STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ALFREDO HERRERA, Complainant, vs. JACOBSEN DIVISION OF TEXTRON AND LOCAL NO. 556, INTERNATIONAL UNION OF AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT, WORKERS OF AMERICA, Respondents.	Case VII No. 28329 Ce-1915 Decision No. 18839-A

Appearances :

Mr. Charles Swanson, Attorney at Law, 1006 Washington Avenue, Racine, WI 53401, appearing on behalf of the Complainant.

Pope, Ballard, Shepard & Fowle, LTD., Attorneys at Law, by Ms. Adrianne C. Mazura, 69 West Washington Street, Chicago, IL 60602, appearing on behalf of Jacobsen Division of Textron.

Mr. Edward Buhler, President, Local 556 UAW, 1711 Packard Avenue, Racine, WI 53403, appearing on behalf of Local 556, International Union of Automobile, Aerospace and Agricultural Implement Workers of America.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Alfredo Herrera, having on July 7, 1981 filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging that Jacobsen Division of Textron and Local No. 556, International Union of Automobile, Aerospace and Agricultural Implement Workers of America committed unfair labor practices within the meaning of Section 111.06 of the Wisconsin Employment Peace Act, hereinafter WEPA; and the Commission on July 22, 1981 having appointed Lionel L. Crowley, 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) Wis. Stats.; and hearing on said complaint having been held in Racine, Wisconsin on June 24, 1982; and the parties having filed briefs and reply briefs, the last of which were sent to the parties on December 1, 1982; and the Examiner having considered the evidence and arguments of Counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. That Complainant Alfredo Herrera, hereinafter referred to as Complainant or Herrera, is an individual who resides at 3208 Debra Lane, Racine, Wisconsin.

2. That Respondent, Jacobsen Division of Textron, hereinafter referred to as the Employer, is a corporation engaged in the manufacturing of power lawn and snow tools, with a plant located at 1721 Packard Avenue, Racine, Wisconsin 53403, where it employs various production, maintenance and warehousing employes.

3. That Respondent Local No. 556, International Union of Automobile, Aerospace and Agricultural Implement Workers of America, hereinafter referred to as the Association, is a labor organization and has its offices at 7435 Smith Howell Avenue, Oak Creek, WI 53514; that the Union has been and is the collective bargaining representative of all employes engaged in production, maintenance, inspection, tool room, engineering experimental shop, warehousing, shipping and receiving employed by the Employer at the Racine plant; that in said relationship, the Union and the Employer have been parties to a collective bargaining agreement covering the wages, hours and working conditions of said employes, which agreement by its terms, is in effect from April 16, 1980 to April 30, 1983; that said agreement contains provisions, among others, providing that an employe may be

discharged "for just and proper cause only", and a section providing a four-step grievance procedure, and for final and binding arbitration of grievances not resolved in said four-step procedure; and that Step III and Step IV of said grievance procedure are as follows:

> "STEP III. Failing a satisfactory settlement of the grievance as set forth in Step II above, the grievance shall then be referred within four (4) work days to a meeting between the chief steward, President, Committeeman of the area, Plant Personnel Manager, the second level supervisor and the Production Manager, which meeting shall be held within five (5) work days of the date of appeal. The Company will give an answer within four (4) work days of the day the third step meeting is held.
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> STEP IV. In the event that any grievance has not been disposed of through the preceding procedure, such grievance shall be taken up at a meeting to be held as soon as practical, at which the representatives designated by the Company and the Bargaining Committee of the Union along with representatives of the International Union, will attempt to dispose of the matter.
>
> Grievances not settled at this meeting shall be answered by the Company in writing within ten (10) days after the conclusion of said meeting."

4. That Complainant Herrera commenced his employment with the Employer on August 25, 1977, in a position in the collective bargaining unit represented by the Union, and continued in such employment until May 28, 1981, on which date his employment was terminated allegedly for excessive absenteeism.

5. That effective February, 1979, the Employer implemented a revision to its absenteeism and tardiness program; that the revised program provided a progressive disciplinary scheme, i.e. verbal warning, written warning, three-day suspension and discharge, with each progressive step based on the accumulation of two unexcused absences within a sixty-day calendar period; and that the program also provided that for every sixty-day calendar period without more than one unexcused absence, one disciplinary step would be removed from the employe's file.

6. That Herrera had been in the Employer's earlier absenteeism and tardiness program and in February, 1979, he was continued in the revised program; that pursuant to said revised program, Herrera had been warned both verbally and in writing and had been suspended on March 24, 25 and 26, 1981 for excessive absenteeism and tardiness; that by May 19, 1981, Herrera had accumulated one and one-half days of unexcused absences; that on May 20, 21 and 22, 1981, Herrera was absent from work; that on May 26, 1981, Herrera returned to work with a doctor's excuse which was dated May 26, 1981, which stated as follows:

> "Excuse from work May 20-21-22 return to work May 26, 1980";

that the excuse bore the signature stamp of his doctor followed by the initials of someone else; that certain insurance claim forms submitted by Herrera's doctor indicated that Herrera could return to work on May 22, 1981; and that the Employer's second-shift nurse contacted Herrera's doctor's office for verification of the dates and was informed that the excuse was incorrect in that the doctor had excused Herrera for May 20 and 21, 1981, but not for May 22, 1981.

7. That on May 28, 1981, a discharge meeting was held with Herrera, Union President Ed Buhler, other Union representatives, and representatives of the Employer being present, concerning Herrera's absence on May 22, 1981; that during this meeting, a representative of the Employer, pursuant to a suggestion by Buhler, telephoned Herrera's doctor who affirmed that he would not excuse Herrera for May 22, 1981; that the parties went into separate caucuses and Herrera again called the doctor but could not get an excuse for May 22, 1981; that Buhler then spoke with the doctor and explained that they were in a discharge meeting and that if Herrera was not excused for May 22, 1981, he would be discharged; that Herrera's doctor told Buhler that the doctor had excused Herrera for May 20 and 21, 1981 and that Herrera was to come in and see him on May 22, 1981, but Herrera failed to see him on that date, and instead, sent a friend to the doctor's office, that the doctor instructed Herrera's friend that the doctor had to see

Herrera in order to excuse him, and that since Herrera was not seen by the doctor on May 22, 1981, he could not excuse him for that date, that Herrera was seen by the doctor on May 26, 1981 and that the doctor's slip dated that day was filled out by the nurse based on the dates Herrera had given her; that after the caucus, the Employer discharged Herrera for excessive absenteeism, tardiness and having left early; that Buhler asked the Employer's representative if he would accept a second excuse for May 22, 1981 and he indicated that he would; that Buhler then instructed Herrera to see his doctor and to get a second excuse for May 22, 1981; that on May 29, 1981, Herrera met with his doctor about a second excuse for May 22, 1981 but the doctor refused to excuse him for that date; and that Herrera thereafter did not produce a second excuse for his absence on May 22, 1981.

8. That on June 25, 1981, pursuant to the contractual grievance procedure, the Union filed a grievance on behalf of Herrera at Step III, wherein it asserted that Herrera's termination violated the just and proper cause provision of the contract and sought his reinstatement with full back pay; that the Employer denied said grievance and the Union processed the grievance to Step IV of the grievance procedure; that prior to the fourth-step grievance meeting with the Employer, Wally Bruss, a representative of the International, met with representatives of the Local Union including Buhler and reviewed Herrera's attendance record, disciplinary record, insurance forms and doctor's slips related to the discharge, and based on his knowledge of prior arbitration awards and the refusal of Herrera's doctor to excuse Herrera for his last day of absence, recommended that the grievance be withdrawn; and that said grievance was withdrawn at the fourth step.

9. That the Union, through the actions of its agents, did not process the grievance relating to Herrera's termination in such a manner so as to establish that its actions in regard thereto were arbitrary, discriminatory or made in bad faith; and that, to the contrary, the Union, in said regard, provided Herrera with fair representation with respect to its decision not to appeal Herrera's grievance to final and binding arbitration.

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

CONCLUSIONS OF LAW

1. That Local No. 556, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America did not commit any unfair labor practices within the meaning of any provision of the Wisconsin Employment Peace Act (WEPA), by refusing to proceed to final and binding arbitration of the grievance involving the termination of Alfredo Herrera by Jacobsen Division of Textron on May 28, 1981.

2. That since the above-noted grievance was resolved by the good faith refusal of Local No. 556, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America to proceed to final and binding arbitration thereon, the Examiner will not invoke the jurisdiction of the Wisconsin Employment Relations Commission to determine whether Jacobsen Division of Textron violated the collective bargaining agreement existing between it and Local No. 556, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, with respect to the termination of the employment of Alfredo Herrera on May 28, 1981, in violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER 1/

IT IS ORDERED that the complaint of Complainant Alfredo Herrera filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 30th day of December, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

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1/ (Continued)

Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The issues raised by the complaint are:

1) Whether the Employer violated the collective bargaining agreement between the Employer and the Union by discharging the Complainant Herrera, and;

2) Whether the Union breached its duty to fairly represent Complainant Herrera in protecting his employment when it withdrew the grievance protesting his discharge from the grievance procedure, thereby failing to prosecute same to final and binding arbitration.

COMPLAINANT'S POSITION

The Complainant contends that he presented a valid doctor's excuse to the Employer for May 20, 21 and 22, 1981, yet he was discharged for an unexcused absence on May 22, 1981. He argues that the Union violated its duty of fair representation when it failed to proceed to arbitration on his discharge. He maintains that an employe cannot be expected to do more than submit a written medical excuse from his physician, and the Union's determination that the Employer's rejection of this excuse and the subsequent discharge of the Complainant did not violate the contract, particularly where there was no written repudiation by the doctor, establishes that it has acted arbitrarily. He contends that the Union failed to take into account the effect the discharge had on him and the great likelihood of success had the Union taken his case to arbitration. The Complainant argues that the Union failed to keep him informed of the progress of his grievance and failed to notify him that the Union dropped his grievance. The Complainant claims that under these circumstances, exhaustion of the grievance procedure was not required.

The Complainant also contends that a grievance he filed on the 48-hour limit for imposing discipline was improperly withdrawn, and had it been processed and decided in Complainant's favor, he would not have been discharged.

The Complainant contends that the Employer did not have good cause within the meaning of the collective bargaining agreement to discharge him. The Complainant points out that he was discharged for his absence on May 22, 1981, which was documented as a medical absence and cannot be treated as an unexcused absence. He argues that under these circumstances, his discharge violated the agreement and he asks to be reinstated with full seniority, back pay, and any other rights and privileges he would have accrued had he not been discharged.

UNION'S POSITION

The Union contends that after reviewing the facts and circumstances leading up to Herrera's discharge and the discharge itself, it properly withdrew the grievance. The Union argues that the Complainant's allegation concerning another grievance pertaining to the 48-hour limit set forth in Section 5.02 of the Agreement is not meritorious, inasmuch as the 48-hour clock does not start until after the foreman or supervisor becomes aware that there may be discipline involved as a result of some absences. The Union also denies that it refused to represent Herrera because he had filed a complaint with the Wisconsin Employment Relations Commission because his grievances were heard after Herrera had filed his complaint and the Union processed them without reference to Herrera's charges.

COMPANY'S POSITION

The Company maintains that the Complainant has failed to prove by a clear and satisfactory preponderance of the evidence that the Union breached its duty of fairly representing him, and as a result, the Commission has no jurisdiction to determine the merits of his discharge. The Company contends that Herrera was discharged for just cause. It points to Herrera's disciplinary record and his three-day suspension on March 24, 25 and 26, 1981 as qualifying him for the next disciplinary step, i.e. termination. The Company contends that Herrera's unexcused absence on May 22, 1981 provided cause for his termination. It argues that Herrera's assertion that his absence on May 22, 1981 was excused is

completely unpersuasive as the undisputed evidence establishes that the May 26, 1981 doctor's excuse was thoroughly disclaimed and Herrera's doctor refused to excuse him for that date. The Company asserts that Herrera's earlier grievance on time limits is not applicable to his case as that grievance was not resolved in his favor and occurred prior to his suspension in March, 1981 which Herrera did not grieve. The Company further contends that Herrera's arguments on the 48-hour time limit set forth in Article 5, Section 2 are without merit as the time limit began when the supervisor became aware of the problem with the doctor's excuse which was about the middle of the shift on May 26, 1981, and Herrera was discharged at the beginning of the shift on May 28, 1981, well within the 48-hour limit. The Employer asks that the complaint be dismissed.

DISCUSSION

The Examiner will not exercise the Commission's jurisdiction to determine the merits of the Complainant's allegation that the Employer breached the collective bargaining in violation of Section 111.06(1)(f) Stats., absent a showing by a clear and satisfactory preponderance of the evidence that the Complainant attempted to exhaust the contractual grievance procedure and was frustrated in doing so by the Union's violation of its duty to fairly represent him. 2/ The Complainant does not have an absolute right to have his grievance processed through all the steps of the grievance procedure including arbitration, and the mere fact that the Union withdrew the grievance short of arbitration does not, without more, constitute a breach of its duty of fair representation. 3/ A Union is given a wide range of reasonableness in exercising its discretion in deciding whether to process a grievance. 4/ The standard that has generally been employed by the Commission and the courts in determining a breach of the duty of fair representation is whether the Union's conduct toward a bargaining unit employee is arbitrary, discriminatory, or in bad faith. 5/ Mere negligence, ineptitude, or poor judgment in grievance handling are insufficient to establish a breach of the duty of fair representation. 6/ Additionally, the failure of a Union to notify a grievant about the disposition of his/her grievance is an inadequate basis for finding a breach of the duty. 7/ A breach of the duty may be found where the Union processes a grievance in an arbitrary or perfunctory manner. 8/ A Union must investigate the facts of a grievance and consider the following relevant factors in determining whether to proceed to arbitration:

1) the monetary value of the employe's claim;
2) the effect of a breach of contract on the employe;
3) the likelihood of success in arbitration. 9/

Applying these principles to the instant case, the Examiner concludes that the Complainant has failed to prove by a clear and satisfactory preponderance of the evidence that the Union breached its duty to fairly represent him. Complainant's discharge for excessive absenteeism was based on the Complainant's absence on May 22, 1981. The Complainant steadfastly maintains that he was excused from work on May 22, 1981 as verified by a doctor's slip dated May 26, 1981. The Complainant maintains that the Union's determination that the medical

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2/ Mahnke V. WERC, 66 Wis. 2d 524, 225 N.W. 2d 617 (1975); Section 111.07(3) Wis. Stats.

3/ Mahnke, supra.

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

5/ Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369(1967)

6/ Coe v. Rubber Workers, 571 F.2d 1349, 98 LRRM 2304 (5th Cir, 1978)

7/ University of Wisconsin - Milwaukee Housing Department, 11457-F(1977)

8/ Hines v. Anchor Motor Freight, Inc., 424 I.A. 554, 91 LRRM 2481(1976)

9/ Mahnke, supra.

excuse was not acceptable was arbitrary. This argument is not persuasive. The evidence establishes that the original excuse was repudiated. At the Complainant's discharge meeting on May 28, 1981, Union President Buhler spoke directly with the Complainant's doctor, who stated that the medical slip was not valid. Buhler told the doctor that the Complainant would be discharged unless he had a valid excuse for May 22, 1981, but the doctor reaffirmed that he would not excuse the Complainant. The doctor also told Buhler that the Complainant had been instructed to see him on May 22, 1981, but he did not, and instead, sent a friend to his office. The Complainant offered no explanation why he failed to see the doctor on May 22, 1981 or why the Complainant's friend did not immediately inform the Complainant that the doctor insisted on seeing him. Buhler made it clear to the grievant that he should personally see his doctor and get another excuse for May 22, 1981. Buhler also got a commitment from the Employer to rescind the discharge if a second excuse could be produced. If the original excuse was valid, there should have been no reason for not obtaining a second excuse. When the Complainant failed to produce a second excuse, Buhler filed a grievance at the third step and processed it through the fourth step. At the fourth step, International Representative Bruss met with Buhler and reviewed the Complainant's disciplinary record, absenteeism record, the doctor's slip and insurance forms. Based on his knowledge of other arbitration cases, Bruss concluded that without a second excuse for May 22, 1981, the Union could not get an arbitrator to rule in favor of the Complainant. The Complainant offered no evidence of any facts that the Union was unaware of or did not consider when it made its decision. The evidence fails to demonstrate that the Union's decision was based on anything other than a considered judgment.

The Complainant also asserted that he should have been informed of the Union's decision not to proceed to arbitration. As stated above, the Union was not required to notify him of the disposition of the grievance and its failure to do so, in and of itself, is not a breach of the duty to fairly represent him.

The Complainant alleged that the Union withdrew his grievance because of his filing the instant complaint. The sole basis for this allegation is an alleged statement to that effect made to the Complainant by Buhler in August or September, 1981. The record reveals that the third-step grievance was filed on June 25, 1981, and the complaint was filed on July 7, 1981. The grievance was not answered by the Employer until September 11, 1981, and the grievance was appealed to the fourth step on September 22, 1981, with the fourth-step hearing occurring sometime after that. The grievance was withdrawn on the recommendation of Bruss, based solely on the merits. The Union's actions after the alleged statement was made contradicts the alleged statement of Buhler. Additionally, there is no proof Bruss had any hostility toward the Complainant or that the complaint played any part in his recommendation to withdraw the grievance. The undersigned concludes that this allegation has not been proved.

The Complainant also asserted that the Union's failure to process an earlier grievance related to the 48-hour limit for imposing discipline was harmful to the Complainant because if the Union had been successful in that grievance, the Complainant would have had one disciplinary step removed from his record and he would not have been discharged. This allegation is also without merit. There is no evidence that the grievance was or would have been resolved in favor of the Complainant. It is logical and reasonable that the 48-hour limit to impose discipline for absenteeism would not start until the supervisor became aware of an unexcused absence which provided the basis for such discipline. Such an interpretation is warranted in light of the language of the contract. It is clear that no discipline was removed from the Complainant's file and that he received a three-day suspension after this grievance was filed, yet the Complainant never grieved his suspension so that at the date of his discharge, the grievant's disciplinary record placed him at the discharge step.

The Examiner concludes that the evidence fails to show that the Union's treatment of the plaintiff was arbitrary, discriminatory or in bad faith, and therefore the Union did not breach its duty of fair representation by failing to pursue Complainant's grievance to arbitration. 10/

10/ See Parks v. U.S. Postal Service, 111 LRRM 2359 (D.C. Ind, 1981)

Inasmuch as Complainant's failure to exhaust the contractual grievance procedure was not the result of the Union's breach of its duty to fairly represent the Complainant, the Examiner will not determine the merits of the Complainant's breach of contract claim and, as a result, the Examiner has dismissed the complaint against the Respondents.

Dated at Madison, Wisconsin this 30th day of December, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By: Lionel L. Crowley
Lionel L. Crowley, Examiner