

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES E. HARTMANN,

Complainant,

vs.

M-K HARTMANN SONS, INC., AND
CARPENTERS' DISTRICT COUNCIL OF
MILWAUKEE COUNTY AND VICINITY,

Respondents.

Case I

No. 18394 Ce-1565

Decision No. 13089-A

Appearances:

Gimbel, Gimbel, & Reilly, Attorneys at Law, by Mr. D. Michael
Guerin, appearing on behalf of the Complainant.

Mr. Michael J. Hartmann, President appearing on behalf of the
Respondent, M-K Hartmann Sons, Inc.

Goldberg, Previant and Uelmen, Attorneys at Law, by Mr. David
L. Uelmen, appearing on behalf of the Respondent Carpenter's
District Council of Milwaukee County and Vicinity.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter and the Commission having authorized George R. Fleischli, a member of the Commission's staff to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07 (5) of the Wisconsin Employment Peace Act (WEPA); and a hearing on said complaint having been held at Milwaukee, Wisconsin on November 12, and 21, 1974 before the Examiner; and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That James E. Hartmann, hereinafter referred to as the Complainant, is an employe of M-K Hartmann Sons, Inc., and a member of Local 1741 of the Carpenters' District Council of Milwaukee County and Vicinity.

2. That M-K Hartmann Sons, Inc., hereinafter referred to as the Respondent Company, is a Wisconsin Corporation operating in Milwaukee, Wisconsin as a contractor of carpenter services.

3. That Carpenters' District Council of Milwaukee County and Vicinity, hereinafter referred to as the Respondent Council, is a labor organization having offices at 3020 Vliet Street, Milwaukee, Wisconsin.

4. That the Respondent Company and the Respondent Council have been parties to a collective bargaining agreement at least from 1973 to date; that said agreement has required the Respondent Company to

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contribute sums of money to the Milwaukee Carpenters' District Council vacation fund; that the current collective bargaining agreement between the Respondent Company and Respondent Council reads in relevant part as follows:

"ARTICLE VI

VACATIONS

Section 1. During the life of this Agreement, the sum of fifty cents (50¢) per hour for vacation pay and of one cent (1¢) per hour for jury pay, on a straight-time hourly basis, with a maximum of forty (40) hours per week for actual time worked per man, shall be paid monthly by the Employer to the Milwaukee Carpenters' District Council Vacation Fund (hereinafter called 'Vacation Fund').

Section 2. (a) The payment of fifty cents (50¢) per hour shall be credited to respective individual employees under and subject to such conditions, limitations and policies as may be provided under the applicable Trust Agreement and as may be established by the Trustees of the Vacation Fund.

(b) The payment of one cent (1¢) per hour shall not be credited to individual employees, but shall be used by the Trustees to pay employees covered by this Agreement for jury duty under and subject to such conditions, limitations and policies as may be established by the Trustees of the Vacation [sic] Fund."

5. That the Milwaukee Carpenters' District Council vacation fund, hereinafter referred to as the vacation fund, is governed by a separate trust agreement and subject to such conditions, limitations and policies as may be established by the trustees of the vacation fund; that the vacation fund board of trustees consists of six trustees, three of whom are appointed by the Respondent Council and three of whom are appointed by participating employers; that the vacation fund office is located at 3020 Vliet Street, Milwaukee, Wisconsin; that the vacation fund is administered by Mr. Ralph Bowes and that his employment as administrator of the vacation fund is his sole form of employment; that the monies in the vacation fund are held in a separate account; that the vacation fund is not subject to the direct control, either jointly or separately, of the Respondent Company or the Respondent Council.

6. That the Respondent Company has at all times material herein, paid into the vacation fund the requisite sums pursuant to the collective bargaining agreement on behalf of the Complainant.

7. That the Complainant received all vacation fund checks from the vacation fund that he was entitled to receive prior to October 1973; that the Complainant did not receive the check due and owing to him from the vacation fund for the period of time from October 1973 to May 1974; that a trustee of the vacation fund, Michael Balen, withheld the Complainant's vacation fund check for the period of October 1973 to May 1974; that although Michael Balen also functions as the business manager for the Respondent Council, he was acting in his capacity as a trustee and agent of the vacation fund when he withheld the Complainant's vacation fund check.

8. That in 1959, the Complainant was engaged in the construction business and employed carpenters who were represented by the Respondent Council; that while he was in the construction business the Complainant was a party to a collective bargaining agreement or agreements with

the Respondent Council and was required pursuant to that agreement or those agreements to pay money into the vacation fund on behalf of his employees who were covered by that agreement or those agreements; that the Complainant failed to make the required contributions from June 1, 1959 through November of 1959; that upon the Complainant's failure to contribute the required sums to the vacation fund, the trustees of the vacation fund obtained a money judgment against the Complainant in the amount of \$849.20 on January 16, 1964; that the Complainant has not satisfied said judgment; that the trustees of the vacation fund have taken no further legal action on the judgment against the Complainant; that the reason that Michael Balen withheld the Complainant's vacation fund check was because of the Complainant's failure to satisfy said judgment.

Upon the basis of the above and foregoing Findings of Fact the Examiner makes and enters the following

CONCLUSION OF LAW

That the aforementioned Carpenters' District Council vacation fund through its representatives, the trustees of said vacation fund, is governed by a trust fund agreement and rules separate and apart from the collective bargaining agreement between the Respondent Council and the Respondent Company; that the trustees of said vacation fund are solely responsible for the administration of the vacation fund and the corresponding fiduciary obligations arising out of their operation of the vacation fund; that any unfair labor practices within the meaning of Section 111.06(1)(f) or 111.06(2)(c) of the WEPA arising out of the withholding of the Complainant's check are attributable to the trustees of the vacation fund and not the Respondent Council and Respondent Company; that therefore, the Respondent Council and Respondent Company have not committed and are not committing any unfair labor practices within the meaning of Sections 111.06(1)(f) or 111.06(2)(c) of the Wisconsin Statutes.

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

ORDER

IT IS ORDERED that the complaint in the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 18th day of March, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

The Complainant brings this action in order to obtain vacation benefits allegedly due and owing to him pursuant to a collective bargaining agreement between the Respondent Council and the Respondent Company. The agreement between the Respondents requires the Employer to contribute monthly a sum, determined on a fixed rate per straight time hours worked basis, to the vacation fund on behalf of each employee. The Respondent Company contributed the required sums on behalf of the Complainant into the vacation fund. The vacation fund refused to remit to the Complainant his vacation fund check for October, 1973 through May, 1974. The instant proceeding however, is brought against the Carpenters' District Council and M-K Hartmann Sons, Inc., the Employer and fails to include the trustees of the fund who are directly responsible for the actions of the fund.

The Complainant argues that the named Respondents select and control the trustees of the fund; that through this control over the trustees the Respondents effectively control the fund; that the actions taken by the fund are therefore attributable to the Respondents; and that since the Respondents are responsible for the actions of the fund, they may be held accountable for any act committed by the fund which constitute unfair labor practices and thereby compelled to cease and desist from any such practices and provide any other remedial measures deemed proper by the Commission.

The vacation fund was apparently established by a trust fund agreement and not by the collective bargaining agreement between the Respondents. Under Article VI, Section 2(a), contributions to the vacation fund "shall be credited to the respective individual employees under and subject to such conditions, limitations and policies as may be provided under the applicable trust agreement and as may be established by the trustees of the vacation fund." Thus, the vacation fund is not governed by the terms of the collective bargaining agreement but rather, it is subject to the provisions of a trust agreement which is administered by its trustees. There is no evidence indicating that the trust agreement or the trustees are subject to any guidelines set forth in the collective bargaining agreement; rather, the plain meaning of the sections of the collective bargaining agreement which were introduced at the hearing indicate that the trustees are without any specific contractual guidelines concerning the operation of the vacation fund.

The Complainant's right to sums contributed to the vacation fund on his behalf is not automatic. Sums contributed on behalf of individuals are credited to their account in the vacation fund under and subject to the conditions, limitations and policies established under the trust agreement and by the trustees. The Complainant's right to vacation fund benefits is determined by the trust agreement and the trustees and not the collective bargaining agreement. The collective bargaining agreement merely established an obligation on the Employer's part to contribute money to the vacation fund. The collective bargaining agreement clearly recognizes that the responsibility for the determination of an employee's right to the benefits of the vacation fund is for the trustees.

Under the collective bargaining agreement, neither the Respondent Council or Respondent Company exercises any control over the fund or its trustees. The agreement recognizes that the trustees have the power to determine the employee's right under the vacation fund. In light of the foregoing, the Examiner concludes that the vacation

fund trustees and not the Respondent Council and Respondent Company are indispensable parties to the enforcement of the trust agreement. 1/

The record indicates that a trustee personally withheld the Complainant's fund check. No evidence was produced to show that the actions taken by the trustee violated the trust agreement or any policies established by the trustees, nor was any evidence produced which would indicate that the trustee lacked the authority to withhold the Complainant's check.

The Complainant contends that because the actions were taken by a trustee who was appointed to that position by the Respondent Council and who also serves as a business manager for the Respondent Council the actions were, therefore, that of the Respondent Council. Regardless of the trustees' affiliation with the Respondent Council or the proximity of the offices of the vacation fund and the Respondent Council, the act of withholding the Complainant's vacation fund check was an act undertaken by Balen in his capacity as trustee of the fund and not as business manager for the Respondent Council.

The vacation fund trust agreement is not administered by either of the Respondents. The acts complained of were taken by representatives of the fund on its behalf. Relief is available to the Complainant only through an order running to the vacation fund trustees to issue the withheld check. The Respondent Company has fulfilled its obligations under the collective bargaining agreement. Therefore, this action is clearly not proper against the Respondent Company. Similarly, although the Respondent Council is responsible for appointing half of the trustees of the vacation fund and shares office space with the vacation fund it is not a necessary party to this action. Because the vacation fund trustees have the sole responsibility for the acts complained of and have the exclusive power to grant the relief sought, the Examiner concludes that the vacation fund trustees are indispensable parties to this action. The Complainant's failure to name them as Respondents requires the dismissal of the Complainant's action. 2/

Dated at Madison, Wisconsin this 18th day of March, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

George R. Fleischli
George R. Fleischli, Examiner

- 1/ See e.g., Dersch v. Mine Workers Fund 73 LRRM 2409 (1969). The Complainant failed to name the employer group that established the trust fund agreement as a Respondent and there is insufficient evidence of record to indicate whether that group and the Respondent Council exercised sufficient control to bring this case within the exception established in SOAR v. N.F.L. Players' Assn. et. al. 88 LRRM 2425 (1975).
- 2/ This decision in this case, does not deal with the question of whether the violation of a trust agreement established pursuant to collective bargaining constitutes the violation of a collective bargaining agreement within the meaning of Section 111.06(1)(f) or Section 111.06(2)(c) of the Wisconsin Employment Peace Act. See for example Austin vs. Calhoun 84 LRRM 2449 (1973). Nor does this decision attempt to resolve the question of whether the vacation fund trustees would have the right to set off the money due and owing under their judgment against the Complainant. See, for example, W.C.L., Inc., (11163-A) 1/73.