

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

-----  
BEN OTTO,  
Complainant,  
vs.  
MILWAUKEE PUBLIC SCHOOLS,  
Respondent.  
-----

Case CXXXIV  
No. 30075 MP-1354  
Decision No. 20005-A

Appearances

Mr. Gerald E. Conen, Attorney at Law, 710 North Plankinton Avenue, Suite 740, Milwaukee, Wisconsin 53203-2445, appearing on behalf of the Complainant.  
Mr. James B. Brennan, Milwaukee City Attorney, by Mr. Theophilas C. Crockett, Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.  
Goldberg, Previant, Uelmen, Gratz, Miller, & Brueggeman, S.C., Attorneys at Law, by Mr. Matthew R. Robbins, 788 North Jefferson Street, Milwaukee, Wisconsin 53202, appearing on behalf of witness John Shurla.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondent has committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission having appointed Dennis P. McGilligan, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Wis. Stats.; and a hearing on said complaint having been held in Milwaukee, Wisconsin on November 29 and 30, 1982 before the Examiner, and the parties having completed their briefing schedule by March 11, 1983, and the Examiner, having considered the evidence and arguments 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 Ben Otto, hereinafter referred to as the Complainant or Otto, was employed by Milwaukee Public Schools as a Painter in the Physical Plant, Repair Division from March 3, 1981 until his termination on January 7, 1983.

2. That Milwaukee Public Schools, hereinafter referred to as the Respondent or MPS, is a school district organized under and by virtue of the laws of the State of Wisconsin; that at all times material herein, MPS employed Thomas D. Graham, Assistant Superintendent, Division of Human Resources, Richard G. Pott, Staffing Specialist, Adrian Wisniewski, Director, Physical Plant Division, John B. Clementi, Assistant Director of Repairs, Ronald G. Allen, Construction Project Supervisor, Thomas H. Thurow, Foreman, Paint Shop and Gilbert Pokrzywninski, Painter.

3. That at all times material herein, the Respondent has recognized Painters and Allied Trades Union, Local 781 affiliated with the Milwaukee Building and Trades Council, AFL-CIO, as the exclusive bargaining representative of certain of its employees including the Complainant herein.

4. That the Respondent and Painters and Allied Trades Union, Local 781 affiliated with the Milwaukee Building and Trades Council, AFL-CIO were not signators to a collective bargaining agreement covering wages, hours, and working conditions of the aforesaid employees; that there was no grievance procedure

ending in final and binding arbitration available to the Complainant under any agreement between the aforementioned parties and that there was an informal grievance procedure available to the Complainant under Respondent's Civil Service rules under which Otto could be represented by the Union' noted above.

5. That painters represented by the aforesaid Union are not normally entitled to use vacation during their initial six month probationary period; that vacation days must be earned before they are used; that painters are not usually advanced vacation days; that painters must obtain the prior approval of their immediate supervisor to take vacation; and that painters turn in daily time sheets every other day to a chargeman who in turn gives them to a foreman for signature.

6. That on or about October 28, 1981, the Complainant asked Thurow for permission to use 7.5 vacation days in December, 1981 to take a Christmas trip to visit his brother in Oregon; that at this time Thurow informed Otto that 2.5 vacation days could be used in 1981 while the remaining five days had to be used in 1982; that the Complainant later confirmed the above comments by Thurow regarding his vacation days in a conversation with Pokrzynwinski sometime in December, 1981; that the Complainant was scheduled to work on the morning of December 28, 1981; that the Complainant asked Thurow sometime in the middle of December, 1981 whether he could take personal time off without pay on the morning of December 28, 1981 and after checking with Allen, Thurow denied the request; that immediately thereafter the Complainant asked Thurow if he could borrow 1/2 day of his 1982 vacation entitlement to use on the morning of December 28, 1981; that Thurow after checking with Allen, denied said request; that the Complainant received permission from Thurow to take vacation on the afternoon of December 28, December 29 and December 30, 1981; that Otto did not receive permission to be off work on the morning of December 28, 1981 or during the first week of January, 1982; that the Respondent expected the Complainant to be at work on January 4, 1982; that the Complainant left for Oregon to visit his brother on December 24, 1981 and returned on January 12, 1982; that Thurow called the Complainant's home on January 5, 6 and 7, 1982, but was unable to reach him; that by letter dated January 7, 1982, the Respondent advised the Complainant that he had resigned his position effective January 7, 1982, as follows:

The Director of Physical Plant has advised me that on the morning of December 28, 1981, you were absent without leave for 1/2 day and that you had previously been approved vacation for the afternoon of December 28, 1981, and December 29 and 30, 1981. You were scheduled to return to work on January 4, 1982. From January 4, 1982, through January 7, 1982, you have not reported to work nor called, in accordance with the call-in procedures. Your foreman has called your home on the mornings of the 5th, 6th and 7th, and was unable to contact you, however, he left a message on your answering service that he had called.

Therefore, in accordance with City Service Rule X, Section 5, you have been resigned from your position of Painter with the Milwaukee Public Schools effective at the close of business on January 7, 1982.

Rule X, Section 5, provides, "the absence of an officer or employee from duty for a period of three successive days or longer, without leave and without notice to the superior officer of the reasons for such absence and of his intention to return, may in the discretion of the department head and/or

Complainant's behalf; that on January 13, 1982, the Complainant met with Thurow, Allen and Wisniewski regarding his termination and in response to a question about when he left for Portland, Otto informed the group that he left on December 24, 1981; that during the course of this conversation on January 13th the Complainant further admitted that he never intended to work on December 28, 1981; that on January 15, 1982, Otto asked for and received grievance forms from the Respondent; that, however, he did not fill them out until February 22, 1982; that on January 14, 1982, the Complainant was told by Allen that he had been terminated without appeal as a result of being absent without leave; and that on or about March 16, 1982, the Complainant spoke with Potts about his remaining vacation days which Otto later received pursuant to an action in small claims court.

8. That on or about March 18, 1982, the Complainant called Shurla about his situation and Shurla told him that the Union was going to represent him; that subsequently Shurla informed the Complainant of an executive board meeting of the Union scheduled for April 12, 1982 at which time his dispute would be discussed; that both the Complainant and Thurow presented information about the dispute at said meeting to the Union executive board which consisted of all Union officers, Shurla and Business Representative K. Poweleit; that in his testimony before the board, the Complainant explained, among other things: (1) that Thurow told him he could only use 2.5 vacation days in 1981 and that the remaining five vacation days had to be used in 1982; (2) that he left for vacation on December 24, 1981, instead of the afternoon of December 28, 1981, which he had agreed to with Thurow; (3) that in a meeting with MPS officials Otto was asked why he didn't report to work on the morning of December 28, 1981 and his initial response was that he had hurt his finger, but later told those present that he was on vacation; that Thurow made the following points to the board: (1) he (Thurow) informed the Complainant that if he went on vacation that the Complainant would have to work the morning of December 28, 1981; (2) that the Complainant did not ask to be on vacation the first week of January, 1982; (3) he (Thurow) confirmed the conversation noted above wherein the Complainant explained why he was not at work on the morning of December 28, 1981; and (4) the Complainant was terminated because he was absent on December 28th and because he failed to inform his supervisor that he was going on vacation during the first week of January, 1982; that after hearing the Complainant's statement the Union believed him to have been untruthful about his departure date as well as the sequence of events the first week of January; and that after receiving the statements made by Thurow and the Complainant noted above as well as a statement from Pokrzywninski, the Union decided that the Complainant's grievance lacked merit and decided not to pursue it.

9. That the aforesaid Union did not act in an arbitrary, discriminatory or bad faith manner in deciding not to pursue the Complainant's grievance.

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

#### CONCLUSIONS OF LAW

1. That Ben Otto was a municipal employee within the meaning of Section 111.70(1)(b), Wis. Stats.

2. That Milwaukee Public Schools is a municipal employer within the meaning of Section 111.70(1)(a), Wis. Stats.

3. That Painters and Allied Trades Union, Local 781, affiliated with the Milwaukee Building and Trades Council, AFL-CIO is a labor organization within the meaning of Section 111.70(1)(j), Wis. Stats.

4. That because the Union, Painters and Allied Trades Union, Local 781 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, Milwaukee Public Schools, breached any agreement by its discharge of the Complainant or by its alleged failure to give him a hearing regarding same in violation of Section 111.70(3)(a)5, Wis. Stats.

5. That the Examiner lacks jurisdiction to consider allegations that the Respondent violated Section 111.70(3)(a) 4, Wis. Stats.

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 filed herein be, and the same hereby is, dismissed. 1/

Dated at Madison, Wisconsin this 16th day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan  
Dennis P. McGilligan, Examiner

- 
- 1/ 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

Otto's complaint alleges that because the Respondent terminated him while he was on vacation and denied him a hearing regarding same, Respondent has failed to bargain with him in violation of MERA. Further, the Complainant asserted at hearing that the Union failed to fairly represent him because it did not conduct a thorough investigation of his claim, had no formal meetings with MPS concerning his termination, and failed to process his grievance through the available grievance procedure. The Respondent answered by stating that the statutory duty to bargain does not run to the individual bargaining unit member but rather to the unit's bargaining representative. Respondent further argues that because Otto failed to allege that MPS failed to bargain with the representative of the bargaining unit the Examiner lacks jurisdiction in the matter. Further, the Respondent asserts that the complaint fails to allege a right to a hearing nor does the proof adduced at hearing establish a right to a hearing under an existing collective bargaining agreement between itself and the Union. Finally, the Respondent concludes that the determination Otto voluntarily resigned his employment was reasonable.

Generally, before an Examiner will assert the Commission's jurisdiction to determine the complaint's allegation that a municipal employer breached the collective bargaining agreement and thus Section 111.70(3)(a)5 of MERA, the 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 his Union's breach of its duty to fairly represent him. 2/ The test is whether the action of the Union was arbitrary or taken in bad faith in the performance of its duty to fairly represent its employee member. 3/ In applying the Mahnke test the Commission has held, inter alia that absent a showing of arbitrary, discriminatory, or bad faith conduct, a union is not obligated to carry grievances through all steps of the grievance procedure and that the Commission will not sit in judgment over the wisdom of union policies and decision making relative to the disposition of grievances. 4/

Further, the Complainant must demonstrate by a "clear and satisfactory preponderance of the evidence" that the Union's conduct toward him was arbitrary, discriminatory or done in bad faith. 5/ Absent such proof the Commission has refused to draw inferences of perfunctory or bad faith grievance handling. 6/

The Examiner notes that although Otto is represented by Painters and Allied Trades Union, Local 781 for collective bargaining purposes there is no collective bargaining agreement between Local 781 and MPS. Although there was a grievance procedure available to Otto, pursuant to Civil Service rules, the record does not disclose its structure or whether it culminates in final and binding arbitration. Nonetheless, the Complainant has the burden of demonstrating that the Union's conduct toward him was arbitrary, discriminatory or done in bad faith with respect to processing his grievance through the aforesaid grievance procedure. This he has failed to do.

---

2/ Mahnke vs. WERC, 66 Wis. 2d 524, 225 N.W. 2d 617 (1975).

3/ Mahnke supra, 532.

4/ University of Wisconsin-Milwaukee Housing Department 11457-F (1977).

5/ Section 111.07(3), Wis. Stats., City of Appleton (17541) 1/80.

6/ City of Janesville (15209-C) 3/78.

The record establishes that shortly after the Complainant discussed his termination with Shurla he (Shurla) contacted Wisniewski and requested a hearing on Otto's behalf. The record indicates that as a result of the above Otto met with Wisniewski, Allen and Thurow on January 13, 1982 and discussed his situation at some length. At this meeting the Complainant admitted leaving town on December 24, 1981, knowing that he was scheduled to work on the morning of December 28, 1981 and telling these representatives of the Respondent that he did not intend to work on December 28, 1981. Although he asked for and received grievance forms from MPS on January 13, 1982, the Complainant did not complete them until February 22, 1982. The record does not reveal whether he sought or obtained the assistance of Local 781 in this effort. Subsequently, the Complainant was told that the Union was going to represent him. However, on April 12, 1982, the Union solicited testimony from both Otto and Thurow and based on this evidence along with a statement from Pokrzymwinski, it determined that Otto's grievance lacked merit and decided not to pursue it. Essentially, at the above meeting the Union determined that Otto was in Oregon when he was scheduled to work on December 28, 1981; that he did not receive permission to be out on vacation during the first week of January, 1982; and that Otto did not report for work during the first week of January, 1982 as required and expected by the Respondent. Based on these facts, the undersigned concludes that the Union's decision not to support the Complainant's grievance was neither arbitrary, discriminatory or in bad faith. Here, the Complainant took his Oregon vacation in spite of what the Respondent told him about being unable to take off on the morning of December 28th. The Complainant also took off the first week in January despite having failed to get approval for same. The Complainant willfully absented himself from work without permission from the Respondent; presented no justification for doing so and initially fabricated a reason for being absent on the morning of December 28, 1981. Thus, the Union's decision that Otto's grievance lacked merit was reasonable and justified in the opinion of the Examiner.

Lastly, the duty to bargain only runs between "a municipal employer, through its officers and agents, and the representation of its employees". 7/ Thus, the Respondent had no duty to bargain with Otto regarding his termination as alleged by the Complainant. Consequently, the Examiner rejects this complaint allegation.

Having concluded that the Union did not breach its duty of fair representation toward the Complainant, the Examiner has no authority to determine whether the Respondent violated any collective bargaining agreement by terminating Otto or failing to give him a hearing regarding same. Based on same, and because there is no duty to bargain between the Respondent and the Complainant, I am dismissing the instant complaint in its entirety.

Dated at Madison, Wisconsin this 16th day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan  
(Dennis McGilligan, Examiner)

---

7/ Section 111.70(3)(a)4 Wis. Stats.