STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TERRY ZIMMERMAN, WALTER BRZOZA, RICHARD LEPKOWSKI, and MARINETTE COUNTY SHERIFF'S DEPARTMENT EMPLOYEE'S UNION LOCAL 1752-B, Complainants, vs. WISCONSIN COUNCIL 40, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, Respondent.	Case 13 No. 33412 MP-1606 Decision No. 22051-A

Appearances:

Mr. Jeffrey A. Sisley, Vanden Heuvel Law Offices, 828 North Broadway, Suite 400, Milwaukee, Wisconsin 53202, appearing on behalf of Terry Zimmerman, Walter Brzoza, Richard Lepkowski, and Marinette County Sheriff's Department Employee's Union Local 1752-B.

Mr. Richard V. Graylow, Lawton and Cates, Attorneys at Law, 110 East Main Street, Madison, Wisconsin 53703-3354, appearing on behalf of Wisconsin Council 40, American Federation of State, County and Municipal Employees, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Terry Zimmerman, Walter Brzoza, Richard Lepkowski, and Marinette County Sheriff's Department Employees Union Local 1752-B filed a complaint with the Wisconsin Employment Relations Commission on June 11, 1984, in which the Complainants alleged that Wisconsin Council 40, American Federation of State, County and Municipal Employees, AFL-CIO had committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA). The Commission held the matter in abeyance while the parties attempted to resolve their differences. These efforts did not result in a resolution of the matter, however, and the Commission appointed, on October 22, 1984, Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a) and Sec. 111.07 of the Wisconsin Statutes. A hearing on the matter was conducted in Marinette, Wisconsin, on December 20, 1984. A transcript of that hearing was provided to the Examiner on January 15, 1985. The parties offered oral argument at the hearing and waived the filing of written briefs.

FINDINGS OF FACT

1. Terry Zimmerman, Walter Brzoza and Richard Lepkowski are each employed as a Deputy Sheriff by the Marinette County Sheriff's Department. Marinette County Sheriff's Department Employees Union Local 1752-B is a labor organization which has its offices located c/o Richard Lepkowski, Route 4, Box 283A, Crivitz, Wisconsin 54114. Zimmerman, Brzoza and Lepkowski are individual members of the Marinette County Sheriff's Department Employees Union Local 1752-B. Brzoza is the president of the Local, and Lepkowski is its secretary. Zimmerman, Brzoza, Lepkowski, and Marinette County Sheriff's Department Employees Union Local 1752-B are collectively referred to below as the Complainants.

2. Wisconsin Council 40, American Federation of State, County and Municipal Employees, AFL-CIO is referred to below as AFSCME, and is a labor organization which has its offices located at 5 Odana Court, Madison, Wisconsin 53719. AFSCME has been, at all times relevant to this proceeding, Complainants' exclusive collective bargaining representative for the purposes of collective bargaining with Marinette County.

3. Marinette County, which is referred to below as the County, is a municipal employer which has its offices located at the Marinette County Courthouse in Marinette, Wisconsin 54143, and which, among its various functions, operates a sheriff's department.

4. Cindy Fenton is an AFSCME staff representative who has had primary responsibility for representing Complainants for the purposes of collectively bargaining with the County from October of 1981 until the end of December of 1983. Georgia Johnson is also an AFSCME staff representative. Sometime in January of 1984, Johnson assumed primary responsibility for representing Complainants for the purposes of collective bargaining with the County. While serving as the staff representative with primary responsibility for representing Complainants, Fenton maintained a business address in Green Bay. On or about December 9, 1983, Fenton relocated to Stevens Point.

5. Fenton represented Complainants for the purposes of collectively bargaining with the County concerning a collective bargaining agreement to cover calendar year 1983. On April 18, 1983, AFSCME filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to initiate final and binding arbitration pursuant to Sec. 111.77, Stats. A Commission investigator conducted an investigation session on June 29, 1983, and advised the Commission on July 19, 1983, that the parties were at an impasse and that the investigator had closed the investigation. After the close of the investigation, the Commission ordered the parties to select an arbitrator to resolve the impasse. An arbitrator was ultimately appointed by the Commission on August 17, 1983. A hearing was conducted before the appointed arbitrator on November 16, 1983. Before the close of that hearing, Fenton and James Murphy, the County's corporation counsel who represented the County at the hearing, agreed that the parties would submit briefs to the arbitrator not later than December 15, 1983. The parties also agreed that Fenton would supply to the arbitrator, in addition to her brief, certain documents clarifying two AFSCME exhibits which had been the subject of some controversy at the November 16, 1983, hearing. Sometime after the November 16 hearing, Fenton contacted Murphy and requested an extension of the briefing schedule which Murphy granted. Their agreement extended the briefing schedule until January 20, 1984. Fenton did not notify the arbitrator or Complainants about this extension.

6. Fenton mails correspondence from her Stevens Point address by placing the correspondence on her front porch where it is picked up by a mail carrier. On January 20, 1984, Fenton placed an envelope on her front porch containing a cover letter, two copies of AFSCME's brief in the pending arbitration as well as revisions of the two Union exhibits which had been disputed at the November 16, 1983, hearing. Fenton put postage on the envelope, but did not arrange for the envelope to be conveyed by registered or certified mail. Fenton has, in the past, had documents lost in the mail.

7. Local 1752-B conducted a Union meeting on March 6, 1984. Johnson appeared at that meeting and responded to various questions regarding whether or not briefs had been filed in the pending arbitration. Certain members requested Johnson to contact the arbitrator regarding the source of delay in the matter. Johnson responded that she believed contact on her part with the arbitrator could be considered ex parte and would be an ill advised step to take since such contact might prejudice the arbitrator against the party making the contact. On March 8, 1984, Lepkowski telephoned the arbitrator to discuss the processing of the arbitration. On March 14, 1984, Brzoza telephoned Johnson to, among other things, determine if she had contacted the arbitrator, and if she would supply Complainants with a copy of AFSCME's brief in the matter. Brzoza and Johnson, in addition to these matters, discussed whether or not the members of Local 1752-B had any intention of disaffiliating with AFSCME and forming an independent association. Johnson did not contact the arbitrator in March of 1984. Lepkowski, in a letter dated March 26, 1984, advised Johnson of various concerns he had regarding the pending arbitration. The body of that letter states:

> The purpose of this letter is to let you know that the local intends to take appropriate action if AFSCME does not begin to appropriately represent our local. They want answers to the following questions within the next five days:
>
> 1) Has AFSCME by either Cindy F. Fenton or yourself provided the County with an explanation of Exhibits 3 and 4 as promised at the arbitration hearing?

2. Has the local's arbitration brief been filed?

3. If so, why haven't I, as secretary of the union, received a copy of the brief?

While the local is not interested in proceeding against you with a prohibitive (sic) practice charge or a breach of the union's duty of fair representation suit, I believe that we have no alternative if the above questions are not answered within the immediate future. As is obvious, we have yet to receive a decision relative to our 1983 contract and we are well into 1984.

Please let me hear from you soon.

Johnson responded in a letter dated April 2, 1984, which stated:

When I received your letter of March 26th today, I was quite frankly puzzled by its content in light of events since our March 6th meeting, and most especially, the fact that I've received no additional servicing requests from your local in the interim.

While my schedule, at the moment, does not permit an exhaustive reply to the now-familiar litany of questions relating to the '83 agreement herein, please be advised that I have had at least one follow-up discussion with your Local President since the March 6th membership meeting I attended at his request, wherein I advised that I was pursuing the inquiries made by the local at that meeting and that should I have something more definitive to report, Brother Brzoza, as LocalPresident (sic), would be promptly and appropriately informed.

If you or Brother Brzoza will kindly advise me of the date of your next regularly scheduled membership meeting, I will, as I assured the local on the 6th, attempt to arrange my schedule, insofar as possible, to attend your meeting to offer further clarification should the situation, in my judgment, warrant it.

. . .

8. In a letter to the arbitrator dated April 14, 1984, Lepkowski stated:

On November 16, 1983, You arbitrated the contract offers between, Marinette County and Marinette County Sheriff's Union, Local 1752B. I spoke with You on March 8, 1984 and March 26, 1984. You indicated to Me that to the best of Your knowledge, briefs, that were required to have been filed by December 16, 1983, have not been filed. We have been unsuccessful obtaining a (sic) explaination (sic) from Our Representative.

Our Membership understands Your request for briefs. However, We are requesting, at this time, for Your immediate decision regarding the arbitration between Marinette County and Our Local.

We will appreciate Your earliest consideration in this matter.

The arbitrator responded in a letter addressed to Murphy and Fenton dated April 30, 1984, which stated:

Enclosed please find a copy of the certified letter I received April 14, 1984, from Richard Lepkowski, Secretary, Marinette County Sheriff's Union.

> I view this ex parte communication by a local Union official as inappropriate. Therefore, I have chosen not to respond, except to the extent of carbon copying Mr. Lepkowski indicating my handling of this matter. Moreover, I view this as somewhat of an internal Union matter in which I should not be requested to intercede.
>
> I would also like to take this opportunity to point out that on March 5, 1984, I wrote the parties requesting information as to when I could expect their Briefs which were due on December 15, 1983. As of this date I have not received a reply to my March 5 letter or copies of your Briefs. In view thereof, please advise as to the status of this case.

The letter was addressed to Fenton's Green Bay address. In a letter to Brzoza dated May 8, 1984, Johnson advised Brzoza of certain concerns on her part. The typewritten body of that letter reads as follows:

> While generally in this business Staff Representatives take "no news" to be "good news," I noted while doing other work that I've not received any servicing requests from your Local since mid-March, no reply to my written request for advance notification of Local meetings at which you'll require my presence, and no follow-up to schedule a meeting to discuss the dispatcher issue with Local 1752-A representatives.
>
> More importantly, I still have not received your Local's initial bargaining requests for 1984, and it's now May! You'll recall, Wally, that I asked you and your folks on March 6th to get your '84 bargaining demands together and to schedule a meeting with me as soon as possible, so that we were prepared to bargain '84 whenever a decision on '83 came down. I'm renewing that request and must insist that you give these matters your prompt attention - in order to assure that your members receive the best level of service possible.
>
> Incidentally, while I have no "inside" information that Arbitrator Vernon has, or is about to, issue a decision with respect to your '83 Agreement, I'm aware that a member of your Local has engaged in "ex parte" communication with him. I sincerely hope it hasn't hurt your case. If you require details in order to take effective measures to halt inappropriate conduct of this sort, please don't hesitate to call me.
>
> I look forward to hearing from you and to receiving your bargaining proposals shortly.

At the bottom of this letter appears a handwritten postscript. Johnson authored this postscript which reads as follows: "Fenton amazed our brief copies sent for exchange weren't rec'd. Perhaps if you'd let me know . . . at any rate, another set is being set." Fenton, in a letter to the arbitrator dated May 15, 1984, stated:

> I am in receipt of your letter dated April 30, 1984. I received your letter on May 7, 1984. I note that you wrote to me at my Green Bay address. The post office forwarded same to me. In any event please be advised that the correct mailing address is shown in the upper right hand corner.
>
> I was somewhat perplexed to find that you had written to myself and James Murphy on March 5, 1984. I did not receive that communication. However, inasmuch as I moved in the middle of December of 1983, perhaps the post office simply screwed up. Your April 30th letter indicated that you have not received briefs from either party.
>
> Please be advised that I did forward to you two copies of the Union's brief and revised exhibits on January 20, 1984. I had spoken with Mr. Murphy's office and indicated that the Unions' brief was going to be late. There was no indication that this presented a problem.

> Be that as it may, I am again forwarding to you two copies of the Union's brief, revised exhibits U4 and U6, plus supporting contracts. I am sending this letter by certified mail in order to avoid any further problems.
>
> Should you have any questions, please contact the undersigned.

9. In a letter to Murphy and Fenton dated June 4, 1984, the arbitrator stated:

> The purpose of this letter is bi-fold:
>
> 1. To acknowledge receipt of the enclosed letter from Ms. Fenton, which included her brief in the above-captioned matter.
>
> 2. To ascertain either the whereabouts of Mr. Murphy's brief or to determine if he intends to submit a brief.
>
> I request that Mr. Murphy respond immediately.

Complainants, on June 11, 1984, filed with the Commission the complaint of prohibited practices which initiated the present proceeding. In a letter to Murphy dated June 22, 1984, the arbitrator stated:

> On June 4, 1984, I wrote you for the purpose of ascertaining the whereabouts of your brief, which was due to be submitted December 15, 1983, in the above-captioned matter. I also wrote you to the same effect on March 5, and April 30, 1984. As of this date, I have not received a response from you concerning your brief.
>
> This is to inform you that, if I have not received a copy of your brief postmarked Friday, June 29, 1984, I will proceed and make a decision based on the evidence and arguments of record as of that date.

Murphy responded to this letter with a brief dated June 28, 1984. With an award dated September 25, 1984, the arbitrator issued a written decision completing the arbitration proceeding. The arbitrator's award selected the final offer of the County which included a wage increase made retroactive to the first day the contract was, by it terms, effective.

10. Lepkowski and Brzoza are not satisfied with the representation afforded Complainants by AFSCME. Lepkowski feels that his dissatisfaction is shared by a majority of the membership of Local 1752-B. Lepkowski stated that an attempt to initiate an election proceeding by which AFSCME's status as exclusive collective bargaining representative for Complainants could be tested was once initiated, but that this attempt was withdrawn because it had not been initiated in a timely fashion.

11. Those extensions of the briefing schedule which were made by the parties were mutually agreed upon by Fenton and Murphy. AFSCME did not, during the processing of the arbitration proceeding discussed above, behave toward Complainants in a bad faith or discriminatory fashion. AFSCME's conduct during the processing of that arbitration cannot be characterized as anything more than mere negligence, and thus cannot be considered arbitrary conduct.

CONCLUSIONS OF LAW

1. Terry Zimmerman, Walter Brzoza, and Richard Lepkowski are each a "Municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

2. Marinette County Sheriff's Department Employees Union Local 1752-B is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

3. Wisconsin Council 40, American Federation of State, County and Municipal Employees, AFL-CIO is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

4. Marinette County is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

5. AFSCME did not, during the processing of the arbitration proceeding discussed in the Findings of Fact above, behave toward Complainants in a bad faith or discriminatory fashion. AFSCME's conduct during the processing of that arbitration cannot be characterized as anything more than mere negligence and, thus, cannot be characterized as arbitrary conduct. Since AFSCME did not behave toward Complainants in an arbitrary, discriminatory or bad faith fashion during the processing of the arbitration, AFSCME did not commit any prohibited practice within the meaning of Sec. 111.70(3)(b)1, Stats.

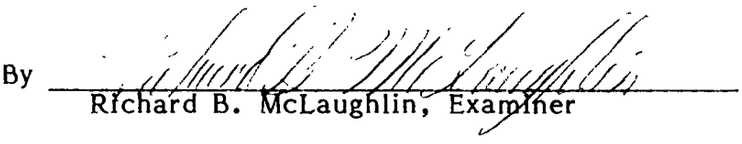
6. Complainants have not, by a clear and satisfactory preponderance of the evidence, demonstrated any conduct on AFSCME's part which would establish a violation of Sec. 111.70(3)(b)2, 3, or (c), Stats.

ORDER 1/

The complaint is dismissed in its entirety.

Dated at Madison, Wisconsin this 21st day of March, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, 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

The Parties' Positions

Complainants argue that the present matter centers on AFSCME's long-delayed filing of a brief in an arbitration under Sec. 111.77, Stats. According to Complainants, evidence to establish AFSCME's breach of its duty of fair representation has, of necessity, been circumstantial but does establish that considerable mistrust existed between Complainants and AFSCME and that AFSCME demonstrated a pattern of conduct in the present matter which warrants concluding that it breached its duty of fair representation to Complainants. Specifically, Complainants assert that Fenton should have filed a brief with the arbitrator by December 15, 1983, but instead of doing so sought an extension from Murphy and did not notify the Local or the arbitrator of this extension. Having received the extension, Fenton, according to Complainants, in spite of past experience with losing documents in the mail, placed the brief on her front porch on January 20, 1984, to be mailed through the regular mail. According to Complainants, this did not constitute filing the brief and the brief cannot be considered filed until May 15, 1984. That the arbitrator's March 5, 1984, letter to Fenton was also allegedly lost in the mail makes this entire scenario, according to Complainants, "pretty unlikely." Complainants assert that AFSCME further complicated the situation between these dates by not replying or by replying in a non-responsive fashion to Complainants' requests for action on the pending arbitration. Complainants also argue that Fenton's mailing of an additional copy of the brief on May 15, 1984, in spite of her having received the arbitrator's request for the brief two weeks earlier, underscores the Complainants' justifiable concerns with the representation afforded them in the present matter. Since, according to Complainants, AFSCME representatives lost or misplaced crucial documents and did not respond to legitimate questions by the Local, it follows that AFSCME has breached its duty of fair representation to Complainants, who should be awarded their attorney's fees and costs.

AFSCME urges that "(a)s is generally apparent in cases like this it sounds as though we are talking about two cases . . ." and that however divergent the two opposed views may appear, the present facts do not warrant a conclusion that AFSCME violated its duty of fair representation. AFSCME argues that the applicable standard demands that Complainants demonstrate AFSCME conducted itself in an arbitrary, discriminatory or bad faith manner. The standard must, according to AFSCME, be clearly distinguished from a common law negligence standard of care. Viewed against the appropriate standard, Complainants have not, according to AFSCME, proven their case. AFSCME argues that Johnson's advice to Complainants not to communicate directly with the arbitrator was legally sound and appropriate on the facts. Asserting that the ultimate conclusions reached by the arbitrator only underscore the soundness of her advice, AFSCME concludes that, however viewed, the advice was honest and forthright and certainly not violative of the duty of fair representation. At most, according to AFSCME, the proof in the present matter would amount to a demonstration of negligence and mere negligence cannot be considered a breach of the duty of fair representation. AFSCME concludes that the present matter constitutes an unfortunate situation in which a "good faith misunderstanding" without "any deliberate stalling on anyone's part" occurred. Such a misunderstanding, according to AFSCME, cannot be considered to have violated the duty of fair representation.

Discussion

Complainants allege AFSCME committed prohibited practices within the meaning of Sec. 111.70(3)(b)1, 2, 3, and (c), Stats. 2/

2/ At the hearing, AFSCME raised various motions concerning these allegations. These motions will not be specifically addressed, but are subsumed in the discussion which follows.

Complainants stated during oral arguments at the hearing that the behavior which underlies these alleged violations centers on AFSCME's failure to timely file a brief and AFSCME's failure to respond in a meaningful fashion to Complainant's express concerns that a pending arbitration was being unduly delayed as a result of AFSCME's behavior.

The behavior questioned by Complainants will not support a finding that AFSCME violated Sec. 111.70(3)(b)2, 3, or (c), Stats. Complainants have not demonstrated what "officer or agent" of the County that AFSCME coerced, intimidated or induced to interfere with the Complainants' exercise of their legal rights, as is demanded by Sec. 111.70(3)(b)2, Stats. Section 111.70(3)(b)3, Stats., makes it a prohibited practice for AFSCME to refuse to bargain collectively with the County, but Complainants have not demonstrated how AFSCME committed such a refusal. Complainants have questioned delays in the briefing schedule, yet those briefing extensions which were not directly related to the receipt or non-receipt of Fenton's brief were mutually agreed upon by Fenton and Murphy or were traceable to delays on the County's part. There is, in addition, no persuasive evidence that AFSCME refused to bargain over the provisions of a successor agreement to the one subject to the pending arbitration proceeding. 3/ Finally, Complainants have not established what "person" within the meaning of Sec. 111.70(3)(c), Stats., acted in violation of Sec. 111.70(3)(a) or (b), Stats., to undertake any action proscribed by Sec. 111.70(3)(c), Stats. Accordingly, no violation of that section has been established.

The sole remaining contention of Complainants centers on an alleged violation by AFSCME of Sec. 111.70(3)(b)1, Stats., which is the provision upon which the Commission has focused its analysis of alleged breaches of the duty of fair representation. 4/ Broadly stated AFSCME would have breached its duty to fairly represent Complainants if the complained of behavior noted above can be characterized as "arbitrary, discriminatory, or bad faith." 5/

Complainants have not proven that AFSCME's behavior during the processing of the arbitration constitutes discriminatory or bad faith behavior. Complainant has not shown whom AFSCME discriminated against, or behaved in bad faith toward, or why. The record does contain some evidence that certain individuals within Local 1752-B may have had an interest in rival labor organizations. This evidence is potentially significant since under established Commission case law, an election proceeding is barred, in certain circumstances, by a pending arbitration proceeding. 6/ If AFSCME manipulated the arbitration proceeding to deny the exercise of employe choice, arguably its behavior toward supporters of a rival labor organization could be characterized as discriminatory or bad faith. In this case, however, such evidence is lacking. There has been no showing, circumstantial or otherwise, that Complainants were denied a representation choice due to AFSCME's behavior in the present matter. It is impossible, in any event, to infer a connection between the behavior complained of in the present matter and Commission election law since any delay in the arbitration proceeding would arguably have prejudiced AFSCME supporters and opponents alike. In sum, there has been no showing that AFSCME behaved toward Complainants in a discriminatory or a bad faith fashion.

The present dispute centers, then, on whether the complained of behavior by AFSCME can be characterized as arbitrary. The parties dispute whether a finding of negligence constitutes a finding that AFSCME's conduct was arbitrary and therefore a breach of its duty of fair representation. Unfortunately the authority on this point is unclear and it is impossible under existing law to resolve the present matter simply by stating that arbitrary conduct either does or

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3/ See the letter of May 8, 1984, from Johnson to Brzoza set forth in Finding of Fact 8 above.

4/ Local 950, International Union of Operating Engineers, Dec. No. 21050-C (WERC, 7/84).

5/ See City of Madison, et al., Dec. No. 20656-C, 20657-C (WERC, 9/84), citing Mahnke v. WERC, 66 Wis.2d 524 (1975).

6/ Marinette County (Sheriff's Department), Dec. No. 22102 (WERC, 11/84).

does not constitute negligent conduct. In the Guthrie 7/ case, the Commission stated that: "While negligence in weighing and analyzing the evidence may not amount to unfair representation the inexplicable failure to give timely notice with the result of aborting any further proceedings is such non-representation as to amount to unfair representation . . . the union breached its duty of fair representation by its failure to make a considered decision whether to proceed to arbitration . . . of (a) grievance." 8/ In reaching that conclusion, the Commission cited both Bazarte v. United Transportation Union, 429 F.2d 868, 75 LRRM 2017 (3d Cir. 1970) and Ruzicka v. General Motors Corp., 523 F.2d 306, 90 LRRM 2497 (6th Cir. 1975). Bazarte has been analyzed as one of a "number of cases (which) have stated that negligent conduct by the union does not breach its duty of fair representation." 9/ Ruzicka, on the other hand, has been analyzed as a case which "(f)or all practical purposes" broke down "the distinction between 'arbitrary' union action, clearly outlawed under the duty of fair representation, and 'negligent' action . . ." 10/ Guthrie, unlike the present matter, involved a grievance arbitration and arose under the State Employment Labor Relations Act. That case, however, as all Commission cases analyzing the duty of fair representation, is rooted in Mahnke, and a union's duty of fair representation extends to all of its various functions including negotiations 11/ as well as litigation. If, under Guthrie, a failure to make a considered decision to process a case in litigation can constitute a breach of the duty of fair representation, arguably any negligent failure to act in processing a pending matter could constitute a breach of the duty since a negligent failure to act, by definition, cannot be characterized as a considered decision. In the present matter, Complainants urge AFSCME did not make a considered decision in mailing a brief, in checking on the processing of a pending arbitration, and in refusing to meaningfully respond to the Complainants' concerns during the processing of that case. In sum, present Commission authority, paralleling authority from other forums, 12/ does not clearly establish whether or not negligence constitutes a breach of the duty of fair representation.

Because it is impossible to resolve the present matter under existing law simply by stating that arbitrary conduct is or is not negligent conduct, it is necessary to attempt to establish the purpose of the doctrine of the duty of fair representation and to posit a standard determining arbitrary conduct which effects that purpose.

As existing case law demonstrates, it is difficult to define the purpose of the doctrine of the duty of fair representation, and an attempt to do so must start with an attempt to define the varied and potentially conflicting policies which define that doctrine. Certain policies underlying the doctrine of fair representation demand adopting a deferential attitude toward review of the

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7/ Local 82, Council 24, AFSCME, AFL-CIO, et al., Dec. No. 11457-F (WERC, 12/77).

8/ Ibid. , at 35.

9/ R. Gorman, Basic Text on Labor Law, Unionization and Collective Bargaining, (West, 1976) at 719. The court stated in Bazarte: ". . . proof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation." 75 LRRM at 2019.

10/ Gorman at 720. The Sixth Circuit has, citing Ruzicka, stated that mere negligence, standing alone, does not breach the duty of fair representation Poole v. Budd Co., 706 F.2d 181, 113 LRRM 2493 (6th Cir. 1983). See also Journeyman Pipefitters Local 392 v. NLRB, 712 F.2d 225, 113 LRRM 3500 (6th Cir. 1983).

11/ See Milwaukee County, Dec. No. 18112-B (WERC, 2/83).

12/ Compare with, for example, Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1082, 98 LRRM 2090 (9th Cir. 1978). See also Dutrisac v. Caterpillar Tractor Co., ___ F.2d ___ , 113 LRRM 3532 (9th Cir. 1983), and compare to Higdon v. United Steelworkers of America, 706 F.2d 1561, 113 LRRM 2971 (11th Cir. 1983) and Curtis v. United Transportation Union, 700 F.2d 457, 112 LRRM 2864 (8th Cir. 1983).

behavior of a collective bargaining representative. Since a collective bargaining representative provides a mechanism for developing uniform solutions to employment relations problems which may reflect conflicting and irreconcilable employe interests, as well as for screening non-meritorious claims which do not further any collective interest, it follows that granting the collective bargaining representative the greatest deference possible will encourage the representative to undertake admittedly difficult decisions without fear of later collateral challenge from adversely affected employes. Certain forums have, in addition, voiced a concern that too broad an oversight of collective bargaining representatives risks diluting the limited resources of the representative 13/ thus undermining the effectiveness of a collective bargaining representative in discharging its functions. Against the policy supporting a deferential view toward collective bargaining representatives has been set a judicially inspired concern that the exclusive representational status a collective bargaining representative statutorily acquires through a majority vote can lead to the denigration of minority or individual rights. 14/ Underlying this concern is the fear that the democratic processes which create a collective bargaining representative can produce a majority representative capable of ignoring minority or individual rights where the majority interest can be asserted without check. The check the courts, and subsequently administrative agencies, have adopted is the duty of fair representation. In applying this check, the depth of the judicial concern for equity can hardly be overstated. The Mahnke court stated the rationale for the duty of fair representation as ". . . apparent . . . it is inequitable to allow an employe's claim to go without a remedy because of the union's wrongful refusal to process his claim . . ." 15/ The Mahnke court underscored the potential conflict between this concern for equity and the deferential policies discussed above by discussing the need for providing "a person in the position of Mahnke" a remedy "federal labor policy notwithstanding . . ." 16/ Commission case law, by incorporating Mahnke, has incorporated this conflict.

That the relationship between collective bargaining representative and an individual employe is, at times, closely analogous to that of attorney and client complicates this complicated policy mix since attorney/client relationships are governed by negligence standard. Especially in grievance arbitration and other litigation areas, a collective bargaining representative is involved in situations which, like an attorney/client relationship, may involve an individual with a significant stake in the outcome of the litigation who must rely to a considerable degree on the expertise of his representative on the basis of a single transaction. In such a situation the individual is especially vulnerable to the risk of inadequate representation and the judicially enforced standard of due care enforced by the doctrine of negligence affords such individuals, in theory, a measure of compensation and a means of inducing a higher standard of care from practitioners.

In other respects, however, the analogy between the relationship between individual employe/collective bargaining representative and attorney/client is more strained and the applicability of a negligence standard is highly questionable. For example, the collective bargaining representative must define conflicting and potentially irreconcilable employe interests and create collective bargaining proposals which address those interests in a uniform manner. In negotiating and in enforcing a collective bargaining agreement, the collective bargaining representative is involved in an ongoing relationship which involves employer, collective bargaining representative and employe in a common enterprise.

13/ See International Brotherhood of Electrical Workers, et al. v. Foust, 442 US 42, 101 LRRM 2365 (1979) discussing the propriety of a punitive damages award for a union's breach of the duty of fair representation under the Railway Labor Act.

14/ See Steele v. Louisville and Nashville Railroad, 323 US 192, 15 LRRM 708 (1944). For a general discussion of the area, see C. Morris, The Developing Labor Law, (BNA, Second Edition, 1983) at Chapter 28.

15/ 66 Wis.2d at 531.

16/ Ibid., at 534.

In discharging this function, the collective bargaining representative must answer to a group electorate whose power, unlike an individual litigant, is not necessarily limited to a single transaction, and can be translated into undeniable political force. Through the election procedures statutorily provided, and the resultant political process, employes retain an ability to enforce a standard of care on their representatives. The value of administrative intrusion into this political arena represents a questionable use of administrative, employer, employe, or individual resources.

Defining the purpose of the doctrine of the duty of fair representation against this background is admittedly difficult, but is a necessary step to positing a standard defining arbitrary conduct which breaches that duty. The purpose of the doctrine, in my opinion, is to afford a collective bargaining representative as much deference as possible to discharge its duties. The limits of that deference are defined by situations in which the political relationship between collective bargaining representative and bargaining unit employe cannot reasonably be relied upon. Such instances would be limited to situations in which the political process would deny an employe a necessary remedy or where the political process could not reasonably be relied upon to address significant individual or minority interests.

The most persuasive statement of a standard to define arbitrary conduct in a way that can effect this purpose is, in my opinion, that applied by the National Labor Relations Board. In Office and Professional Employees International Union, Local No. 2, AFL-CIO, 268 NLRB 207 (1984), the Board stated that arbitrary conduct must be considered as "something more" than "mere negligence." The Board also stated that: "(To) determine whether a union's conduct is 'mere negligence' or 'something more,' we must look beyond the alleged act of negligence and examine the totality of the circumstances." 17/ This phrasing offers some clarification to the standard governing arbitrary conduct. First, it establishes that arbitrary conduct cannot simply be characterized as negligent conduct. Second, the standard clarifies that what constitutes the something more than mere negligence turns on a review of the circumstances of each case. Third, the standard demands that the decision maker must clarify what constitutes the something more that converts non-actionable negligence into actional arbitrary conduct. Finally, the standard is not inflexible. This recognizes the fact that various forums will, in all probability, continue to apply a negligence-like standard in certain circumstances. In light of this fact, and in light of the varied functions performed by a collective bargaining representative, there is no reason to conclude that an inflexible standard should be applied to review the actions of a collective bargaining representative.

Even under the standard stated above, the equity considerations existing under present law will inevitably draw the individual sensitivities of a reviewing forum into each case and thus preclude clarification of what constitutes arbitrary conduct. However, some limited measure of clarity can be applied to the standard stated above by specifying the circumstances in which the something more than mere negligence may be construed as virtually a negligence standard. As I read the case law, three factors determine the deference a reviewing body will grant the action of a collective bargaining representative. The first is the nature of the employe interest in the matter. Analysis of this factor demands an evaluation of the presence and the efficacy of the remedies available to the aggrieved employe. The second factor is the nature of the action required of the collective bargaining representative to address the employe interest. The final factor is the actual exercise of judgment on the collective bargaining representative's part in addressing the employe interest. 18/ Deference to the action of a collective bargaining representative is least likely where the employe interest in the matter

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17/ 268 NLRB No. 207 at 7.

18/ The operation of this factor can be seen in the Mahnke case and in the Guthrie matter mentioned above. Both the Mahnke court and the Commission have attempted to articulate the factors a collective bargaining representative needs to take into account in determining whether to arbitrate a grievance. The articulation of these factors clarifies that where a collective bargaining representative can demonstrate that it exercised considered judgment, a reviewing body will defer to that judgment.

is high (for example a discharge), 19/ the bargaining representative controls the only available remedy (for example arbitration), the act required of the representative is ministerial in nature (for example filing a grievance), and the representative does not exercise any judgment in addressing the employe interest involved (for example forgetting to file a grievance in a timely fashion). To the extent the employe interest is minimized, the act required of the representative is more judgmental in nature, and the representative actually exercises judgment, application of a negligence-like standard is less probable and greater deference will be accorded to the representative's decision.

It is now necessary to examine the circumstances of the present matter to determine if the complained of conduct constitutes something more than mere negligence. The complained of conduct consists of the belated filing of a brief and AFSCME's failure to meaningfully respond to Complainants' concerns regarding the delay attendant to the processing of the arbitration. Viewed against the three factors stated above, the complained of conduct does not present a sound case for characterizing AFSCME's conduct as arbitrary. Viewing the evidence in a light most favorable to Complainants' case, Complainants have demonstrated that they did have a significant interest in the processing of the arbitration and that, in certain respects, little judgment was required or exercised on AFSCME's part to oversee the processing of the arbitration. The nature of Complainants' interest in the present matter must not, however, be overstated since AFSCME's conduct was only one factor in the delay of the arbitration and since the award ultimately rendered redressed, in significant part, the harm due to this delay by including a retroactive payment of the wage increase granted under the award. In addition, AFSCME representatives did exercise judgment in not questioning the arbitrator as Complainants wished. Johnson's unrebutted testimony establishes her fear that contact with the arbitrator might be viewed as ex parte in nature and might prejudice the pending arbitration. Complainants understandably argue that the validity of Johnson's fear is debatable and that other means existed to check into the processing of the arbitration. These arguments do not, however, change the fact that Johnson's fear is a defensible exercise of judgment on an advocate's part.

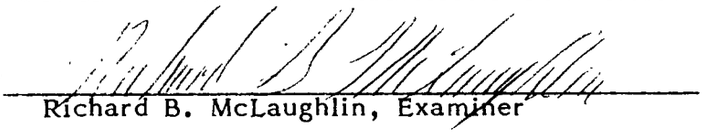
More significantly, even if the evidence regarding the exercise of judgment by AFSCME or regarding other factors contibuting to the delay in the present matter is ignored, it does not follow that AFSCME's conduct can be considered sufficiently egregious to constitute arbitrary conduct breaching its duty of fair representation. The nature of Complainants' differences with AFSCME at root center on their conclusion that AFSCME did not provide them the level of representation they desired. Complainants seek to enforce a higher standard of care from AFSCME through an award of attorney's fees and costs to compensate them for their efforts in undertaking to achieve the representation they desired in the arbitration. As noted above, however, there is no persuasive evidence that AFSCME acted to deny Complainants access to the election procedure, and there is no reason on the facts of the present matter to conclude the remedy sought by Complainants, even if assumed to be otherwise warranted, would somehow better serve to enforce a higher standard of care from AFSCME than do established Commission election procedures, or the political processes available to Complainants. The present litigation arguably demands an administrative determination of what constitutes an undue extension of a briefing schedule, what documents should be sent by certified mail, or what constitutes a meaningful response to a unit member's question. Such determinations would serve only to embroil an administrative agency in the political relationship between AFSCME and the bargaining unit it services. Such political questions are best left to the individuals and organizations immediately involved. Any other conclusion would serve only to induce litigants to bring political and internal problems out of the political arena and into the litigation process at great cost and of doubtful benefit to all concerned. Thus, even assuming AFSCME was required to, and did in fact, exercise little judgment in the present matter regarding processing the arbitration, the complained of conduct by AFSCME did not deprive Complainants of a meaningful remedy or prejudice significant individual or minority interests which cannot be addressed through the political process. It cannot be said that, under the present circumstances, AFSCME's conduct, even if viewed in the light most favorable to Complainant, constitutes anything more than mere negligence.

19/ See Dutrisac, footnote 12 above.

In sum, the sole contention to which the parties devoted a significant amount of evidence centers on Sec. 111.70(3)(b)1, Stats., and on whether AFSCME breached its duty to fairly represent Complainants in violation of that Section. A demonstration of a breach of the duty of fair representation under that Section requires a showing that a collective bargaining representative behaved in an arbitrary, discriminatory or bad faith manner. Because there is no persuasive evidence that AFSCME behaved toward Complainant in a bad faith or discriminatory fashion the sole controversy regarding the violation of Sec. 111.70(3)(b)1, Stats., turns on whether AFSCME's conduct in the present matter can be characterized as arbitrary. Arbitrary behavior must be characterized as something more than mere negligence. What constitutes the something more cannot be precisely defined in the abstract in light of current case law, but depends upon a case by case analysis. That case by case analysis ultimately turns on an evaluation of three basic factors: (1) the nature of the employe interest in the matter including an evaluation of the presence and efficacy of the remedies available to the aggrieved employe; (2) the nature of the action required of the collective bargaining representative to address the employe interest; and (3) the actual exercise of judgment on the collective bargaining representative's part in addressing that interest. Analysis of the three factors should isolate those cases in which the political processes defining the relationship between collective bargaining representative and bargaining unit member cannot be relied upon to address significant individual or minority interests or to effect any remedy in circumstances in which one is essential. In such cases deference to the behavior of a collective bargaining representative may be minimal and the something more than mere negligence standard may closely resemble a negligence standard. In cases not of this type, deference to the collective bargaining representative will be greater. In the present matter there is no persuasive evidence that the complained of behavior by AFSCME denied Complainants of a desired representation election. The complained of conduct demonstrates a series of concerns which are political in nature and are best left to the parties to resolve through the political process. Accordingly, no violation of Sec. 111.70(3)(b)1, Stats., has been found, and accordingly, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 21st day of March, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner