Edward Taylor also stated that in 1971 Morris

> . . . wrote my name down; then he went and gave the slip to the man at night. The man come and the supervisor come and asked me. He said "You can have it. Nobody else is going to take it." (59)

6/ Exhibit 9 was not received into evidence. At the first hearing, Exhibit 9 was marked by counsel for the Union (69) but not identified or offered. At the second hearing, Exhibit 9 was identified on direct examination by Employer witness Hiegert (230); Union counsel then cross-examined Hiegert on the Exhibit (236-237). Employer counsel moved the admission of Exhibit 9 and no objections were lodged but the Examiner did not expressly rule on the motion (237). The parties appear to have proceeded as though Exhibit 9 were 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. Therefore, the Commission treats Exhibit 9 as received.

7/ James Taylor did not testify concerning vacation preferences.

Taylor stated that he took his 1972 vacation during the first week of July 1972 (60).

At the second hearing Ed Taylor testified that Harvey, "the supervisor", talked to him about his 1972 vacation and approved it (275). Yet, Taylor also stated that Andy Morris was the "only person" Taylor had "any dealings with" concerning his 1972 vacation preference (274). Taylor testified that he never told anyone he wanted to vacation in December but that he did tell "them" he wanted his vacation in September (275); that he never filled out or received a slip approving his vacations in 1972 -- that his vacations were verbally approved by Harvey (275-276). Finally, Taylor stated that Hiegert never spoke to him concerning his 1972 vacation preference (274).

The Examiner made an extensive analysis of the record and exhibits in arriving at his finding (see Memorandum pp. 34-37). We will not repeat his reasoning in detail although we summarize it as follows:

1. The Examiner rejected the possibility that Exhibit 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) would knowingly claim July 10 and then perjure himself in the hearing below, or that Morris (who was then about to retire) would jeopardize his financial interests by falsifying evidence and perjuring himself.

2. The Examiner rejected, as unsupported, 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 but 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 Morris then gave to Hiegert. 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, Exhibit 8, to the more vague dates listed 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, created the anomaly that the supposed erroneous document, Exhibit 1, was more accurate in one respect than Exhibit 8, although 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.

Respondent Employer contends that the Examiner erred and that the more reasonable hypothesis is: Exhibit 8 was prepared in the spring of 1972 before Exhibit 1 was written; that Exhibit 1, not Exhibit 8, was written during preparation for processing Guthrie's grievance; that Morris gave Guthrie a copy of Exhibit 1 after recording Guthrie's preference thereon as the week of July 10; that Morris was unaware that Exhibit 8 had been retained.

We agree that the Respondent Employer's hypothesis is most reasonable for the following reasons. Hiegert must have used Exhibit 8 or the vacation slips, not Exhibit 1, to prepare Exhibit 9. The evidence on this record concerning Exhibit 9 and the evidence concerning the need for supervisory approval of vacations and the use of vacation request/approval "slips" supports this conclusion.

Implicit in our analysis is the premise that supervisory approval (verbal or written) was necessary before an employe could rely on taking his/her vacation at a specific time. As detailed above in our summary of Reynolds' and Ed Taylor's testimony, the facts clearly support this premise. Thus, it is clear from the evidence that Hiegert asked Morris to poll employes concerning their vacation preferences and to draft a list which would "help me out" and "give me something to go by" (238, 232); and that Hiegert "copied" the information from the preference list Morris gave him (Exhibit 8) onto vacation request slips for employes who had specific vacation periods.

Although there is little evidence on this record concerning Exhibit 9 and when it was drafted, a careful analysis of Hiegert's testimony indicates that he drafted Exhibit 9 some time after he received Exhibit 8 from Morris (231, 232) and that he used Exhibit 8 to fill out vacation slips for employes who had specified vacation periods on Exhibit 8 (233). Hiegert's testimony on these points stands uncontradicted. Thus, it is possible that Hiegert used Exhibit 8 to draft both the vacation slips and Exhibit 9 or that he used Exhibit 8 to fill out the vacation slips and then used the vacation slips to draft Exhibit 9. Assuming either of the above hypothesis is true, our conclusion that Exhibit 8 preceded Exhibit 1 in time would follow therefrom: Hiegert could not have "copied" from Exhibit 1 onto either the slips or onto Exhibit 9 without reference to a senoirity list and/or a calendar.

Put another way, we note that for all employes (except Ed Taylor, Complainant and Isaac Gill), Exhibits 8 and 9 contain sufficient information for Hiegert to merely copy from either of those Exhibits onto vacation slips. Close analysis of these Exhibits also supports our conslusions. First, with the exception of Ed Taylor, Exhibit 8 contains check marks placed to the left of most employe's names which tends to indicate the employes who had listed specific vacation preferences. Exhibit 8 also contains question marks which appear to the right of Guthrie's and Isaac Gill's names while no check marks appear to the left of their names. This tends to indicate that Guthrie and Gill had not specified vacation dates. We note that Exhibit 1 contains no check marks and no question marks. Finally, some of the dates listed on Exhibit 1 are less specific than those listed on Exhibit 8. For example, Exhibit 1 lists some vacation periods as "the week of . . .", "the month of . . .", "the last 2 weeks of . . .", "the first 2 weeks of . . .", while Exhibit 8 generally lists exact vacation periods by beginning and ending dates. These marks and details indicate that Exhibit 8, not Exhibit 1, was Hiegert's working copy and that Hiegert simply could not have copied the dates from Exhibit 1 onto vacation request forms or onto Exhibit 9. Furthermore, the fact that Reynolds requested vacation for the month of August on Exhibit 1 but actually took three weeks in August, as listed on Exhibit 8, also supports the view that Exhibit 8, not Exhibit 1, was the list Morris gave Hiegert and the list Hiegert used to fill out vacation request slips.

The fact that Ed Taylor's vacation dates are not listed on Exhibit 8 is not inconsistent with our analysis. There is a check mark next to Taylor's name on Exhibit 8, not a question mark, which tends to support the assertion that Taylor's preference had been checked and approved although it was not listed on Exhibit 8. Indeed, Taylor testified at the first hearing 8/ that he gave his preference to Morris, received verbal supervisory approval and took his vacation during the first week of July, the dates listed on Exhibit 9. In addition, the absence of any vacation dates for Ed Taylor on Exhibit 8 supports Hiegert's testimony that he filled out vacation slips only for employes who had specified dates listed on Exhibit 8 and supports Taylor's testimony that he received verbal approval for his vacation from supervision after Morris wrote down his preference and took it to the "night man" (59).

8/ We are fully aware that Taylor's testimony at the first hearing conflicts, in part, with his testimony at the second hearing. We attribute this to the passage of time between the first and second hearings. However, Taylor's testimony is consistent in all crucial matters, and only some minor details are confused.

Finally, we note that it was logical and proper procedure for Morris to give Guthrie a copy of Exhibit 1 during the processing of Guthrie's grievance. This explains how Guthrie came to possess a copy of Exhibit 1. We note that Morris did not affirm giving Guthrie a copy of Exhibit 1 at the time Morris took Guthrie's preference; that neither Ed Taylor nor Henry Reynolds stated that Morris gave them a copy of Exhibit 1 and that Taylor and Reynolds' identification of Exhibit 1 rested largely upon the vacation preference dates they had given Morris, not upon identification of the document itself.

We are aware that the Respondent Employer's hypothesis conflicts with Morris' testimony: (1) that Guthrie told him he wanted his vacation to begin July 10th; (2) that Morris wrote that preference on Exhibit 1; (3) that Morris gave Hiegert a copy of Exhibit 1; and (4) that thereafter, Morris drafted Exhibit 8 to assist in processing Guthrie's grievance. We discredit Morris in these matters. 9/

In support of this conclusion, we note that Morris was not only uncertain of the date on which he prepared Exhibit 8, but he also testified inconsistently concerning its contents. At two points, Morris stated that Guthrie may have changed his preference. At another point, Morris stated that he could not recall listing Guthrie's preference on Exhibit 8 as some time in December. Finally, Morris stated he must have erred in recording Guthrie's preference on Exhibit 8.

Beyond these inconsistencies, we note that it is very unlikely that Morris would have made a transcription error as he claimed, since Morris was aware of the importance of these preferences. Furthermore, since Guthrie was the only employe listed on Exhibits 8 or 9 who chose dates in December, it is not probable that Morris would have confused Guthrie's preference with that of any other employe in recording the dates.

We find significant Morris' testimony wherein he stated that Guthrie could have changed his vacation preference from July 10 to sometime in December (68-69). Also, we believe that Morris' assertion that he gave Hiegert a copy of Exhibit 1 is improbable: Exhibit 1 would have been of little use to Hiegert in preparing vacation slips and Exhibit 9 for a majority of the employes. Thus, in light of the nature of the exhibits and the foregoing considerations of Morris' testimony, we find that Guthrie in late 1971 or early 1972 told Morris his vacation pick was December, that Morris recorded his request on Exhibit 8, gave it to Hiegert, and that Hiegert copied vacation slips and Exhibit 9 from Exhibit 8.

Comment must be made on the Examiner's discrediting Carl Hiegert. Unlike the Examiner, we find no testimonial inconsistency on Hiegert's part. Hiegert consistently took the position he had never seen Exhibit 1. The fact that Ed Taylor and Henry Reynolds stated Hiegert did not speak to them concerning their "preference" and the fact that the Respondent Employer did not produce the vacation slips to corroborate Hiegert, of course, weakens the Respondent Employer's case. But, the Examiner was in error when he found that the record was barren of testimony concerning such slips and their use. Quite the contrary, a close reading of Reynolds and Ed Taylor's testimony shows that they corroborated Hiegert's testimony concerning the need for supervisory approval of vacations and the use of the slips. As detailed above, the exhibits themselves support Hiegert's testimony. Finally, we believe the Examiner erred in emphasizing Hiegert's interest in the outcome as a low level supervisor of Respondent Employer as a reason to discredit him. At the time of trial, Hiegert no longer worked for UW-M. There is no evidence to show that Hiegert had any reason to alter Guthrie's vacation selection dates. Indeed, it is far more likely that Guthrie's interest in the outcome of this case would influence his testimony than that Hiegert's interests would influence his testimony.

In conclusion, we amend the Examiner's Finding of Fact No. 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:

9/ In discrediting Morris regarding Exhibit 8, we do not impute forgery or perjury to Morris as the Employer's arguments suggest. The evidence herein does not support such an imputation.

> that Complainant told Morris he wanted to take his vacation some time 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.

Finding No. 8

The Examiner found that Hiegert's recording error was perpetuated and after Guthrie transferred to Housing, management in that department was unaware of Guthrie's July 10 vacation pick. The Examiner also found that on July 10, Guthrie made a claim of right to begin his vacation that evening and that Guthrie properly began his vacation on July 10.

Respondent Employer argues that Hiegert did not err and therefore no error was perpetuated. We agree with the Respondent Employer's contention for the reasons detailed above. Hiegert's record was correct.

Respondent Employer contends that Guthrie did not make a claim of right to vacation on July 10 and that the Examiner erred in finding that Guthrie went on vacation on that date. We disagree and affirm the Examiner.

Nathaniel Teague, night lead worker, testified that Guthrie said he "wanted" his vacation on July 10 (207). Guthrie testified that on July 10 he went to the Housing Department for the purpose of telling Teague his vacation "had started" (10). Respondent Employer's own discharge letter of July 14 (Exhibit 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 affirmed the accuracy of that sentence (163). Of course, the fact that Guthrie made a claim to vacation does not mean that he was entitled to take that vacation. Although we affirm the Examiner, we do not find that Guthrie's taking vacation on that night was proper.

Finally, the Respondent Employer argues that the Examiner erred in not finding Guthrie took his vacation on July 10 without permission.

We agree. This follows from our conclusion that Guthrie had asked for a December and not a July vacation. Thus, Nathaniel Teague testified and Guthrie confirmed that on July 10 Teague told Guthrie that Guthrie could not begin his vacation that night; that Guthrie would have to fill out the proper form and give at least a week's notice; and that Guthrie should return the next evening to fill out the form (207). The Examiner credited Teague and also found that Teague did not give Guthrie permission to leave work or to start his vacation on July 10 (See his Memorandum, p. 29-30). We see no reason to upset those findings.

However, the question arises whether Guthrie had permission to begin his vacation on July 11. Although Guthrie testified that Teague told him that his signature on the form (Exhibit 13) "was sufficient" (11, 162), we note that the Examiner did not credit Guthrie concerning the events of July 11. (See his Memorandum, p. 31).

In addition, other testimony indicates that Guthrie perceived that management had not given him permission to take vacation on July 11. Reynolds testified that on the evening of July 10, Guthrie drove him and Ed Taylor to work and that Guthrie told them his vacation was "due" (199). On the morning of July 11, Guthrie met Taylor and Reynolds at a restaurant where Guthrie told them that he "couldn't take his vacation . . . he couldn't have it". On the evening of July 11, Guthrie again took Taylor and Reynolds to work and on the morning of July 12, Guthrie again met them at a restaurant where Guthrie told them "they still wouldn't let him take his vacation" (200).

Ed Taylor corroborated Reynolds. Taylor testified that on the evening of July 10 Guthrie stated:

. . . he said he had his vacation (sic) was supposed to be coming up; he said he was going to find out that night. (195)

Taylor stated that the next night Guthrie said he was going "to find out why he couldn't take his vacation" (196).

These facts clearly show and we conclude that Guthrie knew on July 10 and 11 that in the eyes of management he was not entitled to begin his vacation and that Guthrie left his work on both July 10 and 11 without permission.

In conclusion, the Commission reverses the Examiner's finding in the first clause of Finding No. 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 unncessary material in this finding.

Finding No. 9

The Examiner found that Guthrie timely processed his grievance through the first three steps of the grievance procedure with Union assistance; that Larry Grennier (the Union's president) absented himself completely from the processing of Guthrie's grievance, "breaking with his usual and customary practice"; and that the 30 day period in which the Union had to invoke arbitration in Guthrie's case began on August 31, 1972.

First, the Respondent Employer contends that the Examiner erred--that the 30 day appeal period applied to both the Union and to Guthrie.

We agree with the Examiner. The collective bargaining agreement provides that the appeal period applies to "either party" to the agreement (Exhibit 3, p. 14). Employes are not parties. In any event, this exception as stated is cosmetic and does not go to the merits of this case.

Respondent Employer next asserts that Grennier did not completely absent himself from processing Guthrie's grievance. We agree with the Respondent Employer.

The record indicates that Grennier spoke to Guthrie about one week after the Third Step of the grievance procedure, but upon detecting "overtones of racial discrimination" (81, 83, 90), Grennier referred Guthrie to Hattush Alexander (79, 80, 81). Grennier told Alexander to get in touch with Osowski and set a meeting (92). Grennier later okayed that meeting with Personnel (92). Finally, Grennier spoke to Stewards Weiland and Osowski about Guthrie's grievance prior to the Executive Board's deliberations thereon (86).

Although it appears that Grennier did not become as involved in Guthrie's grievance as he normally did in other grievances (81), Grennier was involved. Thus, we must modify the Examiner's finding to conform with uncontroverted testimony on this point.

Both Respondent Employer and Respondent Union argue that Grennier's minor involvement in Guthrie's grievance was for legitimate non-discriminatory reasons.

The Examiner made no finding here that Grennier's reasons were inappropriate. However, the Examiner's ultimate conclusion in Finding No. 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. Therefore, we address these arguments here.

We conclude that Finding No. 9 must be amended to reflect that the reasons Grennier did not involve himself fully in processing 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, that he believed Guthrie felt he was suffering from racial discrimination and that Alexander could better deal with such an allegation. This conclusion is amply supported by the record.

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, that the Housing Department had a steward and a chief steward who could handle the grievance (81). Finally, Grennier testified that he referred Guthrie to Alexander

because Guthrie's conversation implied racial overtones, Guthrie and Alexander both were black, and both had worked well together in the past (80, 83, 85, 90). We believe that a careful reading of Grennier's testimony concerning the "racial overtones" issue reveals that these overtones were voiced by Guthrie not Grennier.

In arriving at this conclusion we do not upset the Examiner's credibility determination that Guthrie in essence told Grennier he desired to proceed to arbitration. That credibility resolution is otherwise consistent with Grennier's above-cited testimony, and its does not restrict review of the ultimate issues here. In conclusion, we affirm the Examiner's Finding No. 9 with the foregoing noted modifications.

Finding No. 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 Grennier, did not properly invoke Alexander's jurisdiction to act on Guthrie's discharge grievance; that after Step Three, Guthrie told Steward Weiland and Union President Grennier that he desired the Union to continue to process his grievance; and that Grennier, having detected racial overtones in the matter, referred Guthrie to Alexander since both were black and he thought they could work better together.

Respondent Employer contends Council 24 may take a case to arbitration under the collective bargaining agreement, that field representatives of the Council (such as Alexander) have the authority to request arbitration and that an investigation is conducted and report made to the Executive Board which then decides whether to go to arbitration.

We affirm the Examiner. (See, our discussion of the evidence and of the Examiner's Findings No. 2 and No. 5.) Although the collective bargaining agreement implies that there are only two parties to the agreement (Exhibit 3, p. 14: ". . . either party . . ."), we note that the agreement otherwise makes clear that the parties to the agreement are the Employer, Council 24 and Local 82 (Exhibit 3, p. 3). Furthermore, 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 here. 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 (see Grennier, 84; Alexander, 99-100).

Respondent Employer argues that Guthrie never asked that his grievance go to arbitration, that he only inquired about his case.

We agree with the Respondent Employer on this point -- Guthrie cannot be credited that he specifically asked that his grievance be taken to arbitration. We believe Guthrie's own testimony belies crediting him. Grennier, Weiland and Osowski each testified that Guthrie never actually requested arbitration (Grennier, 79, 82-83; Weiland, 121-123; Alexander, 95). For example Grennier testified:

(By Mr. Jacobson)

Q All right. When your counsel asked whether he (Guthrie) had asked you about his case going to arbitration, you said he (Guthrie) was lying.

A He was. He didn't ask me to go to arbitration.

Q What did he say?

A He asked me about the case--further extension of the case.

It is probable that a grievant would inquire about the processing of his grievance in general terms; it is unlikely that even Guthrie, a Union steward, would use the exact words with which the Examiner credits Guthrie.

Our finding that Guthrie did not ask for arbitration in so many words is not otherwise inconsistent with the Examiner's Findings, Conclusion or his Memorandum discussions. Thus, we leave undisturbed the Examiner's findings that the Union knew and understood from Guthrie's inquiries about the processing of his griev-

ance, that Guthrie wanted the Union to proceed with his case, and that Guthrie asked about the processing of his grievance. (Examiner's Memorandum pp. 17-19.) We agree with the Examiner that all of the Union's actions subsequent to Guthrie's inquiries concerning his case indicate that the Union fully understood and acted upon Guthrie's request that the Union continue to pursue his case.

Respondent Employer asserts that Grennier's referral of Guthrie's grievance to Alexander resulted in a higher degree of effort being expended on that grievance than was normally expended on grievances and that Guthrie was not discriminated against arbitrarily, capriciously or individually on the basis of race. Concerning Finding No 13, the Union poses a similar argument.

We agree with the Respondents. We believe that by referring the case to a member of the same race who might be more sensitive and appreciative of this element of the case, Grennier cannot be criticized. Such care does not taint the Union's motive or conduct merely because it has its root in a racial consideration.

Finally, it is necessary for us to correct the Examiner's findings contained in the last four lines of his Finding of Fact No. 10 as they conflict with the uncontradicted testimony (see his Memorandum pp. 19-20), even though no party has excepted to these portions. These corrections do not affect the Examiner's credibility resolutions.

Finding No. 11

Respondent Union generally excepted to this finding in its petition for review. On brief, the Union specifically excepted to the Examiner's determination of the jurisdictional powers of union stewards and chief stewards (brief dated 1-26-76, p. 5). We have dealt with these objections in detail above and will not repeat them here. The Examiner's Finding No. 11 is affirmed.

Finding No. 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 them was present at any Executive Board meeting; and that the decision not to arbitrate was not communicated to Guthrie until after the time for doing so had passed.

Respondent Employer and Respondent 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 some time in September (within the 30 day period), each time the date was included in the question, not in Morris' answer (65, 71). Morris testified:

(By Mr. Jacobson)

Q All right. Now, Mr. Morris, Mr. Guthrie said that--as far as the situation involving his termination in July of 1972, that he saw you on the street when he was working around Brown Street--9th and Brown in September of 1972 and that you told him that his case wasn't going to arbitration; that Hattush Alexander "killed" it. Do you recall this meeting with Mr. Guthrie, in September of 1972?

A I believe we had a conversation once or twice, and I did tell him that there would be no arbitration, and I did tell him I had bad news for him when I was talking to him. (65)

Respondent Employer also argues that the Examiner put too much emphasis on the fact that neither Weiland, Osowski nor Alexander attended the Executive Board meeting regarding Guthrie's grievance. Respondent Employer would emphasize the fact that they reported to Grennier prior to that meeting.

We agree with the Respondent Employer. Grennier testified without contradiction 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). There is no evidence to indicate the content of these discussions. The fact that none of these poeple was at the Executive Board meeting is not crucial here since we have found that the Union's breach of its duty of fair representation occurred at the Executive Board meeting.

However, we believe Finding No. 12 must be amended by adding a finding that Grennier talked to Osowski and Weiland prior to the Executive Board meeting.

For reasons discussed below, the Commission concludes that the material fact on the question of fair representation is that the Respondent Union did not make a considered decision on Guthrie's request for arbitration, and we incorporate this finding into Finding No. 12. The record does not show that the Respondent Union considered the impact of a no-arbitration decision on Guthrie or that it weighed that factor with other relevant considerations, such as Respondent Union's finances and the merits of the grievance. We also revise Finding No. 12 to indicate that Grennier spoke to Osowski and Weiland prior to the Executive Board meeting.

Finding No. 13

The Examiner found that the Respondent 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 parties have excepted hereto.

The Commission believes it is error, as indicated above, to conclude that the Respondent Union's conduct was improperly tainted by racial considerations. The Examiner's finding in that regard has thus been set aside. The Commission substitutes its conclusion of law, that the Respondent 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:

It is by now axiomatic in cases such as the instant one that before the Commission will consider whether it will exercise its jurisdiction over breach of contract claims under Sec. 111.84(1)(e), Stats., (herein the just cause issue) it must first decide the duty of fair representation issues. However, since the Respondent Union and Respondent Employer have contended that Guthrie had a right to take his own case to arbitration independent of the Respondent Union, we first respond to this contention.

Without repeating the Examiner's reasoning and conclusions, we affirm the Examiner that Guthrie had no independent right to arbitrate his case (see Examiner's Memorandum, pp. 12-13). We note that even assuming that Guthrie could have taken his own case to arbitration, this would not excuse the Respondent Union from discharging its duty of fair representation.

We also affirm the Examiner's conclusion that the Supreme Court made no formal finding on the above-stated issue. 10/ The appeal to the Court was purely procedural. The line quoted from the Court's decision in the Respondent Employer's brief is not a finding but a mere preliminary summary of contractual language. Thus, we are not bound by the principles of stare decisis here as the Respondent Employer claims.

Were we to follow the Respondents' interpretation of their contract with regard to the employe's right to independent arbitration, this would result (as the Examiner recognized) in inconsistencies and immense problems in practically applying the contract terms. Contrary to the Respondents, we believe that the clear import of the contract is to allow an employe to elect Union representation or representation by one who is not a Union official and to allow an employe the option to process his grievance through the grievance procedure or directly with Respondent Employer.

10/ State v. WERC, 65 Wis. 2d 624, 627 (1974).

Consequently, we conclude that the Complainant did not have a right under the collective bargaining agreement to invoke arbitration, that even if Guthrie enjoyed such right, the Respondent Union owed him a duty of fair representation and that that duty, if breached, warrants the exercise of the Commission's jurisdiction over the merits of the alleged contract violation.

The Union Breached Its Duty of Fair Representation:

We now reach the issue whether the Respondent Union herein violated its duty to fairly represent Guthrie. Applying the law to the facts of this case, we find the Respondent Union breached that duty.

In Mahnke v. WERC, 66 Wis. 2d 524, 225 N.W. 2d. 617, (1975), the Wisconsin Supreme Court stated:

> We do not believe the United States Supreme Court intended a person in the position of Mahnke to be remediless. After twenty years of employment it is difficult to understand why, federal labor policy notwithstanding, he could be discharged, arguably in violation of his contract, and then denied a remedy merely because his union does not wish to spend the money necessary to vindicate his rights. Vaca, supra, provides that suit may be brought subsequent to an arbitrary, discriminatory or bad faith refusal to arbitrate by the union. Vaca also requires the union to make decisions as to the merits of each grievance. It is submitted that such decision should take into account at least the monetary value of his claim, the effect of the breach on the employee and the likelihood of success in arbitration. Absent such a good-faith determination, a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation.
>
> 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 that 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, was probably too broad. 11/ It also recited a previous holding "that a union occupies a fiduciary relationship to members." 12/

Here, the testimony regarding the Union's weighing of the Mahnke factors is conclusory at best (86-87). Grennier's statement of general policy does not show compliance with all of the Mahnke standards. Further, proof of general practice is not proof that such was followed in a particular case. There is no evidence to show what facts and arguments Osowski and Weiland reported to Grennier, what facts and arguments Grennier reported to the Executive Board, which of these facts the Executive Board supposed were true, what specific facts and policies the Board discussed and "the evidence" or how the Board weighed the Mahnke factors, if they did. There is no evidence on this record to show that the Union's Executive Board ever acted upon Guthrie's arbitration request or that it made a final decision on the merits. Rather, it appears that the Union simply let Guthrie's grievance drop without acting upon it and without informing Guthrie of their "decision". Indeed, there is nothing on this record which clearly indicates that the Executive Board ever discussed Guthrie's grievance. Further, there is no evidence to indicate that the Executive Board considered the impact on Guthrie of

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11/ Id., at 532.

12/ Id., at 532-533.

dropping his grievance. We simply cannot assume that the Respondent Union considered and weighed the Mahnke factors. Therefore, we are constrained to hold that the Union did not meet the standards set down in Mahnke, supra. 13/

When reaching this conclusion, we have considered the various arguments made by Respondent Union concerning the issue of the breach of its duty of fair representation. We deal with these arguments as follows.

Respondent 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 in the Cottrell meeting, and the fact that the ad hoc meeting with Cottrell was itself an exercise above and beyond the normal call of duty. Respondent 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, Respondent Union says, is not an index of bad faith.

We agree with the Respondent Union that there is no reason to believe the Respondent 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. Respondent Union breached its duty by 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.

Our amended conclusion of law in this regard deletes the Examiner's reference to Respondent Union's conduct being discriminatory and perfunctory because we have found no impermissible racial motivation to be present. We substitute our conclusion that Respondent Union breached its duty of fair representation by failing to make a considered decision on whether to arbitrate the grievance. We also note that the Examiner found the breach to be in violation of "Sections 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.

Respondent Union argues that its unsuccessful but well-intentioned attempts to communicate with Guthrie after the Cottrell meeting do not warrant a finding of bad faith. However, the only Union attempts to contact Guthrie occurred after the Cottrell meeting. There is no record evidence of an attempt by the Union to contact Guthrie concerning the action or inaction of the Executive Board. This failure to contact Guthrie after the Executive Board meeting is part and parcel of the breach of the Union's duty of fair representation in this case, although not an independent violation of the duty.

Consequently, the Respondent Union's argument is not persuasive and the Commission agrees with the Examiner that the Respondent 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.

Respondent Union argues that it did not have fair notice of the nature of the (alleged) violation of its duty of fair representation toward Guthrie. We disagree and find the Respondent Union had proper notice.

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. Section 227.07(2), Stats., (1979-1980) provides:

13/ We note that 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.

Contested cases; notice; hearing; records. (1) * * *

(2) The notice shall include:

* * *.

(c) A short and plain statement of the matters asserted. If the matters cannot be stated with specificity at the time the notice is served, the notice may be limited to a statement of the issues involved.

* * *.

We conclude that the amended complaint fairly put the Respondent Union on notice that the propriety of its decision not to arbitrate was in issue. Respondent Union did not move to make the amended complaint more definite and certain prior to the hearing. It did not object to Complainant's evidence nor did it produce evidence in its behalf concerning the Executive Board's consideration of Guthrie's arbitration request.

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

Although we agree with Respondents that a union need not take every grievance to arbitration to avoid employer/union liability, the union must meet the standards enunciated in Mahnke v WERC, supra. If Mahnke standards are not met, as discussed above, we will find a violation of the duty of fair representation.

Respondent Union contends 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. 14/

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

Discussion of the Just Cause Issue:

As the Commission has found that the Respondent Union has breached its duty of fair representation, the Commission will exercise its jurisdiction to determine whether the Respondent Employer had just cause to discharge Guthrie under the collective bargaining agreement. 15/

The Examiner found no just cause for the discharge. His reasoning can be summarized as follows. First, he found that the May 3, 1972, incident and the subsequent discipline cannot be considered as a proper basis for discharge since the evidence supported the Complainant's version of the incident and because the discipline itself was tainted by anti-union animus. Second, since Teague was a lead worker and not a supervisor, the Respondent Employer's claim that Guthrie was insubordinate toward Teague is undermined. Third, Complainant was not loud or abusive on the evening of July 10, contrary to the Respondent Employer's assertion. (Although the Examiner found that on July 11 Complainant became upset, "perhaps" understandably, because he was caught in the shuffle between Teague acting as mere postman and supervision concerning his taking a vacation.) Fourth, the real reason for Guthrie's discharge was his alleged absence from work without leave, not any altercation Guthrie may have had with Teague. Finally, since Complainant was entitled to be on vacation the week of July 10, he committed no wrong in being absent during that week.

14/ Respondent Employer raised a similar argument in its brief.

15/ We see no need to quote relevant passages of the parties' agreement. The Examiner's Memorandum is sufficiently clear thereon.

We agree with the Respondent Employer, for the reasons we have detailed above, that the May 3, 1972, incident was not tainted by anti-Union animus. Thus, this portion of the Examiner's reasoning fails. However, we agree with the Examiner and affirm him that the Respondent Employer could not rely on the events of May 3 to establish that Guthrie was guilty of insubordination and of leading a work stoppage. The evidence simply does not support such a conclusion.

The Examiner, however, failed to consider that the May 26 letter (Exhibit 10) warned Complainant to use the grievance procedure rather than self-help. 16/ Respondent Employer based its discharge in part on Complainant's failure to heed this notice. 17/ Since Complainant had specific notice, Respondent Employer properly considered his failure to heed the principle "work now and grieve later."

Concerning the Examiner's second reason, we note that the discharge letter (Exhibit 2) suggests that both Guthrie's attitude toward Teague and his absence without leave were considered insubordinate by the Respondent Employer. Teague was management's only representative on the evenings in question. Whether or not Teague was a mere postman, he correctly relayed the position of his supervision to Guthrie and Guthrie clearly understood management's position. Under these circumstances, we cannot accept the Examiner's second reason.

Concerning the Examiner's third and fourth reasons for finding a lack of just cause, we agree with the Examiner, as detailed above. However, this does not mean we must affirm the Examiner's no just cause conclusion. As to the Examiner's final reason, we have reversed the Examiner's finding that Guthrie had properly scheduled vacation for July 10, as detailed above.

Guthrie claims that he had properly preferenced the week of July 10 as his vacation and that that preference had been approved. Yet Guthrie's actions belie his testimony and the above scenario leaves certain uncontested facts unexplained. Thus, we are disturbed, as was the Examiner, by the fact that Guthrie reported to his work station and to leadman Teague on July 10, that he parked his car on campus on July 10 but did not work and that he returned on July 11 as Teague had directed. These actions do not comport with Guthrie's claim that his vacation had been properly preferenced and approved. Generally, if an employee has vacation, he/she simply takes that vacation and does not report to work. (The collective bargaining agreement here does not require more.) Furthermore, Guthrie's actions on the evenings of July 10 and 11 cannot be explained by his being a member of a carpool. We find it highly improbable that anyone would drive a carpool to work when they truly believed they were on vacation. Indeed, Guthrie's statements to Ed Taylor and Reynolds on July 10 and 11 indicated that Guthrie did not truly believe he was on approved vacation as of July 10. In this regard, we note that Teague testified that on July 10 he told Guthrie that Guthrie did not have approved vacation for that week, that Teague could not approve Guthrie's vacation and that Guthrie would have to return on July 11 to fill out a form (Exhibit 13). Guthrie returned on July 11 and attempted to fill out the required form but became upset and left without permission when Teague informed Guthrie that he (Teague) could not then approve Guthrie's vacation request. Thereafter, and for the remainder of the week, Guthrie did not appear on campus and did not drive his carpool to work. Thus, on July 10 Guthrie knew full well the Respondent Employer's position (right or wrong) that Guthrie did not have approved vacation for that week. Yet Guthrie was absent without leave on and after July 11 and did not work at all during that week. In our view, Guthrie's actions during the week of July 10, in light of his prior discipline and warning of May 26, 1972, would alone have been sufficient to justify his discharge for being absent without leave. If Guthrie had truly believed that he had approved vacation as allegedly reflected on his copy of Exhibit 1, Guthrie presumably would not have reported to

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16/ 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."

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

his work station on July 10 and 11 to check on his vacation (see, Taylor: 195-196; Reynolds: 199-200). Thus, our analysis of the Exhibits and of the facts herein remain consistent. The Commission, therefore, believes the discharge was for just cause. Complainant's superseniority did not excuse his scheduling vacation for December, claiming it on an evening in July, and leaving Respondent Employer's premises without permission. 18/

Remedy:

Having found that Respondent Union committed an unfair labor practice within the meaning of Sec. 111.84(2)(a), Stats., when it breached its duty of fair representation by failing to make a considered decision on whether to arbitrate Complainant's discharge grievance, we have ordered Respondent Union to cease and desist therefrom. We have revised the Examiner's cease and desist order to accurately reflect the basis upon which we have found such a violation.

In addition, we think it appropriate to grant Complainant Guthrie affirmative relief by ordering Respondent Union to pay Guthrie an amount of money equal to the costs, including reasonable attorney's fees, which were incurred by Guthrie when litigating the merits of his discharge during a portion of the proceeding before Examiner Schurke. Such an order is an appropriate remedy herein because Respondent Union's breach in essence deprived Guthrie of a potential arbitration hearing on his discharge for which he would have borne no cost. As the merits of Guthrie's discharge were litigated before Examiner Schurke in the functional equivalent of an arbitration hearing and as Guthrie bore the costs, we find it appropriate that he be reimbursed for same so as to best approximate the cost free arbitration as to which he was potentially deprived by Respondent Union. While the Respondent Union might have been able to provide representation at a lesser cost than that incurred by Complainant with his own counsel, we do not find the potential for a cost difference troublesome because it is Respondent Union's conduct which created the potential for such additional expense. We find Examiner Schurke's remedy of reasonable attorneys fees and costs incurred in the prosecution of the entire complaint to be overbroad as it extends beyond remedying the potential deprivation of a cost free arbitration hearing suffered by Complainant Guthrie.

As we have concluded that Respondent Employer had just cause to discharge Complainant Guthrie, we have revised the Examiner's Order by deleting the requirement of reinstatement with backpay.

Consultation with the Examiner:

As our decision has revised certain findings of the Examiner which in turn impact upon the manner in which the Examiner resolved certain credibility conflicts, we had a duty to consult with the Examiner concerning his personal impressions as to witness demeanor and credibility. On April 16, 1984, the Examiner, who now resides in the State of Washington, was sent the transcript, exhibits and a copy of his decision. An informal transcript index which highlighted portions of the transcript which the Commission believed would be most important for the Examiner to review was also included. On May 17, 1984, the Commission conducted an initial telephonic conference with Examiner Schurke and received his personal impressions. Despite the passage of time between the January 30, 1973, and March 12, 1975, hearings and our conference, Examiner Schurke did have substantial and specific recollection as to the witness' demeanor. During the initial conference call, Schurke asked that the Commission search the case files for any personal notes which might assist him in recalling his impressions. Such notes were located by the Commission's General Counsel and sent

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18/ Superseniority or not, Complainant should have made his pick the previous March or April (ex. 3, pars. 66, 67, 23). In addition, Guthrie's pick as an officer of the Union, presumably, could not displace that of other employes who had properly chosen their vacation previously.

by overnight mail to Schurke on May 17, 1984. On May 22, 1984, the Commission conducted a follow-up telephonic conference with Schurke who, having reviewed his personal notes, supplemented his initial recollections. As the Examiner's notes are not a part of this record, the Commission did not review same.

Dated at Madison, Wisconsin this 30th day of May, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner