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**FEB 21 1986**

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE ~~WISCONSIN~~ EMPLOYMENT  
RELATIONS COMMISSION

SAM GUTHRIE,

Plaintiff,

v.

Case No. 642-461

WISCONSIN EMPLOYMENT  
RELATIONS COMMISSION,

Defendant.

Decision No. 11457-H

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NOTICE OF ENTRY OF  
DECISION AND ORDER

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PLEASE TAKE NOTICE that a decision and order, of which a true and correct copy is hereto attached, was signed by the court on the 29th day of January, 1986, and duly entered in the Circuit Court for Milwaukee County, Wisconsin, on the 29th day of January, 1986.

Dated at Madison, Wisconsin, this 19th day of February, 1986.

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WISCONSIN EMPLOYMENT  
RELATIONS COMMISSION

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY  
CIVIL DIVISION  
BRANCH 26

SAM GUTHRIE,

Plaintiff,

-vs-

CASE NO. 642-461

WISCONSIN EMPLOYMENT  
RELATIONS COMMISSION,

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Defendant.

DECISION

I. INTRODUCTION

This case is before the Court on appeal from a decision of the Wisconsin Employment Relations Commission (hereinafter "WERC"). The petitioner, Sam Guthrie, (hereinafter "Guthrie"), was employed by the University of Wisconsin - Milwaukee as a building maintenance helper. He was discharged on July 14, 1972 for failure to notify his employer of an extended period of absence. Guthrie claimed that the absences were the result of a properly arranged vacation period. This fact is disputed by the employer.

Upon discharge from his job, Guthrie filed a grievance through his Union, Local 82 Council 24, AFSME, AFL-CIO. The Union took the grievance through the first three steps, one step short of arbitration. Guthrie alleged in his

1 grievance that UWM did not have just cause to terminate his  
2 employment. The grievance was denied at the third step, and  
3 the case was not taken to arbitration.

4 Upon denial of his grievance, Guthrie filed with WERC  
5 an unfair labor practice complaint against both UWM and the  
6 Union. The complaint alleged that: 1) Guthrie was discharged  
7 without just cause and 2) the Union breached its duty to  
8 represent Guthrie fairly by failing to proceed to arbitra-  
9 tion. A hearing was held on January 30, 1973 before Hearing  
10 Examiner Marvin Schurke. At the close of this hearing, UWM  
11 brought a motion for summary judgment, which was denied by  
12 the Examiner. UWM then filed a petition for review with WERC.  
13 This petition was then denied. UWM sought further review  
14 by the Circuit Court of Dane County. Assistant Attorney  
15 General Charles Hoornstra represented WERC in this action.  
16 The Circuit Court dismissed this action on motion of WERC.

17 The case was returned to Examiner Schurke, who then  
18 issued a written decision on December 23, 1975. The Examiner  
19 held that the Union had breached its duty of fair representa-  
20 tion and UWM did not have just cause to discharge Guthrie.  
21 The WERC reviewed Examiner Schurke's decision and issued its  
22 own decision on this case. The WERC agreed with Examiner  
23 Schurke on the issue of fair representation. However, it  
24 found that UWM had just cause to discharge Guthrie. Charles  
25 Hoornstra, who since became a Commissioner with WERC,

1 participated in the drafting of WERC's final decision. The  
2 Supreme Court of Wisconsin held that there was an appearance  
3 of impropriety when Mr. Hoornstra both represented WERC in  
4 Dane County Circuit Court and then participated in drafting  
5 the decision in the same case. The case was remanded to WERC  
6 for further consideration without the participation of Mr.  
7 Hoornstra.

8 On remand, WERC (without Commissioner Hoornstra) reviewed  
9 Examiner Schurke's December 23rd findings of fact and  
10 conclusions of law and the accompanying memorandum, along  
11 with the entire record. In order to comply with the Supreme  
12 Court's order, the case was examined without referring to  
13 the tainted first decision of WERC. Upon consulting with  
14 Examiner Schurke about his impressions of demeanor and  
15 credibility, WERC came to the same conclusions as were  
16 contained in its first decision.

## 17 II. DISCHARGE FOR JUST CAUSE

18 The issue of whether Sam Guthrie was discharged for just  
19 cause is one to be decided by the trier of fact. Under  
20 section 227.09(1), Wis. Stats., an agency may designate a  
21 hearing examiner to make findings of fact and conclusions of  
22 law. Sec. 227.09(1)(h), Wis. Stats. The agency, when filing  
23 its final decision, may accept or reject the hearing exami-  
24 ner's decision. Sec. 227.09(2), Wis. Stats. If the agency  
25 should decide to reject the findings of fact and conclusions

1 of law of the designated hearing examiner, the agency must:

2 "1) Consult of record with the examiner  
3 to glean his impressions of credibility  
4 of the witnesses and 2) include in a  
5 memorandum opinion, an explanation for  
6 its disagreement with the examiner."

7 Hamilton v. ILHR Department, 94Wis.2d  
8 611, 621, 288N.W.2d857 (1980: Carley  
9 Ford, Lincoln-Mercury v. Rosquette,  
10 72Wis.2d569, 575, 241N.W.2d596 (1976).

11 The requirement that the examiner be consulted has been  
12 defined by the Supreme Court. In Appleton v. DILHR, 67Wis.2d  
13 162, 226n.W.2d497 (1975), DILHR took testimony in a  
14 Workmen's Compensation case, through a hearing examiner. The  
15 examiner took testimony of a doctor who concluded that the  
16 applicant did not contract cancer as a result of his job.  
17 The Commission rejected the findings of fact and conclusions  
18 of law of the examiner. The Supreme Court held that the  
19 Commission may not reject the findings and conclusions of  
20 a hearing examiner unless the Commission first consulted  
21 with the examiner to obtain his personal impressions of the  
22 credibility of material witnesses. Id. at 170-171. This  
23 requirement is not only applicable to Workmen's Compensation  
24 claims (ch. 102) but also to the Administrative Procedures  
25 Act (ch. 227), which governs review of WERC. Id. The Court  
need not have anymore proof of consultation with the examiner  
than a simple recitation in the record. Id.

26 In this case, Mr. Schurke was contacted on two separate  
occasions to obtain his impressions of the demeanor of the

1 witnesses. Mr. Schurke was first contacted in September of  
2 1977 by Commissioners Hoornstra and Slavney. They made no  
3 arrangements for him to prepare for the interview. Mr.  
4 Schurke was not provided with transcripts, exhibits or the  
5 record in the case. The conversation lasted no more than  
6 fifteen minutes. Admittedly, this phone call did not lead  
7 to any useful information. Mr. Schurke was contacted again  
8 in May of 1984 by Commissioners Torosian and Covelli. At  
9 this time a more thorough consultation took place. One month  
10 prior to the May 1984 consultation, Schurke was provided with  
11 transcripts, exhibits and copies of his previous decision.  
12 In addition, he was given an informal transcript index in  
13 which important parts of the transcript were highlighted.  
14 This time Schurke was well prepared to discuss the case with  
15 the Commissioners.

16 Even though there was a large gap in time from the last  
17 hearing to the time of the May consultation, it is evident  
18 that Schurke had specific recollections of the witnesses'  
19 demeanor. In fact, when Schurke did not have enough recol-  
20 lection to honestly give an opinion, he asked that WERC  
21 find his personal notes which might assist him to remember.  
22 Those notes were located and sent to Schurke. After Schurke  
23 was given about five days to review his notes, the consult-  
24 ation resumed.

25 It is the opinion of the Court that there was adequate

1 consultation between WERC and Examiner Schurke as to  
2 demeanor and credibility. In fact, WERC went to great  
3 lengths to make sure it was properly advised as to this issue.  
4 The actions of WERC were certainly sufficient to satisfy  
5 the consultation requirement.

6 In addition to the consultation requirement, WERC  
7 "must include in a memorandum opinion, an explanation for  
8 its disagreement with the examiner." Hamilton v. ILHR,  
9 94Wis.2d at 621. In the instant case, WERC issued a detailed  
10 22 page memorandum opinion. This opinion carefully and  
11 specifically states the reasons for each finding of fact  
12 and the reason for deviating from the examiner's findings.  
13 In light of the existing law, WERC has adequately met this  
14 second requirement. As a result, WERC has properly met  
15 the prerequisites necessary to overrule the findings and  
16 conclusions of Examiner Schurke.

17 The Court now turns to the scope of review of the  
18 decision of WERC. Scope of review is governed by section  
19 227.20, Wis. Stats. The law is clear that:

20 [I]f the agency's action depends on any fact found  
21 by the agency in a contested case proceeding, the  
22 Court shall not substitute its judgment for that of  
23 the agency as to weight of the evidence on any  
24 disputed finding of fact. The Court shall, however,  
25 set aside agency action or remand the case to the  
agency if it finds that the agency's action depends  
on any finding of fact that is not supported by  
substantial evidence. Sec. 227.20(6), Wis. Stats.  
(Emphasis added).

1 A reviewing Court must affirm the findings of fact if  
2 they are supported by substantial evidence in view of the  
3 entire record. Muskego - Norway C.S.J.S.D. No. 9 v. WERB,  
4 35Wis.2d540, 562, 151N.W.2d617 (1967). The test for  
5 "substantial evidence" is whether "reasonable minds could  
6 arrive at the same conclusions as the agency". Wisconsin  
7 Environmental Decade, Inc. v. DNR, 85Wis2d518, 538, 271N.W.  
8 2d69 (1978); Daly v. Natural Resources Board, 60Wis.2d208,  
9 219, 208N.W.2d839 (1973).

10 "There may be cases where two conflicting  
11 views may each be sustained by substantial  
12 evidence. In such a case, it is for the  
13 agency to determine which view of the  
evidence it wishes to accept." Robertson  
Transport Co. v. PSC, 39Wis.2d653, 659,  
159N.W.2d636 (1968).

14 The reason for deferring to the agency is clear. The agency  
15 has experience, technical competence and specialized  
16 knowledge of the subject in which it deals regularly.  
17 Muskego - Norway v WERB, 35Wis.2d at 562.

18 In this case, Guthrie was discharged for walking off  
19 the job without permission on July 10 and 11, 1972. The  
20 issue here is whether Guthrie was actually on vacation  
21 during the week of July 10th. There is conflicting evidence  
22 as to this issue. The WERC found that Guthrie was not on  
23 vacation at this time and, thus, was discharged for just  
24 cause. This Court must decide if there is substantial evidence  
25 to uphold WERC's decision. In doing so, we must only look



1 to evidence that supports WERC's holding and decide whether  
2 reasonable minds could, indeed, reach the same conclusion as  
3 WERC.

4 The defendant, UWM, alleged that Guthrie did not choose  
5 July 10, 1972 as his vacation, but rather chose to take it  
6 sometime in December. There are conflicting exhibits as to  
7 this issue. Exhibit 1, written by Mr. Morris (the Union  
8 steward at that time) indicates that Guthrie was to begin  
9 his vacation on July 10, 1972. However, Exhibits 8 and 9,  
10 also written by Morris, indicate that the vacation was to  
11 begin in December. The only explanation Morris has for this  
12 discrepancy is that he must have made a mistake. A reasonable  
13 mind may infer from these exhibits that Guthrie decided,  
14 on the spur of the moment, that he would take his vacation  
15 during the week of July 10, 1972. He may then have  
16 invented the story about previously selecting those dates  
17 in order to cover up for himself. This issue is to be  
18 decided on the basis of credibility and demeanor of the  
19 witnesses, which is within the province of the agency.

20 In addition, Guthrie had, in the past, resorted to  
21 self-help before following Union grievance procedures. He  
22 was warned by management not to take matters into his own  
23 hands before first following the proper procedure. Guthrie  
24 did not heed this warning in this case. If he had a  
25 legitimate dispute as to the dates of his vacation, he should

1 have discussed the matter with a Union official.  
2 Finally, there is additional evidence that shows that  
3 July 10th was not Guthrie's assigned vacation. Mr. Teague,  
4 Guthrie's supervisor, testified that Guthrie appeared for  
5 work on the evening of July 10, 1972 and said to him that  
6 he wanted his vacation that week. Also, a fellow worker  
7 testified that during the ride to work on July 10, 1972,  
8 Guthrie told him that his vacation was coming up and that  
9 Guthrie was going to find out when it was.

10 In light of all the evidence, it is clear that a  
11 reasonable mind may come to the conclusion that Guthrie was  
12 either discharged for just cause or not. Thus, the Court  
13 must defer to the determination of the agency and uphold its  
14 findings. Sam Guthrie was discharged from his employment  
15 at the University of Wisconsin-Milwaukee with just cause.

16 III. FAIR REPRESENTATION BY THE UNION

17 The issue of whether the Union fairly represents its  
18 members is a question of fact to be decided by the jury.

19 Mahnke v. WERC, 66Wis.2d524, 533, 225N.W.2d617; Clark v.  
20 Hein-Werner Corp., 8Wis.2d264, 272, 99N.W.2d132 (1959).

21 The Union, in order to fairly represent its members in a  
22 grievance proceeding, must make its decisions in good faith  
23 and in a non-arbitrary manner. Vaca v. Sipes, 386U.S.171,  
24 194 (1967). The WERC has found, and this Court agrees, that  
25 there was no bad faith in failing to take Guthrie's case to

1 arbitration.

2 However, there are two parts to the Vaca standard.

3 Vaca requires that a decision of whether to take a case  
4 to arbitration must be non-arbitrary. Id. The Wisconsin  
5 Supreme Court in Mahnke v. WERC, 66Wis.2d524, 225N.W.2d617  
6 (1975), set forth the minimum factors that the Union must  
7 consider before making a decision not to take a grievance  
8 to arbitration. The Union must at least take into account:  
9 1) the monetary value of the claim, 2) the effect of the  
10 breach of contract on the employee and, 3) the likelihood  
11 of success in arbitration. Id. at 534. These factors are  
12 not new. In fact, common sense would dictate that a Union  
13 would take these factors into account before dismissing a  
14 grievance. They are only a bare minimum. Other additional  
15 factors may also be taken into account.

16 The standard for review in this case, as discussed  
17 supra, is the substantial evidence test. If a reasonable  
18 mind may come to the same conclusion as WERC, then its  
19 decision must be upheld. The WERC, in its decision, stated  
20 that the Union president's testimony as to general Union  
21 policy was not proof that this policy was followed in the  
22 instant case. Furthermore, there was no evidence to show  
23 the results of the Union's investigation into Guthrie's  
24 grievance or whether such results were communicated from the  
25 investigating stewards to the Union president and from the

1 president to the Union Executive Board. In addition, there  
2 is no evidence as to what factors were considered by the  
3 Executive Board before they denied Guthrie arbitration.  
4 In fact, it appears to WERC that the Union simply let  
5 the grievance drop without acting upon it and without  
6 informing Guthrie of their decision. Commission's opinion  
7 at pp. 24-25. Finally, WERC found that the two stewards  
8 in charge of the investigation did not make a recommendation  
9 to the Union president nor did they attend the Executive  
10 Board meeting when the decision to drop the grievance was  
11 made.

12 From the evidence presented at the hearing it is clear  
13 that the Mahnke standards had not been considered by the  
14 Executive Board. There is no evidence to show that the  
15 Board considered anything other than the cost of the  
16 arbitration. A decision not to send a grievance to arbitration  
17 based solely on economic considerations is arbitrary, and in  
18 this case, a breach of the Union's duty of fair representa-  
19 tion. There is substantial evidence to up hold WERC's decision.

20 It has been argued that the Mahnke case cannot be  
21 retroactively applied. This is not true in this case. It is  
22 evident from the records that the first hearing was held in  
23 January of 1973. Mahnke was decided on February 4, 1975,  
24 one month before the second hearing. The second hearing was  
25 to relate solely to the issue of just cause. However, it

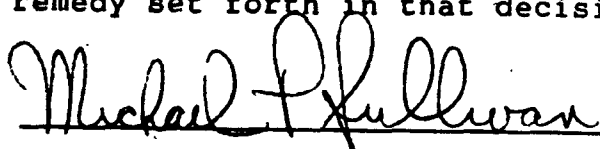
1 is the duty of every attorney to know the law and the changes  
2 that may arise. There is to be no leeway given on dates of  
3 decisions. When an opinion is delivered by the Supreme  
4 Court on February 4, 1975, it is clear that from that date  
5 on the law is as it is set forth in that opinion. The  
6 Union's attorney cannot claim that the opinion becomes law  
7 when he discovers the case some three months later. The  
8 Union had a duty to keep up on the law related to their  
9 case and to ask leave at the second hearing to produce evidence  
10 in light of the Mahnke requirements.

11 The Union asks that this case be dismissed or, in the  
12 alternative, be remanded for further hearings. This case  
13 must not be dismissed because the Union chose not to enter  
14 evidence in light of the Mahnke requirements. The Union  
15 was careless in researching the applicable law, and as a  
16 result, the Court cannot penalize Mr. Guthrie by dismissing  
17 his case. Furthermore, this Court will not remand this  
18 case for further hearings. Mr. Guthrie's grievance has  
19 been pending for 13 years. To again remand this would be  
20 fruitless and only delay its final disposition. The events  
21 surrounding this case happened a long time ago. Witnesses  
22 either disappear, forget or stories change. It would be  
23 impossible to glean the truth from such a proceeding.  
24 Therefore, the decision of WERC to hold the Union liable for  
25 breaching its duty to fairly represent Sam Guthrie in his

1 grievance must be affirmed.

2 IV. REMEDY

3 Having upheld the decision of WERC, the Court also  
4 upholds the remedy set forth in that decision.

5   
6

7 HON. MICHAEL P. SULLIVAN  
8 Circuit Court Judge, Branch 26

9 Dated this 29 day of January,  
10 1986 at Milwaukee, Wisconsin.