

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CALVIN E. GRESENS,

Complainant,

vs.

CITY OF APPLETON,

Respondent.

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: Case CXIII
: No. 24168 MP-947
: Decision No. 17541
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Appearances:

Esler and Esler, Attorneys at Law, by John A. Esler, appearing on behalf of Complainant.

Mr. David G. Geenen, City Attorney, Appleton, Wisconsin, appearing on behalf of Respondent.

Goldberg, Previant and Uelmen, S.C., Attorneys at Law, by Thomas J. Kennedy, appearing on behalf of the Union.

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 Stephen Schoenfeld, 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 said complaint having been held at Appleton, Wisconsin on March 30, 1979; and all parties having waived the submission of briefs; 1/ and the Examiner having considered the evidence and arguments made at the hearing 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 Calvin E. Gresens, hereinafter referred to as Complainant, is an individual residing at 402 S. Memorial Drive, Appleton, Wisconsin; that Complainant is an employe of the City of Appleton Park Department.

2. That the City of Appleton, hereinafter referred to as Respondent, is a municipal employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act (MERA).

3. That at all times material herein, Respondent has recognized General Drivers and Dairy Employees Union, Local 563 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the union, as the exclusive bargaining representatives of certain of its employes.

4. That at all times material herein Respondent and the union have been signatories to a collective bargaining agreement effective from January 1, 1977 to December 31, 1978, covering wages, hours, and working conditions of said employes; and that said agreement contains the following provisions material herein:

1/ The Examiner was notified in writing on or about May 12, 1979, of Complainant's intention to waive filing a brief, on June 4, 1979, of the union's intent to not submit a brief, and on June 6, 1979, of Respondent's desire to waive submission of a brief.

ARTICLE 1 - RECOGNITION

The Employer shall recognize General Drivers and Dairy Employees Local Union #563 as the authorized representative and exclusive bargaining agent for the employees employed in the Park, Forestry, Weed Control and Golf Course Divisions, Recreation Maintenance Division, and Office Clerical Personnel, exclusive of Supervisors, Professional and Managerial employees, seasonal student help.

ARTICLE 14 - GRIEVANCE PROCEDURE

A. A grievance shall be processed as follows:

- (1) The grievance shall be reduced to writing, presented to and discussed with the employee's Supervisor, by the employee and Steward, if requested. The Supervisor shall respond in writing within three (3) working days. If the grievance is not resolved, the grievance shall be taken to Step 2 provided it is done within five (5) work days (Saturdays, Sundays, and holidays excluded) from the date of response by the Supervisor.
- (2) The grievance shall then be presented to the Department Head who will meet with the Union and then respond in writing within three (3) working days of such meeting (Saturdays, Sundays and holidays excluded). If this solution is not satisfactory, the process shall move to Step 3, provided it is done within five (5) working days from the date the written statement is received by the Union.
- (3) The grievance shall then be presented to the Director of Personnel, who will meet with the Union and then respond in writing within three (3) working days of such meeting (Saturdays, Sundays and holidays excluded). If the grievance is not satisfactorily resolved, either party may notify the other within five (5) work days (Saturdays, Sundays and holidays excluded) from receipt of the written statement of their desire to arbitrate.

B. Any grievance must be presented in writing within ten (10) days of its occurrence or discovery or it shall not be subject to the grievance procedure herein before set forth.

ARTICLE 15 - ARBITRATION

Section A.

Any grievance relative to the interpretation or application of this Agreement, which cannot be adjusted by conciliation between the parties, may be referred by either party hereto, within five (5) days to the Wisconsin Employment Relations Commission for the appointment of an arbitrator from its staff.

Section B.

The arbitrator shall, within five (5) days of appointment, conduct hearings and receive testimony relating to the grievance and shall submit findings and decisions. The decision of the arbitrator shall be final and binding on both parties to this Agreement.

Section C.

The expense of the arbitrator shall be divided equally between the parties to this Agreement.

Section D.

It is understood that the arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.

ARTICLE 25 - SENIORITY

Section 1.

Unless otherwise modified elsewhere in this Agreement, seniority rights shall prevail. Seniority for all employees shall prevail on a unit-wide basis. A seniority list of employees shall be posted in a conspicuous place. Any disagreement concerning an employee's seniority shall be subject to the grievance procedure.

Section 2.

Seniority for permanent employees shall be determined by the length of service of the employee and shall commence on the date of employment as a permanent employee plus such additional time as is required or granted for vacations, leave of absences, illness or accidents. An employee's seniority is nullified if the employee is laid off and not re-employed within two (2) years from the date of layoff; if the employee fails to return to duty when recalled from layoff as herein provided; if the employee leaves the Employer of the employee's own volition; or if the employee is discharged for just cause and not subsequently reinstated. A laid off employee shall be given notice of recall by Certified Mail, return receipt requested, to the employee's last known address. The Employee must respond to such notice within three (3) days after receipt thereof and must actually report to work in seven (7) days after receipt of such notice unless otherwise mutually agreed to.

Section 3.

Work outside the regular hours of work shall be offered the senior available employees in that classification of the unit.

Section 4.

In laying off employees because of reduction in forces, the employees shortest in length of service in the unit shall be laid off first, provided those retained are capable of carrying on the employer's usual operations. In re-employing the employees on the seniority list having the greatest length of service in the unit shall be called back first, provided they are qualified to perform the available work.

Section 5.

A seniority list of all employees covered by this Agreement shall be furnished by the Employer to the Union, upon request.

5. That Complainant initially commenced his employment with Respondent in 1956 as a caretaker in the parks department and after spending a number of years in said department, subsequently assumed responsibilities in other city departments; that Complainant eventually returned to the parks department and assumed the job as foreman 2/ for several years and remained in said position until March, 1978, when he once again assumed the responsibilities as a caretaker in said department; in September, 1978, Respondent issued a seniority list involving the employees in the parks department; that Complainant's indicated seniority date was March 15, 1978; and that Complainant believed that he was improperly denied seniority based upon his years of service with the Respondent.

6. That subsequent to Complainant's discovery that Respondent had utilized March 15, 1978, as his seniority date, Complainant contacted Mr. Robert Van Eyck, the Union Steward for Local 563; that Complainant indicated to Van Eyck that he believed the Respondent had erroneously placed him on the "bottom" of the seniority list and asked Van Eyck if there was any thing that could be done about it; that Van Eyck informed Complainant that he would look into the matter; that Van Eyck subsequently discussed the matter with Mr. Dennis Vanden Bergen, a business representative of the union, and based upon the then pertinent contract language, and the length of time Complainant was a supervisor and consequently had been excluded from the collective bargaining unit, the union took the position that Gresens' complaint regarding his seniority date had no merit; and that Van Eyck informed Complainant of the union's evaluation of said grievance.

7. That Complainant did not pursue any further action with respect to processing his grievance regarding his date of seniority.

8. That there is insufficient evidence that the union or any of its representatives in processing and investigating Complainant's grievance over his seniority date acted arbitrarily, discriminatorily or in bad faith; and the record indicates that the union, at all times material herein, provided Complainant with fair representation.

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

CONCLUSIONS OF LAW

1. That Complainant did attempt to exhaust the contractual grievance procedure, but such attempt was frustrated by the union's refusal to process the grievance.

2. That the conduct of Local 563, General Drivers and Dairy Employees Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Robert Van Eyck as agent for said union, in processing and investigating Complainant's charges that Respondent had given him an erroneous seniority date, was not arbitrary, discriminatory or in bad faith; that Local 563 and Robert Van Eyck therefore did not violate their duty to fairly represent Complainant.

3. That, since General Drivers and Helpers Union, Local 563 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen,

2/ Said position is supervisory and consequently does not come within the ambit of the parties' collective bargaining agreement.

and Helpers of America, did not violate its duty to fairly represent Complainant with respect to his grievance regarding his seniority date, the Examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining the merits of said grievance.

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

ORDER

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

Dated at Madison, Wisconsin this 10th day of January, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant, in his complaint, alleges that Respondent violated the collective bargaining agreement between the Respondent Employer and General Drivers and Helpers Union, Local 563 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. 3/ The Complainant further alleged that he made a request of the union to file a grievance and that said request was denied. Respondent maintains that it utilized the correct date when ascertaining Complainant's seniority and that there has been no denial of Complainant's seniority rights. The union basically contends that the complaint should be dismissed because Complainant has failed to exhaust his internal union remedies and has failed to exhaust his contractual remedies. 4/

Before the Commission will exercise its jurisdiction to determine the merits of Complainant's allegation that Respondent Employer breached the collective bargaining agreement in violation of Section 111.70(3)(a)5 of the Municipal Employment Relations Act, the Complainant must show that he attempted to exhaust the collective bargaining agreement's grievance procedure and that he was frustrated in his attempt by the Union's violation of its duty of fair representation. 5/ The record establishes that the Complainant inquired of Van Eyck whether anything could be done with respect to the establishment of March 15, 1978, as his seniority date. When Van Eyck eventually responded that there was really nothing that the union could do for Complainant because of the length of time he had been out of the unit, it is understandable how Gresens could reasonably infer that the union would not process a grievance for him. Based upon such conduct, the Examiner has concluded that Complainant attempted to exhaust the grievance procedure, and that his attempt was frustrated by Van Eyck's reluctance to proceed with the grievance. However, in order for the Commission to determine the merits of Gresens' grievance, the Complainant must establish, by a clear and satisfactory preponderance of the evidence 6/ that the Union violated its duty to fairly represent him.

While it is inequitable to allow an employee's grievance to go without remedy because of the union's wrongful refusal to process it, the U.S. Supreme Court, in Vaca v. Sipes, made it clear that a "wrongful refusal"

3/ At the hearing Complainant amended his complaint and alleged that Respondent, by its conduct in assigning him a March 15, 1978 seniority date, had violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA).

4/ Unlike the Respondent, the union, as an affirmative defense, alleges that Complainant failed to exhaust his internal union remedies. It is the Examiner's judgment that even assuming arguendo that Complainant failed to exhaust the internal union procedures available to him, said conduct should not preclude him from prosecuting the Complaint filed herein. The question of whether Complainant should have exhausted said procedures is irrelevant to the proper disposition of the question before the Examiner, which is whether Complainant's rights under the MERA have been violated.

5/ Vaca v. Sipes 386 U.S. 171, 1967; F. Dohmen Co. (8419-A, B) 9/68 (aff. Dane County Cir. Ct. 6/70); Ozite Corp. (10298-A, B) 2/72.

6/ See Section 111.07(3) and 111.70(4)(a), Stats.

occurs only when the union breaches its duty of fair representation and that:

A breach of the statutory duty of fair representation occurs only when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. 7/

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

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

The union's duty of fair representation does not necessarily require it to carry any grievance through all steps of the grievance procedure, especially if the union concludes after investigation that there is little likelihood of success. In the instant case, Van Eyck, after discussing and investigating Gresens' grievance with Vanden Bergen, concluded that the Complainant's grievance was without any merit. The union's arrival at said decision based upon its examination of the then pertinent contractual language and the fact that Gresens had been out of the unit as a supervisor for a number of years. Thus, there is no reasonable basis for concluding that the union's decision that the grievance lacked merit was not the product of a reasoned decision. 9/ The Complainant failed to prove that the union's investigation or processing of the grievance was pursued in a manner that was tainted by arbitrariness, discrimination or bad faith. Absent such conduct, the union did not breach its duty to fairly represent Complainant.

Therefore, the Examiner will not assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining the merits of the grievance and, as a result, has dismissed the complaint.

Dated at Madison, Wisconsin this 10th day of January, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Examiner

7/ Vaca v. Sipes, at page 190.

8/ Humphrey v. Moore (1964) 375 U.S. 335, 349, 8 U.S. Sup. Ct. 363, 11 Ed. 2d 370; also Ford Motor Co. v. Hoffman (1953), 345 U.S. 330, 338.

9/ The hearsay testimony relating to the statements allegedly made by Mr. Robert Schlieve, a business representative of the Union, to the effect that there was no love lost between Schlieve and Gresens are not of sufficient import, without additional evidence, to reach a contrary conclusion.