STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ALLEN R. HOLLE, Complainant, vs. BLOOMER JOINT SCHOOL DISTRICT NO. 1 and BLOOMER PROFESSIONAL EDUCATORS ASSOCIATION, Respondents.	Case IX No. 22745 MP-830 Decision No. 16228-A

Appearances:

Ms. Judith Neumann; Attorney at Law; Wisconsin Education Association Council; P.O. Box 8003; Madison, WI 53708; appearing on behalf of Complainant.

Losby, Riley & Farr, S.C.; Attorneys at Law; by Mr. James M. Ward; 204 E. Grand Ave.; P.O. Box 358; Eau Claire, WI 54701; appearing on behalf of Respondent Bloomer Joint School District No. 1.

Wiley, Rasmus, Colbert, Frasch and Norseng, S.C.; Attorneys at Law; by Mr. B. James Colbert; 119-1/2 N. Bridge St.; Chippewa Falls, WI 54701; appearing on behalf of Respondent Bloomer Professional Educators Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

The above-named Complainant having filed a Complaint and Amended Complaint with the Wisconsin Employment Relations Commission, wherein it has been alleged that the above-named Respondents have committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission having appointed Michael F. Rothstein, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Sec. 111.07(5), Wis. Stats.; and hearings on said Amended Complaint having been held at Chippewa Falls and Eau Claire, Wisconsin, on July 25 and 26, and November 28, 29 and 30, 1978, before the Examiner; and the Complainant and Respondents having filed post-hearing briefs through December of 1979; and the Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Orders.

FINDINGS OF FACT

1. That Allen R. Holle, hereinafter referred to as Holle or Complainant, is an individual residing in Bloomer, Wisconsin; Complainant was employed and continues to be employed as a teacher by the Bloomer Joint School District.

2. That Bloomer Joint School District No. 1, hereinafter referred to as the Respondent School District or the Employer, is a public school district organized under the laws of the State of Wisconsin and is a Municipal Employer within the meaning of Sec. 111.70(1)(a) of MERA.

3. That the Bloomer Professional Educators Association, hereinafter referred to as Respondent Association, was at all times material herein a labor organization engaged in the representation of certain employes of the Respondent School District, and has been recognized by

the Respondent School District as the exclusive bargaining representative of said employes including Complainant Holle; at all times material herein Arlys Mullen was the president of Respondent Association, Rita Bitney was vice-president of Respondent Association and Mabel Klingbeil was secretary-treasurer of Respondent Association.

4. That the Respondent School District's Board of Education is an agent of the Respondent School District, and is charged with the possession, care, control and management of the property and affairs of the Employer; at all times material herein James Munro was Superintendent of Schools for said Respondent District.

5. That at all times material herein the Respondent School District and Respondent Association have been parties to collective bargaining agreements governing the wages, hours and other working conditions of the employes represented by Respondent Association; and that the Respondent School District and Respondent Association were signatories to a specific collective bargaining agreement effective from 1976 to 1978; and that said agreement contained the following relevant provisions:

ARTICLE II

RECOGNITION

. . .

3. The Board on its own behalf and on behalf of the electors of the school district, hereby retains and reserves unto itself without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the school code and the laws of the state, the constitution of the State of Wisconsin and/or the United States. Such rights, duties, etc., shall include, by way of illustration and not by way of limitation, the right to:

. . .

c. direct the working forces, including the right to establish and/or eliminate positions, to hire and rehire, evaluate, promote, suspend, non-renew and discharge employees, <u>including assignments for all programs of an extra-curricular nature,</u> determine the size of the work force and to lay off employees. [Emphasis added]

. . .

6. The Board reserves all rights and responsibilities not specifically nullified by this agreement.

7. The Board agreed [sic] that it will not exercise any of the foregoing rights in such manner as to violate the express provisions of this contract or the Statutes or Constitutions of the State of Wisconsin or the United States.

. . .

ARTICLE V

TEACHER RIGHTS

. . .

2. All rules and regulations governing employee activities and conduct shall be interpreted and applies [sic] as uniformly as is reasonably possible troughout [sic] the district; provided, however, that the parties recognize that valid differences in rules and regulations on similar issues may exist between buildings and between grade levels and subject area fields.

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ARTICLE VI

GRIEVANCE PROCEDURE

. . .

2. Whenever a grievance shall arise, the following procedure shall be followed:

Step I

a. An earnest effort shall first be made to settle the matter informally between the teacher and his immediate supervisor.

b. If the matter is not resolved, the grievance shall be presented in writing by the teacher to the immediate supervisor within five days after the facts upon which the grievance is based first occur or first become known. The immediate supervisor shall give his written answer within five days of the time the grievance was presented to him in writing.

Step 2

If not settled in Step 1, the grievance may within five days be appealed in writing to the Superintendent. Within five days of receipt, the Superintendent shall meet with the Grievant [sic] to attempt to resolve the grievance. The Superintendent shall give a written answer to the grievant no later than five days after this meeting.

Step 3

If not settled in Step 2, the grievant may within fifteen days submit the matter in writing to the Board. The Board shall schedule a hearing on the grievance at its regularly scheduled Board meeting. Within ten days of the hearing, the Board shall issue its written decision. In the discretion of the Board, this Step may be waived.

Step 4

Grievances not settled in Step 2 of the grievance procedure may be appealed to arbitration which shall become binding on both parties provided that:

1. Written notice of a request for such arbitration is given to the Board within ten days of receipt of the last answer at Step 3 (or Step 2, if Step 3 is waived by the Board).

2. The issue involves the interpreation [sic] or application of a specific provision of the agreement.

Upon receipt of written ntoice [sic] of a request for arbitration, both parties shall jointly file a written request with the WERC to appoint a commissioner or a member of its staff to act as arbitrator. The decision of the arbitrator will be final and binding on both parties.

. . .

5. The employee representative may assist in processing the grievance at any step.

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ARTICLE VIII

WORKLOAD AND CLASS SIZE

. . .

5. Teacher participation in extra curricular activities will be compensated in accordance with the provisions of appendix B, attached to this agreement and will be agreed on by both parties. [Emphasis added]

. . .

ARTICLE XVII

DISCIPLINE PROCEDURE

. . .

2. After the probationary period, a teacher shall not be disciplined, discharged or nonrenewed except for just cause. In the event a teacher is disciplined, discharged or nonrenewed, the full grievance procedure as set forth in Article VI herein need not be followed. In such event, the following procedure shall apply:

a. The teacher and the B.P.E.A. shall be promptly notified in writing of the discipline, discharge or nonrenewal, which notice shall contain a statement of the basis for the action. The teacher or the union shall have five (5) school days within which to request a meeting with the Superintendent.

b. The Superintendent shall meet upon request from the teacher within five (5) school days of such request for the purpose of discussing the action taken and the basis therefor. The teacher may have representation and counsel present at such meeting. Within five (5 [sic] school days following said meeting, the Superintendent shall notify the teacher and the union of any change in the employer's position.

c. If the teacher and/or the B.P.E.A. remain dissatisfied with the action taken after the meeting with the Superintendent, either of them may submit the decision, within ten (10) school days, to the Wisconsin Employment Relations Commission for final and binding arbitration, pursuant to the provisions set forth herein; provided, however, that in grievances processed hereunder, this remedy of final and binding arbitration shall be exclusive of any other procedures or remedies afforded to any teacher by law. Failure to comply with the ten (10) day time limit set forth above shall be deemed a waiver of the right to arbitrate the issue.

. . .

APPENDIX B

EXTRA PAY SCHEDULE

Extra curricular activities will be paid on a rating scale from one to five. The amount listed includes payment for pre and post season practice events . . .

. . .

POSITION	Point Value	Payment
. . .	. . .	. . .
Freshman Basketball	3	540.00
Head Track Coach	2 1/2	450.00
. . .	. . .	. . .

6. That prior to the 1977-78 school year, Complainant Holle was the Freshman basketball coach for eight years and the head track coach for seven years; and that on March 10, 1977, Respondent Employer's Board of Education voted to remove Complainant Holle's basketball and track coaching duties from Holle's individual teaching contract for the 1977-78 school year; the removal of Holle's coaching duties was based upon the recommendation of Superintendent James Munro at a regularly scheduled School Board meeting of the Board of Education held on March 10, 1977.

7. That on or about March 11, 1977, Complainant Holle telephoned Arlys Mullen and requested that Respondent Association assist and represent him in a grievance that he wished to file about the loss of his coaching duties; Holle and Mullen scheduled a meeting for March 15, 1977.

8. That on March 13, 1977, Arlys Mullen telephoned Superintendent Munro to find out what responsibilities Respondent Association had in representing Complainant Holle; and that during said conversation Superintendent Munro informed Mullen that the Respondent School District's decision to remove the coaching duties from Holle's individual teaching contract for the next school year had been made pursuant to Article VIII, Sec. 5 of the collective bargaining agreement then in existence between Respondent Association and the Respondent School District.

9. That on March 15, 1977, Complainant Holle met with the officers of Respondent Association to discuss the processing of his grievance for the loss of his coaching duties; at this meeting Holle requested that Respondent Association represent him and assist him in the processing of said grievance; officers of Respondent Association (Mullen, Bitney and Klingbeil) discussed the general merits of Holle's grievance under the "mutual agreement" clause of the collective bargaining agreement; 1/ Mullen and Bitney indicated at the meeting on March 15th that Respondent Association would represent Holle to the extent required by the collective bargaining agreement; they indicated, however, that his grievance would not be taken to arbitration; 2/ upon Holle's request, Mullen agreed to seek legal advice on the interpretation of the collective bargaining agreement; although Mullen agreed to accompany Holle to the Step 1a meeting under the grievance procedure of the collective bargaining agreement, she refused to arrange the Step 1a meeting, she refused to speak on behalf of Holle at the Step 1a meeting, and she refused to file, draft or assist in drafting a written grievance on behalf of Holle. 3/

10. That on or about March 15, 1977, Arlys Mullen sought legal advice from attorney B. James Colbert; Mullen asked Colbert about the meaning of the "mutual agreement" clause of the collective bargaining agreement; Colbert advised Mullen that Complainant's grievance lacked merit, but Colbert and Mullen did not discuss other provisions of the collective bargaining agreement which Holle believed were relevant to his grievance.

11. That on March 16, 1977, Holle and Mullen met with Raykovich, Holle's immediate supervisor, and at said meeting Holle requested that Raykovich provide reasons for the removal of his (Holle's) coaching duties for the following school year; after hearing Raykovich's reasons, Holle commented on them and explained to Raykovich his position; however, Raykovich indicated that he could not settle the grievance with Holle; at the meeting between Raykovich and Holle, Arlys Mullen did not speak nor in any way assist Holle in the presentation of his position; after the meeting, Holle requested that Respondent Association file a written grievance on his behalf; Mullen refused to file or assist in filing a written grievance; subsequent to this conversation, Holle sent a letter to Mullen requesting that she file a grievance on his behalf; Mullen did not respond to Holle's letter.

12. That on March 17, 1977, Complainant Holle contacted Superintendent James Munro and requested a meeting pursuant to Article XVII,

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1/ [illegible]

Section 2a of the contract; Holle and Munro arranged to meet on March 23, 1977.

13. That on March 21, 1977, Holle telephoned Mullen and asked her to accompany him to the meeting with Superintendent Munro; Mullen agreed to accompany Holle to said meeting; however, Mullen refused to speak at said meeting; Holle asked Mullen whether the discipline procedure covered non-renewals and whether his situation came under that provision; Mullen explained that she was not familiar with the disciplinary procedure and offered no advice, nor did she offer to investigate the matter on behalf of Holle.

14. That on March 22, 1977, Holle again requested that Respondent Association represent him at his March 23rd meeting with Superintendent Munro.

15. That on March 23, 1977, Holle met with Superintendent Munro; Arlys Mullen accompanied Holle to the meeting; Munro refused to state the District's reasons for removing Holle's coaching duties other than to indicate that athletic director Gunderson had recommended the removal of Holle's coaching duties from his individual teaching contract; throughout the entire meeting Mullen did not speak on behalf of Holle nor assist him in presenting his position; at the end of the meeting between Holle and Munro, the grievance remained unresolved.

16. That on March 30, 1977, Munro sent a letter to Holle indicating that Holle's removal as Freshman basketball coach and head track coach was made pursuant to Article VIII, Section 5 of the collective bargaining agreement ("mutual agreement" clause).

17. That on April 1, 1977, Holle telephoned Mullen to request that Respondent Association submit his grievance to the Wisconsin Employment Relations Commission for arbitration pursuant to the terms of the collective bargaining agreement; Mullen indicated that Respondent Association was not in favor of arbitration, but that she would speak to the Association's executive committee about Holle's grievance.

18. That on April 2, 1977, Holle wrote a letter to Respondent Association again requesting that the Association submit his grievance to the Wisconsin Employment Relations Commission for arbitration pursuant to the terms of the collective bargaining agreement.

19. That between April 2 and April 11, 1977, Mullen contacted Bitney and Klingbiel of Respondent Association's executive committee and spoke to them about submitting Holle's grievance to arbitration.

20. That on April 11, 1977, Mullen sent a letter to Complainant Holle on behalf of Respondent Association stating that the Association would not submit his grievance to arbitration.

21. That Respondent Association's failure to make a considered decision regarding Holle's request for arbitration, accompanied by the Association's perfunctory handling of the grievance itself, was arbitrary and constituted a breach of the duty of fair representation.

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

CONCLUSIONS OF LAW

1. That Complainant Holle attempted to exhaust the contractual grievance procedures under the existing collective bargaining agreement between the Respondent School District and Respondent Association, but that such attempts were frustrated by Respondent Association's refusal to process Complainant's grievance.

2. That Respondent Association, by arbitrarily refusing to investigate the merits of Holle's grievance and by processing Holle's

grievance in a perfunctory manner, failed to fairly represent Holle, and thus violated Sec. 111.70(3)(b)1 of the Municipal Employment Relations Act. 4/

3. That the Respondent Employer did not violate the terms and conditions of the collective bargaining agreement then in existence between the Respondent School District and Respondent Association when the Respondent School District removed the coaching duties of Complainant Holle from his individual teaching contract for the 1977-1978 school year, and therefore the Respondent Employer did not violate Sec. 111.70(3)(a)5 5/ of the Municipal Employment Relations Act.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and files the following

ORDERS

IT IS ORDERED THAT:

1. Bloomer Professional Educators Association, its officers and agents, shall immediately:

(a) Cease and desist from failing to make a considered decision on requests that grievances be taken to arbitration, and further shall cease and desist from acting in a perfunctory manner when processing grievances under the collective bargaining agreement in existence between said Association and the Bloomer Joint School District No. 1.

(b) Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

4/ Sec. 111.70(3)(b)1 states:

> (b) 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).

Sec. 111.70(2) states, in part:

> (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . .

5/ Sec. 111.70(3)(a)5 states, in part:

> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, . . .

(1) Pay Complainant's reasonable attorney's fees in the amount of one thousand dollars ($1,000.00), and deliver said amount to the Wisconsin Education Association Council, 101 W. Beltline Highway, P.O. Box 8003, Madison, WI 53708.

(2) Notify all employes employed in the bargaining unit which it represents that it will fairly represent all employes and that it will not coerce or intimidate any employes represented by it in the enjoyment of their legal rights, including those rights guaranteed by Section 111.70(2) of the Municipal Employment Relations Act, by posting the notice attached hereto and marked "Appendix A" in its offices and in any places provided by the Bloomer Joint School District No. 1 for the posting of notices by the Respondent Association. Said notices shall be signed by the principal officer of the Respondent Association and shall remain posted for sixty (60) days. The Respondent Association shall take all reasonable steps necessary to insure that said notices are not altered, defaced or covered by any other material.

(3) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order regarding what steps it has taken to comply with this Order.

2. The Amended Complaint filed herein, except insofar as it alleges that Respondent Association has violated its duty of fair representation, shall be dismissed.

Dated at Madison, Wisconsin this 7th day of August, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Michael F. Rothstein, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYES REPRESENTED BY
BLOOMER PROFESSIONAL EDUCATORS ASSOCIATION

Pursuant to an Order of the Wisconsin Employment Relations Commission, all employes of Bloomer Joint School District No. 1 represented by the Bloomer Professional Educators Association are hereby notified that the Bloomer Professional Educators Association, its officers and agents, will fairly represent all employes represented by it and will not coerce or intimidate any employes represented by the Bloomer Professional Educators Association in the enjoyment of their legal rights under the Municipal Employment Relations Act including those rights guaranteed in Section 111.70(2) of the said act.

Dated this _____ day of _____, 1980.

_____

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

SCHOOL DISTRICT OF BLOOMER, IX, Decision No. 16228-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

FACTUAL BACKGROUND

On March 1, 1978 Allen Holle and Nancy Kloss filed a Complaint with the Wisconsin Employment Relations Commission in which they jointly alleged that the Respondent Employer had committed prohibited practices in violation of Secs. 111.70(3)(a)1, 2, 3 and 5; Complainants further alleged that Respondent Association had committed prohibited practices under Secs. 111.70(3)(b)1 and 2 of the Wisconsin Statutes. On May 30, 1978 an Amended Complaint was filed removing Nancy Kloss as a Complainant. Hearings were held during July and November of 1978. Throughout 1979 the parties briefed the various issues raised at the hearings and by the pleadings. By post-hearing agreements between Complainant and the Respondent School District, Complainant has withdrawn his charges alleging prohibited practices under Sec. 111.70(3)(a)2 and Sec. 111.70(3)(a)3, Wis. Stats. In exchange for the Complainant's withdrawal of these allegations, the Respondent Employer has waived all procedural jurisdictional defenses which it might have raised, including the defense of failure to exhaust the grievance procedure or to timely file the grievance under the collective bargaining agreement. Thus, by stipulation of the parties, the Examiner has jurisdiction and authority to decide the merits of Complainant's allegation that Respondent Employer violated the applicable collective bargaining agreement and therefore violated Secs. 111.70(3)(a)5 and, collaterally, 111.70(3)(a)1, Wis. Stats.

Initially, Complainant Holle was the Freshman basketball coach and the head track coach for the Bloomer School District. He was also active in a rival union, Northwest United Educators (NUE). In the Bloomer School District NUE is the minority union, having previously lost an election between NUE and Respondent Association for the exclusive bargaining rights of the teachers of the Respondent Employer. In March of 1977, at a regularly scheduled meeting of the Board of Education, Holle's coaching duties were removed from his individual teaching contract for the upcoming school year.

Holle immediately contacted Arlys Mullen, president of Respondent Association, and requested that she file a grievance on his behalf and further that she represent him throughout the grievance process. Meetings and discussions were held between Holle and officers of Respondent Association throughout March and April. At different points in time, Mullen attended meetings with Holle and members of the administration of the Respondent School District as the grievance progressed through the first several steps of the grievance process provided for under the collective bargaining agreement. However, at none of these meetings did Mullen speak on behalf of Holle, nor did Mullen assist Holle in the preparation of his grievance. In order to determine the viability of Holle's grievance, Mullen contacted the Superintendent of the School District (James Munro), and she also contacted an attorney (B. James Colbert). She was advised by both of these individuals that the Holle grievance was without merit. Mullen was further advised by Munro that she had no obligation to assist in the preparation of the grievance nor to speak on behalf of a teacher at any of the meetings with the administration of the Respondent School District.

Having exhausted the first several steps of the grievance procedure without satisfactory resolution, Holle requested that Respondent Association process his grievance to arbitration. Mullen advised Holle that the Association did not believe in arbitration and that they would not take his grievance to arbitration. Having thus attempted to exhaust the grievance procedure and finding himself frustrated in the completion of that process, Holle filed a Complaint before the Wisconsin Employment Relations Commission alleging that Respondent

Association had breached its duty of fair representation by its perfunctory handling of his grievance and its refusal to take his grievance to arbitration. Holle further alleged that the Respondent School District, by removing his coaching duties, had violated the terms of the collective bargaining agreement then in effect between the Respondent School District and Respondent Association.

POSITIONS OF THE PARTIES

Complainant maintains that the removal of his coaching duties was a violation of the collective bargaining agreement which provides, among other provisions, that all rules and regulations governing employe activities will be uniformly applied to all teachers, that teacher participation in extracurricular activities shall remain in effect until the teacher determines that he/she wishes to terminate such activities, and that no teacher shall be disciplined, discharged or nonrenewed except for "just cause." Holle argues that the District violated this "just cause" provision, in that the removal of his extracurricular coaching duties was a discharge or nonrenewal, or was a form of discipline. In addition, Holle maintains that the provisions in the collective bargaining agreement providing for equal treatment have been violated in that nothing in his coaching activities or his handling of those responsibilities was different from the methods employed by other teachers in their coaching duties.

As to Respondent Association, Holle alleges that the Association has acted in an arbitrary and perfunctory manner in their handling of his grievance. It is Holle's position that the Association failed to weigh the merits of his grievance, relied upon the administration for answers to questions of their duty to represent him, refused to arbitrate his grievance even though there were legal arguments that could have been raised by the Association, and in general refused to act as a representative of Holle because of their historic nonadvocacy orientation and general recalcitrance toward processing grievances. This attitude on the part of the Association, argues Holle, constitutes a clear violation of the duty of fair representation; thus, failure to exhaust the grievance procedure should not bar his action against the School District for unlawfully terminating his coaching duties. As a remedy for these violations, Holle requests reinstatement of his coaching duties, backpay for the period of time during which his coaching duties were removed, reasonable attorney's fees, and an order requiring Respondent Association to process grievances to arbitration.

Respondent Employer maintains that the removal of coaching duties from the Complainant's individual teaching contract for the succeeding school year does not violate the collective bargaining agreement. It is the position of the District that the removal of coaching duties does not constitute discipline, discharge or nonrenewal, and thus the "just cause" standard as set forth in Article XVII of the collective bargaining agreement does not apply to the factual situation presented here. In support of this position Respondent Employer argues that there is no evidence in the record that the motivation of the District for the removal of Complainant's coaching duties was premised upon any misconduct on the part of Complainant; but rather, that removal of the coaching duties arose from the administration's perception that the Complainant lacked sufficient interest in his coaching activities to continue those duties. Respondent School District further maintains that the procedure followed for removal of Complainant's coaching duties is consistent with the practice of the District in the removal of other teacher's extracurricular duties; and therefore, Respondent Employer did not treat Complainant differently than other members of the bargaining unit whose extracurricular activities have been removed from their individual teaching contracts. Respondent Employer argues that the only provision of the collective bargaining

agreement which addresses the issue of extracurricular activities is Article VIII, Section 5, which the parties refer to as the "mutual agreement" clause. Under this provision, argues the District, the assignment of extracurricular activities requires the assent of both the teacher and the District; and if either the teacher or the District does not agree to the continuation of the original assignment of the extracurricular activity, either party may refrain from contracting for such an assignment. Based upon this analysis, the District concludes that its removal of the coaching duties from Complainant Holle's individual teaching contract for the succeeding school year is not in violation of the collective bargaining agreement, and therefore the Complaint as to the School District should be dismissed.

Respondent Association maintains that it fairly and completely represented Complainant Holle pursuant to its obligation imposed by law. The Association argues that it fulfilled this obligation by agreeing to represent Holle in accordance with the terms of the collective bargaining agreement, and that that agreement required the individual teacher to draft and file his own grievance letter and to speak on his own behalf; therefore, Respondent Association's failure to assist Holle in drafting his grievance or in speaking on his behalf did not constitute a violation of the Association's duty to fairly represent Holle. In addition, Respondent Association argues that Complainant Holle had extensive experience with the handling of grievances and therefore was in a position to represent himself effectively. By meeting with Holle and listening to his grievance, by attending the meetings between Holle and his immediate supervisor and the Superintendent of the School District, and by seeking legal advice, Respondent Association maintains that it fulfilled its legal obligations to Holle as a member of the bargaining unit. As to the Association's refusal to process Holle's grievance to arbitration, the Association points out that there is no requirement that all grievances be submitted to binding arbitration; and that, since the Association has never processed a grievance to arbitration, Holle was not treated any differently than other members of the bargaining unit. Thus, it cannot be said that Respondent Association discriminated against Holle. Finally, Respondent Association maintains that the burden of proof is upon the Complainant to establish by a clear and satisfactory preponderance of the evidence that the Association's conduct toward Holle was arbitrary or discriminatory, or that the conduct of the Association toward Holle evinces bad faith. The Association maintains that Holle has not succeeded in meeting this burden of proof. Thus, Respondent Association argues that the allegations of the Complaint which accuse the Association of wrong-doing ought to be dismissed.

DISCUSSION OF ISSUES

Duty of Fair Representation

Concomitant with the right of exclusive representation bestowed upon the collective bargaining agent (under federal law and under Wisconsin Statutes), a union has a duty to fairly represent all employes throughout the bargaining unit, since such employes do not have individual negotiating rights and must look to the union to represent their interests. While no single statement adequately characterizes this duty of fair representation, the standard that has generally been employed by the Commission and the courts is that a union's conduct toward a bargaining unit employe cannot be arbitrary, discriminatory or in bad faith. 6/ The Commission and the courts have also employed

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6/ Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Mahnke v. WERC, 66 Wis. 2d 524, 225 NW 2d 617 (1975).

a standard which requires that a union cannot arbitrarily ignore a meritorious grievance nor process a grievance in a perfunctory fashion. 7/

There appears to be a trend in the cases which have been decided since the decision in Vaca, suggesting that greater emphasis be placed on the affirmative obligations imposed upon a union. Even in Vaca the Court noted that "in administering the grievance and arbitration machinery . . . a union must, in good faith and in a non-arbitrary manner, make decisions as to the merits of particular grievances." 8/ The duty of fair representation is thus more than an absence of bad faith or hostile motivation. 9/ A union "must investigate and process each grievance in a manner that is untainted by arbitrary, discriminatory or bad faith motives" 10/; in administering the grievance and arbitration machinery, a union must "make decisions as to the merits of particular grievances." 11/ In Mahnke the Wisconsin Supreme Court imposed specific duties upon the union when it is engaged in determining whether to arbitrate a grievance; the Court stated that a union must consider the following "relevant factors" in determining the merits of each grievance presented for processing through the grievance machinery: (1) the monetary value of the employe's claim; (2) the effect of a breach of contract on the employe; and (3) the likelihood of success in arbitration. 12/ The Court further stated: "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." 13/ Thus, Mahnke requires that, when challenged by an individual, a union's exercise of its discretion must be put on the record in sufficient detail to enable the Commission and reviewing courts to determine whether the union has made a considered decision by reviewing the relevant factors ennunciated by the Court, and further that such weighing process was not done in a perfunctory or arbitrary fashion. Correspondingly, so long as a union exercises its discretion in good faith and with honesty of purpose, the collective bargaining representative is granted broad discretion in the performance of its duties for the bargaining unit it represents. Mere negligence, poor judgment, or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation. 14/ Yet, though a union is given great lattitude to disregard non-meritorious grievances and to pursue policies for the general welfare of all employes

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7/ Vaca v. Sipes, supra; Mahnke v. WERC, supra; University of Wisconsin-Milwaukee Housing Department 11457-E, F (1/78); City of Janesville 15209-C (3/78); Hines v. Anchor Motor Freight, 424 U.S. 554, 91 LRRM 2481 (1976).

8/ Vaca v. Sipes, supra, 64 LRRM, at 2378.

9/ Eagleknit Inc. 13501-A, B (1975); Griffin v. UAW, 469 F. 2d 181, 81 LRRM 2485 (1972).

10/ Eagleknit Inc. supra; Badger Lumber Co. 12451-A, B (1974).

11/ Vaca v. Sipes, supra, 64 2d LRRM at 2378.

12/ Mahnke v. WERC, supra; University of Wisconsin-Milwaukee Housing Department 11457-F (1977).

13/ 66 Wis. 2d at 534.

14/ Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2551 (1953); King Soopers, Inc., 222 NLRB 1011 (1976) and see Tedford v. Peabody Coal Co., 533 F. 2d 952, 99 LRRM 2990 (5th Circuit 1976), for discussion on the limits of union discretion.

that the union represents, there comes a point when a union's action or its failure to take action is so unreasonable as to be arbitrary and thus contrary to its fiduciary obligations. 15/ The question is thus whether Respondent Association's handling of Holle's grievance was so unreasonable or was performed in such a perfunctory manner as to constitute a violation of the duty of fair representation. I have concluded that the Association's handling of Holle's grievance did constitute a violation of its duty.

Respondent Association contends that Holle was familiar with the procedures involved in the processing of grievances because of his active role in NUE, and therefore he should have processed his own grievance and represented himself at the meetings with the School administrators; however, this argument is inconsistent with the well-established principle that a union is obligated to give equal representation to all bargaining unit employes without regard to union membership or affiliation. A union activist is entitled to no lesser quantum of fair representation because of his union activity and the knowledge and experience gleaned therefrom. 16/ Thus, the issue turns on whether the union's representation of Holle fell short of fair representation as that standard would be applied to any bargaining unit member. Fair representation requires, at a minimum, that the exclusive bargaining representative must do the following: (a) upon a request from a bargaining unit member for assistance, a union must explain the steps of the contractual grievance procedure; in addition, the union must discuss the facts of the potential grievance with the aggrieved employe 17/; (b) after meeting with the bargaining unit employe, the union must undertake an initial investigation of the situation 18/; (c) if requested to do so by the bargaining unit employe, the union must represent the grievant at the initial meetings provided for under the collective bargaining agreement. 19/ In this regard it is fairly obvious that "representation" includes specific acts. In order for there to be meaningful representation a union representative must speak on behalf of the grievant. 20/ Meaningful representation also includes the presentation of arguments favorable to the grievant and an initial challenge to the validity of the Employer's position. 21/ In a timely manner the union is required to review the merits of the grievance with the individual grievant and to make a timely decision as to whether or not to assist the grievant in further processing the matter. 22/

15/ Allen L. Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, 469 F. 2d 181 (C.A. 4, 1972); United Steel Workers of America, Local 8093, AFL-CIO-CLC (Kennecott Copper Corporation, Ray Miner Division), 225 NLRB 802 (1976); King Soopers, supra; General Truck Drivers, Warehousemen, Helpers and Automotive Employees, Local 315 (Rhodes & Jamieson, LTD.), 217 NLRB 616 (1975).

16/ University of Wisconsin-Milwaukee Housing Department, supra.

17/ Beverly Manor Convalescent Center, 229 NLRB No. 104 (1977).

18/ Newport News Shipbuilding, 236 NLRB No. 197 (1978); Owens-Illinois Inc., 240 NLRB No. 29 (1979); Hines v. Anchor Motor Freight, supra.

19/ Ford Motor Co. v. Huffman, supra.

20/ Beverly Manor Convalescent Center, supra.

21/ Beverly Manor Convalescent Center, supra; Owens-Illinois, supra; Hines v. Anchor Motor Freight, supra.

22/ University of Wisconsin-Milwaukee Housing Department, supra.

Clearly, the Respondent Association in the instant matter failed to meet these minimal standards of fair representation. Respondent Association has a history of refusing to process grievances or to take them to arbitration. Throughout the five and one-half years of its existence the Association had never processed a grievance nor taken one to arbitration, despite numerous requests to provide such assistance (Transcript B, 141-146; Transcript C, 4-7, 82-84, 113-115; Transcript D, 23, 53-55, 113-114; Exhibits 6 through 13). Complainant's grievance was the first one ever handled by the Respondent Association (Transcript E, 9-10, 18, 22). Having finally decided to undertake the grievance on behalf of a bargaining unit employe, Respondent Association then proceeded to follow its arbitrary policy of not taking an active role in the processing of grievances regardless of the employe's request for assistance. The Association refused to participate in arranging a meeting with the principal on behalf of Complainant (Transcript D, 53-54, 58, 113). Respondent Association further refused to assist Complainant in the drafting of the grievance letter (Transcript D, 54-55, 98-99, 101-102, 105, 114). Rita Bitney, an officer of Respondent Association, stated that "she would never write a letter for another person" (Transcript D, 114); and Arlys Mullen, President of Respondent Association, believed that grievances were individual matters and not the concern of the Associations and thus it was up to the individual teacher to draft and file his or her own grievance (Transcript D, 54-55, 98-99, 101-102, 105).

It is also clear that Respondent Association's investigation of the Holle grievance was done in such a perfunctory manner as to constitute a violation of the duty of fair representation. The investigation undertaken by the Association consisted of making a telephone call to the Superintendent of the School District and requesting information on how to proceed with the handling of the grievance; this was followed by a brief discussion with Complainant and a hollow attempt at obtaining legal advice. At no time in the investigatory stage did Respondent Association confront the Respondent Employer about its contractual interpretation or the reasons given for the removal of Complainant's coaching duties (Transcript C, 37, 87-88; Transcript B, 125; Transcript C, 118-119; Transcript B, 131-135; Exhibit 20 at pages 96-97). Respondent Association consistently evaluated the merits of Complainant's grievance solely through the eyes of the Respondent Employer; no attempt was made to evaluate the grievance based upon the employe's concerns nor the concerns of the employes of the entire bargaining unit.

Perhaps the most egregious conduct on the part of the Association was its failure to speak on behalf of the Complainant at meetings with the principal and the Superintendent of the School District. Meaningful representation must include the presentation of arguments favorable to a grievant and at least an initial challenge to the validity of the employer's position; to sit in absolute silence at a first or second level grievance meeting constitutes such a dereliction of the duty of fair representation as to establish, without more, a breach of that duty. The Association's refusal to actively participate in the initial meetings makes a fair consideration of the grievance even more unlikely. 23/ This silence on the part of the agents of the Association puts the grievant at a serious disadvantage because it may signal to the Employer the Association's approval of the Employer's position.

Other factors which lead to a conclusion that Respondent Association violated its duty of fair representation is the Association's failure

23/ See Owens-Illinois, supra; Hines v. Anchor Motor Freight, supra.

to consider the monetary value of Complainant's claim, and the effect of the Employer's alleged contractual breach on the individual grievant (Transcript D, 92, 120; Exhibit 4G). The testimony of the officers of Respondent Association is simply a litany that they reviewed the contract and the facts in determining whether to proceed to arbitration. There is absolutely no indication in the record that any factors were weighed; more importantly, Respondent Association failed to demonstrate that it weighed the "relevant factors" in deciding whether or not to process Holle's grievance beyond the meeting with the Superintendent. Finally, there is evidence in the record that Respondent Association refused to assist Holle in the preparation of his grievance for the invidious reason that Complainant Holle was very active in election activities on behalf of the rival NUE union. 24/ The Examiner has not concluded that this evidence standing along is sufficient to sustain an independent finding of a breach of the duty of fair representation; however, this evidence coupled with the other failures of the Association demonstrates a pattern of behavior which is so unreasonable as to support the conclusion that Respondent Association's representation of Holle was arbitrary and perfunctory.

Two arguments presented by Respondent Association require additional analysis. Respondent Association contends that its determination to drop the Holle grievance was based in large part upon the advice of counsel. At first blush this argument has great superficial appeal. Many important decisions made by individuals and companies, as well as by employe associations, are based upon advice from the helping professionals - doctors, accountants, social workers, and lawyers. However, it is axiomatic in Western jurisprudence that reliance upon the advice of counsel is not an absolute defense. Bad legal advice does not change the obligation imposed by law upon an individual. In the area of the duty of fair representation the analogy may not be quite as consistent as it might be in other areas of the law; this is especially true because a factor to be taken into account in the duty of fair representation is the state of mind of the individuals making decisions on behalf of the union. Thus, it may very well be that total reliance upon legal advice which has been sought in good faith and has been fully explored by the union would demonstrate that the union acted in a fair and non-arbitrary manner, and that its processing of a grievance was done in a deliberate, considered method while weighing all of the relevant factors in order to exonerate it from the charge of breaching its duty of fair representation.

Closer scrutiny of the facts in the instant matter have convinced the undersigned Examiner that such is not the case in the Holle matter. In the first place, Arlys Mullen obtained the name of Attorney Colbert from Superintendent Munro. When Mullen called Colbert, she posed her questions in such a manner as to preclude obtaining additional information or exploring other contract provisions which might have had an impact on the underlying grievance. Colbert's advice that extra duties were not covered by the term "nonrenewal" based upon the Richards v. Sheboygan case, coupled with the "management rights" clause and the "mutual agreement" language obviously reinforced Munro's position. Neither Mullen nor Colbert attempted to discuss the claims raised by Holle in terms of other contract clauses, specifically the "just

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24/ President Mullen admitted that the Association refused to draft Holle's letter of grievance "simply because of I think it was the opinion of our officers that we were being barraged with these - we're being the recipients of this barrage of letters merely because there was an election coming up and they [Holle and Kloss] were trying to bring discredit to our Association." (Transcript D, 88-89)

cause" provision, protections under the "uniform rules" section, or even the possibility of pursuing an action based upon anti-union animus. Since the legal opinion obtained by the Association failed to demonstrate that a review of the possible legal arguments that could be made on behalf of Holle was undertaken, the Examiner must conclude that, similar to the other "investigatory" techniques employed by the Association, a perfunctory review of legal challenges was similarly made. Respondent Association cannot hide behind a perfunctory request for legal advice in order to demonstrate its good faith and non-arbitrariness. To rule otherwise would permit unions to evade their responsibilities to bargaining unit members by cloaking their arbitrary decisions behind the veil of "legal consultations." Complainant's brief demonstrates the absurdity of blind reliance upon legal advice as satisfying the duty of the Association:

> For example the B.P.E.A., based on legal advice, wrote to Holle that Article II, Sec. 3, the "management rights clause," reserved to management the right to make all assignments for extracurriculars and therefore he had no meritorious basis for proceeding to arbitration. (Ex. 4-g) Yet this subsection of the management rights clause, in context, preserved to the board the power to ". . . suspend, non-renew, and discharge employes, including assignments for all programs of an extracurricular nature . . ." (emphasis added). Had Holle been suspended or nonrenewed from his teaching job rather than his extracurriculars, would a legal opinion that this provision authorized management's action, in the face of a clear and comprehensive just cause provision in another article covering discipline and nonrenewals be enough in itself to satisfy Mahnke's requirement that a "considered" decision be made regarding arbitration? Obviously not. (brief of the Complainant, pages 63-64).

The foregoing analysis makes it clear that involvement of legal counsel does not, per se, preclude a union from having to make a considered judgment based upon factors outlined in Mahnke, and to undertake that analysis in a nonarbitrary, noncapricious and nondiscriminatory manner. 25/

The second major argument raised by Respondent Association which deserves further analysis is the assertion that, in determining whether to process the grievance, the Association found the Holle grievance to have no merit and therefore there was no obligation to proceed to arbitration. Of course it is settled law that a union need not expend time and resources pursuing a grievance that is clearly frivolous. 26/ However, resolution of the question of whether or not a union has breached its duty of fair representation by declining to process a grievance to arbitration does not depend on an ex post facto evaluation of the merits of the grievance. Examination of a grievance for the limited purpose of determining whether or not it is clearly frivolous is not the first step into the inquiry of whether or not a union has breached its duty:

25/ Hughs v. Teamsters Local 683, 95 LRRM 2652 (9 Cir. C. 1977).

26/ Vaca v. Sipes, 386 U.S. 171 at 191; 64 LRRM 2369 (1967).

> "Where as here a union undertakes to process a grievance but decides to abandon the grievance short of arbitration, the finding of a violation turns not on the merit of the grievance but rather on whether the union's disposition of the grievance was perfunctory or motivated by ill will or other invidious considerations." 27/

Thus, the focus of attention must of necessity reflect upon the manner in which Respondent Association engaged in its review of the grievance brought to it by Complainant Holle. Based on the prior discussion highlighting the inadequacies of the investigation and representation by Respondent Association, it is clear that, regardless of the merits of Holle's grievance, Respondent Association breached its duty to fairly represent Complainant Holle. The failure of the Association to inquire into the validity of the stated reasons for the removal of Holle's coaching duties, and its willingness to evaluate the validity of the employe's claim based solely through the eyes of the employer "is more than mere negligence or ineptitude . . . it is perfunctory grievance handling and so unreasonable as to be arbitrary." 28/

Alleged Contract Violation

By post-hearing stipulation the parties have agreed to permit the Examiner to determine the issue of the alleged contract violation first raised by Holle subsequent to the removal of his coaching duties. The issue may be phrased in the following manner:

> Did the School District violate the collective bargaining agreement when it removed the coaching duties from Al Holle's 1977-1978 individual teaching contract? If so, what is the appropriate remedy?

Pertinent provisions of the collective bargaining agreement then in effect between the School District and the Association are outlined in Findings of Fact No. 5. Holle claims that the District's termination of his coaching duties violated provisions of the contract requiring even-handed and nonarbitrary application of rules. In addition, Holle maintains that in order to remove coaching duties from his individual teaching contract the District must demonstrate that it had "just cause" for its actions. Holle further maintains that the action of the District constitutes "discipline," and that in order to discipline him the District must demonstrate "just cause" for such action. Finally, Holle maintains that the contract provision providing that extracurricular activities are to be agreed upon by both parties is a provision which inures to the benefit of the teacher, and does not abrogate the right of the teacher to continue such extracurricular activity until such time as the employer demonstrates "just cause" to terminate that activity.

Respondent Employer maintains that the right of the District to remove coaching duties from individual teaching contracts can be found in the "management rights" clause of the collective bargaining agreement. This is all the more evident, argues the Respondent Employer, by the provisions contained in Article VIII, Sec. 5, which

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27/ Glass Bottle Blowers Association, (Owens-Illinois, Inc.), 100 LRRM 1294, at 1295 (1979); Phyllis Whitehead d/b/a P & L Cedar Products, 90 LRRM 1462 (1976); Beverly Manor Convalescent Center, supra.

28/ Beverly Manor Convalescent Center, supra.

by its express terms permits the Employer to remove coaching duties from the individual teaching contract. Respondent School District further argues that the removal of Holle's coaching duties does not constitute discipline, discharge or nonrenewal, and therefore the "just cause" provision does not apply to the removal of these duties. Even if the "just cause" provision were to apply to the removal of coaching duties, there is no evidence in the record to suggest that the removal of Holle's coaching duties was in any way a "disciplinary" action; and furthermore, it cannot be considered a "discharge" as that term is commonly understood. Thus, under the provisions argued by the Complainant, the only possible "just cause" provision that could be applied would be for "nonrenewal," and on that basis, argues the District, there was "just cause" for removal of the coaching duties. However, the Employer does not seriously believe that the "just cause" provision applies to co-curricular assignments; but rather only to the basic teaching contract. Finally, the Employer maintains that if in fact any conflict does exist between the "just cause" standard as set forth in Article XVII and the right of the Employer to remove coaching duties pursuant to Article VIII, Sec. 5, the latter Article ("mutual agreement") takes precedence. The District maintains that the basic principle of contract interpretation which provides that a specific provision takes precedence over a general provision would lead to the conclusion that the "just cause" provision (as it applies to the co-curricular assignments) is more general than the "mutual agreement" provision which applies specifically to co-curricular assignments. Thus, the Employer maintains that there has been no breach of the collective bargaining agreement and accordingly requests that the Examiner dismiss the complaint as to the Respondent District.

A review of the facts in conjunction with the applicable provisions of the parties' collective bargaining agreement has led the Examiner to conclude that the removal of Holle's coaching duties was not a violation of the collective bargaining agreement, and thus not a violation of Section 111.70(3)(a)5, Wis. Stats. Complainant's reliance upon the "just cause" provisions of the collective bargaining agreement are inapplicable to the instant dispute. The agreement then in existence between Respondent Association and Respondent District provided that ". . . a teacher shall not be disciplined, discharged or nonrenewed except for just cause." (Article XVII) Relying upon the earlier Commission decisions of Lancaster Joint School District (No. 13016-A, 1976) and Weyauwega School Board (No. 14373-D, 1978), Complainant argues that the removal of coaching duties requires the application of the "just cause" standard contained in the collective bargaining agreement. However, closer analysis reveals that both the Lancaster case and the Weyauwega case are inapplicable to the circumstances surrounding the removal of coaching duties under the collective bargaining agreement in existence between the parties to the instant dispute. In Lancaster, the Examiner found that loss of extracurricular activities was a reduction in rank or compensation; the "just cause" standard in the collective bargaining agreement in that case provided that no teacher would be disciplined, nonrenewed, or "reduced in rank or compensation without just cause." Similar language referring to reduction in rank or compensation is not found in the collective bargaining agreement between the parties to this dispute. Similarly, in the Weyauwega case, the collective bargaining agreement did not specifically define the relationship between coaching and teaching duties. That particular case involved the discharge of a teacher during the term of her contract for failure to perform coaching duties for which the teacher had signed a separate individual contract specifically including such coaching duties.

The Examiner concludes that, under the collective bargaining agreement between Respondent Association and Respondent Employer, the co-curricular activities are not part of the basic professional teaching

contract. In reaching this conclusion the Examiner does not rely upon the Wisconsin Supreme Court decision in Richards v. Sheboygan, [58 Wis. 2d 444 (1973)], wherein the Court found that removal of co-curriculars did not constitute nonrenewal for purposes of requiring compliance with Sec. 118.22, Wis. Stats. Were the collective bargaining agreement between the parties in the instant dispute silent on the issue of co-curricular activities, it is possible that a different result might follow. However, the instant collective bargaining agreement is not silent on the issue of retention or loss of co-curricluar activities; the "mutual agreement" clause (Article VIII, Sec. 5) clearly addresses the disputed issue. The "mutual agreement" clause is quite clear on its face; it provides that "teacher participation in extracurricular activities . . . will be agreed upon by both parties." While Complainant contends that this provision inures to the benefit of the teacher only, the evidence introduced at the hearing does not support this interpretation. Complainant must prove by a satisfactory preponderance of the evidence that his interpretation is in fact the interpretation agreed upon by the parties. The Examiner concludes that Complainant has failed to meet this burden. The language on its face does not support Complainant's theory, but rather suggests that a teacher can, under each new individual teaching contract, reject a proposed assignment of an extracurricular activity; and the employer is similarly granted the right to remove a teacher from a particular co-curricular assignment at the end of the individual teacher's contract. The only evidence of bargaining history found in the record supports this latter interpretation: [Testimony of Superintendent Munro]

> "We have long believed since I was a part of the negotiations team that negotiated that particular article into the agreement and I can remember very clearly that it was said, look, if we're going to have mutual agreement that goes two ways. That the board has the right to just not mutually agree to put someone in a position as well as the teacher . . ." (Transcript E, pages 16-17)

Since the removal of extracurricular activities at the end of an individual teaching contract does not constitute nonrenewal or discharge, analysis of the interaction between the "just cause" provision and the "mutual agreement" provision of the collective bargaining agreement thus depends upon whether or not removal of co-curricular activites can be defined as "discipline." If the removal of Holle's coaching duties can be viewed as discipline, the actions of the School Board become subject to scrutiny under the "just cause" standards of the agreement. The Examiner has concluded that Holle's coaching duties were not removed for disciplinary reasons. There is no evidence in the record suggesting that the motivation for removal of Complainant's coaching duties was a form of retribution for any misconduct on Holle's part. The original impetus for the removal of Holle's coaching duties came from the school's athletic director (David Gunderson) who became concerned over the course of several years by what appeared to be Holle's lack of interest in his coaching activities. Gunderson testified that Holle began to cut his practice sessions short, periodically missed practices, failed to properly supervise the students, and had a general difference in coaching philosophies from that of the athletic department. The overall impression that Gunderson formed was that the Complainant had lost his enthusiasm for coaching. Gunderson's recommendation was not premised upon any misconduct by Holle for which Gunderson believed Holle should be disciplined, but rather from a general impression that Complainant lacked enthusiasm and interest in coaching activities. Gunderson then recommended to Superintendent Munro that Holle's coaching duties be removed because of this lack of interest. Munro testified:

"It was my feeling that the fact that our athletic director had made the recommendation to me that coaching duties be removed for basically lack of enthusiasm and for other reasons that have been mentioned before that under our contract it was perfectly alright for us to do this and so it didn't really - it didn't appear to me to be any kind of a punishment. It just seemed to be a fact. He wasn't interested in it (coaching) anymore so we take it (coaching duties) off the contract." (Transcript B, Pages 15-16)

When Munro recommended the removal of coaching duties from Holle's individual teaching contract at the Board meeting on March 10th, there was not discussion by Munro or the Board members about the reasons for the removal of the coaching duties. There is no indication in the record that the removal of Holle's coaching duties was meant as discipline for some activity for which the administration was seeking to punish Holle. In determining whether or not a particular act constitutes discipline, it is necessary to explore the motivation behind such act. Having reviewed the record, the Examiner does not find that the motivation for the removal of Holle's coaching duties was in fact for disciplinary reasons. Having thus concluded that such removal did not constitute discipline, it follows that the "just cause" provisions of the collective bargaining agreement do not apply to the removal of Holle's coaching duties.

Complainant further argues that the removal of his coaching duties violated Article V, Section 2, providing for uniform treatment of all employes. The record does not establish that Holle was treated in a manner different than other coaches that had been relieved of their coaching activities. The record indicates that the removal of Robert Warner's coaching duties and Gordon Meyer's coaching duties (two coaches whose duties had been previously removed) were handled in exactly the same manner as the removal of Holle's coaching duties. A second aspect of the uniformity of treatment argument suggested by the Complainant is that other coaches (specifically Shirley Revoir and John Welter) performed their coaching duties in the same manner as did Holle, and yet their coaching duties were not removed. The record does not support that these other coaches in fact had the same pattern of behavior relative to their coaching responsibilities as did Holle. It does not appear from the record that the administration felt that these coaches had lost their interest and enthusiasm in coaching; for this reason, apparently, their coaching duties were not removed from their individual contracts for the 1977-78 school year.

Having thus concluded that the Respondent District's removal of Complainant Holle's coaching duties did not violate the "just cause" standard of the collective bargaining agreement nor the "uniformity" provision of that agreement, and further having concluded that the Employer did have the right to remove Holle's coaching duties under the "mutual agreement" clause of the collective bargaining agreement, the Examiner has concluded that the Respondent Employer did not violate Section 111.70(3)(a)(5) of the Wisconsin Statutes; accordingly, that portion of the complaint alleging a violation of the collective bargaining agreement has been dismissed.

REMEDY AND ACCOMPANYING ORDERS

Since the Examiner has concluded that Respondent Association has breached its duty to fairly represent Complainant Holle in violation of Section 111.70(3)(b)1, Wis. Stats., by failing to adequately represent him during the grievance process and by further failing to make a considered decision as to whether to pursue his grievance to arbitration, cease and desist orders have been issued against Respondent Association.

In addition, the Examiner has ordered that Respondent Association pay to Complainant's legal counsel a sum certain. While it is clear that this is an exceptional remedy, the Examiner believes that the effect of the Union's violation of its duty to adequately represent Complainant cannot be dissipated without such an award. Respondent Association's failure to represent Complainant is so egregious and lacking in those basic elements which are clearly mandated for an exclusive bargaining representative to satisfy its duty of fair representation that it cannot seriously be argued that the violation is a mere technical error under the law. I further note that there is precedent in prior Commission decisions for the award of attorney's fees in a situation similar to that in which the Complainant finds himself. 29/ Since Complainant was denied representation in respect to the processing of his grievance and was further denied a meaningful evaluation of his grievance for purposes of arbitration, a reasonable remedy is reimbursement for the equivalent cost of representation had the matter gone to arbitration through the grievance process. While the Union might have provided such representation at a cost less than the sum of the ordered attorney's fees, "the Union cannot complain since its conduct compelled Complainant to seek relief through counsel at his own expense." 30/ In determining the amount of attorney's fees attributable to litigating the matter before an arbitrator, the Examiner has considered such factors as the complexity of the issues raised by the grievance, the multiple provisions of the collective bargaining agreement which arguably could have resulted in sustaining Complainant's grievance, the analysis of prior Commission law involving the interplay of "just cause" and co-curricular activities, the extent to which the parties engaged in filing briefs and reply briefs, and the extent of pre-hearing investigation performed by Complainant's counsel in order to assess the relative testimony of the parties and their witnesses, together with the need for Complainant's counsel to find supporting witnesses and evidence for the purpose of presenting Complainant's claim before the Examiner. Finally, it must be noted that in the opinion of the Examiner, Complainant's claim was not frivolous. Had I concluded that Holle's claim was, in fact, frivolous, attorney's fees would not have been ordered.

The Examiner has ordered Respondent Association to pay directly to Complainant's legal counsel the sum certain provided for in the Order. This procedure is consistent with prior Commission policy. 31/

Based upon the foregoing discussion, the Examiner has dismissed the Complaint in all respects except as to the allegations claiming that Respondent Association failed to discharge its duty of fair representation.

Dated at Madison, Wisconsin this 7th day of August, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Michael F. Rothstein, Examiner

29/ University of Wisconsin-Milwaukee Housing Department (No. 11457-F, 1977).

30/ University of Wisconsin-Milwaukee Housing Department, supra.

31/ University of Wisconsin-Milwaukee Housing Department, supra.