STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TINA M. BUECHNER, Complainant, vs STATE OF WISCONSIN DEPARTMENT OF EMPLOYMENT RELATIONS: and WISCONSIN STATE EMPLOYEES UNION, COUNCIL 24, AFSCME, AFL-CIO Respondents.	Case 233 No. 36093 PP(S)-125 Decision No. 23486-A

Appearances:

Ms. Tina M. Buechner, 505 Fair Oaks Avenue, Madison, WI 53714, appearing pro se.

Lawton & Cates, Attorneys at Law, 214 West Mifflin Street, Madison, WI 53703, by Mr. Richard V. Graylow, appearing on behalf of Wisconsin State Employees Union, Council 24, AFL-CIO.

Division of Collective Bargaining, by Ms. Susan Sheeran, Employment Relations Specialist, appearing on behalf of the State of Wisconsin.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel J. Nielsen, Examiner: Tina M. Buechner, hereinafter referred to as the Complainant, having on December 6, 1985, filed with the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, a complaint of unfair labor practices alleging that the State of Wisconsin and the Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, hereinafter referred to as the State and the Union, respectively, had acted in concert to deny to her benefits under a grievance settlement agreement; and the Commission having appointed Daniel J. Nielsen to serve as Examiner and make and issue Findings of Fact, Conclusions of Law and Order, pursuant to Sec. 111.07(5), Wisconsin Employment Peace Act; and the State having, on April 24, 1986, filed an answer wherein it denied any unfair labor practices had been committed and moved for dismissal of the complaint against the State and, in the alternative, for a bifurcated hearing on the complaint; and the Union having, on May 6, 1986, filed an answer wherein it denied the commission of any unfair labor practices and moved for dismissal of the complaint as failing to state a cause of action; and a hearing having been held on the complaint on May 16, 1986 at Madison, Wisconsin, at which time the Complainant was allowed to amend her complaint to allege that the Respondents had engaged in discrimination within the meaning of Sec. 111.84(c), State Employment Labor Relations Act, by applying the terms of their settlement agreement only to Union members; and the Union having renewed its motion to dismiss and having further moved to dismiss on the basis of the one year statute of limitations having expired; and the State having renewed its motion to dismiss and as well as its motion for bifurcated hearing; and the Examiner having taken the motions to dismiss under advisement and having denied the motion for a bifurcated hearing; and the parties having been given the full opportunity to present such evidence as was relevant at the hearing on May 16 and the subsequent hearing on May 29, 1986; and the parties having agreed to submit oral argument at the close of the hearing rather than submitting written briefs; and a transcript having been made of the hearings, a copy of which was received by the Examiner on June 16, 1986; and the Examiner having considered the testimony, exhibits and arguments of the parties, 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 Tina M. Buechner, hereinafter referred to as the Complainant, is an individual residing at 505 Fair Oaks Avenue, Madison, WI 53714; that the Complainant has been employed by the State of Wisconsin in various capacities for ten and one half years; that the Complainant was employed in August of 1982 as a Program Assistant I at the University of Wisconsin Hospital Food Service Department; that the position of Program Assistant I is included in the bargaining

units represented by the Respondent Wisconsin State Employees Union; that the Complainant thereafter accepted a promotion to the position of Program Assistant II - Confidential with the University of Wisconsin Hospital and Clinics Nursing Service; that the Complainant was employed in that position on November 24, 1984; that the position of Program Assistant II - Confidential is not included in the bargaining units represented by the Respondent Wisconsin State Employees Union; and that the Complainant was, as of the time of filing of this complaint, employed by the Wisconsin Department of Justice.

2. That the Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization having its principal offices at 5 Odana Court, Madison, WI 53719; that Martin Beil is the Executive Director of the Union; that the Union is the exclusive bargaining representative for employes of the State of Wisconsin in six bargaining units: Clerical and Related; Security and Public Safety; Professional Social Services; Technical; Blue Collar; and Research, Statistics and Analysis; that the Union had representative status in these bargaining units prior to 1982; and that, in November of 1984, Beil was President, Mark Neimeiser was the Executive Director, and Karl Hacker was the Assistant Director of the Union.

3. That the State of Wisconsin, hereinafter referred to as the State, is an employer; that the State is represented for the purposes of collective bargaining by the Department of Employment Relations, which has its principal offices at 137 East Wilson Street, P. O. Box 7855, Madison, WI 53707; that Alfred Hunsicker is employed by the Department of Employment Relations as an Employment Relations Specialist; and that Hunsicker was so employed in 1984.

4. That Chapter 317 of the Laws of 1981 (The Budget Repair Bill) provided that wage increases for nonrepresented state employes should be deferred for three months so as to achieve a 25% reduction in costs of wage increases for the 1982-83 fiscal year; that the bill further authorized the Secretary of the Department of Employment Relations to reopen negotiations with state unions in order to seek a similar wage deferral; that the negotiations between the state and the unions representing its employes were not successful in achieving said deferral; that thereafter most represented employes of the state were laid off for a period of time in order to achieve a 25% reduction in the cost of wage increases for that fiscal year; that among these employes were those represented by the Respondent Wisconsin State Employees Union; and that the Complainant was temporarily laid off for a total of forty hours on the following schedule:

August 2, 1982 -- 8 hours
August 3, 1982 -- 3 hours
August 4, 1982 -- 5 hours
August 20, 1982 -- 8 hours
August 23, 1982 -- 8 hours
August 24, 1982 -- 8 hours

5. That Beil, as President of the Union, filed a grievance on behalf of the Union, its local unions and the members of the represented bargaining units contending that the layoffs resulting from Chapter 317 violated the labor agreements between the Union and the State; that many individual grievances were also filed over the layoffs; that the Complainant was, at the time of filing of Beil's grievance, a member of a bargaining unit represented by the Union; that the Complainant did not file an individual grievance; that Beil's grievance was processed through the grievance procedure and was referred to binding arbitration for resolution; that the grievance was heard by an Arbitrator on November 17, 18 and 24, 1982; and that, in an Award dated February 22, 1983, the Arbitrator determined that the layoffs did not violate the Union's contracts with the State and dismissed Beil's grievance.

6. That, following the issuance of the Arbitrator's Award, representatives of the Union and the State met to resolve remaining issues relating to the Chapter 317 layoffs, as well as a continuing dispute over rest breaks in correctional institutions; and that, on December 6, 1984, the parties reached the following agreement on these issues:

RESOLUTION OF LAYOFF AND REST BREAK GRIEVANCES

The State of Wisconsin, Department of Employment Relations, and AFSCME Council 24, Wisconsin State Employees

Union, have agreed to the following procedure to resolve grievances filed on the implementation of Chapter 317, Laws of 1981 (five day layoffs). This procedure will also attempt to resolve all prospective issues relating to rest breaks under Article VI, Section 3 of the labor Agreement in the Department of Health and Social Services Correctional Institutions as described in sections 3 and 4 of this agreement.

1. The Department of Employment Relations, representing the Employer, will agree to restore the following benefits to WSEU represented employes who are employes as of November 24, 1984 and who lost benefits due to layoffs under Chapter 317, Laws of 1981 and whose benefits have not previously been restored. The benefit restoration shall be based on the employe's percentage of budgeted position (FTE).

PERCENTAGE OF FTE	**50% or less**	**more than 50%**
Sick Leave	2-1/2 Hrs.	4 Hrs.
LENGTH OF SERVICE PAY* 6-30-83		
$ 50.00	$ .50	$1.00
$100.00	1.00	2.00
$150.00	1.50	3.00
$200.00	2.00	4.00
$250.00	2.50	5.00

* Will be paid to employes as a pay adjustment on the payday of January 31, 1985.

VACATION (Hours and minutes)
1-1-83 Category

80 Hours	:45 Hours	1:30 Hours
120 Hours	1:15 Hours	2:30 Hours
136 Hours	1:30 Hours	2:45 Hours
160 Hours	1:30 Hours	3:15 Hours
176 Hours	1:45 Hours	3:30 Hours
200 Hours	2:00 Hours	4:00 Hours

Income Continuation Insurance

If the restored sick leave credits would change the employes income continuation premium category level, the category level and the premium will be adjusted. Excess premiums paid due to the sick leave benefit loss will be refunded after the employes so affected notify their supervisors in writing. No corrections to the employe.s (sic) premium level will be made unless notification is received on or before June 1, 1985. Any employe who withdrew from income continuation insurance coverage because of an increase in his/her premium levels attributable to the Chapter 317 layoff days will have coverage reinstated at the category level the employe would be eligible for with the sick leave restored as described above. No employe.s (sic) premium level will be recalculated under this section unless the employe.s (sic) payroll office is notified in writing of the employe's claim of eligibility for recalculation on or before June 1, 1985.

Retirement

The employer is not aware of any employe losing retirement time credits due to the Chapter 317 layoffs. If any employe did lose any retirement time credits as a result of these layoffs, the employe must notify his/her payroll office in writing on or before June 1, 1985. No restoration of time credits will be made unless notification is received on or before June 1, 1985.

2. The Union agrees to voluntarily and with prejudice drop, dismiss or withdraw support on any and all charges, suits, appeals or other actions whether administrative, judicial or contractual that are filed against the Employer in relation to either the procedure or substance of the Ch. 317 layoffs prior to implementation of other portions of this Agreement. The union also agrees not to file or support any additional charges, suits, appeals or other actions regarding the Ch. 317 layoffs. Karl Hacker of the Wisconsin State Employees Union and Alfred Hunsicker of the Department of Employment Relations will jointly identify all the grievances to be dropped or have union support withdrawn. The union will notify the grievants in those actions where the cases are either dropped or withdrawn. A copy of such notice or a listing of persons so notified will be sent to the Department of Employment Relations.

3. The Union will make every positive effort to settle the unresolved rest break issues. Karl Hacker of the Wisconsin State Employees Union and Alfred Hunsicker of the Department of Employment Relations will work with each of the four H&SS Division of Corrections. Institutions and their local Unions in reaching local agreements on rest breaks. The schedule of meetings is as follows:

   a. Local 178 - Dodge Correctional Institution - December 3, 1984;

   b. Local 1005 - Fox Lake Correctional Institution - January 8, 1985;

   c. Local 126 - Taycheedah Correctional Institution -Date not yet set.

   d. Local 15 - Ethan Allen School - date not set.

4. All outstanding arbitrations on the rest breaks issue have been identified and have been scheduled for hearing. Those arbitrations will proceed.

Martin Beil, President Wisconsin State Employees Union	12/6/84 Date
Mark Neimeiser, Executive Director Wisconsin State Employees Union	12/6/84 Date
Karl Hacker, Assistant Director Wisconsin State Employes Union	12/6/84 Date
Howard Fuller, Secretary Department of Employment Relations	12/5/84 Date

Kristiane Randal, Administrator
Division of Collective Bargaining
Department of Employment Relations

12/6/84
Date

Alfred C. Hunsicker
Employment Relations Specialist
Division of Collective Bargaining
Department of Employment Relations

12/6/84
Date

7. That the provision of the settlement agreement set forth in Finding of Fact 6, supra, restricting its benefits to those employes employed in a represented position as of November 24, 1984 was included for the purposes of administrative convenience in implementing the settlement agreement, and was included at the insistence of the State.

8. That the settlement agreement set forth in Finding of Fact 6, supra, made no distinction between represented employes who were members of the Union and those represented employes who are not members of the Union.

9. That the representatives of the Wisconsin State Employees Union and the State of Wisconsin did not act in an arbitrary or capricious manner, nor for discriminatory motives, in restricting the benefits of the settlement agreement set forth in Finding of Fact 6, supra, to those who were employed in positions represented by the Union on November 24, 1985 rather than all employes who had been members of the bargaining unit during the Chapter 317 layoffs.

10. That the provisions of the settlement agreement set forth in Finding of Fact 6, supra, became known to state employes some time after the agreement was actually reached; that the settlement was communicated to University employes, including the Complainant, by way of informational bulletin dated February 7, 1985; and that the instant complaint was filed on December 6, 1985.

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

CONCLUSIONS OF LAW

1. That Tina M. Buechner is a "party in interest" within the meaning of Sec. 111.07(2)(a), Wisconsin Employment Peace Act.

2. That the Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO is a "labor organization" within the meaning of Sec. 111.81(12) SELRA, and is a "party in interest" within the meaning of Sec. 111.07(2)(a) WEPA; and that Martin Beil, Mark Neimeiser and Karl Hacker, in their capacities as President, Executive Director and Assistant Director, respectively, were acting as agents of the Union in entering into the settlement agreement set forth in Finding of Fact 6, supra.

3. That the State of Wisconsin is an "employer" within the meaning of Sec. 111.81(8) SELRA, and is a "party in interest" within the meaning of Sec. 111.07(2)(a) WEPA.

4. That the instant complaint was filed in a timely manner, consistent with the provisions of Sec. 111.07(14), WEPA.

5. That the State of Wisconsin and the Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO did not engage in any unfair labor practices in restricting the application of the settlement agreement set forth in Finding of Fact 6, supra, to employes who were employed in positions included within the bargaining units represented by the Union as of November 24, 1984.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner 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 9th day of July, 1986.

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.

DEPARTMENT OF EMPLOYMENT RELATIONS (CLERICAL & RELATED)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. FACTUAL BACKGROUND

There is no dispute as to the background facts. The Complainant has been employed by the State in a variety of positions for the past ten and one half years. In 1982, she was employed as a Program Assistant I at the University of Wisconsin Hospital and Clinics Food Service Department. This position is included in one of the six bargaining units represented by the WSEU. The Complainant was among the employes temporarily laid-off for five days under then-Governor Dreyfus's scheme for addressing a perceived revenue shortfall. In her case, the layoff was for a total of forty hours, spread over six days in August of 1982.

The layoff plan instituted by the state was grieved by many individual employes, as well as by Martin Beil, then the President of the WSEU. Beil's grievance was filed on behalf of the WSEU, its affiliated locals, members and represented employes. The grievance was heard by Arbitrator Mueller in November of 1982 and decided in February of 1983. Mueller found that the layoffs did not violate the WSEU's labor agreements with the State and dismissed the grievance.

After the Arbitrator's decision was received, the State and the WSEU engaged in negotiations intended to settle the remaining outstanding grievances over the layoffs, as well as a long-standing dispute over rest breaks at state correctional facilities. As a result of these negotiations, a settlement agreement was signed on December 6, 1984 which provided for a partial restoration of benefits for those employes who had been laid off. The agreement addressed sick leave, longevity, vacation, income continuation insurance and retirement. In consideration of the agreement, the Union agreed to drop or dismiss its pending grievances, and withdraw support for any other grievances relating to the Chapter 317 layoffs.

The settlement agreement required, for purposes of eligibility, that an employe be employed in a WSEU represented position on November 24, 1984 and further that the employe have lost benefits by virtue of the Chapter 317 layoffs. Because the Complainant had accepted a promotion to a confidential position prior to November 24, 1984, she was not eligible to receive a restoration of benefits under the agreement.

II. POSITIONS OF THE PARTIES

A. The Position of the Complainant

The Complainant takes the position that the State and the Union acted in concert to deny her, and similarly situated employes, benefits to which they should have been entitled. She notes that Sec. 111.815 imposes a duty on the state to "establish and maintain, wherever practicable, consistent employment relations policies and practices throughout the state service." The distinction drawn by the use of eligibility dates in the settlement agreement results in an inconsistent practice, since some emloyes who lost benefits through the Chapter 317 layoffs are not made whole while others are made whole. She further notes that Sec. 111.80(2) SELRA establishes a policy favoring ". . . fair, friendly and mutually satisfactory employe management relations . . ." and asserts that the withholding of benefits from some laidoff employes is, on its face, unfair.

The Complainant alleges that the Union violated its duty to fairly represent her in the settlement of the Cahpter 317 layoff grievances. The Union was her only means of grieving the layoff, and had an obligation to continue to represent her interests even though she had left the bargaining unit by the time the settlement was reached. Both the Union and the State should reasonably have known that some employes would have transferred out of the bargaining unit between the dates of the layoffs and the eligibility date set out in the December 6, 1984 agreement. Since the agreement treated represented employes preferentially, it has the effect of encouraging union membership in violation of Sec. 111.84(1)(c), and (2)(b). As parties to a discriminatory contract, the Complainant alleges that both the State and the Union are liable to her for her losses.

B. The Position of the Union

The Union takes the position that the complaint should be dismissed as untimely filed. Further, the Union alleges that the complaint is without merit, since the Union did not act in an arbitrary, capricious or discriminatory manner towards the Complainant. The Union had lost the grievance over the Chapter 317 layoffs, and thus had no bargaining power in its negotiations with the State. Its goal in the negotiations was simply to get whatever it could under the circumstances. The Union proceeded in good faith to negotiate the best terms that it could. Under the rule of Humphrey v. Moore, 55 LRRM 2031 (U.S. 1964), a union does not violate its duty of fair representation by taking a good faith position contrary to the interests of some of its members. Since this is essentially the complaint lodged in the instant case, the complaint should be dismissed.

C. The Position of the State

The State takes the position that the complaint should be dismissed. The Mueller arbitration disposed of the question of any liability by the State for the Chapter 317 layoffs. Since there was no contract violation, there can be no liability to the Complainant for her layoff. Furthermore, the State asserts that the Complainant has failed to show any evidence of bad faith, arbitrariness or discrimination by either the State or the Union. Absent such a showing, the Complainant may not recover on a duty of fair representation claim. Finally, the State notes that the policy underlying the broad discretion given Unions and Employers to negotiate grievance settlements would be seriously undercut by allowing this Complainant to prevail in a case where she failed to show any misconduct on either party's part. For all of the foregoing reasons, the State urges that the complaint be dismissed.

III. DISCUSSION

A. Statute of Limitations

The Union asserts that the complaint should be dismissed as having been filed after the expiration of the one year statute of limitations established by Sec. 111.07(14), WEPA. The Complainant, on the other hand, alleges that the record evidence shows that her first opportunity to become aware of the December 1984 agreement was in February of 1985, when an informational bulletin was circulated at the University.

The settlement agreement was signed on December 6, 1984 and the complaint was filed exactly one year later, on December 6, 1985. Wisconsin Administrative Code Sec. ERB 10.08 provides, in pertinent part:

> "ERB 10.08 Time for filing papers other than letters. (1) COMPUTATIONS OF TIME. In computing any period of time prescribed or allowed by these rules or by order of the commission or individual conducting the proceeding, the day of the act, event or default after which the designated period of time begins to run, shall not be included."

The complaint filed in this case is, therefore, timely filed since, even assuming the Complainant should have known of the agreement upon signing, the one year period runs from December 7, 1984, the day after the signing of the settlement agreement.

B. Discrimination

The Complainant amended her complaint to allege that the settlement agreement had the effect of discriminating against employes on the basis of union membership because it did not apply to persons damaged by the layoffs but not included in the bargaining unit. Neither on its face nor in application does the settlement agreement make any distinction between union members and nonmembers. Rather, the agreement draws a distinction between those employes who were included in the

bargaining unit as of November 24, 1984 and those who were not. The Complainant has not suggested, and the Examiner cannot discern, how this distinction in any way encourages or discourages membership in the Union. 2/ Accordingly, this allegation is dismissed.

C. The Duty of Fair Representation

The Union has an obligation to represent its members fairly, a duty which derives from its status as exclusive bargaining representative. 3/ The well established rule of law is that a Union breaches its duty of fair representation when its conduct towards a member or members is arbitrary, discriminatory or undertaken with bad faith. 4/ Reviewing the record in this case, there is nothing to suggest that the Union has acted in such a manner. The selection of a November 24, 1984 eligibility date was not arbitrary, since the State's negotiator testified that the agreement never would have been signed had there been no specification of an eligibility date. This is due to the relatively mobile nature of many employes and the administrative difficulties in attempting to track down those who might have been affected by the Chapter 317 layoffs but had since left represented state service. While it is true, as the Complainant argues, that another date could have been selected which would have guaranteed that she would have recovered her losses, the fact that there were many possible choices does not by itself render this choice arbitrary. November 24th was the pay period date immediately before the agreement was signed. The choice of any other eligibility date would have adversely affected other persons, although not necessarily the Complainant. The State and the Union have both proferred rational explanations for the selection of that date, reflecting legitimate administrative concerns. Under these circumstances, the selection of this date cannot be said to be arbitrary.

The choice of November 24th cannot be said to have been discriminatory as regards the Complainant for the simple reason that she was personally unknown to all the negotiators. Neither is there anything in the record to suggest that the Complainant belongs to a class of persons against whom the Union might have wished to discriminate. The only discrete grouping of employes which includes the Complainant is the grouping created by the agreement -- those who were laid off but did not receive compensation. It is worth noting that the members of that class, by and large, were excluded from the benefits of the agreement because they were not eligible to be represented by the Union when the agreement was reached. The Union's duty to represent persons not included in the bargaining unit -- indeed, in the Complainant's case, persons who were not "employes" within the meaning of SELRA 5/-- is, if it exists at all, not a creature of the State's labor

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2/ This allegation may have been brought as a result of the Complainant's apparent confusion of the terms "Union" and "unit." See colloquay between Complainant and Examiner, Transcript, May 16, 1986, pages 11-12.

3/ The Complainant also asserts in her pleadings and oral argument, that the State was under an obligation to fairly represent her. There is no such obligation imposed on employers by the collective bargaining statutes. While the Complainant is correct in her assertion that Board of Education v. WERC, 52 Wis. 2d 625 (1971) establishes that an employer commits an unfair labor practice by entering into an agreement which discriminates on the basis of union membership, this is not because the employer thereby breaches some duty to represent employes. Rather this flows from the specific prohibition on such conduct contained in the bargaining laws.

4/ Mahnke v. WERC, 66 Wis. 2d 524 (1974); Marinette County Sheriff's Department Employees Union, Dec. No. 22051-A (McLaughlin, 3/85); Milwaukee Deputy Sheriff's Association Dec. No's. 18112-A & 18112-B (Honeyman, 1/82; WERC, 2/83).

5/ At the time the agreement was entered into, the Complainant was a confidential employe. Sec. 111.81(7), SELRA, excludes confidential employes from the statutory definition of "Employee."

laws. 6/ In any event, the Complainant has shown no motive for discrimination, nor any evidence of discrimination as that term is commonly understood in duty of fair representation cases.

Finally, the Union must have acted in good faith in its dealings with the Complainant. Good faith is a fluid concept, taking its meaning from the specific factual context under review. In this case, the Union had vigorously pursued a grievance on behalf of the Complainant and her co-workers and had lost. In spite of this, the Union was able to secure a settlement for most of its represented employes, restoring to them certain of the benefits they had lost to the layoffs. Having suffered an Award stating that they had no claim at all, the Union would hardly have been in a position to reasonably refuse the State's demand for an eligibility date in the settlement agreement. The relatively weak bargaining position of the Union, together with the reasonable arguments of the State in favor of fixing an eligibility date, would lead naturally to the Union's agreement to this comparatively minor point. In short, it appears that the Union made the best deal that it could for the majority of its represented employes. The fact that not every possible beneficiary received compensation reflects the realities of bargaining and the practicalities of attempting to implement an agreement two years after the fact in a very large organization. Neither the procedures followed in securing the agreement, nor the substance of the agreement, provide any indication of bad faith.

In the absence of arbitrariness, discrimination or bad faith, the question becomes whether a Union violates its duty of fair representation simply by agreeing to a settlement which unevenly distributes benefits across a group of employes. The Wisconsin Supreme Court answered this question in Mahnke, when it said:

> ". . . 'Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employes and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.'. . . Id, at 531, citing Humphrey v. Moore (1964), 375 U.S. 335, 349, 84 Sup. Ct. 363, 11 L. Ed. 2d 370.

Bargaining, whether over a settlement agreement or a contract, is largely the process of making choices. In almost every instance, the choice made will benefit some more than others. A demand for family insurance coverage diverts resources which might otherwise go to the wages of single people. A seniority based system of layoffs adversely impacts junior employees. A proposal to improve pensions is of relatively lesser importance to the twenty-two year old employe than the fifty year old. To find that a Union cannot in good faith make these choices without violating its duty to fairly represent all employes would be to toll the death knell for bargaining. Plainly this is not the law.

IV. CONCLUSION

A Union has a broad range of discretion in negotiating with an Employer. Absent some showing of arbitrariness, discrimination or bad faith, the mere fact that some employes who might logically be beneficiaries of an agreement are excluded in the bargaining process does not constitute a breach of the duty of fair representation. In the instant case, the selection of an eligibility date which excluded the Complainant from the benefits of a settlement agreement was the result of good faith negotiations and was part of a logical, non-discriminatory administrative system for implementing the agreement. There is no evidence that

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6/ This is not to suggest that the Union had no obligation to pursue the grievance filed on behalf of the Complainant simply because she changed jobs after its filing. In the instant case, the grievance had been pursued and resolved. The obligation then in question became that of representing the Complainant in negotiations over the general issue of the Chapter 317 layoffs.

the Union violated its duty of fair representation, nor that the Union or the State in any way sought to discriminate against the Complainant individually or as a member of any discrete class of employes. Accordingly, the complaint is dismissed in its entirety.

Dated at Madison, Wisconsin this 9th day of July, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Daniel J. Nielsen, Examiner