

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EDNA C. JOHNSON,	:	
	:	
Complainant,	:	
	:	Case 2
vs.	:	No. 33662 PP(S)-113
	:	Decision No. 21980-D
AFSCME, COUNCIL 24, WISCONSIN STATE	:	
EMPLOYEES UNION,	:	
	:	
Respondent.	:	
	:	

Appearances:

Castellani, Sheedy & McCormick, by Mr. Michael T. Sheedy, 829 North Marshall Street, Milwaukee, Wisconsin 53202, appearing on behalf of Complainant Edna C. Johnson.
 Lawton & Cates, S.C., by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703, appearing on behalf of Respondent AFSCME, Council 24.

SUPPLEMENTAL FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Edna C. Johnson filed a complaint without the accompanying filing fee on July 13, 1984 with the Wisconsin Employment Relations Commission, alleging that AFSCME, Council 24, Wisconsin State Employees Union had violated unspecified sections of Sec. 111.84, Wis. Stats., by failing and refusing to fairly represent her in an arbitration proceeding; that she remitted the fee on August 8, 1984; that on December 10, 1984, Complainant Johnson filed an amended complaint which incorporated her original complaint by reference and alleged that within the last calendar year, Respondent Union refused to pay the costs for the above-referenced arbitration proceeding and continues to unfairly represent Complainant Johnson by withdrawing support in grievance arbitration Case 4053; that the Commission appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5) Wis. Stats.; that hearing was held on January 17, 1985, and again on July 20, 1989, on Respondent's Motion to Dismiss for want of jurisdiction, at which time the parties were given full opportunity to present their evidence and arguments; that the parties completed their briefing schedule on September 18, 1989; that the undersigned Examiner issued Findings of Fact, Conclusions of Law and an Order Granting Motion to Dismiss in this matter on November 1, 1989 in which she dismissed all of the allegations contained in the initial and amended complaints for being filed out of time within the meaning of Sec. 111.84(4) and 111.07(14); the Complainant having filed a petition with the Commission seeking review of the Examiner's decision on November 13, 1989, the parties having filed additional written briefs the last of which was received on December 15, 1989; the Commission having on February 27, 1990, issued an Order Affirming in Part and Modifying in Part the Examiner's Findings of Fact and Conclusion of Law and further dismissing the original and amended complaints except for the allegation that Respondent Union committed an unfair labor practice on October 10, 1984 as to Grievance Arbitration Case 4053; the Commission having remanded said allegation to the Examiner for further proceedings; hearing on said allegation having been held on September 10, 1990 in Milwaukee, Wisconsin at the conclusion of which the parties made oral arguments; the Examiner having received the transcript on October 15, 1990; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Supplemental Findings of Fact, Conclusion of Law and Order.

SUPPLEMENTAL FINDINGS OF FACT

1. That Edna C. Johnson, hereinafter referred to as the Complainant or Johnson, is an individual who resides at 1909 East Kenwood Boulevard, Milwaukee, Wisconsin, 53211.

2. That the State of Wisconsin, hereinafter referred to as the State is an employer employing employees in the performance of its various functions; and that a number of classifications of its employees are included in appropriate collective bargaining units and are represented by various labor organizations for purposes of collective bargaining pursuant to the State Employment Relations Act.

3. That AFSCME, Council 24, Wisconsin State Employees' Union, hereinafter Respondent Union, is a labor organization within the meaning of Sec. 111.81(12), Wis. Stats., and has its principal offices at 5 Odana Court, Madison, Wisconsin 53705; and that Cindy Manlove and Karl Hacker are and were at all times relevant employees and agents of Respondent Union occupying the positions of Southeastern Field Representative and Assistant Director of

Respondent respectively.

4. That in September of 1981, Johnson was discharged by the State.

5. That Johnson and Respondent Union contested her discharge by filing a grievance over said dispute.

6. That said grievance was appealed through the initial three steps of the grievance procedure and to arbitration in February of 1982.

7. That in February and March of 1982, Respondent Union and its Local 82 informed Johnson that they would not pursue her discharge case to arbitration but that she was free to hire an attorney and pursue the case on her own.

8. That Johnson did hire a private attorney and pursued her discharge to arbitration; that the arbitrator reinstated Johnson to her previous position; that upon her reinstatement, Johnson filed a grievance on October 10, 1983 alleging harassment and discrimination (Grievance Case No. 4053); that she complained as follows:

I think I am being harrassed (sic) and discriminated against because of the duties assigned to me by my supervisor since I reported back to work. Also my office is located in a storage room which is totally inadequate to perform my duties. The telephone is in now, but persons can only call in, I cannot call out. I have been excluded from all benefits lectures. The second step answer was not at all responsive.

and that as relief, she requested:

I want a clarification of my duties. I would like to know who is my charge, Fay or Kathy? I want some decent furniture in my office. Barbara Faucett's answer to the second step of my grievance did not address any of this.

9. That the grievance was processed to the third step of the grievance procedure; that Cindy Manlove, Respondent's agent, met with Johnson and discussed the grievance; that Manlove then met with management with respect to the grievance; that after meeting with management, Manlove discussed the grievance with Karl Hacker; that Manlove believed some of the working conditions of which Johnson was complaining, in particular the operation of her phone and the adequacy of her office, had been remedied or resolved at the time of her third step discussions with management and that the ongoing concern over job duties was not violative of any contractual provision of the agreement; that Manlove did not believe Johnson was being harassed; and that Manlove recommended to Hacker that Respondent Union not pursue Johnson's grievance any further.

10. That Hacker reviewed Johnson's grievance with Manlove and decided not to proceed to arbitration; that Hacker did not speak with Johnson prior to making said decision; that he informed Johnson by letter dated September 24, 1984 that the Respondent Union believed that the relief sought had been granted and that Respondent Union would not pursue the case to arbitration; and that he informed the State on or about October 10, 1984, of said decision on the part of Respondent Union.

11. That Complainant Johnson has failed to establish that the Respondent Union has acted arbitrarily, capriciously or in bad faith in refusing to pursue the harassment grievance to arbitration.

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

CONCLUSION OF LAW

That Respondent AFSCME, Council 24, Wisconsin State Employees Union, did not commit an unfair labor practice in violation of Sec. 111.84(2)(a).

Upon the basis of the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and renders the following

ORDER 1/

It is ordered that the allegation set forth in the amended complaint that Respondent Council 24 committed an unfair labor practice on October 20, 1984 as to its disposition of Grievance Arbitration Case 4053 be and hereby is dismissed.

Dated at Madison, Wisconsin this 15th day of November, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Mary Jo Schiavoni, 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,
CONCLUSION OF LAW AND ORDER

On February 27, 1990, the Commission issued a decision in which it affirmed in part and modified in part the undersigned examiner's original Findings of Fact and Conclusion of Law. It dismissed all allegations contained in the original and amended complaints with the exception of an allegation that Respondent Union committed an unfair labor practice on October 10 1984 as to Grievance Arbitration Case 4053. The Commission remanded that single allegation to the Examiner for further proceedings. Hearing on said allegation was held on September 10, 1990. The parties made brief oral arguments at that time.

POSITION OF THE PARTIES:

Complainant

The Complainant contends that Respondent Union did not represent her fairly and competently during the discharge proceedings and when she returned to work through her own efforts, it did not do anything to remedy the harassment and poor working conditions which she encountered. Complainant points out that Respondent Union did not investigate whether or not she was receiving in-coming calls or could make outgoing calls. It did nothing about the fact that she was given a storage room as an office; and it did nothing about her job assignment difficulties. According to the Complainant, Respondent Union just did not care.

Respondent

Respondent maintains that it investigated the harassment grievance as best it could. It maintains that inasmuch as all of the relief Johnson sought was granted, there was no reason to go further to arbitration. Respondent argues, in the alternative, that even if said relief was not granted, it had no duty to take her grievance to arbitration. Noting that Complainant has the burden of demonstrating that the Respondent's decision not to proceed to arbitration was arbitrary, discriminatory, or in bad faith, Respondent maintains that the Complainant has not met her burden. Thus, there has been no violation of the State Employment Relations Act.

DISCUSSION:

As the Respondent Union correctly points out the standard by which the Union's conduct must be measured is whether its action in refusing to process the grievance was "arbitrary, discriminatory, or in bad faith." 2/ Under such a standard, broad discretion is extended to unions as they seek to represent various constituencies within a bargaining unit. 3/ In duty of fair representation cases, a union's decision not to pursue even a meritorious grievance is not determinative of whether or not a violation of law has occurred. 4/ Only if the Union's action is arbitrary, discriminatory, or in bad faith is there a violation. Furthermore, Complainant has the burden of establishing her case by a clear and satisfactory preponderance of the evidence and absent such proof the Commission has refused to draw inferences of perfunctory or bad faith grievance handling. 5/

Union representative Manlove testified that she did not believe the Complainant was being harassed. She further stated that she felt that some of Johnson's complaints as to her working conditions, namely, the operation of her phone and the adequacy of her office, had been remedied by the time of the third step discussions with the State. Given these conclusions along with her assumption that the job assignment difficulties about which Johnson was complaining were not grievable under the collective bargaining agreement, Manlove recommended that the grievance not be pursued further and Hacker accepted Manlove's recommendation. This action, without any further evidence of bad faith, arbitrariness, or discrimination, falls well within the broad latitude granted to unions with respect to grievance disposition. Complainant strenuously avers that Respondent Union did not fairly represent her in her original discharge case and that now it is refusing to fairly represent her when she complains of harassment upon her reinstatement. As the Commission

2/ Mahnke v. WERC, 66 Wis. 2d 524 (1975); and Humphrey v. Moore, 375 U.S. 335 (1975).

3/ City of Greenfield, Dec. No. 24776-C (WERC, 2/89).

4/ City of Greenfield, supra at p. 6.

5/ School District of West Allis-West Milwaukee, Dec. No. 209822-D (Schiavoni, 10/84); Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, Dec. No. 21854-A (Nielsen, 9/84); also City of Madison, Dec. No. 24251-A (Schiavoni, 1/88).

made abundantly clear in its decision and order, this Examiner is without jurisdiction to consider Complainant's contentions with respect to the representation afforded to Complainant by Respondent Union in her original discharge case because her original and amended complaint were filed out of time within the meaning of Sec. 111.84(4) and 111.07(14), Stats. Moreover, Complainant has failed to present any evidence of hostility, bad faith, arbitrary or discriminatory conduct on the part of Respondent Union or its agents in refusing to continue to process Complainant's harassment grievance sufficient to refute the testimony of Manlove and Hacker or to meet its rather significant burden of proof in this matter. Therefore, this allegation is dismissed.

Dated at Madison, Wisconsin this 15th day of November, 1990.

By _____
Mary Jo Schiavoni, Examiner