

BARRY D. BICKLE,

Complainant,

vs.

CITY OF JANESVILLE, STREET DEPARTMENT,
JIM KOLSTAD AND KEN BIENASH, and
BERT PUNZEL,

Respondents.

Appearances:

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FINDINGS OF FACT

No. 15209-C

those employees represented by Local 523 who work in the Street Department. Punzel is responsible for choosing the three members of the grievance committee. The grievance committee is responsible for processing grievances through the fourth step of the grievance procedure; should no settlement occur, the grievance is referred to representatives of Council 40. Frank Schmeling, referred to as Schmeling, was a member of the grievance committee. At all times pertinent to this action, Punzel and the members of the grievance committee acted as agents of Local 523.

5. At all times pertinent to this action, Respondent City and Local 523 and Council 40 were parties to a collective bargaining agreement which was in effect for the calendar year 1976. The agreement provides for a five step grievance procedure; the fifth step is final and binding arbitration. Pursuant to the terms of the grievance procedure, an individual employee does not have the right to invoke the arbitration process. The collective bargaining agreement also provides that the City has the right to discharge employees for just cause.

6. Complainant was discharged on June 23, 1976 by Respondents Kolstad and Bienash, effective that day. Complainant was discharged for throwing away a citizen's trash barrel the previous day, contrary to department policy, for fighting with fellow employees and for having a bad attitude.

7. On the day of his discharge, Complainant approached either Schmeling or Respondent Punzel about filing a grievance. Complainant was provided with the appropriate form and he thereafter timely filed the grievance protesting his discharge, pursuant to the provisions of the collective bargaining agreement. Schmeling was responsible for processing Complainant's grievance. Respondent City denied Complainant's grievance in its timely answer.

8. Complainant, upon receiving the City's answer, approached Respondent Punzel about appealing his grievance to the next step of the grievance procedure. In response to Complainant's request, Punzel met with the grievance committee members, including Schmeling, to discuss Complainant's grievance. Complainant was not present at this meeting. The committee members and Punzel agreed that they would not process Complainant's grievance further because, in their opinion, his grievance was without merit and his discharge was for just cause. They based their decision on Schmeling's opinion that Complainant's job performance was unsatisfactory.

9. Complainant was promptly informed that Local 523 would not process his grievance further because his grievance was without merit due to his unsatisfactory work record. On numerous occasions after being informed of the decision of Respondent Punzel and the grievance committee members and prior to the expiration of the contractual deadline for appealing the grievance, Complainant spoke to Punzel about the decision and about Complainant's interest in appealing his grievance. Complainant alleged but did not prove that representatives of Local 523 failed to inform him that he could appeal his grievance without the support of Local 523. Neither Complainant nor any representative of Local 523 appealed Complainant's grievance to the next step of the grievance procedure. Thus, the contractual grievance procedure was not exhausted by Complainant or by Local 523 or Respondent Punzel on Complainant's behalf.

10. The processing of Complainant's grievance by Respondent Punzel and the members of the grievance committee, including their decision not to process the grievance further, was not arbitrary, discriminatory, perfunctory, or in bad faith.

Based on the above Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Respondent Punzel did not violate his duty to fairly represent Complainant and thus did not commit prohibited practices within the meaning of section 111.70(3)(b) of the Municipal Employment Relations Act.

2. Local 523 did not violate its duty to fairly represent Complainant.

3. Because neither Respondent Punzel nor Local 523 violated their duty to fairly represent Complainant, the Examiner will not assert the Commission's jurisdiction to determine whether Respondents City, Kolstad and Bienash breached the collective bargaining agreement by discharging Complainant in violation of section 111.70(3)(a)5 of the Municipal Employment Relations Act.

Based on the above Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that the complaint and the amended complaint filed herein be, and the same hereby are, dismissed.

Dated at Madison, Wisconsin this 27th day of March, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Ellen J. Henningsen
Ellen J. Henningsen, Examiner

MEMORANDUM ACCOMPANYING FINDINGS
OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant filed his complaint on January 18, 1977, naming the City of Janesville, Jim Kolstad and Ken Bienash as Respondents. On February 2, 1977, the above Respondents filed a motion to make the complaint more definite and certain; the motion was granted by the Examiner on February 3, 1977. Complainant filed his amended complaint, supplying the information required by the Examiner's order, on February 11, 1977. In addition, Complainant named Bert Punzel as a respondent in his amended complaint.

POSITION OF COMPLAINANT

Complainant alleges that Respondents City, Kolstad and Bienash discharged him without just cause as required by the collective bargaining agreement and thus violated section 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA). 1/ Complainant admits that he failed to exhaust the contractual grievance procedure concerning his discharge. His failure to exhaust should not bar consideration of the merits of his discharge, however, since, Complainant alleges, his failure was due to Punzel's actions. Punzel failed to appeal Complainant's grievance and also failed to inform Complainant that Complainant could pursue his grievance by himself; this conduct amounts to a violation by Punzel of section 111.70(3)(b) of MERA. 2/

1/ Section 111.70(3)(a)5 of MERA provides that it is a prohibited practice for a municipal employer to violate the terms of a collective bargaining agreement.

2/ Section 111.70(3)(b) states that:

"It is a prohibited practice for a municipal employe, individually or in concert with others:

1. To coerce or intimidate a municipal employe in the enjoyment of his legal rights, including those guaranteed in sub. (2).

2. To coerce, intimidate or induce any officer or agent of a municipal employer to interfere with any of its employes in the enjoyment of their legal rights, including those guaranteed in sub. (2), or to engage in any practice with regard to its employes which would constitute a prohibited practice if undertaken by him on his own initiative.

3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or certified exclusive collective bargaining representative of employes in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously agreed upon.

4. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining (footnote continued on next page)

Complainant also alleges that his failure to exhaust the grievance procedure should not bar consideration of the merits of his discharge since his failure was caused by Local 523's breach of its duty to fairly represent Complainant during the processing of his grievance.

POSITION OF RESPONDENTS CITY, KOLSTAD AND BIENASH

Respondents City, Kolstad and Bienash deny that Complainant was discharged without just cause and thus deny violating section 111.70(3)(a)5 of MERA. Respondents City, Kolstad and Bienash raise the affirmative defense that Complainant failed to exhaust the contractual grievance procedure. Therefore, his complaint and amended complaint should be dismissed without any determination on the merits.

POSITION OF RESPONDENT PUNZEL

Respondent Punzel denies that he violated section 111.70(3)(b) of MERA or that he breached his duty to fairly represent Complainant.

DISCUSSION

Before the Examiner will assert the Commission's jurisdiction to determine the merits of Complainant's allegation that Respondents City, Kolstad and Bienash breached the collective bargaining agreement in violation of section 111.70(3)(a)5 of MERA, Complainant must show that he attempted to exhaust the collective bargaining agreement's grievance procedure and that his failure to succeed in exhausting the grievance procedure was caused by Local 523's breach of its duty to fairly represent him. 3/ Complainant must sustain his burden of proof "by a clear and satisfactory preponderance of the evidence." 4/

The record establishes that Complainant did file a timely grievance concerning his discharge and that, upon its denial, Complainant promptly contacted representatives of Local 523 about appealing his grievance but that representatives of Local 523 refused to appeal the grievance. Thus, Complainant has proven that he attempted to exhaust the grievance procedure.

The next matter that Complainant must prove is that his failure to exhaust was caused by Local 523's breach of its duty to fairly represent

2/ (continued)

agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them.

5. To coerce or intimidate an independent contractor, supervisor, confidential, managerial or executive employe, to induce him to become a member of the labor organization of which employes are members."

3/ Mahnke v. WERC 66 Wis. 2d 524, 225 N.W. 2d 617 (1975). The burden rests with the Employer to raise and prove the defense of failure to exhaust the contractual grievance procedure. The burden rests with Complainant to prove that, although failing to exhaust the grievance procedure, he at least attempted to exhaust the grievance procedure and that his attempt was frustrated by Local 523's breach of the duty of fair representation.

4/ Section 111.07(3), Wis. Stats.

Complainant. 5/ Local 523, as the exclusive bargaining representative of Street Department employees, has a duty to fairly represent all employees in the bargaining unit while bargaining on behalf of those employees and while processing their grievances. 6/ In order to establish that Local 523 has violated this duty, Complainant must show that the union's conduct was arbitrary, discriminatory or in bad faith or that the union processed the grievance in a perfunctory manner. 7/ As noted in Mahnke v. WERC:

5/ There are two ways in which a complainant may present his or her allegation that a union violated its duty of fair representation. First, a complainant may name the union as a respondent and allege in the complaint that the union has violated its duty of fair representation and thus has committed a prohibited practice within the meaning of sections 111.70(3)(b)1, 2, 3 and/or 4. (Of course, the specific section or sections alleged to have been violated would depend on the particular facts of the case.) This method of raising the allegation ensures that a remedy can be entered against the union as well as against an employer, assuming that a complainant proves a breach of the duty of fair representation by the union and a contractual violation by the employer. It is not necessary, however, to name a union as a respondent or to find that said union has committed a prohibited practice in order to find that the union has breached its duty of fair representation. Thus, the second approach is to allege, without naming the union as a respondent and without alleging that it committed a prohibited practice, that the union violated its duty of fair representation. As with the first approach, if the allegation of a violation of the duty of fair representation is proven, the merits of the contractual issue can then be addressed. If this second approach is used, no remedy could be entered against the union.

In the instant case, Complainant did not name Local 523 as a respondent but did name Bert Punzel, its vice-president. Complainant, although not specifically mentioning that Punzel breached the duty of fair representation, alleged that Punzel had committed a prohibited practice within the meaning of section 111.70(3)(b) of MERA. Nowhere in his complaint did Complainant allege that Local 523 had breached its duty of fair representation. At the hearing, Complainant did allege that Punzel and Local 523 had violated the duty of fair representation. The Examiner interprets Complainant's claim to be an allegation that Respondent Punzel violated the duty of fair representation and thereby committed prohibited practices within the meaning of section 111.70(3)(b) of MERA and that Local 523 also violated the duty of fair representation.

6/ University of Wisconsin-Milwaukee, Housing Department (11457-F) 1/78, presently on appeal to Circuit Court; Hines v. Anchor Motor Freight, Inc. ___ U.S. ___ 96 S. Ct. 1048 (1976); Mahnke v. WERC, above; Racine Policemen's Professional and Benevolent Corporation (12637, 12637-A) 5/74.

7/ University of Wisconsin-Milwaukee, Housing Department, above; Hines v. Anchor Motor Freight, Inc., above; Mahnke v. WERC, above.

". . . a union has considerable latitude in deciding whether to pursue a grievance through arbitration. . . . Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. . . .

The [United States] Supreme Court in Vaca [v. Sipes 386 U.S. 171, 87 S. Ct. 903 (1967)] left no doubt that a union owes its members a duty of fair representation, but that opinion also makes it clear that the union may exercise discretion in deciding whether a grievance warrants arbitration. Even if an employee claim has merit, a union may properly reject it unless its action is arbitrary or in bad faith." 8/

Complainant alleges two ways that Respondent Punzel and Local 523 breached its duty. First, Complainant alleges that he was not told by Punzel or the other representatives of Local 523 that Complainant could have appealed the grievance himself. Complainant never testified that he was not given this information; Punzel specifically denied this allegation in his answer to the complaint and amended complaint (entered in the record orally at the hearing) and also refuted this allegation in his testimony. Thus Complainant has failed to prove this allegation.

Even if Complainant had proven this allegation, failure to inform Complainant that he could appeal his grievance does not violate the duty of fair representation under the circumstances of this case. Assuming that the collective bargaining agreement permits an individual employee to appeal a grievance without the support of the union, the collective bargaining agreement involved in this case does not permit an individual employee to arbitrate his grievance. The arbitration clause of the contract states that "either party" may proceed to arbitration. The term "either party" is a reference to Local 523 and the City. The Commission has previously held that only the "most compelling language" in a collective bargaining agreement will permit a conclusion that an individual employee can invoke the arbitration process found in that contract. 9/ Such compelling language is absent here. Since Complainant could not arbitrate his grievance and since there is no evidence that processing his grievance through the steps prior to arbitration would have overturned his discharge, Complainant would have gained little had he appealed the grievance himself. In addition, assuming that he was not informed that he could appeal the grievance himself, there is no evidence that any such failure was arbitrary, discriminatory, done in bad faith or based on a perfunctory processing of the grievance. Thus, assuming that he was not informed that he could appeal his grievance, failure to so inform him does not amount to a breach of the union's duty to fairly represent him.

Second, Complainant alleges that Punzel and Local 523 breached the duty of fair representation by refusing to appeal his grievance. Again, Complainant has the burden of establishing by a "clear and satisfactory preponderance of the evidence" that this conduct amounts to a breach of the duty of fair representation. 10/ The record establishes that Complainant approached representatives of the Union after the denial of his grievance to request that his grievance be appealed; that the grievance committee members and Respondent Punzel met to discuss Complainant's grievance; that the committee members and Punzel agreed that they would not process Complainant's grievance further because they believed his grievance was without merit and that an arbitrator would rule against him; and that their conclusion was based on Schmelings's opinion that Complainant's work record was unsatisfactory.

8/ Above, at 531.

9/ University of Wisconsin-Milwaukee, Housing Department, above.

10/ See footnotes 3 and 4.

This conduct alone does not establish a breach of the duty of fair representation. Although the record contains inferences that representatives of Local 523 treated Complainant's grievance in a perfunctory manner by failing to review his personnel file and to interview him concerning the incidences which led to his discharge, Complainant has failed to prove any perfunctory treatment. Thus, Complainant has failed to show that Respondent Punzel or any other representative of Local 523 breached their duty to fairly represent Complainant in the processing of his grievance. Based on this conclusion, the Examiner has determined that Respondent Punzel did not commit prohibited practices within the meaning of section 111.70(3)(b) of MERA.

Because Complainant has not established that Respondent Punzel or Local 523 breached their duty to fairly represent Complainant, the Examiner will not assert the jurisdiction of the Commission to determine whether Respondents City, Kolstad and Bienash violated the collective bargaining agreement by discharging Complainant, thereby committing a prohibited practice within the meaning of section 111.70(3)(a)5 of MERA.

Dated at Madison, Wisconsin, this 27th day of March, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Ellen J. Henningsen
Ellen J. Henningsen, Examiner