STATE OF WISCONSIN	:	CIRCUIT COURT BRANCH 1	:	RACINE COUNTY

STEVEN McNEIL,

Petitioner,

-vs-

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

MEMORANDUM DECISION

Case No. 80-CV-0483

Decision Nos. 16992-B and 16993-B

This proceeding was begun on March 28, 1980 under section 111.07(8) and Chapter 227, Wis. Stats. for this court's review of the decision and order of the W.E.R.C. which dismissed the unfair labor practices complaint of petitioner Steven McNeil against UAW Local 180 and the J. I. Case Company.

FACTS

The petitioner began his employ with the J. I. Case Company on September 20, 1972. UAW Local 180 was the exclusive bargaining agent for Steven McNeil. The company has extensive written agreements with the Union and therefore with the petitioner. Within the Central Agreement between the Company and the Union dated July 11, 1977 is an Article (IX, Section 4 (3)) which terminates an employe's seniority if:

> "He is absent for more than three [3] consecutive working days without properly notifying the Company, unless circumstances make it impossible to so do."

The petitioner was absent from work on September 12, 13 and 14, 1978. He was terminated effective September 15, 1978 by a letter of September 20, 1978 because he failed to notify the Company as required by the Central Agreement. On September 13, 1978 the petitioner visited a local doctor who diagnosed McNeil's condition as flu. It is undisputed that the petitioner failed to notify the Company about his absence from work for three consecutive days.

McNeil filed a grievance with the assistance of the UAW Local 180. The grievance procedure was taken through three of four stages. The final stage is established as arbitration. After the denial of the grievance at the third stage, a Union group consisting of the Local President, the Bargaining Committee Chairman, the Recording Secretary, and the International's Union Grievance Representative met to decide whether to withdraw McNeil's grievance or to submit it to arbitration. The group reviewed the doctor's slips, a phone disconnection notice, the pertinent collective bargaining agreement provisions, the results of other arbitration decisions, and the facts of the case. The Committee ultimately concluded that it could probably not win in arbitration and, without notifying the petitioner or obtaining his consent, decided to withdraw the grievance. McNeil was notified by a letter dated March 20, 1979 that the grievance had been withdrawn.

On April 16, 1979 McNeil filed unfair labor practice complaints with the W.E.R.C. and against the UAW Local 180 and the Company under the Wisconsin Employment Peace Act, Section 111.01 - 111.19, Wis. Stats. He alleged that the Company violated the Central Agreement when it terminated him rather than his seniority. He further alleged that the termination violated Section 111.06(1)(f), Wis. Stats. The petitioner claimed the Union failed to fairly represent him by not submitting his grievance to arbitration. Both the Union and the Company denied the allegations.

A proper hearing was conducted by the W.E.R.C. on February 11, 1980. Examiner Schoenfeld concluded that UAW Local 180 did not breach its duty of fair representation and order that McNeil's unfair labor complaints be dismissed. By operation of Section 111.07(5) the Examiner's decision and order automatically became the decision and order of the Commission on March 4, 1980.

ISSUE

Does substantial evidence in the record support the W.E.R.C.'s finding that the decision of UAW Local 180 to withdraw McNeil's grievance prior to arbitration was not arbitrary, discriminating, or in bad faith?

On judicial review under Chapter 227, Wis. Stats. an administrative agency's findings of fact are conclusive if supported by substantial evidence in the record. Chicago, M., St. P. & P. RR. Co. v. ILHR Department, 62 Wis. 2d 392, 396, 215 N.W. 2d 443 (1974) Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Bell v. Personnel Board, 259 Wis. 602, 608, 49 N.W. 2d 889 (1951).

From a review of the record it is clear that the Commission found that the Union considered the applicable language of the Central Agreement, the particular facts of McNeil's case, prior arbitration decisions, the advice of the International Grievance Representative, and their belief that McNeil's termination would be sustained in arbitration. With respect to the particular facts of this case, the Union noted that the petitioner had the opportunity on September 13, 1978 to notify the Company during the day when he visited the doctor. The Union determined that it was possible and reasonable for the petitioner to notify the Company on September 13, 1978. It is undisputed that McNeil failed to notify the Company when he reasonably could have done so; namely, during his second day of absence, the 13th day of September, 1978.

There is additional substantial evidence in the record which supports the Commission's finding on the issue of arbitration. A decision is not "arbitrary" when it is the result of the "winnowing and sifting" process. Olson v. Rothwell, 28 Wis. 2d 233, 239, 137 N.W. 2d 86 (1965). The Union considered prior arbitration decisions including arbitration by UAW Local 180 and others arbitrated in the Case Company corporate structure. The International Grievance Representative's advice to withdraw the grievance was based on his six years of arbitrating grievances for the UAW at five Case Company plants.

The petitioner's main argument is his contention that the Company could only terminate the seniority (not the employment) if an employe fails to notify the company of his absence for three consecutive days. Termination of employment is provided for under Article VIII (A) of the Central Agreement. It provides that: "An employee will not be suspended or discharged except for good cause..." The petitioner contends that the Union's practice of equating termination of employment with termination of seniority is evidence of the allegedly arbitrary, discriminatory and bad faith actions by the Union.

In his brief the petitioner acknowledges the fact that the Respondent Union and the Respondent Company have treated the termination of seniority with the termination of employment. Indeed, the record shows that between 20 to 25 employes each year who fail to abide by the notice of absence requirement (Article IV, §4(3) have their employment terminated. The Respondent Company's Post-Hearing Brief, pages 30 through 33, further verifies the practice of an employe losing his employment when he loses his seniority because of his failure to give notice about his absence for three consecutive days.

The petitioner's claim that the Union was arbitrary because they failed to challenge long-standing interpretation and practice of the contract language is for these reasons without merit.

The court finds that the Commission, as the record shows, had substantial evidence to support its finding that the decision of UAW Local 180 to withdraw McNeil's grievance prior to arbitration was not arbitrary, discriminatory, or made in bad faith. The Union did not breach its duty of fair representation.

The Findings and Order of the Commission are affirmed.

Dated at Racine, Wisconsin, this 18th day of June, 1981.

BY THE COURT:

John C. Ahlgrimm /s/
John C. Ahlgrimm
Judge