

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL L. BABBITTS,	:	
	:	
Complainant,	:	Case II
	:	No. 25224 MP-1044
vs.	:	Decision No. 17369-A
	:	
THE TOWN OF MENASHA and THE TOWN OF	:	
MENASHA PROFESSIONAL POLICE	:	
ASSOCIATION,	:	
	:	
Respondent.	:	
	:	

Appearances:

Patterson, Jensen, Wylie & Wilton, S.C., Attorneys at Law, 331 East Washington Street, Appleton, Wisconsin, by Mr. James Hill, appearing on behalf of the Complainant.
 Hammer, Gieringer & Forsgren, Attorneys at Law, 118 West Peckham Avenue, Neenah, Wisconsin, by Mr. Erik R. Forsgren, appearing on behalf of Respondent-Town of Menasha.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A 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 Duane McCrary, 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 111.07(5) of the Wisconsin Statutes; and a hearing on the matter having been held at Menasha, Wisconsin on December 17, 1979 and the parties having filed briefs in the matter by May 28, 1980; 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 Complainant Michael L. Babbitts, hereinafter referred to as Complainant, is a municipal employe and was employed by Respondent Town of Menasha as a Patrolman in the Town's Police Department from January, 1975 until his termination which was effective on August 30, 1979 pursuant to the Respondent Town of Menasha's action on August 27, 1979; and that Complainant was represented for collective bargaining purposes by the Respondent, Town of Menasha Professional Police Association.
2. That the Town of Menasha, hereinafter referred to as the Town, is a municipal employer; and that at all times material herein, Ms. Esther Walling functioned as the Chairman of the Town Board and that Mr. William Weiss, functioned as the Chief Officer of the Town's Police Department and was Complainant's immediate supervisor.
3. That at all times material herein the Town of Menasha Professional Police Association, hereinafter referred to as the Association, was the exclusive bargaining representative of all full-time law enforcement officers of the Town Police Department, including all full-time officers with arrest powers and with the rank of sergeant or below, expressly excluding the Chief Officer; and that at all times material herein, Patrolman Leonard Hoehne was President of the Association and Mr. F. David Krizenesky functioned as Counsel for the Association.

4. That at all times material herein the Town and the Association have been signators to a collective bargaining agreement effective from January 1, 1978 to December 31, 1979, covering the wages, hours and conditions of employment of the bargaining unit described in Finding of Fact 3; and that said agreement contained the following provisions material herein:

ARTICLE 2. MANAGEMENT RIGHTS

The Town possesses the sole right to operate the Town Police Department and all management rights reposed in it, subject only to the provisions of this Agreement and applicable law. These rights include but are not limited to the direction of all operations of the Town of Menasha Police Department, establishment of reasonable work rules, the discipline of employees for just cause, the assignment and transfer of employees within the Department, and the determination of the number and classification of employees needed to provide the services of the Department. These rights shall be exercised in a reasonable manner and shall not be used to discriminate against any employee.

The Association may challenge the exercise of any of the foregoing functions on the basis that such exercise violates a specific provision of this Agreement.

. . .

ARTICLE 6 GRIEVANCE PROCEDURE

A. A grievance is defined as being a complaint by an employee or a group of employees involving an alleged violation of a specific provision of this Agreement or a claim that the Town has taken a disciplinary action without just cause.

B. This grievance procedure constitutes the sole and exclusive means of resolving grievances and employees will at all times continue to work as directed by the Town. Settlement of the controversy at any step in the grievance procedure shall be binding on all Parties, including the employee or employees making the complaint.

C. Grievances shall only be processable if action is taken within the time limit set out for each step.

Step 1. The employee shall reduce his grievance to writing and shall, within three (3) working days after the grievant knew or should have known of the occurrence of the incident giving rise to the grievance, first take up his grievance with the Chief of the Department. The Chief shall give his written answer within three (3) working days after the grievance was presented to him.

Step 2. If the grievance is not settled in Step 1, the Association may appeal it by presenting the grievance in writing to the Town Chairman within three (3) working days of receipt of the Chief's answer. The Town

shall give its written answer to the grievance within five (5) working days after the first Town Board Meeting following the Town Chairman's receipt of the appeal.

Step 3. If the grievance is not settled in Step 2, it may be appealed by written notice to the Town Chairman, to arbitration in accordance with the procedure and conditions set forth in "Arbitration" of this Agreement.

D. The Parties agree to follow each of the foregoing steps in the processing of a grievance and if in any step the Town's representative fails to give his written answer within the time limits therein set forth, the Association may appeal the grievance to the next step at the expiration of such time limit. If the Association fails to appeal the grievance to the next step within the time limits stated above, the last answer of the Town shall be final and binding on all Parties.

ARTICLE 7. ARBITRATION

A. Arbitrable issues are only those which meet each and all of the following tests:

1. The issue must first have gone through the grievance procedure as outlined in this Agreement.

2. All time limits for original filing and appealing the grievances as outlined within the grievance procedure itself must have been observed.

3. Notice of intent to arbitrate must have been forwarded within ten (10) working days after issuance of the last answer of the Town following the last step of the grievance procedure.

4. The issue must be one arising out of a claim that a specific provision of this Agreement has been violated or a claim that the Town has taken disciplinary action without just cause.

B. If the Association desires to submit an issue to arbitration, it shall forward to the Town Chairman a written notice of intent to arbitrate. This notice shall state the matter at issue and shall state in what respect the Agreement has been violated by reference to the specific clause of clauses relied upon. The notice shall also stipulate the nature of the relief or remedy sought.

5. That on August 16, 1979 the Complainant was suspended for twelve (12) days without pay commencing on August 30, 1979 by Chief Officer Weiss; that at this time the Complainant told Weiss that he wanted to resign; that the Complainant via an undated letter on August 27, 1979 informed Weiss and the Town Board that he did not wish to resign his position nor did he intend to do so, that any inference drawn from his conversation with Weiss on August 16, 1979 was to be withdrawn, and that he wished to file a grievance with respect to the suspension imposed on him August 16, 1979; that on August 27, 1979 the Town Board voted to accept the recommendation of Weiss to accept the Complainant's resignation; that the grievant was present at the Town Board meeting on August 27, 1979; that by

letter dated August 28, 1979 to Chief Weiss the Complainant grieved his "discharge"; that by letter dated August 29, 1979 to Complainant's attorney Weiss denied both the suspension and the discharge grievance. 1/

6. That by letter dated September 4, 1979 to Patrolman Hoehne, Complainant's attorney requested the Association's assistance in representing the Complainant with respect to both the suspension and the discharge grievances; that by letter dated September 6, 1979 the Complainant advised Ms. Walling that he was appealing both grievances to the second step of the grievance procedure; that on September 7, 1979 Ms. Walling referred the grievant to Step 2 of the grievance procedure and advised that she could not consider or deny his request for an appeal; that on or about September 7, 1979 the Association, without the Complainant, voted not to process Complainant's grievances and that subsequently the Town was advised of the results of that vote; that the Complainant was not advised that the vote was to take place nor did he participate in, or was advised of the outcome of the vote by the Association; that on September 10, 1979 he again requested the Association's assistance in processing his grievances; that on September 11, 1979 the Complainant through his attorney served notice on the Town of his intent to arbitrate the suspension and the discharge grievances; that at both some time prior and subsequent to the Association's vote on Complainant's grievances, the Association was advised by its attorney to follow the grievance procedure concerning Complainant's grievances.

7. That on September 27, 1980 the Town advised the Complainant's attorney that if the Association submitted a written notice of intent to arbitrate the Complainant's grievances, it would consider the notice to have been given in accordance with the collective bargaining agreement; that by letter dated October 3, 1979 Complainant's attorney advised the Association of the Town's position, that the Association did not assist the Complainant in the processing of his grievances at the second step or at the arbitration step of the grievance procedure by filing a notice of its intent to arbitrate Complainant's grievances.

8. That the Complainant attempted to exhaust the contractual grievance procedure but was frustrated in his attempt by the Union's inaction.

9. That the Association's failure to process the Complainant's grievances was wholly arbitrary.

10. That the Complainant's discharge was not for just cause under the terms of the collective bargaining agreement.

CONCLUSIONS OF LAW

1. That Complainant did attempt to exhaust the contractual grievance procedure under the existing collective bargaining agreement between the Association and the Town but the attempt was frustrated by the Association's refusal to process his grievance.

2. That the Commission will assert its jurisdiction to determine whether the Town breached the collective bargaining agreement and thus Section 111.70(3)(a)5 of the Municipal Employment Relations Act because the Complainant was prevented from exhausting the grievance procedure due to the inaction of the Union.

1/ At hearing the parties agreed not to try the merits of the grievances. However, the Complainant attempted to show that the grievances had arguable merit. See transcript pp. 20-22.

3. That the conduct of the Association in refusing to process Complainant's grievances through the contractual grievance procedure up to and including final and binding arbitration violated the Association's duty to fairly represent the Complainant and thus violated 111.70(3)(b)1 of the Municipal Employment Relations Act.

4. That because there was no just cause under the collective bargaining agreement for the discharge of the Complainant by the Town said discharge violated the agreement and thus Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

5. That the Town did not violate the collective bargaining agreement when it refused to process Complainant's grievances through the contractual grievance procedure and therefore the Town did not violate Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

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

ORDERS

IT IS ORDERED

1. That the Menasha Professional Police Association, its officers and agents, shall immediately:

(a) Cease and desist from arbitrarily refusing to process grievances up to and including final and binding arbitration and/or the collective bargaining agreement in existence between the Association and the Town of Menasha.

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

(1) Pay to Complainant's attorney reasonable and actual attorney's fees not to exceed \$1000 and deliver said amount to Patterson, Jensen, Wylie & Siltan, S.C., Attorneys at Law, 331 West Washington Street, Appleton, Wisconsin 54911.

(2) Notify all employees employed in the bargaining unit which it represents that it will fairly represent all employees and that it will not coerce or intimidate any employees 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 Town of Menasha for the posting of notices by the Association. Said notices shall be signed by the President of the Association and shall remain posted for sixty (60) days. The 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 Town of Menasha shall immediately:

(a) Offer to reinstate the Complainant to his former position on the Police Department with all lost wages, seniority and benefits. Lost wages shall

be computed by deducting the Complainant's interim earnings which includes only the income the grievant earned or received (including unemployment compensation), if he had not been wrongfully discharged, less the expenses Complainant incurred in obtaining employment and working elsewhere which he could not have incurred but for his discharge - from a sum equal to that which the Complainant would have earned from August 27, 1979 to the date of the offer of reinstatement. This remedy contemplates retroactive payment to the Wisconsin Retirement Fund on behalf of the Complainant's account plus any interest if required by the Fund; reimbursement for any losses the Complainant experienced as a result of his loss of health insurance coverage until he received similar health insurance coverage from a subsequent employer or until he is offered such coverage by the Town of Menasha; and does not include the value of vacation days and holidays.

(b) 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.

3. That portion of the complaint alleging that the Town violated the collective bargaining agreement and thus Section 111.70(3)(a)5 of the Municipal Employment Relations Act by not processing Complainant's grievances through the grievance procedure up to and including arbitration is hereby dismissed.

Dated at Madison, Wisconsin this 26th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 

Duane McCrary, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYES REPRESENTED
BY THE MENASHA PROFESSIONAL POLICE ASSOCIATION

Pursuant to an order of the Wisconsin Employment Relations Commission all employes of the Town of Menasha Police Department represented by the Menasha Professional Police Association, its officers and agents, will fairly represent all employes represented by it and will not coerce or intimidate any employes represented by the Menasha Professional Police Association in the enjoyment of their legal rights under the Municipal Employment Relations Act including those rights guaranteed in Section 111.70(2) of said Act.

Dated this _____ day of _____, 1981.

President, Menasha Professional Police Association

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Initially, the Complainant asserts that the Town has committed prohibited practices in violation of Sections 111.70(3)(a)1, 4 and 5 of the Municipal Employment Relations Act (MERA) by suspending him on August 16, 1979 for a period of twelve days beginning on August 30, 1979. Later that day the Complainant told Chief Officer Weiss that he wanted to resign his position. However, on August 27, 1979 Complainant by letter informed both Weiss and the Town Board that he did not wish to resign his position and that any inference to that effect that may have been drawn from his conversation with Weiss on August 16, 1979 was to be withdrawn. But, the Town at its Board meeting on August 27, 1979 voted to accept his resignation. Further, the complaint alleges that the termination of Complainant's employment was unlawful and that it violated the collective bargaining agreement thus violated MERA.

In addition, Complainant alleges that the Association breached its duty to fairly represent him by preventing Complainant from exhausting the grievance procedure. Specifically, the Association refused to meet and confer with the Complainant about his grievance, refused to act upon them and did not follow the grievance procedure culminating in final and binding arbitration.

The Town asserts that it must adhere to the provisions of the collective bargaining agreement in processing grievances and in accordance with that agreement only the Association and not the grievant may appeal grievances to the second step of the grievance procedure. Thus, when Complainant presented his second step appeals to Chairman Walling, the Town had no contractual obligation to process them. Further, the Town avers that the Association must present to it a notice of its intent to arbitrate within ten working days of the Town's answer at the last step of the grievance procedure. Hence, because the Association failed to issue a notice of its intent to arbitrate Complainant's grievances, it was under no duty to arbitrate them.

Although the Association did not appear at the hearing, its president, Leonard Hoehne testified as did Mr. F. David Krizenesky, its retained counsel.

Before the Examiner will assert the Commission's jurisdiction to determine the merits of Complainant's allegation that the Town breached the collective bargaining agreement and thus section 111.70(3)(a)5 of MERA, Complainant must demonstrate that he attempted to exhaust the agreement's grievance procedure and that his failure to succeed in exhausting the grievance procedure was caused by the Association's breach of its duty to fairly represent him. ^{2/} Further, Complainant must sustain his burden of proof by a "clear and satisfactory preponderance of the evidence." ^{3/}

In order to establish that the Association has breached its duty to fairly represent him, Complainant must show that the Association's conduct toward him was arbitrary, discriminatory or in bad faith. ^{4/} In Bloomer Joint School District No. 1 (16228A, AB) 8/80

^{2/} Mahnke v. WERC, 66 Wis 2d 524, 225 N.W. 2d 617 (1975).

^{3/} Section 111.07(3) Wisconsin Statutes.

^{4/} Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Mahnke, supra.

the Commission described the minimal obligations that an exclusive bargaining representative owes to its members under the duty of fair representation as follows: (a) upon specific request for assistance, a union must explain the steps of the grievance procedure to the bargaining unit member; in addition, the union must discuss the facts of the potential grievance with the aggrieved employe; (b) after meeting with the bargaining unit employe, the union must undertake an initial investigation of the situation; (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. Representation includes the presentation of arguments favorable to the grievant and an initial challenge to the validity of the Employer's position. In addition, in a timely manner the Union is required to review the merits of the grievance with the grievant in further processing the matter. 5/ Further, in determining whether to take the grievance of an employe who alleges a contract breach to arbitration, the Union in order to fulfill its duty of fair representation, should consider such factors as the expense of arbitration, the monetary value of the employe's claim, the effect of the breach on the employe and the likelihood of success in arbitration. 6/ Lastly, a union's action or its failure to act may be so unreasonable as to be arbitrary and, thus, contrary to its fiduciary obligations. 7/

The record establishes that Complainant filed his grievances regarding the suspension and his termination on August 27 and August 28, 1979, respectively. Weiss denied them on August 29, 1979. The Complainant then appealed his grievances to the Town Board. At this point he did not seek the Association's assistance and the record does not reveal his rationale for not doing so. Ms. Walling, Town Board Chairman, took the position that only the Association may perfect appeals of Step 2 of the grievance procedure and by letter dated September 7, 1979 informed the Complainant that she was "neither able to consider or deny your request for an appeal." The record does not establish that Complainant's appeals were presented to the Town Board.

By letter dated September 4, 1979 the Complainant advised President Hoehne that his grievances were pending and requested the Association's assistance in connection thereto. Hoehne testified that on or about September 4, 1979 he received a communication from Walling seeking the Association's position on the Complainant's pending grievances. Shortly thereafter a secret vote was taken among the membership and the Association voted not to represent the Complainant. Complainant was not advised that the vote was going to take place nor did he participate. As the Association's bylaws were not admitted into the record the Examiner is not able to determine whether the Association was required to advise Complainant of the vote or to allow him to participate. Subsequently, the Association advised the Town of its position not to represent Complainant but did not so advise the Complainant. Lastly, Mr. Krizenesky testified, without contradiction, that prior to the secret ballot he advised Hoehne to process Complainant's grievances through the grievance procedure.

5/ University of Wisconsin - Milwaukee Housing Dept. (11457-E,F) 1/78.

6/ Mahnke, supra.

7/ Allen L. Griffin v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, 469F 2d 181 (4th Cir. 1972).

The Complainant on September 10 again requested the Association's assistance in processing his grievances but received no response from the Association. On September 27, 1979 the Town indicated to the Complainant that it would consider proceeding to arbitration on Complainant's grievances if it received the requisite notice of intent to arbitrate from the Association. This was communicated to the Association by the Complainant on October 3, 1979, however, the Association did not reply.

The Examiner concludes that the Association's total course of conduct toward the Complainant was so unreasonable as to be wholly arbitrary, thus a breach of its duty to fairly represent him and hence a violation of section 111.70(3)(b)1 of MERA. Although the Examiner notes that initially the Complainant proceeded to represent himself and then retained counsel to represent him, after Complainant's requests for assistance, at no time did the Association respond. The Association did not meet with the Complainant to explain the grievance procedure or to discuss the merits of his grievances. The Association failed to ask the Town for its rationale for Complainant's suspension and subsequent termination. Nor did it present initial arguments favorable to the Complainant to the Town for its consideration.

Complainant's grievances were discussed among the Association's membership. However, the record does not reveal the nature and extent of the Association's initial investigation of the facts and circumstances giving rise to the Complainant's grievances. Indeed, the record does not demonstrate that an initial investigation took place. Apparently, the Association's investigation consisted of discussing Complainant's grievances among themselves and then voting not to represent him.

The record demonstrates that Hoehne instructed the Association to consider the merits of Complainant's grievances as well as the possibility of prevailing on them and their costs. Again, the nature and extent of the Association's consideration of these factors are not revealed in the record. However, Hoehne testified that he knew that the Complainant would underwrite the cost of processing his grievances, if the Association allowed them to proceed. Yet, the record doesn't indicate whether Hoehne told the Association members of this fact or whether once informed, whether the Association's membership considered it.

A union has considerable flexibility in deciding whether to pursue a grievance.

". . . Just as a union must be free to sift out wholly frivolous grievance which could only clog the grievance process, so it must be free to take a position on the not so frivolous disputes . . ." 8/

Hoehne testified that the Association believed that the Complainant's grievances were not arbitrable because the collective bargaining agreement did not speak to resignations. However, the Association's attorney advised it to process Complainant's grievances but was ig-

The Association failed to respond when the Complainant informed it that the Town would arbitrate the grievances if it received the proper notice of an intent to arbitrate. This is particularly egregious when coupled with Hoehne's knowledge that the Complainant would underwrite his arbitration costs.

Despite Complainant's requests, the Association did not meet with the Complainant to discuss the merits of his grievances. Nor did it confront the Town about why it suspended and then subsequently, discharged the Complainant. No initial investigation was conducted regarding the merits of Complainant's grievances. There is no evidence the factors listed in Mahnke, supra were considered. Lastly, the Association ignored its attorney's advice to proceed on Complainant's grievances. Thus, when the Association's total course of conduct is juxtaposed against its fiduciary obligation to fairly represent the Complainant, it is clear that the Association breached its duty and thus violated section 111.70(3)(b)1 of the Municipal Employment Relations Act.

Contract Violation

Because the Complainant has demonstrated that he attempted to exhaust the agreement's grievance procedure and that he was frustrated in his attempt by the Association's violation of its duty to fairly represent him, the Examiner may assert the Commission's jurisdiction to determine the merits of Complainant's allegation that the Town breached the collective bargaining agreement by initially suspending and subsequently discharging the grievant and by failing to process Complainant's grievances concerning his suspension and discharge through the grievance procedure.

Complainant was suspended for twelve days without pay on August 16, 1979 by Weiss for insubordination, failure to follow a rule regarding the filing of reports and his prior personal record. After being suspended Complainant tendered an oral resignation. However, he withdrew this resignation on August 27, 1979 by a letter delivered to the Town Clerk's office. Later that day the Town Board met and a motion was made by Weiss to accept Complainant's oral resignation. However, someone at this meeting noted receipt of Complainant's letter wherein he withdrew his resignation. The Town Attorney believed that Complainant could withdraw his resignation as he did not abandon his duties. Further, he noted that under Chapter 17, Wisconsin Statutes a valid resignation must be in writing. However, Weiss indicated to the Town Board his belief that his authority would be denied if the Town Board delayed action in the matter. The Town Board then voted to accept the recommendation of Weiss to accept Complainant's resignation.

An examination of Chapter 17, Wisconsin Statutes arguably requires a public officer, such as a town police patrolman, to tender his resignation in writing to the Town Chairman. There is no contractual provision concerning resignations or requiring them to be in writing. The uncontroverted testimony of the former chairman of the Town Board is that the power to hire and fire rests with the Town Board and not the Chief Officer. This is consistent with Section 60.29(8) Wisconsin Statutes which gives the Town Board the power to appoint police officers and with the action the Town Board took in the instant matter. However, the Wisconsin Supreme Court has ruled that the tender of a resignation unsupported by consideration can be withdrawn at anytime prior to acceptance. 9/

9/ Eberle v. Joint School District No. 1, 37 Wis 2d 651 (1967).

Here, the Complainant unequivocally withdrew his resignation prior to acceptance by the Town Board on August 27, 1979. Further, there is no evidence in the record that the Town in any way relied upon Complainant's resignation to its detriment. The Town Board minutes of August 27, 1979 note the receipt of Complainant's letter withdrawing his resignation. In the Examiner's opinion because the Town had no resignation to act upon, it discharged the Complainant, when it accepted Complainant's "resignation" on August 27, 1979. The Town must have just cause to discharge according to the collective bargaining agreement.

The Town does not assert that it was discharging the Complainant nor does it aver that just cause existed for the discharge. It merely accepted Complainant's "resignation". The August 27, 1979 Town Board minutes reflect no reason for Complainant's discharge except Weiss's belief that not acting on the Complainant's "resignation" would somehow deny his authority. That belief standing alone is not sufficient to sustain Complainant's discharge under the just cause standard set forth in Article 2 Management Rights of the agreement. Accordingly, the Town breached the collective bargaining agreement and thus MERA on August 27, 1979 when it discharged the Complainant.

The Examiner does not conclude that the Town breached the collective bargaining agreement by not processing Complainant's grievances. At Step 2 of the grievance procedure the Association must present the appeal to the Town Chairman for its presentation to the Town Board. Thus, when Complainant presented his appeals to Walling on September 6, 1979 she was under no duty to present them to the Town Board.

Additionally, according to Article 7, Arbitration of the agreement, arbitrable issues are those which have been processed through the grievance procedure. Complainant's grievances were not processed due to the Association's failure to represent him and thus could not be arbitrated. Accordingly, that portion of the complaint alleging that the Town violated the collective bargaining agreement by not processing Complainant's grievances through the grievance procedure up to and including arbitration has been dismissed.

Remedy

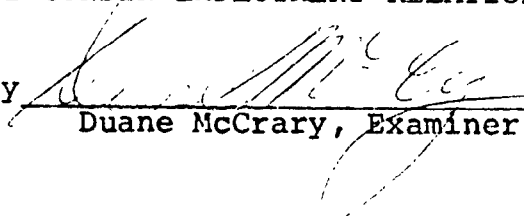
Because the Association breached its duty to fairly represent Complainant in violation of Section 111.70(3)(b)1 of MERA, the Examiner has issued the appropriate cease and desist order. Moreover, as the Association's total course of conduct toward the Complainant and his grievances are wholly arbitrary, the Examiner has directed the Association to pay reasonable and actual attorney fees not to exceed \$1000.00. ^{10/} As Complainant was denied fair representation concerning the processing of his grievances and was further denied a meaningful evaluation of them for arbitration purposes, the reasonable remedy is reimbursement for the equivalent cost of representation had the matter proceeded to arbitration. In determining the amount of attorney fees reasonably attributable to the merits of Complainant's grievances the Examiner has considered such factors as the length of the hearing, the exhibits submitted and required skill in analysis for purposes of examination and cross-examination of witnesses, the facts underlying the grievances and the extent to which the parties engaged in filing briefs and reply briefs.

^{10/} University of Wisconsin - Milwaukee Housing Department, supra.

There is federal precedent for holding both the union and the employer jointly and severally liable for an employe's loss of pay resulting from a discharge which violated the collective bargaining agreement and from the union's breach of its duty of fair representation. 11/ However, there is no Commission precedent for such a remedial order. Further, there was no appreciable delay caused by the Association in getting the merits of the discharge grievance heard. Thus, the Town has been directed to pay to the Complainant all lost wages retroactive to his discharge on August 27, 1979 and the Association will not be held liable for any portion of the back pay due the Complainant.

Dated at Madison, Wisconsin this 26th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Duane McCrary, Examiner

11/ Freeman v. O'Neal Steel, Inc., 95 LRRM 3212 (1977); Bowen v. U.S. Postal Service, 103 LRRM 2367 (1979).