STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LEO GARSKI, Complainant, vs. WISCONSIN STATE EMPLOYEES UNION, COUNCIL 24, AFSCME, AFL-CIO and its affiliated Local 584; DAVID TIMM, PRESIDENT of Local 584; BERNIE ENGEBRETSON, VICE PRESIDENT of Local 584; and GARY STOUT, SECRETARY TREASURER of Local 584, Respondents.	Case I No. 33284 PP(S)-110 Decision No. 21854-A

Appearances:

Mr. Leo Garski, 1706 Monica Court, Plover, Wisconsin 54467, appearing pro se.

Lawton & Cates, Attorneys at Law, 110 East Main Street, Tenney Building, Madison, Wisconsin 53703, by Mr. Richard V. Graylow, appearing on behalf of Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel J. Nielsen, Examiner: Leo Garski, hereinafter referred to as the Complainant, having on May 8, 1984, filed a complaint of unfair labor practices against the Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, and its affiliated Local 584, hereinafter referred to as the Respondent Union, and David Timm, Bernie Engebretson, and Gary Stout, Officers of Local 584, hereinafter referred to as the Respondents Timm, Engebretson and Stout, respectively; and the Commission having appointed Daniel J. Nielsen, an Examiner on its staff, to serve as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07(5), Wisconsin Employment Peace Act; and the Respondents having entered an answer on July 26, 1984, wherein they denied the allegations in the complaint and moved to dismiss the complaint; and the hearing having been conducted before the Examiner on July 30, 1984 in Stevens Point, Wisconsin; and a stenographic record of the hearing having been made, a transcript of which was received by the Examiner on August 9, 1984; and the Complainant having submitted a "Summary of the Hearing" which was received by the Examiner on August 13, 1984; and the briefing schedule having expired without the submission of written argument by the Respondents; and the record having been closed on September 4, 1984; and the Examiner having considered the evidence, arguments of the parties and the record as a whole, 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 Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, and its affiliated Local 584, hereinafter referred to as the Respondent Union, are labor organizations having their principle offices at 5 Odana Court, Madison, Wisconsin 53719; that among the employes represented by the Respondent Unions are certain employes of the Housing Department at the University of Wisconsin-Stevens Point, including those employes in classification of Building Maintenance Helper II; that, at all times material herein, the Officers of Local 584 were David Timm, President, Bernie Engebretson, Vice President, and Gary Stout, Secretary-Treasurer.

2. That Leo Garski, hereinafter referred to as the Complainant, is employed as a Building Maintenance Helper II in the Housing Department at the University of Wisconsin-Stevens Point; that Garski has been so employed for approximately twenty years; and that Garski is a former Vice President of Local 584.

3. That on March 17, 1983, the Complainant filed a group grievance alleging that Building Maintenance Helper II's were being required to work out of their classification in replacing broken windows at the Stevens Point campus; that the grievance further alleged that some Building Maintenance Helper II's (BMH II's) were receiving assistance with this work while others were not, thus discriminating against those who were required to work unassisted; that management denied the grievance in an answer dated March 24, 1983; that, by motion of the general membership of Local 584 in the spring of 1983, David Timm was directed to investigate the discrimination grievance filed by Garski; that Timm discussed the grievance with certain of the members who had signed on the grievance; that several of the members who had originally signed on the grievance decided to remove their names after speaking with Timm; that other members who had signed the original grievance did not wish to have their names removed; that the grievance was thereafter processed through the third step of the grievance procedure; that the third step of the grievance procedure involves a meeting between the grievance representative for WSEU and the designated grievance representative for UW-System; that David Timm was the designated third step grievance representative for the WSEU and Tom Moran was the designated third step grievance representative for the University of Wisconsin system; that the third step meeting was held after the normal time limits for processing a grievance from the second step to the third step had expired; that the grievance was denied at the third step; and that the status of this grievance was as yet undetermined as of the date of the hearing on the instant complaint.

4. That Timm's actions in discussing the grievance with certain of the grievants, including encouraging persons to sign off of the grievance, did not prejudice the rights of the remaining grievants with respect to the grievance; and that Local 584's processing of the group grievance as set forth in Finding of Fact 3 supra, was not arbitrary, nor discriminatory, nor indicative of bad faith.

5. That Complainant Garski called in sick on September 30, 1983 complaining of stomach pains; that certain of his supervisors later in the day observed him in a tavern near his home; that Garski was notified on October 11, 1983 that the University was considering discipline against him; that he asked Gary Stout, Secretary-Treasurer of Local 584, to represent him at the fact-finding hearing in the matter; that the fact-finding hearing was held on October 20, 1983 at the University of Wisconsin-Stevens Point; that Stout represented the Complainant at the fact-finding hearing; that Stout introduced evidence at the fact-finding hearing to show that Garski was in fact ill on the day in question and was later admitted to the hospital; that Stout further introduced evidence that the Complainant had not had anything to drink while in the tavern; that at the close of the fact-finding hearing, management decided to impose a written reprimand on the Complainant; that, after the fact-finding hearing, the Complainant told Stout that he wished to pursue the matter further; that Stout told Garski he would prefer that someone else represent him in the grievance because he personally felt that discipline was appropriate; that Stout referred the Complainant to leadership of Local 584 to secure another representative; that the Complainant spoke to David Timm regarding the matter and that Timm also expressed the opinion that discipline was appropriate; and that Garski did not file a formal grievance over the letter of reprimand issued to him after the fact-finding hearing.

6. That Gary Stout's reluctance to pursue a grievance on behalf of Complainant in the matter of his discipline was not arbitrary, discriminatory nor in bad faith inasmuch as it was premised upon his evaluation of the merits of such a grievance; that David Timm's reluctance to pursue a formal grievance in the matter of the Complainant's, discipline was not arbitrary, discriminatory nor in bad faith in that it was premised upon an evaluation of the merits of such a grievance; and that the record in the instant case does not reflect that the right to arbitrate under the collective bargaining agreement is exclusive to the Union.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following Conclusions of Law.

CONCLUSIONS OF LAW

1. That Leo Garski is an "employe" within the meaning of Sec. 111.81(15), State Employment Labor Relations Act;

2. That the Wisconsin State Employees Union and its affiliated Local No. 584 are "labor organizations" within the meaning of Sec. 111.81(9), SELRA; and that David Timm, Bernie Engebretson and Gary Stout are agents of Local 584 in their capacities as local officers;

3. That the Respondents, through their processing of a group grievance as set forth in Findings of Fact 3 and 4, supra, did not commit any unfair labor practices within the meaning of Sec. 111.84, SELRA;

4. And that the Respondents, through the processing of the matter of Garski's discipline as set forth in Findings of Fact 5 and 6 supra, did not commit an unfair labor practice within the meaning of Sec. 111.84, SELRA.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the undersigned makes and issues the following

ORDER 1/

IT IS HEREBY ORDERED that the instant complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 14th day of September, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Daniel J. Nielsen, 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.

WISCONSIN STATE EMPLOYEES UNION, COUNCIL 24, AFSCME, AFL-CIO AND ITS AFFILIATED LOCAL 584, Case I, Dec. No. 21854-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. BACKGROUND

The Complainant is employed as Building Maintenance Helper II at the University of Wisconsin-Stevens Point. His complaint centers on the handling by his local union of two grievances. The first dealt with the assignment of work out of classification by the University, and the second with discipline imposed by the University on the Complainant himself for abuse of sick leave. A third grievance raised in the complaint, concerning illegal transfers, was not mentioned thereafter in the testimony or argument, and is therefore dismissed without consideration by the Examiner based upon a lack of any evidence.

With respect to the first grievance, alleging violations of the contract for assigning work out of classification and discrimination in assisting some building maintenance helpers with replacing broken windows while denying it to others, the record evidence establishes that the grievance was filed in March, 1983. Sometime thereafter, a motion was made at a membership meeting of Local 584 to have the President investigate the grievance. David Timm, the President of the Local, discussed the grievance with those who had signed it. In the course of these discussions, several of the original signators signed off the grievance indicating that they wished the matter dropped. Some of these individuals apparently were influenced by Timm's comments regarding the long range implications of the grievance. Other individual signators did not sign off the grievance. The grievance was ultimately processed through the third step of the grievance procedure, where it was denied by the University's grievance representative. While the grievance has not been heard in arbitration as yet, neither has it apparently been dropped. Timm testified that this grievance was among two or three that he was still awaiting word on and was unsure of its status.

The second "grievance" was not formally filed as a grievance. The Complainant was disciplined for abuse of sick leave following a fact-finding hearing by the University's representative. The Respondent Stout represented him at the fact finding hearing. At the conclusion of the hearing, Stout informed him that he would prefer not to represent him any further, as he believed the Complainant's actions merited a written reprimand by the employer. Timm later expressed agreement with Stout's analysis when the Complainant spoke with him about filing a grievance. The evidentiary record does not reflect that the Complainant thereafter filed a grievance or pursued the matter with either the Union or the University.

II. POSITIONS OF THE PARTIES

The Complainant submitted a "Summary of the Hearing" wherein he argued that:

Summary of the Hearing

> I can find no minutes of a Local 584 Union Meeting where anyone made a motion for Dave Timm to make an investigation on group evidence. If ever there was such a motion made, he did not make an investigation by telling people to take their names off a grievance because everybody else did, and by telling people they would be demoted if they did not take their name off a grievance. This is not an investigation, it is another violation by the President of Local 584, Dave Timm. It is a lie and very misleading.
>
> For a person to be sick and be admitted to the hospital and be disciplined for abusing sick leave, and for the union or the person's representative at the fact finding hearing not to represent that person at a grievance, would not be proper representation, and it would be very unfair.

> The union had a lawyer. I could not afford one; if I could afford one there would have been more evidence, and it would have been presented better.

Leo Garski
1706 Monica Court
Plover, WI 54467

The Respondent submitted no written arguments, other than to renew the motions to dismiss previously entered on the grounds that:

1. The Complainant failed to state a cause of action; and

2. The complaint was procedurally defective in that it failed to specify what sections of the statute had been violated, nor specify the statutory authority for the complaint; and

3. The complaint alleged actions beyond the one year statute of limitations; and

4. The Complainant had failed to join an indispensable party as it did not name the employer, the University of Wisconsin, as a Respondent.

III. DISCUSSION

Although the Complainant was not represented by counsel and did not therefore use the standard terms of art for his grievance against Local 584, it is plain from the complaint and the evidence adduced at hearing that he is charging the Union and its officers with a violation of their duty of fair representation. The standard for evaluating a Union's conduct in processing grievances was discussed by the Wisconsin Supreme Court in Mahnke v. WERC, 66 Wis. 2d 524 (1975).

> . . . (Vaca v. Sipes, 386 U.S. 171, 87 Sup. Ct. 903, 17 L. Ed. 2d 842 (1967)) . . . provides that suit may be brought subsequent to an arbitrary, discriminatory or bad faith refusal to arbitrate by the union. Vaca also requires the union to make decisions as to the merits of each grievance. It is submitted that such decision should take into account at least the monetary value of his claim, the effect of the breach on the employee and the likelihood of success in arbitration. Absent such a good-faith determination, a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation.
>
> This is not to suggest that every grievance must go to arbitration, but at least that the union must in good faith weigh the relevant factors before making such determination.
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> - Mahnke, at page 534.

The Complainant has the burden of establishing his case by a clear and satisfactory preponderance of the evidence. 2/ While there is language in the Commission's Guthrie decision 3/ which, read in the abstract, seems to suggest that the Union has the burden of demonstrating that it considered the Mahnke standards, a close reading of the case reveals that there is no inconsistency between the Union's obligation to produce such evidence and the statutory burden of proof on the Complainant. In Guthrie, the Commission reviewed the evidence concerning the Union's handling of the Complainant's discharge grievance and concluded that it had not shown compliance with the Mahnke standards. The

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2/ Section 111.07(3), Stats., Wisconsin Employment Peace Act, made applicable to proceedings under SELRA by Section 111.84(4), Stats.

3/ Sam Guthrie v. Local 82, Council 24, AFSCME, AFL-CIO and University of Wisconsin-Milwaukee, Housing Department, Dec. No. 11457-H (WERC, 5/84).

Commission then stated that "We simply cannot assume that the Respondent Union considered and weighed the Mahnke factors." (Guthrie, supra, at pg. 25). This statement does not, in the Examiner's view, place a burden of proof on the Union to demonstrate a negative - i.e. that it was not arbitrary, discriminatory or acting in bad faith. It merely expresses the fact that the Union had failed to rebut a prima facie case already made by the Complainant in the Guthrie case, and that absent such evidence there can be no presumption of regularity in the Union's handling of the grievance.

In reviewing the record in this case, therefore, the Examiner must determine whether the Complainant has made a prima facie case by showing that (1) a grievance existed; and (2) the Union failed to pursue the grievance through the grievance procedure; and (3) the Union's failure to process the grievance prejudiced the employe's rights; and (4) there is some reason to believe that the Union's failure to pursue the grievance was arbitrary or discriminatory or resulted from bad faith. This final point may be established through direct evidence, or by drawing a reasonable inference from the record. If the Complainant has made its prima facie case, the Examiner must weigh the entirety of the record evidence, including the Mahnke factors, to determine whether the Complainant has met its burden of proving the case by a clear and satisfactory preponderance of the evidence.

A. THE GRIEVANCE ALLEGING DISCRIMINATION AND IMPROPER ASSIGNMENT OF WORK

The complaint alleges that the Union failed to provide proper representation at the third step of the grievance procedure. The evidence adduced at hearing, however, focused upon Timm's efforts to investigate the grievance and the allegation that he attempted to persuade individual signators to remove their names from the grievance. With respect to this latter point, the Examiner can discern no prejudice resulting to the Complainant by virtue of Timm's actions. The grievance was not dropped as a result of Timm's efforts and was processed through to the third step. The interplay between Timm and the indiviudal signators does not go to the quality of representation given those grievants who chose not to sign off the grievance. Moreover, the Complainant did not produce any evidence from which one could reasonably infer an improper motive on the part of the Union. The only evidence relating to Timm's discussions with the individual signators suggest that Timm had concerns about the long range implications of the grievance. This is a legitimate concern for a union representative when considering whether to file or process a grievance. In short, there can be no conclusion that the Union violated its duty of fair representation through Timm's discussions with the individual grievants, since his conduct at these preliminary steps did not appear to bear on the quality of representation in the later steps of the procedure, and there is nothing to suggest bad faith, discrimination or arbitrary conduct.

With respect to the allegation that proper representation was not provided at the third step, the evidence in the record is scant. The record establishes that the grievance was taken to a third step meeting with Thomas Moran, the University's designated representative. The grievance was presented to Moran and at some point, Moran walked out of the meeting. Again, the record is devoid of any evidence relating to the quality of representation at the third step or suggesting that the Union acted in other than subjective good faith.

Finally, the Examiner cannot conclude that the Union has failed to pursue the grievance in a manner inconsistent with its duty of fair representation for the simple reason that the grievance has not yet been resolved. Timm testified that the grievance had not been dropped after the third step, although neither had it been arbitrated. Instead, he testified that this was one of two or three grievances on which he was awaiting word. While the Examiner finds it troubling that the status of the grievance would be in question after such a length of time, the record is insufficient to draw any particular conclusions from this fact. Thus the Complainant has failed to make his prima facie case, in that he has demonstrated neither that the Union failed to pursue the grievance nor that any prejudice has resulted to him from the Union's action or inaction. Put plainly, the record is not adequate with respect to the merits of this grievance, the processing of this grievance or the disposition of this grievance, to allow any firm conclusions about the Complainant's first cause of action. The Examiner therefore dismisses this portion of the complaint in its entirety.

B. THE DISCIPLINE AGAINST GARSKI

The second major cause of action stated by the Complainant centers on the Union's handling of the discipline imposed on him for abuse of sick leave. The grievant was disciplined for being seen in a tavern during working hours while on sick leave. A fact-finding hearing was held before the University's representative on October 20, 1983. Gary Stout, the Secretary-Treasurer of the Local and a named Respondent herein, represented the grievant at his request at the fact-finding hearing. The record establishes that Stout presented the available evidence to management and argued in favor of Garski's position. Management determined to issue a written reprimand at the end of the fact-finding hearing. Stout then informed the Complainant that he would prefer not to represent him on a grievnace over the discipline, since he felt that management had acted appropriately. When Garski spoke with David Timm about filing a grievance, Timm echoed Stout's sentiments. No grievance was thereafter filed.

The record does not unequivocally establish that the Union refused to file a grievance on Garski's behalf. 4/ Stout denied refusing Garski's request, stating that he had merely expressed a preference that Garski secure another representative. The only evidence tending to show that the Complainant pursued the matter further is presented in his redirect testimony, to wit:

> MR. GARSKI: And I would just like to state that Gary Stout did get angry at that fact-finding hearing and Dave Timm was within less than 10 feet when I asked Gary to file the grievance for me, and I got the same answer from Gary as I did from Mr. Timm. That's all I have.
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> - Transcript, pg. 49, folios 17-22.

Resolving all ambiguities in favor of the Complainant, the undersigned will assume, without concluding, that Garski did demand that a grievance be filed on his behalf and that this demand was refused. Even with the foregoing assumption, the Complainant has not made a prima facie case. There is nothing in the record to raise any questions about the Union's course of conduct. Indeed, the record supports the conclusion that the Union had a reasonable basis for not wishing to process the grievance over Garski's discipline. The conduct of the Complainant in being present at a tavern while on sick leave is, in the mainstream of labor relations, grounds for discipline. It is apparent from the testimony presented that the Union weighed likely loss to the grievant - a written reprimand - against the likelihood of success in the grievance procedure and decided against pursuing a grievance. The Union's decision was reasonable on its face, and satisfies the Mahnke standards. Thus the Union satisfied its duty of fair representation with respect to the Complainant's disciplinary grievance.

Dated at Madison, Wisconsin this 14th day of September, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Daniel J. Nielsen, Examiner

4/ Neither does the record reflect whether such a refusal would have prejudiced the Complainant's contractual right to grieve. Neither party introduced a copy of the applicable collective bargaining agreement into evidence. The Examiner proceeds on assumption that the Union's right to grieve is exclusive. Given the Examiner's conclusion that the Union had a non-arbitrary basis for refusing to pursue the matter, the question of prejudice is not determinative.