STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MR. KENNETH A. KRAUCUNAS, Complainant,	:	Case XCVII No. 22893 MP-849 Decision No. 16329-A
vs.	:	
MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.	:	B/4/19

Appearances:

Mr. Kenneth A. Kraucunas, Complainant, appearing on on his own behalf.

Mr. James B. Brennan, City Attorney, by Mr. Nicholas M. Segal, Assistant City Attorney, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Kenneth A. Kraucunas, hereinafter referred to as Complainant or Kraucunas, having filed a prohibited practice complaint with the Wisconsin Employment Relations Commission, hereinafter the Commission, wherein he alleges that the Milwaukee Board of School Directors, hereinafter Respondent, has committed prohibited practices contrary to the provisions of Section 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act (MERA); the Commission having appointed Sherwood Malamud, a member of the Commission's staff to make and issue Findings of Fact, Conclusions of Law and Order in the matter; hearing in the matter having been held on May 18, 1978 in Milwaukee, Wisconsin; Complainant having filed his brief on August 1, 1978 and Respondent having refrained from filing a brief in the matter; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Kenneth A. Kraucunas, Complainant herein, is an individual who resides at 1508 South Union Street, Milwaukee, Wisconsin and he is employed as a School Fireman (Boiler Attendant) in the Division of Plant Operations of the Milwaukee Board of School Directors. The position of School Fireman is included in a collective bargaining unit represented by Local 950 of the International Union of Operating Engineers, hereinafter the Union.

2. The Milwaukee Board of School Directors, Respondent herein, is a Municipal Employer, and it maintains its principal offices in Milwaukee, Wisconsin.

3. Respondent and the Union were parties to a collective bargaining agreement which was in effect from January 1, 1975 through December 31, 1976 and extended to June 1977 when a successor agreement was executed by the parties. The terms of the extended 1975-1976 agreement govern the events related below, and specifically the provisions of the grievance and arbitration procedure are material hereto. The agreement provides for a three-step grievance procedure which culminates at step four with final and binding arbitration. The first step of the grievance procedure is an oral step

which an employe may initiate with the School Engineer or with the Assistant Director of Plant Operations. If the grievance is not resolved at step one, the agreement provides that the Union shall then reduce the grievance to writing; the grieving employe must sign the grievance, and the grievance is presented to the appropriate division head. If the grievance is not resolved at step two, the Union presents it to the Secretary-Business Manager or his designee. If the grievance is not resolved at step three, then the Union has 25 days from the date of the Employer's third-step response to certify the grievance to arbitration.

4. On March 24, 1977, 1/ Louis Seefeld, Complainant's Supervisor and the School Engineer at South Division High School where Complainant was employed, issued "correction omission memos" 2/ to Complainant for allegedly assaulting Wendorf, a custodial employe at the high school and for locking him in the furnace room. On March 28, Roca, the Assistant Director of Plant Operations, called Complainant at his home and informed him that he was to be transferred to the Audubon Junior High School effective on April 4.

5. On April 1, Schlesinger mailed Complainant a written order, which Complainant received on April 5, transferring Complainant to the Audubon Junior High School on the second shift, Complainant's present shift, effective April 7.

6. April 7 was the first day of a teacher's strike against Respondent. On that date, Complainant did not report to his newly assigned school, instead he reported to South Division High School.

7. On April 12, Complainant, Schlesinger, the Director of Plant Operations and Borkowicz, the Chairman of the Union's negotiating committee, met for the purpose of discussing Complainant's grievance and objections to his involuntary transfer from South Division High School to the Audubon Junior High School. During the meeting, Complainant requested that employes who complained about his conduct be included in this meeting. Schlesinger, without objection from Borkowicz, denied this request. Schlesinger offered to place a statement in Complainant's personnel file attributing the transfer to a "clash of personalities." Complainant wanted the correction omission memos issued by Seefeld removed from his file, as well; Schlesinger demurred. At some point, during the April 12 meeting tempers flared. Schlesinger ordered Borkowicz out of the room, where both Schlesinger and Borkowicz spoke out of earshot of Complainant. In addition, during the meeting Complainant was told by Schlesinger that he was considering recommending the suspension of Complainant for five or ten days for insubordination in failing to appear as ordered at the Audubon School on April 7. Complainant stated that he had been under considerable emotional stress and that he was going to seek medical advice. In response, Schlesinger agreed to refrain from taking any further action against Complainant.

1/ Hereafter, all dates refer to 1977.

2/ Correction Omission Memo - is a written warning calling to the attention of an employe some omission in the performance of his duties.

8. On April 18, Complainant reduced his grievance concerning his involuntary transfer to writing and filed same with Respondent.

9. On April 27, Schlesinger prepared a letter to Respondent's Division of Personnel in which he recommended that Complainant be suspended for ten days for his failure to report to the Audubon School on April 7. However, Schlesinger did not send the letter to Personnel, at this time.

10. On May 10, Complainant filed another grievance concerning his loss of one day's pay for his failure to report to the Audubon School on April 7.

11. On May 10 Schlesinger, Borkowicz and Complainant met and discussed his grievances concerning his transfer and Respondent's docking one day's pay from Complainant. During the meeting, the Union was able to extract the following offer of settlement from Schlesinger: a) a statement would be placed in Kraucunas' personnel file which would attribute the transfer to a clash of personalities; b) all correction omission memos placed in Complainant's file in March, 1978 would be removed; c) Complainant would be paid for April 7; d) Complainant would not be disciplined for his failure to report to the Audubon School on April 7. Complainant rejected this offer, in part, because he sought revenge for being placed under emotional stress by Respondent's actions. After Complainant's rejection of the settlement offer, Schlesinger read aloud to Complainant and Borkowicz, the May 27 letter in which he recommends that Complainant receive a ten-day suspension for his failure to report to his new assignment on April 7.

12. By letter dated May 26, 1977 Gordon, a staffing specialist in Respondent's Division of Personnel, advised Complainant of his suspension for five days from June 6 through June 10 for "Uncooperative work attitude and insubordination."

13. On May 27, Complainant filed a grievance concerning his five-day suspension.

14. On June 3, Complainant, the Union's representatives, President Melenberg and Borkowicz, and Michael F. Corry, a Personnel Analyst with the Classified Personnel Section of Respondent's Division of Personnel met in a second step grievance meeting to discuss Complainant's five-day suspension grievance.

15. On June 6, Complainant filed a grievance in which he complains about Respondent's failure to respond to his grievance of May 10 concerning his loss of one day's pay.

16. On June 9 Corry issued his written disposition and denial of Complainant's five-day suspension grievance.

17. On June 13, Complainant filed another grievance in which he alleges that he did not have an adequate opportunity to defend himself at the second-step meeting of June 3.

18. On August 1, at a third-step meeting Complainant, Borkowicz, Schlesinger and other supervisory personnel and Roland S. Olenchek, Respondent's Assistant Secretary-Business Manager, discussed Complainant's five grievances: namely, 1) the transfer; 2) the loss of pay for April 7; 3) the five-day suspension; 4) Complainant's charge that Respondent failed to respond to Complainant's loss-of-pay grievance; and 5) Complainant's charge that he had an inadequate opportunity to defend himself at the June 3 meeting.

20. On August 9, Olenchek issued his written disposition and denial of all five grievances. Olenchek sent the disposition to Borkowicz, the Chairman of the Union's negotiating committee. However, he did not send a copy of the disposition directly to Complainant.

21. On August 22, when no written disposition of the August 1 meeting was received by Complainant, he wrote to the Secretary-Business Manager Linton inquiring into the disposition of his grievances. On August 27, Linton replied and referred Complainant to Borkowicz concerning the disposition. On August 30, Complainant received a copy of Olenchek's written disposition from Borkowicz.

22. On September 14, Complainant called Borkowicz to inquire into the status of his grievances, and to request that his grievances be certified to arbitration. Borkowicz informed Complainant that the time for appealing the grievances to arbitration had expired, but that he would attempt to obtain an extension of the time limit.

23. Sometime shortly after the September 14 phone conversation, Borkowicz contacted Respondent and obtained an extension to October 28 in the time for appealing Complainant's grievances to arbitration.

24. On October 5, Complainant met with the Union's negotiating committee, its International Representative and attorney to reach a decision on whether or not to take Complainant's grievances to arbitration. They focused their attention on the transfer and suspension grievances. After two and one-half hours, the negotiating committee, on the advice of its International Representative and attorney concluded with respect to the transfer grievance that Respondent had the authority to transfer Complainant and that as a school fireman as opposed to an engineer, Complainant had no right to a meeting with the Secretary-Business Manager before an involuntary transfer could be effectuated. In addition, the Negotiating Committee concluded that instead of refusing to comply with the tranfer order, Complainant should have complied with that order and grieved. In light Respondent's authority to transfer Complainant and his refusal to report to the Audubon School on April 7, the Union's negotiating committee, attorney and International Representative concluded that Complainant's grievances were without merit. The Union's committee concluded that they could not obtain a better settlement offer than the one rejected by Complainant on May 10. Based upon the above considerations the Union's negotiating committee decided to recommend to the Union's executive board that none of Complainant's grievances be appealed to arbitration.

25. On October 6, the Union's executive board met and decided to follow the recommendation of its negotiating committee with respect to Complainant's grievances. The executive board then notified Complainant in writing of its decision not to appeal his grievances to arbitration, and it advised him of his right to present his position to the entire membership at a meeting scheduled for October 12. Complainant was advised that the membership had the right to ignore the executive board's decision and to authorize the appeal of Complainant's grievances.

26. Although Complainant received the above notice prior to the October 12 membership meeting, he did not appear at said meeting nor did he request that the meeting be rescheduled or that he be provided with an opportunity to present his case to the membership at some other meeting of the membership. At the October 12 meeting, the membership accepted the recommendation of its executive board; it decided not to appeal Complainant's grievance to arbitration. The Union's decision was made in good faith; it was based solely on its determination that Complainant's grievances were without merit.

27. Complainant's five grievances concerning his transfer, loss of pay, suspension, Respondent's delay in responding to grievances and Complainant's inadequate opportunity to present his defense at a step-two grievance meeting, each states a claim which on its face is covered by the parties' collective bargaining agreement.

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

CONCLUSIONS OF LAW

1. Since the agents and representatives of Local 950 of the International Union of Operating Engineers acted in good faith and not in an arbitrary or capricious manner when they decided to refrain from appealing any of Complainant's five grievances to arbitration, the Examiner will not exercise the jurisdiction of the Wisconsin Employment Relations Commission under Section 111.70(3)(a)5 of the Municipal Employment Relations Act to determine the merits of said grievances.

2. Schlesinger, a supervisor and agent of Respondent did not interfere with Complainant's enjoyment of rights protected under Section 111.70(2) of the Municipal Employment Relations Act, and he did not violate Section 111.70(3)(a)1 of MERA when he hollered at Complainant at the April 12 meeting or when he threatened Complainant with a suspension and ultimately recommended that Complainant be suspended for the days when Complainant rejected settlement offers proffered at the April 12 and May 10 meetings.

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

ORDER

That the complaint in the instant matter be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 13th day of February, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud
Sherwood Malamud, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Introduction

The complaint herein was originally filed on November 3, 1977 and amended on April 12, 1978. In his complaint, Kraucunas alleges that the Union through the Chairman of its negotiating committee, Borkowicz did not fairly represent Complainant: in that Borkowicz did not adequately assert himself on Complainant's behalf at the April 12 and May 10 meetings, and in that Borkowicz did not immediately provide Complainant with Respondent's third-step written disposition of all of Complainant's grievances. In light of the Union's failure to represent Complainant fairly, Complainant argues that the Examiner should assert the jurisdiction of the Commission and determine the merits of the dispute. Kraucunas alleges that through threats to suspend and the recommendation of a suspension of Complainant by the Director of Plant Operations at the April 12 and May 10 meetings, Schlesinger interfered with Complainant's enjoyment of his right to file and pursue his grievances.

Respondent asserts as an affirmative defense to Complainant's contractual claim that he failed to exhaust the contractually established grievance and arbitration procedure. Therefore, Complainant must prove that the Union failed to represent him fairly in order for the Commission to assert its jurisdiction and determine the merits of the five grievances. Respondent denies that Schlesinger or any other agent of Respondent interfered with Complainant's exercise of his protected rights.

In the discussion which follows, the Examiner will first consider the issue of fair representation and then discuss Complainant's interference charge.

Duty of Fair Representation

Complainant requests the Commission to assert its jurisdiction to determine the merits of his five grievances. Complainant is covered by a collective bargaining agreement which provides for final and binding arbitration of contractual disputes. The Wisconsin Supreme Court in Mahnke v. WERC 66 Wis. 2d 524, 532-533 (1975) enunciated the prerequisites for the assertion of jurisdiction by the Commission in a breach of contract claim, as follows:

> If it is established that the grievance procedure provided for in the collective bargaining agreement has not been exhausted then it must be proven that the union failed in its duty of fair representation before the employee can proceed to prosecute his claim against the Employer . . .
>
> "We [the Court] believe the Employer is obligated in the first instance by way of affirmative defense to allege that the contract grievance procedure has not been exhausted. If this fact has been established by proof, admission or stipulation, the employee cannot prosecute his claim unless he proves the union breached its duty of fair representation to him."

Here, Respondent asserted as an affirmative defense and proved at hearing that none of Complainant's five grievances were taken to

arbitration by the Union. In this regard, Respondent has met its burden. Under Mahnke, supra, the burden shifts. Complainant must establish by a clear and satisfactory preponderance of the evidence 3/ that the Union breached its duty of fair representation to him before the Commission will assert its jursidiction to determine the merits of Complainant's grievances.

The Wisconsin Supreme Court in Mahnke, supra, also set forth the criteria to be used in determining whether or not a union breached its duty of fair representation, and in so doing the Wisconsin Supreme Court relied upon the analysis of the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2469 (1967). On the basis of that analysis the Wisconsin Court established that the Commission could assert its jurisdiction to determine the merits of a claim of a contractual breach when the Union's refusal to arbitrate an employe's grievance is arbitrary, discriminatory or in bad faith. The Court states that the Union's decision to refuse to arbitrate an employe's grievance may be made only after consideration of the merits of the grievance by the Union. The Court continues and states that good faith is established when a union considers among other factors, the monetary value of the employe's claim, the affect of the Employer's contractual breach on the employe, as well as the likelihood of success in arbitration.

The Wisconsin Court goes on to state that in light of its analysis as set forth heretofore:

> 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. Mahnke, supra at p. 534.

In this regard, the Wisconsin Court cites with approval 4/ the following statement of the Seventh Circuit Court of Appeals in Moore v. Sunbeam Corp. 459 F. 2d 811, 820 (Seventh Circuit 1972) with respect to the latitude afforded a union in making its good faith decision to process a grievance through the grievance and arbitration procedure:

> The Supreme Court in Vaca 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 taken in bad faith. . . . (Emphasis added.)

Prior to considering the record evidence concerning the Union's conduct with respect to its duty of fair representation, it should be noted that Complainant did not name the Union as a party nor did Respondent move to join the Union as a named party to this proceeding. As noted by Examiner Henningsen at footnote no. 5 on page 6 of her decision in City of Janesville (15209-C) 3/78 which was peremptorily affirmed by the Commission at Decision No. (15209-D) 4/78:

3/ Section 111.07(3) Wisconsin Statutes as made applicable to municipal employment pursuant to Section 111.70(4)(a), Wisconsin Statutes.

4/ Mahnke, supra, at p. 531.

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.

With the Mahnke criteria in mind, the Examiner will now turn to the consideration of the record evidence on the issue of fair representation. Complainant points to the following Union conduct in support of its claim that the Union did not fairly represent him. Borkowicz, the Chairman of the Union's negotiating committee, did not strenuously assert himself at the April 12 or the May 10 meeting with Schlesinger. Furthermore, Borkowicz permitted Schlesinger to order him from the meeting room at the April 12 meeting where Borkowicz continued the discussion with Schlesinger out of earshot of Complainant. 5/ Borkowicz raised no objection to Schlesinger's shouting at Complainant at the April 12 meeting. The Union did not contest Respondent's use of the correction omission memos issued by Seefeld in the disposition of his grievances, and the Union did not press Respondent for its failure to investigate the underlying facts in this dispute. With the apparent approval of the Union, Schlesinger refused to include other employes in the April 12 meetings. In addition, the Union failed to notify Complainant and to provide him in a timely fashion with Respondent's written third-step answer to Complainant's five grievances. Complainant received the disposition only four days prior to the expiration of the contractual period for taking an appeal to arbitration.

When Complainant's allegations and arguments are weighed against the evidence of the Union's conduct with respect to its representation of Complainant, it is clear that the Union did not act in bad faith or in an arbitrary or capricious manner with respect to the duty it owed to Complainant. A brief review of the Union's conduct from April through October follows.

During the April 12 and May 10 meetings, Complainant believed that Borkowicz should have been more aggressive in his representation of Complainant. The representation of a grieving employe may take many forms. The only question relevant here is whether the Union acted in bad faith in its representation of Complainant. Borkowicz may not have been "aggressive" in his style of presention. However, Borkowicz was able to elicit a settlement offer from Schlesinger in which: 1) the correction omission memos issued by Seefeld in March would be removed from Complainant's personnel file; 2) the stated reason for the transfer would be stated as a personality clash, thereby removing the appearance that the transfer was disciplinary in nature; 3) Respondent would reimburse Complainant for his work on April 7; and 4) no disciplinary action would be taken against Complainant for his failure to comply with a written order to report to the Audubon Junior High School on April 7. Although this offer settled all matters related to the two grievances

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5/ Borkowicz testified that he asked Schlesinger to leave the room at a point in the meeting when it was getting out of hand. Complainant testified that it was Schlesinger who ordered Borkowicz from the room. The Examiner does not view this conflict in testimony as one over a material issue in this case. However, Complainant views this fact as material to his case. The Examiner based his finding of fact (no. 8) on a review of the evidence most favorable to Complainant in order to simplify the discussion of this case.

filed by Complainant as of May 10, Complainant rejected this offer because he sought revenge 6/ for the emotional distress he suffered as a result of Respondent's action.

As for the June 3 hearing before Corry, a Classified Personnel Specialist in Respondent's Division of Personnel, Kraucunas complained that the Union permitted Respondent's use of the March correction omission memos issued by Seefeld. Borkowicz testified that he did object to the use of the correction omission memos by Respondent on the grounds that they were not issued within 24 hours in which the claimed deficiency occurred. However, both the testimony of Complainant and Borkowicz indicate that Kraucunas, contrary to Borkowicz's advice, volunteered information at the June 3 hearing concerning his engaging in horseplay on the job and not wearing his uniform as directed which may well have been used by Corry as the basis for his conclusions in his second-step response to Complainant's grievances.

Although Complainant was not satisfied with the representation provided by Borkowicz, both in the settlement offer elicited by Borkowicz in the grievance procedure and the advice proffered to Complainant during the processing of the grievance, it is clear that Borkowicz made a good faith effort to represent Complainant's interests.

Complainant was not prejudiced by the delay he experienced in receiving Respondent's third-step written disposition of his grievances. When Borkowicz learned of Complainant's desire to proceed to arbitration, the Union was able to obtain an extension to October 28 in the time limitation for appealing Complainant's grievances to arbitration.

With respect to the Union's refusal to take Complainant's grievances to arbitration, the record evidence establishes that the Union carefully considered the merits of the grievances prior to making its decision. The Union had both its attorney, who would present the case to an arbitrator should it be taken to arbitration, and the International Representative present at the meeting. They provided professional advice on the merits of the grievances and were of the opinion that Respondent possessed the right to transfer Complainant, and that Complainant should have reported to the Audubon School on April 7 and then grieved. The discussion of Complainant's grievances consumed two and one-half hours, after which the negotiating committee on the advice of counsel and the International Representative concluded that Complainant's grievances were without merit and should not be taken to arbitration. Every bit of evidence contained in this record supports the conclusion that Complainant and the Union's negotiating committee simply disagreed over the merits of the grievances. There is not a scintilla of evidence which would indicate that in arriving at its decision, the Union was acting in a manner which was arbitrary, capricious or in bad faith.

After considering the representation afforded Complainant by the Union at each step of the grievance procedure and the process by which the Union arrived at its decision to refrain from taking Complainant's grievances to arbitration, the Examiner concludes that in every respect, the Union met its duty to fairly represent Complainant. Therefore, the Examiner did not assert the jurisdiction of the Commission to determine the merits of Complainant's grievances.

6/ Tr. p. 44.

Interference

In his complaint, Kraucunas charges that by shouting and pounding his fist at the April 12 meeting and by threatening him with a suspension for pursuing his grievances, Borkowicz interfered with the enjoyment by Complainant of his rights protected under Section 111.70(2) of MERA. The record evidence does not support Complainant's charge. As early as the April 12 meeting, Schlesinger considered recommending that Complainant receive a ten-day suspension for his failure to report to the Audubon School on April 7. At the April 12 meeting, when Kraucunas revealed that he would seek medical help for his problems, Schlesinger decided to hold any disciplinary recommendation in abeyance.

Schlesinger considered the imposition of discipline soon after the April 7 incident. The consideration of disciplinary action, at this early stage is unrelated to Complainant's decision to process his grievances. However, when Complainant rejected the settlement offer on May 10, two consequences resulted. First, Complainant was free to pursue his grievance through the remaining steps of the grievance procedure. Secondly, Schlesinger was free to act on his initial consideration to recommend that Complainant be suspended. The threat of discipline and the actual imposition of discipline was related to Complainant's failure to report to the Audubon School on April 7, and is not attributable to Complainant's decision to pursue his grievances. Therefore, the Examiner dismissed Complainant's interference charge.

Dated at Madison, Wisconsin this 13th day of February, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud, Examiner