

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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ERNEST H. EICK III,

Complainant,

vs.

UNIFIED SCHOOL DISTRICT OF RACINE,

Respondent.  
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Case XLV

No. 22897 MP-850

Decision No. 16341-E

F- n/21

Appearances:

Mr. Ernest H. Eick III, Complainant, appearing on his own behalf.

Mr. Thatcher Peterson, Attorney at Law, appearing on behalf of the Respondent School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, in the above-entitled matter; and the Commission having appointed Dennis P. McGilligan, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.70(4) and 111.07(5), Wisconsin Statutes; and a hearing on such complaint having been held at Racine, Wisconsin on July 17, 1978, before the Examiner; and the Complainant and Respondent School District having completed the briefing schedule on September 29, 1978; 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 Order.

FINDINGS OF FACT

1. That Ernest H. Eick III, hereinafter referred to as the Complainant, is an individual residing in Racine, Wisconsin.

2. That Unified School District of Racine, hereinafter referred to as the Respondent School District or District, is a public school district organized under the laws of the State of Wisconsin and a Municipal Employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act.

3. That at all times material herein, the Respondent School District has recognized Local 152 of the Service Employees International Union as the exclusive bargaining representative of certain of its employees including the Complainant herein.

4. That at all times material herein, the Respondent School District and Union have been signators to a collective bargaining agreement effective from 1976 to 1979, covering wages, hours and working conditions of said employees and, among other provisions, provides:

"ARTICLE VII

G R I E V A N C E P R O C E D U R E

1. Building Service Department employees who are members of Local 152 or who are eligible for membership therein shall report grievances to the Grievance Committee of the Union.

2. After an investigation, if the Committee feels the grievance is warranted, it will submit such grievances to the Superintendent of Unified with request for a conference to adjust said grievance within five (5) days from receipt of said grievance.

3. If a settlement is not made, an appeal may be taken directly to the Board of Unified.

4. If a satisfactory settlement is not made by the Board of Unified, Union or District may appeal the grievance to arbitration. Notice of election to submit to arbitration shall be given to the opposite party by certified mail which shall be deposited in the U.S. Mails no later than five (5) working days after the completion of the grievance procedure provided for in the rules and regulations. Each party shall designate an arbitrator within five (5) working days from the date of mailing of such notice and such arbitrators shall, within three (3) days thereafter, designate the third arbitrator. In the event the arbitrators so designated shall be unable to designate the third arbitrator, within five (5) working days thereafter, either party may request the Wisconsin Employment Relations Commission to designate a third arbitrator under sec. 111.10, Stats. In the absence of any such request, the third arbitrator may be appointed in sec. 298.04, Stats. The total costs of arbitration shall be borne equally by both parties hereto. For purposes of these provisions, 'working days' shall mean all days exclusive of Saturdays, Sundays, and paid holidays.

5. The Union may, on its own initiative and without specific complaint by any employee, institute complaints and grievances in accordance with the foregoing procedures.

6. Nothing herein shall be construed to abrogate or diminish the rights of individual employees or minority groups to present grievances to Unified in person or otherwise, as provided for in sec. 111.05(1), Stats., of 1965."

5. That the Complainant worked for the Respondent School District as an elementary school custodian at all times material herein; that in December, 1976, George Ginther, principal of the Wind Point Elementary School for the District, met with a group of Wind Point P.T.D.A. people and the Executive Board; that the Complainant turned the lights out on the aforementioned group of people as the meeting broke up and people were leaving the building; that this occurred shortly before the Complainant's shift ended at 10:00 p.m.; that thereafter Ginther told the Complainant that it was rude to turn the lights off while people remained in the school building and that he should work overtime if necessary in order to allow people to leave the school building following evening meetings.

6. That on April 11, 1977 the Complainant made some loud noises outside the gymnasium while cleaning the school; that the noise disrupted an evening meeting which featured a guest speaker talking to a group of students and their parents; that because it was a warm and humid night the gymnasium doors were open to improve air circulation; that when Ginther asked the Complainant to be quiet the Complainant told the principal to shut the damn door.

7. That by the following written directive dated April 11, 1977 Ginther ordered the Complainant to set up for a meeting in the gymnasium scheduled for April 19, 1977:

"The season of evening programs is coming upon us. Sometimes I forget to tell the most important person that we have an evening program. That most important person is you.

Here are some dates to be aware of so that you can plan accordingly.

. . .

Tuesday, April 19 - All chairs set up in gym for 7:30 meeting. Some rooms may be used on this evening. I do not know how many, but will let you know as soon as possible.";

that near the end of the afternoon on April 19 the Complainant asked for a clarification of the above memo; that in response Ginther told the Complainant that he would only have to set up the chairs and tables prior to the start of the meeting (the principal would set up the movie projector and screen); that however at 6:45 p.m. on April 19 Ginther discovered the chairs and tables were not set up; that Ginther and/or a part-time custodian then set them up; that it was part of the Complainant's normal work duties to both set up and take down the chairs and tables.

8. That sometime before 10:00 p.m., the April 19 meeting broke up; that the Complainant left the school building without taking down the chairs and tables; that as the Complainant walked past the principal out of the building, Ginther called the Complainant's name, but the Complainant failed to acknowledge hearing the principal; that Ginther then shouted to the Complainant that he should not return to work until notified to do so; that the Complainant returned from his car, approached the principal, and said to him: "I don't have to listen to you. You are nothing. You are nothing. I will listen to Volpintesta or Gregory but not you because you are nothing,"; that the Complainant then got into his car and drove away; that the next day Joe Kopecky, head engineer at Wind Point Elementary School, picked up the chairs and tables in the gymnasium.

9. That after the April 19 meeting Ginther wrote a letter dated April 21, 1977 to Anthony Volpintesta, Supervisor of Operations for the District, as follows:

"This letter is to inform you of a series of events that prompts me to request that Mr. Ernest Eick not report to work at Wind Point School until further notice.

Mr. Eick has repeatedly been late for work. His supervisor, Mr. Joseph Kopecky, may have the dates and times of his late reporting for work. I have not kept any formal record but I do know that he reported nine minutes late on Tuesday, April 18, 1977. Mr. Kopecky has informed me of his tardiness but I have taken no action. I felt that as long as Mr. Kopecky had not filed a formal complaint with me, he would work things out between himself and Mr. Eick.

Mr. Ted Mertins, relief custodian for Mr. Kopecky during the week of April 11, informed me of several instances of Mr. Eick being late in reporting for work.

On Monday, April 11, 1977, Dr. Gardetto was speaking to a group of people in the school gym. It was a warm and humid night and the gym doors were open for ventilation. Outside the gym and thirty feet from the door, Mr. Eick was picking up dirt that he had swept out of classrooms. While picking up the dirt he would bang a metal dustpan on the ceramic tiling. The noise was disrupting Dr. Gardetto's speech. I went into the hallway and said, 'Ernie, sshh.' implying that he not make the noise. His reply was, 'Then shut the damn door.' Since he was finished picking up the dirt, I did not pursue the matter.

Sometime during the month of December, I was meeting in the school library with the Executive Board of the Wind Point School PTA. The meeting concluded at approximately 9:50 or 9:55 p.m. As parents were walking up the hallway, Mr. Eick turned off the lights illuminating the hallways. I told Mr. Eick that turning off the lights in that manner was rude, that if he were required to stay beyond 10:00, he was to turn in overtime and that he was not to be rude to parents again.

On April 5, 1977, the PTA Executive Board met in the school library. I was absent. The meeting lasted until ten o'clock.

. . .

The next morning I received a call from the PTA president. She said, 'Last night Mr. Eick stood in the doorway with his hands on his hips.' I said to him, 'We have until ten, don't we?' He replied 'ten minutes to.'

The PTA group left the building at ten o'clock.

See the attached memo.

On April 18, I sent a confirming memo to Mr. Eick relating to the April 19 date. I do not have a copy of the April 18 memo as I wrote it out. This memo directed Mr. Eick to have rooms 12 & 13 cleaned first or at least by 7:00 p.m. on April 19. It also directed him to set up chairs in the gym and to place a screen and overhead projector in the gym.

At approximately 4:15 on April 19, Mr. Eick requested clarification of my memo relating to cleaning up rooms 12 and 13. His manner was demanding and insolent and he directed me to [sic] more specific. I clarified the portion of the memo that he did not understand. I attempted to help him regain his composure by saying, 'Don't panic, Ernie. Don't panic.'

On this same day, I arrived at school at 6:45 p.m. There were no chairs set up in the gym. I directed the part time custodian to set up the chairs and I went to a meeting in the school library. I do not know if Mr. Eick assisted in the setting up of the chairs.

At approximately 10:00 p.m. on this same evening, Mr. Eick left the building. I hurried out to ask him what he intended to do about the tables and chairs that needed to be put away. I said, 'Ernie?'

Before I finished my sentence, he turned and said, 'I don't have to listen to you.' I then directed him to stay home until he heard from me, Mr. Volpintesta or Mr. Gregory. His response was, 'I don't have to listen to you. You're nuthin'. You're nuthin'. I'll listen to Volpintesta or Gregory but not you because you're nuthin'.' He then left.

Later that evening, our PTA president informed me that she didn't appreciate Mr. Eick turning off a set of lights while parents were still in the gym. She said that it was not exactly subtle the way he did it.

All of the furniture that was set up for the meeting was put away by Mr. Kopecky on the following morning.

I do not understand why Mr. Eick responds to reasonable and routine requests in an insolent and insubordinate manner. Neither do I understand why he must be rude to parents while they are in the building."

10. That thereafter on April 28, 1977, representatives of the District convened a meeting to discuss the events described above; that present at the meeting were the Complainant, Louis Schneider and Jerry Kaestner, two executive board members from the Complainant's collective bargaining representative (the Union), Volpintesta, Ginther, and Delbert Fritchen, Assistant Superintendent of Personnel for the District; that the Union representatives were present because Fritchen had notified them of the meeting; that it was a common practice for Union representatives to be notified of, and to be present at, meetings where disciplinary action might occur; that the parties present at the meeting discussed the events noted above; that during the course of said discussion the Complainant offered no excuse or explanation for his actions stated above and admitted to having failed to set up and take down the chairs and tables in the gymnasium on April 19 as well as having told Ginther that he was nothing following said meeting; that at no time during the meeting did the Complainant indicate that any representative of the District was discriminating against him because of his participation in the 1977 custodial strike or for any other reason.

11. That after this meeting Fritchen discharged the Complainant by letter dated May 13, 1977:

"I am writing to confirm a conference held in my office on Thursday, April 28, 1977, regarding an incident which occurred at Wind Point Elementary School on April 19, 1977. Present at that conference besides you and me were Louis Schneider, Jerry Kaestner from Local 152, George Ginther, Principal at Wind Point Elementary School, and Tony Volpintesta, Operations Supervisor. The purpose of the conference was to review some event [sic] which have happened during the past two months at Wind Point School and, in particular, the incident of April 19, 1977.

In reviewing Mr. Ginther's letter of April 21, 1977 concerning that situation and in discussing the incident with you and Mr. Ginther, the following appears to be a rather accurate description of the situation.

You received a memo from Mr. Ginther concerning a PTA activity to be held at Wind Point School on April 19, 1977. The memo directed you to clean rooms 12 and 13 first, or at least before 7:00 p.m. It also directed you to set up chairs in the gym and to place a screen and the overhead projector in the gym. At approximately 4:15 p.m. on April 19, 1977, you asked Mr. Ginther to be more specific regarding the memo. Mr. Ginther felt that the tone of your request was rather demanding and insolent when you asked for more specifics.

When Mr. Ginther arrived at the school that evening at about 6:45 p.m., there were no chairs set up in the gym. He then directed the part-time custodian to start to set up the chairs so that the gym would be ready for the activity. At approximately 10 p.m. that same evening, you left the building and Mr. Ginther rushed out the same door to ask you what you were going to do about the tables and chairs that needed to be put away. According to Mr. Ginther, he said 'Ernie,' and before he finished what he was going to say, Mr. Ginther indicated that you turned to him and said, 'I don't have to listen to you.' Mr. Ginther then directed you to stay home until you heard from either him or Mr. Volpintesta or Mr. Gregory, and your response was, 'I don't have to listen to you.' You are nothing. You are nothing. I will listen to Volpintesta or Gregory but not you because you are nothing,' and you left.

That same evening, according to Mr. Ginther, the P.T.A. President informed him that she did not appreciate your turning off a set of lights while parents were still in the gym. She did not feel it was a very subtle way of asking parents to leave.

The furniture that was set up for the meeting was put away by Joe Kopecky the next morning.

When Mr. Ginther approached you about this situation, you indicated that you had worked as hard as you could on that day to have the whole building ready and clean. You felt that Mr. Ginther did not give your proper respect and courtesy. When your shift ended at 10 p.m., you left the building as you would have any other day. You disagreed with Mr. Ginther's version of the conversation that took place after you left the building, but you did agree that you made the statement a couple of times that, 'You are nothing. . . you are nothing,' to Mr. Ginther.

In the letter of April 21, 1977, Mr. Ginther also referred to an incident in December of 1976 when lights were turned off in the hallway of the school before all members attending an executive board meeting of the Wint [sic] P.T.A. were out of the building. Also, on April 11, the letter speaks of an incident at the school with a program being held in the gym with Dr. Gardetto as a guest speaker. It was a humid night and the gym doors were open for some ventilation. During the presentation by Dr. Gardetto, you made some disruptive noises caused by a metal dustpan banging on ceramic tile. Mr. Ginther came out in the hall and said, 'Ernie, shhhh' indicating that it was disrupting the program going on in the gym. Your response to this was, 'Then shut the damm [sic] door.'

In reviewing the discussion that took place during our conference, I feel that there is definitely a conflict between you and Mr. Ginther. I feel that your responses to reasonable and clear directives were uncalled for and ranged from sarcasm to insubordination.

The refusal to follow directives given by your immediate supervisor and by the overall statement saying that 'You are nothing,' causes me to terminate you from your employment with the district for misconduct connected with your employment. Your last day of work with the district was April 19, 1977. Your final paycheck will include pay through that date plus two weeks of severance pay and pay for vacation time earned to April 19.

Please feel free to call me should you have any questions."

12. That following the aforementioned April 28, 1977 meeting and following the discharge, the Union's executive board met to consider whether to process a grievance on the Complainant's behalf; that the two executive board members who were present at the April 28 meeting with the District reported to the executive board about the meeting; that the members of the executive board discussed the merits of the Complainant's dispute and then voted 8-0 not to meet with the Superintendent of the District to discuss adjusting the grievance according to Step 2 of the grievance procedure; that the executive board voted not to process a grievance in the matter because they felt the Complainant was in the wrong and "because they didn't think they would have a chance to win the grievance";

that thereafter the Union informed the Complainant of its decision; that the Union's executive board presented its decision not to process a grievance on behalf of the Complainant to the floor of the next monthly Union meeting; that the Complainant was in attendance at said meeting but did not participate in same; that after some discussion the Union membership ratified the executive board's decision; that the processing of the Complainant's grievance by the Union and the members of the Union's executive board, including their decision not to process the grievance further, was not arbitrary, discriminatory, perfunctory, or in bad faith.

13. That the Complainant did not present a grievance himself as he had the right to do under Article VII, section 6 of the parties' collective bargaining agreement; that neither the Complainant nor the Union on the Complainant's behalf attempted to exhaust or in fact exhausted the contractual grievance procedure.

14. That the Respondent's discharge of the Complainant was based on the reasons stated in its letter dated May 13, 1977 to the Complainant; and that, by such discharge, the Respondent did not intend to, and in fact did not, interfere with, restrain and coerce the Complainant in the exercise of his right to engage in concerted activity under Section 111.70(2) of the Wisconsin Statutes.

15. That the Respondent's discharge of the Complainant was not due, in any part, to animus toward the Complainant because of his activities with respect to the teacher/custodian strike between January 25 and March 16, 1977 or because of any other actions of the Complainant on behalf of the Union or its members.

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

#### CONCLUSIONS OF LAW

1. That the Complainant, Ernest H. Eick III, did not attempt to exhaust the contractual grievance procedure.

2. That the conduct of the Union, Service Employees' International Union Local 152, and the executive board, as agents of the Union, was not arbitrary, discriminatory or in bad faith; and that therefore, the Union did not violate its duty to fairly represent the Complainant.

3. That because the Union, Service Employees' International Union Local 152, did not violate its duty to fairly represent the Complainant, and because of the total absence of conduct of an arbitrary, discriminatory or bad faith nature by the Union with regard to the Complainant, the Examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining whether the Respondent, Unified School District of Racine, breached the collective bargaining agreement by its discharge of the Complainant in violation of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

4. That the Respondent, by discharging the Complainant, has not interfered with, restrained and coerced him in the exercise of his right to engage in concerted activity within the meaning of Section 111.70(2) of the Municipal Employment Relations Act, and has not engaged in, and is not engaging in, prohibited practices within the meaning of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

5. That the Respondent's discharge of the Complainant was not due, in any part, to animus toward the Complainant because of his activities with respect to the Union and therefore, Respondent, Unified School District of Racine, did not discriminatorily discharge Complainant Ernest H. Eick III in violation of Section 111.70(3)(a)1 and 3 of the Municipal Employment Relations Act.

6. That the Respondent, by its conduct and actions, did not engage in, and is not engaging in, prohibited practices within the meaning of Section 111.70(3)(a)6 of the Municipal Employment Relations Act.

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

ORDER

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

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Dennis P. McGilligan  
Dennis P. McGilligan, Examiner



MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

The Complainant filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on April 13, 1978. The Examiner on May 2, 1978, issued an Order to make Complaint More Definite and Certain. In response the Complainant, on May 9, 1978 filed a letter with the Wisconsin Employment Relations Commission stating additional facts regarding the dispute. Subsequently on May 23, 1978 the Respondent filed a motion to make Complaint More Definite and Certain. Thereafter the Examiner, on May 25, 1978, issued an Order granting the aforesaid motion. On June 5, 1978 the Examiner received a copy of the Complainant's response to the aforementioned Order dated May 25, 1978 from the Respondent. On June 8, 1978 the Respondent filed an Answer in the matter along with a Motion to Dismiss and a Motion to Decline Jurisdiction. Thereafter the Examiner issued an Order on June 19, 1978 inter alia granting in part and denying in part the aforesaid Motion to Dismiss, denying the Motion to Decline Jurisdiction and directing Complainant to make Complaint More Definite and Certain. Then on July 10, 1978 the Examiner received a copy of the Complainant's response to the above Order dated June 19, 1978 from the Respondent along with a Motion from the Respondent to Dismiss. The Examiner issued an Order granting the Motion to Dismiss on July 11, 1978. As a result of the Examiner's Orders noted above all portions of the Complainant's complaint and amended complaint have been dismissed except for the allegations concerning his discharge on or about April 27, 1977.

The instant dispute involves an allegation by the Complainant that his discharge from the employment of the Respondent on or about April 27, 1977 constitutes a violation of various sections of the Municipal Employment Relations Act. A hearing in the matter was held at Racine, Wisconsin on July 17, 1978. A transcript was issued on August 30, 1978. The Complainant filed a brief on September 12, 1978. The Respondent filed its brief on September 26, 1978.

Upon reviewing the entire record and the briefs of the parties, and for the following reasons, the Examiner hereby dismisses the complaint.

POSITION OF THE PARTIES:

The Complainant basically maintains that the Respondent discharged him in violation of the collective bargaining agreement in effect between the Union and the District and that the Union failed to represent him fairly. The Complainant also maintains that he was discriminated against and interfered with in the exercise of his rights under Section 111.70(2) of the Wisconsin Statutes. The Complainant further argues that he was denied overtime in violation of the contract and the practice of the District.

The Respondent counters that the Commission should refuse to assert jurisdiction over the complaint because the Complainant failed to prove that the Union breached its duty of fair representation, and also failed to prove the existence of any circumstances that justified his not exhausting the grievance procedure. In addition, the Respondent argues that it did not breach any contractual duty owed the Complainant. Finally, the Respondent contends that the Complainant failed to meet the burden of proving other alleged violations of the Municipal Employment Relations Act.

DISCUSSION:

Before the Examiner will reach the merits of the Complainant's claim that the Respondent violated a collective bargaining agreement between the Union and the District in violation of Section 111.70(3)(a)5 of the Munic-

ipal Employment Relations Act, the Complainant must show that he attempted to exhaust the collective bargaining agreement's grievance procedure, and that such attempt was frustrated by the Union's breach of its duty of fair representation. 1/

#### EXHAUSTION OF GRIEVANCE PROCEDURE:

Individual complainants bringing contract violation actions against an employer must attempt use of the contract grievance procedure. 2/ The evidence clearly shows that the Complainant made no such attempt. The executive board of the Union reviewed the merits of the Complainant's grievance and after some discussion decided the Complainant was wrong and that they couldn't win the grievance. The executive board then voted 8-0 not to process the grievance. Specifically, the board refused to meet with the Superintendent according to step two of the grievance procedure. This action was later ratified by the union membership at a meeting attended by the Complainant. There is no evidence in the record that the Complainant was deprived of an opportunity to speak at this meeting or that the Complainant attempted to persuade those in attendance at said meeting to reverse the executive board's decision. The Complainant also failed to adduce any evidence showing he attempted himself to grieve the matter pursuant to Article VII, Section 6 of the contract. The Respondent raised the defense of failure to exhaust the contractual grievance procedure in a timely manner both by motion prior to hearing and again at the hearing itself.

#### VIOLATION OF THE DUTY OF FAIR REPRESENTATION:

In view of the above, the Examiner finds that the Complainant did not prove that he attempted to exhaust the grievance procedure. Consequently, the Complainant must prove that his failure to exhaust was caused by the Union's breach of its duty to fairly represent the Complainant. Local 152 of the Service Employees' International Union, as the exclusive bargaining representative of certain employees of the District including the Complainant, has a duty to fairly represent all employees in the bargaining unit while bargaining on behalf of those employees and while processing their grievances. 3/ In order to establish that Local 152 violated this duty, Complainant must show that the Union's conduct was arbitrary, discriminatory or in bad faith. 4/ The Union is given a wide range of reasonableness when exercising its discretion in deciding

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- 1/ VACA v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Mahnke v. WERC 66 Wis. 2d 524, 225 N.W. 2d 617 (1975).
  - 2/ The burden rests with the Employer to raise and prove the defense of failure to exhaust the contractual grievance procedure. The burden rests with Complainant to prove that, although failing to exhaust the grievance procedure, he at least attempted to exhaust the grievance procedure and that his attempt was frustrated by Local 152's breach of the duty of fair representation. Mahnke v. WERC, supra.
  - 3/ University of Wisconsin-Milwaukee, Housing Department (11457-F) 1/78, presently on appeal to Circuit Court; Hines v. Anchor Motor Freight, Inc. 424 U.S. 554, 96 S. Ct. 1048 (1976); Mahnke v. WERC, above; Racine Policemen's Professional and Benevolent Corporation (12637, 12637-A) 5/74.
  - 4/ University of Wisconsin-Milwaukee, Housing Department, above; Hines v. Anchor Motor Freight, Inc., above; Mahnke v. WERC, supra.

whether to process a grievance, "subject always to complete good faith and honesty of purpose." 5/ The Union must, at least, weigh all the relevant factors before rejecting a grievance as unmeritorious. 6/

In the instant case, the Complainant has shown only that the Union took a position, adverse to the Complainant, with respect to his discharge. Nothing in the record can support a finding that the decision by the Union, or its executive board, with respect to processing a grievance on behalf of the Complainant was arbitrary, discriminatory or in bad faith. To the contrary, the Respondent presented substantial evidence to show that the Union carefully considered its position with respect to the Complainant's grievance before reaching a decision that it lacked merit and should not be processed any further through the grievance procedure.

In this regard the record indicates that two Union representatives attended the aforementioned April 28, 1977 meeting wherein the Complainant's behavior was discussed. Thereafter, these Union representatives reported on the results of this meeting to the Union's executive board. The Union's executive board then discussed the merits of the Complainant's position. The executive board members felt the Complainant was wrong and that they couldn't win a grievance. As a result the Union's executive board voted 8-0 not to process the grievance. The executive board next presented its decision to the union membership at its monthly meeting. After some discussion the union members present at said meeting ratified the board's action. Although the Complainant was in attendance at said meeting there is no evidence he attempted to present his position or swayed any union members against the board's decision as a result thereof.

In view of all of the foregoing, the Examiner therefore concludes that the Complainant did not attempt to exhaust the contract grievance procedure either on an individual basis by presenting a grievance to the District as was his right pursuant to Article VII, Section 6 of the contract or by attempting to reverse the Union's executive board decision (not to process his grievance) at the membership meeting.

The Examiner also concludes that the Complainant failed to sustain his burden of proving, by a clear and satisfactory preponderance of the evidence, that the Union's conduct toward him was arbitrary, discriminatory or in bad faith. Absent such conduct, the Union did not breach its duty to fairly represent him.

Therefore, the Examiner will not assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining whether the Respondent District breached its collective bargaining agreement with the Union in violation of Section 111.70(3)(a)5 of the Municipal Employment Relations Act with respect to the Complainant's discharge.

#### INTERFERENCE:

Complainant failed to offer any evidence showing that the District interfered with, restrained or coerced him in the exercise of the rights guaranteed him in Section 111.70(2) of the Wisconsin Statutes.

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5/ Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953).

6/ Mahnke v. WERC, supra.

DISCRIMINATION:

Although not specifically alleged, the Complainant did refer to the matter of discrimination during the course of the hearing. However, the Complainant failed to prove a discriminatory motive by the District with respect to his discharge. To the contrary, all the evidence in the record indicates the District did not discriminate against the Complainant. Several witnesses testified, unrebutted by the Complainant, that the District did not discriminate against the Complainant because he participated in a strike or for any other reason. Therefore, the Examiner dismisses this charge against the Respondent.

OTHER ALLEGED VIOLATIONS:

The Complainant also failed to meet the burden of proving other alleged violations.

Complainant alleged a violation of Section 111.70(1)(i), Wis. Stats. That section provides:

"'Labor dispute' means any controversy concerning wages, hours and conditions of employment, or concerning the representation of persons in negotiating, maintaining, changing or seeking to arrange wages, hours and conditions of employment."

This section is definitional only. It does not create any substantive right or duty on the part of either Complainant or Respondent.

The Complainant also alleged a violation of Section 111.70(4)(a), Wis. Stats. That section provides:

"Sec. 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term 'unfair labor practices' appears in s. 111.07 the term prohibited practices' shall be substituted."

This provision deals with procedures by which prohibited practice cases will be litigated; no violations thereof were shown by the Complainant.

The Complainant further alleged a violation of Section 111.70(3)(a)6 of the Wis. Stats. That section provides:

"To deduct labor organization dues from an employee's or supervisor's earnings, unless the municipal employer has been presented with an individual order therefor, signed by the municipal employee personally, and terminable by at least the end of any year of its life or earlier by the municipal employee giving at least 30 days' written notice of such termination to the municipal employer and to the representative organization, except where there is a fair-share agreement in effect."

The Complainant did not introduce any evidence relating to dues and thus failed to prove a violation of this section of the Statute.

Finally, the Complainant spent a great deal of time at the hearing on the question of the District's denial of overtime to him. However, the portions of the complaint dealing with overtime were dismissed by previous Orders of the Examiner as noted in paragraph one of the Memorandum.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Dennis P. McGilligan, Examiner