STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ERNEST WARREN MCDADE, Complainant, vs. MILWAUKEE BOARD OF SCHOOL DIRECTORS and LOCAL 150 - REP. PAT GRADY, Respondents.	Case 179 No. 36627 MP-1823 Decision No. 24559-A

Appearances:

Mr. Ernest W. McDade, 4610 North 29th Street, Milwaukee, WI 53209, on his own behalf.

Perry, First, Lerner, Quindel & Kuhn, S.C., Attorneys at Law, 823 North Cass Street, Milwaukee, WI 53202, by Ms. Barbara Zack Quindel, on behalf of Respondent Local 150, Service Employees International Union, AFL-CIO.

Mr. Stuart S. Mukamal, Assistant City Attorney, City of Milwaukee, City Hall, 200 East Wells Street, Milwaukee, WI 53202, on behalf of the Respondent Milwaukee Board of School Directors.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Ernest Warren McDade, hereinafter the Complainant, having, on March 4, 1986, filed a complaint with the Wisconsin Employment Relations Commission, hereinafter the Commission, wherein he alleged that management representatives of the Milwaukee Board of School Directors, hereinafter the Board, had conspired to have him discharged in violation of the Board's rules and that Respondent Local 150, hereinafter the Union, had failed to adequately represent him in the processing of the grievance of his discharge in violation of his rights under the Municipal Employment Relations Act (MERA); and the Complainant having thereafter requested that hearing on said complaint be delayed until he could retain legal counsel; and the Complainant having notified the Commission on April 6, 1987 that he was ready to proceed; and the Respondent Board having filed an answer on June 24, 1987, and Respondent Union having filed an answer on August 21, 1987, wherein both Respondents denied the allegations in the complaint; and the Commission having appointed David E. Shaw, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and a hearing on said complaint having been held at Milwaukee, Wisconsin on August 26, 1987, with a transcript of that proceeding provided to the Examiner by September 23, 1987; and the Respondents Board and Union having moved to dismiss the complaint upon completion of the Complainant's case in chief, which motions were denied; and the Respondents Board and Union having presented oral argument at the conclusion of the hearing; and the Respondent Board having moved that it be awarded costs and attorneys fees; and the Complainant having on November 4, 1987 submitted a post-hearing brief and additional documentary evidence; and the Respondents Board and Union having submitted their respective positions and argument on the additional evidence offered by the Complainant by December 18, 1987; and the additional exhibits having, on December 11, 1987, been ruled admissible; and the Respondent Union having, on December 18, 1987, submitted argument regarding the relevancy of the additional evidence; and the additional exhibits having been received by the Examiner on January 15, 1988; and the Examiner, having considered the evidence and the arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant is an individual residing in Milwaukee, Wisconsin and at all times material herein was employed by the Respondent Board as a Building Service Helper I at the Board's 68th Street School; that Complainant began his employment in that position in January of 1978 and was employed by the Board during the school year on a part-time basis up until his discharge on March 12, 1985; and that at all times material herein Complainant was a member of the bargaining unit represented by the Respondent Union.

2. That Respondent Board is a municipal employer and the governing body of the Milwaukee Public Schools, a public school district, hereinafter District, and has its principal offices located at 5225 West Vliet Street, Milwaukee, Wisconsin, 53201; that from June of 1984 to July of 1985 Donald Rebella was the School Engineer at the Board's 68th Street School and was in charge of seeing that the Complainant completed his assigned tasks and for reporting Complainant's hours for the purpose of payroll records; that at all times material herein Antonio Roca was the Assistant Director Plant Operations for the Board and his duties included personnel responsibilities with regard to employes such as the Boiler Attendants, Building Service Helper I's and II's; that at all times material herein George Schlesinger was the Director Plant Operations for the Board and had overall responsibility for the housekeeping, heating and snow removal operations at the District's schools; and that the Board was party to a 1983-1986 collective bargaining agreement with the Respondent Union that covered the Building Service Helpers bargaining unit of which Complainant was a member.

3. That the Respondent Union is a labor organization with its principal offices located at 6427 West Capitol Drive, Milwaukee, Wisconsin, 53216; that since August of 1984 Daniel Iverson has been the President of the Union; that in that capacity Iverson administers the rules and regulations of the Union, oversees the activities of the Union's Business Representatives and organizers, examines all grievances and contract bargaining disputes before they proceed to arbitration, serves on the Union's Executive Board and serves as Representative to certain bargaining units represented by the Union, including the Building Service Helpers unit; that the Union's Business Representative who represented the Complainant in grieving his discharge was Pat Grady; that Grady left the Union's employ in July of 1986; and that the Union's Constitution provides in relevant part that:

> Article XIII
> GRIEVANCES
>
> Any member who claims an unfair adjustment of his grievance by a Business Agent may, within seven (7) days of such action by the Business Agent, appeal, in writing, to the President of this Local Union. If such member is not satisfied with the decision of the President, he may appeal his case to the Local Executive Board. Any such appeal to the Local Executive Board shall be filed, in writing, with the Secretary by registered or certified mail within seven (7) days after the decision of the President. Thereafter, an appeal to the next regular membership meeting of the Local Union may be taken by filing such appeal, in writing, with the Secretary by registered or certified mail within fifteen (15) days after the decision of the Local Executive Board and at least three (3) days before such regular membership meeting. The decision of the Local Executive Board shall be final and binding unless overruled by a majority vote of the members present at the regular membership meeting to which such decision has been appealed.

4. That Complainant's assigned work hours since the start of the 1984-85 school year were 3:00 p.m. to 6:00 p.m.; that on December 18, 1984 Rebella issued two written reprimands to Complainant - one for "failure to follow call-in procedures" with regard to December 13, 1984, and one for "leaving post without permission" and "poor performance" with regard to allegedly leaving work early and doing a poor job cleaning blackboards; that on December 19, 1984 Rebella issued a written reprimand to Complainant for "loafing or laxness on job; failure to perform assigned tasks" and "poor performance" with regard to allegedly doing a poor job vacuuming in rooms and cleaning the boys' bathroom; that the Complainant

refused to sign the written reprimands he received on December 18 and 19, 1984, and complained to the Union's Busines Representative, Grady, but he did not grieve those written reprimands; that through Grady the Complainant requested, and was granted, a meeting with Roca and Schlesinger to discuss whether the Complainant would continue to be required to provide a doctor's statement for every absence he claimed was due to personal illness and to discuss Complainant's attendance record; that at said meeting Complainant requested a transfer out of the 68th Street School due to he and Rebella not getting along with each other, and said request was denied; that on March 12, 1985 the Complainant was given written notice by Schlesinger, the Director Plant Operations, that he was suspended immediately for "Failure to follow work rules" and "Falsification of time records," and which notice indicated that a "disciplinary hearing" was scheduled for March 13, 1985 and that his Union Representative had been notified; that the disciplinary hearing on said charges was postponed to March 19, 1985; that present at said hearing was Complainant, Grady, Schlesinger and Roca; that at said meeting management indicated that it had evidence that the Complainant had been leaving his work site early and had reported his regular hours on his time sheets; that Grady spoke on Complainant's behalf at said meeting; that the Complainant did not deny at said meeting the charge that he had been leaving work early, but indicated that management had been aware that he had been leaving early and that he was not responsible for filling out his time sheets; and that by the following letter dated May 22, 1985, from Richard Pott, a staffing specialist for the Board, the Complainant was notified that he had been discharged:

March 22, 1985

Mr. Ernest McDade
P.O. Box 133
Milwaukee, WI 53201

Dear Mr. McDade:

The director of plant operation has advised me that a hearing was held on Tuesday, March 19, 1985, to discuss your falsification of time records and your failure to follow work rules. Present at the hearing were yourself, Mr. Pat Grady, Local 150 representative; Mr. George Schlesinger, director of plant operation; and Mr. Antonio Roca, assistant director of plant operation. The hearing revealed that on ten separate occasions between February 6, 1985, and March 11, 1985, you left your work site prior to your quitting time of 6 p.m. However, you reported on your time sheets that you had worked until 6 p.m. On at least two occasions you had left at least an hour and fifteen minutes before your quitting time. You have received the plant operation division work rules which require you to record actual time worked and provide that leaving work before the end of your shift, even if properly reported on the time sheet, is cause for disciplinary action. You not only left work early, but falsified the time sheets by reporting you left at your quitting time of 6 p.m.

Therefore, based on your record and the recommendation of the director of plant operation and under the provisions of Article VI, Paragraph 6.06 of the Rules of the Board of School Directors, you are hereby discharged from your position of building service helper I at 68th Street School at the end of your shift on March 12, 1985.

The reasons for your discharge are: Falsified time records and failure to follow plant operation division work rules.

You are hereby further advised that within five days after the receipt of this notice you may file a grievance as to the just cause of this discharge. You may be represented in this matter by a member of your bargaining unit, legal counsel and/or other person of your choice.

This action is taken by the direction and authority of the Secretary-Business Manager.

If there are any questions concerning this matter, please contact this office.

Sincerely,

Richard Pott
Staffing Specialist
Classified Personnel Section

RP:glr
cc: George Schlesinger
Pat Grady

5. That the 1983-1986 Collective Bargaining Agreement between the Respondent Board and the Respondent Union covering the Building Service Helpers unit contains a four-step grievance procedure, with the fourth step being the certifying of the grievance to an "impartial referee" selected by the Board and Union; that said grievance procedure provides for time limits for presenting the grievances and for management to respond at each step; and that the Agreement also contains the following provisions regarding Board rules and discipline:

PART I

E. SUBORDINATE STATUTES, ETC.

This agreement shall in all respects, wherever the same may be applicable herein, be subject and subordinate to the provisions of the Wisconsin Statutes as amended and shall also be subject to the rules of the Board, as amended, provided, however, that if any amendment to the rules is in conflict with any specific provision of this agreement, the agreement shall govern.

. . .

PART VI

H. DISCIPLINARY MATTERS

1. Any regularly apointed (sic) employe who is reduced in status, suspended, removed or discharged may, within five (5) working days after receipt of such action, file a grievance as to the just cause of the discharge, suspension or discipline imposed upon him/her.

2. The Union shall be notified of all disciplinary actions.

6. That on March 25, 1985 the Union filed a grievance on Complainant's behalf grieving his discharge; that a second step grievance meeting was held at which Complainant, Grady, Pott, Schlesinger and Roca were present; that at said meeting management presented its case against Complainant which included his past work record and a record of ten dates on which Schlesinger alleged that he observed the Complainant leave work early or that he found the 68th Street School unoccupied prior to the end of Complainant's scheduled work shift; that Grady spoke on Complainant's behalf at said meeting; that at said meeting the Complainant did not deny that he had left work early, but told his side of the story and stated that management and Rebella knew he left early and still recorded his full hours on his time sheets, that the problem stemmed from a dispute between he and Rebella regarding whether he was to clean blackboards and that he wanted a transfer and would not work for Rebella; that the Complainant's work record with the District, in addition to the December 1984 warnings, included a number of warnings and two suspensions for excessive absenteeism; that Pott issued a "Grievance Disposition Form" dated April 18, 1985 denying Complainant's grievance; that at Complainant's request, on July 18, 1985 the Union filed an appeal of the denial of the Complainant's grievance to step three; that a third step grievance meeting was held with the Complainant, Grady, Schlesinger and David Kwiatkowski present; that at the earlier meetings the Complainant had stated that a reason he left work early was that the 68th Street School is in an all-white neighborhood and he was the only black man traveling down the alley when he left the school in

his car and he wanted to leave before it was dark; that at the third step meeting the Complainant gave as an additional reason for leaving early that his mother had a stroke the year prior and he would leave early to make sure that she was not trying to cook, and then return to the school or come in on the weekend, and that management was aware of this practice; that at said meeting Kwiatkowski asked the Complainant if he would resign if he was rehired, and when the Complainant mentioned this to Grady the latter responded to the effect that "Do you really think you are going to get this job back;" and that on October 14, 1985 the Secretary-Business Manager for the District issued a "Grievance Disposition Form" denying the Complainant's grievance.

7. That following the denial of Complainant's grievance at Step 3, Iverson, in his capacity as the Respondent Union's President, reviewed the Complainant's grievance of his discharge in determining whether the Union would proceed to arbitration on the grievance; that at Iverson's request, Grady produced the evidence gathered during the grievance meetings and documents from the Complainant's personnel file for Iverson's review; that in reviewing the grievance Iverson reviewed and considered the evidence that the Board's administrators had relied on and produced during the grievance meetings, the work rules, the Complainant's personnel file, including the prior disciplinary warnings and suspensions, the Complainant's work history and the lack of a denial by the Complainant that he had left work early; that after reviewing the Complainant's grievance, Iverson decided that there was not a sufficient likelihood of success if the grievance was submitted to arbitration and did not certify the grievance to an impartial referee for arbitration; and that the Union did not receive an appeal from Complainant of Iverson's decision to not proceed to arbitration on his grievance.

8. That the Complainant was not, and is not, satisfied with the representation afforded him by Grady and the Union during the processing of his grievance, both as to the manner in which Grady represented the Complainant in the grievance meetings and the delays in processing the grievance and as to the Union's refusal to process the grievance to arbitration; and that the Complainant believes his contractual rights have been violated by the Board.

9. That the Union, through its Business Representative, Pat Grady, represented the Complainant at all of the meetings with the Board's representatives regarding the Complainant's discharge; that Complainant's grievance was not denied as untimely at any of the steps in the grievance procedure; that part of the delay in processing the grievance was due to having to await the response from management; and that Grady's representation of the Complainant in processing his grievance and Iverson's decision not to certify Complainant's grievance to arbitration was not arbitrary, discriminatory or done in bad faith.

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

CONCLUSIONS OF LAW

1. That Respondent Local 150, its officers and agents, did not violate its duty of fair representation with respect to the Complainant by the manner in which it processed the Complainant's grievance and by not certifying said grievance to arbitration, and, therefore, did not violate Sec. 111.70(3)(b)1 of the Municipal Employment Relations Act.

2. That having concluded that Respondent Local 150 did not violate its duty to fairly represent the Complainant, the Examiner is without jurisdiction to determine whether the Respondent Milwaukee Board of School Directors, its officers and agents, violated Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act by discharging the Complainant.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

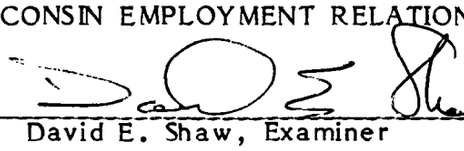
ORDER 1/

1. That the complaint filed herein be, and the same hereby is, dismissed in its entirety.

2. That the motion of the Respondent Milwaukee Board of School Directors for costs and attorneys fees be, and same hereby is, denied.

Dated at Madison, Wisconsin this 9th day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
David E. Shaw, 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.

MILWAUKEE BOARD OF SCHOOL DIRECTORS
LOCAL 150

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In the complaint filed in this case the Complainant asserts that certain members of the Board's Plant Operations management and a School Engineer conspired to have him discharged, and that when he was discharged the Union's Business Representative failed to properly represent him in the grievance procedure by siding with management and by allowing the time for appealing the grievance to the next step to "go null."

In its Answer the Union admits that a grievance was filed and properly pursued through the grievance procedure up to the arbitration step, and asserts that at that point the Union considered the merits of the grievance and determined not to take it to arbitration. In making that determination it did not act in a bad faith, arbitrary or discriminatory manner.

The Board's Answer denies that there was any conspiracy to have the Complainant discharged and admits that a grievance was filed on his discharge through the third step and that the denial of the grievance at that step was not appealed. The Board denies the Union allowed the grievance to become untimely. As affirmative defenses the Board's Answer claims first that Complainant must first show that the Union breached its duty of fair representation prior to any determination being made on the merits of his discharge. Secondly, the Board claims it has no evidence of any such breach by the Union. Third, that any decision by the Union not to proceed to arbitration on the grievance was based on a good faith determination that it lacked merit and would not be upheld by an arbitrator. In support thereof, the Board also claims that the Complainant was discharged for just cause. The Board also requested it be awarded costs and/or reasonable attorneys fees.

COMPLAINANT

The Complainant contends that the evidence shows that the whole time he was at the 68th Street School he never received a reprimand for not completing his work. Even when Schlesinger visited the school and found it empty, he found the work had been done. According to the Complainant, work he could not complete during the week he finished on the weekends.

The evidence also demonstrates that Rebella and the Complainant's supervisors were aware he was leaving work early, but they still put the full hours on his time sheets. Complainant asserts it was not his responsibility to check the hours on the sheet, only to sign the sheet. Complainant also alleges that the evidence shows that he was not paid for the time he was not at the school, that he was marked AWOL on days when he was not required to be at work and that he had earned a significant number of "merit days" that he could not use. Further, his time sheets show that he did not deserve the suspensions he received in the past.

It is also contended by Complainant that he made his supervisors aware of the situation with regard to Rebella's trying to make him look bad because he would not clean the blackboards as Rebella had ordered.

The Complainant argues that Schlesinger's documentation of his leaving early shows that it is inaccurate and exaggerated.

With regard to the representation afforded him by the Union, the Complainant asserts that he had never met Iverson prior to the hearing in this case and that Grady just kept his arms folded each time he appeared as the Complainant's representative.

UNION

The Union contends that the standard to be applied in a duty of fair representation case is that set forth in Mahnke v. WERC, 66 Wis. 2d 524 (1975) and that the Complainant has not met his burden of proof under that standard.

According to the Union, the Union was present and represented the Complainant at all of the hearings on his suspension and discharge and all of the facts were brought out at those hearings. The Union's President reviewed and considered all of the evidence - including the Complainant's work record, the fact that he did not dispute that he was leaving early and the fact that there was strict adherence to set hours in these positions, in deciding the likelihood of success on the merits if the grievance went to arbitration.

Noting its Constitution, the Union asserts that the Complainant could have appealed to the President if he was dissatisfied with Grady's conduct and also had the right to appeal the President's decision not to take the grievance to arbitration, but he did not take advantage of either of those procedures.

The Union feels that this is a case of the Complainant and the Union seeing something different when viewing the same events. The Complainant saw a conspiracy against him by management, and the Union looked at the evidence and management's actions and decided that an arbitrator would find that the employer acted properly in documenting the violations and following progressive discipline and would sustain the discharge. Similarly, while the Complainant felt that other events should not be considered, the Union realized its responsibility to assess the grievance as would an arbitrator. The Union pursued the grievance for the Complainant, gathered and reviewed the information and made an informed and proper decision not to proceed to arbitration.

BOARD

The Board contends that the Complainant has a double burden of proof with regard to his complaint against the Board. He must first prove that the Union violated its duty of fair representation, and only if he proves that may he proceed to the merits of his discharge, where he then has the burden of proving that he was discharged for reasons other than just cause. While the Board does not have the burden of proving just cause as to Complainant's discharge, if it did, the evidence indicates that the Board has met that burden.

Regarding the Complainant's discharge, the Board contends that he was made aware at the start of his employment of the applicable work rules regarding reporting and remaining at work, yet he repeatedly violated those rules. He was reprimanded three times in December of 1984 and did not grieve. In February of 1985, having reason to believe he was still leaving work early, his supervisors personally observed him to determine if that was true. Their method of observing him was the only way it could be determined if discipline was warranted. These observations showed that the Complainant left early on at least ten separate occasions. The Complainant signed his time sheets with his full hours, verifying those were the hours he had worked, thus, falsifying his time sheets. Further, the Complainant admitted that he left work early and that he never sought permission to do so. The Complainant's work record also was anything but exemplary and that was also a factor that was considered in deciding he should be discharged.

As to the Union's role, the Board asserts that the record shows that the Union represented the Complainant by filing and processing his greivance on his discharge and representing him at the grievance hearings. The Board's evidence was explained at those hearings. There was no issue of timeliness as to the grievance and the Union decided not to proceed to arbitration on the basis that it would not have succeeded in arbitration.

Lastly, the Board asserts that there is no evidence of any conspiracy between Complainant's supervisors to get him and no evidence that he was subjected to a different standard from other employes. There is also no evidence that the Union did other than fully represent the Complainant and no evidence that the Union bore him any ill will, rather it made its decision based upon an objective review of the facts. The evidence does indicate that the Complainant failed to exhaust his internal Union remedies.

The Board also contends that the Complainant should be ordered to pay costs and attorneys fees to the Board for bringing a frivolous suit.

DISCUSSION

The Complainant has alleged a breach of his contractual rights by management's actions leading up to his discharge and a breach of the Union's responsibility to him by its failure to properly represent him.

The applicable law is set forth in the Wisconsin Supreme Court's decision in Mahnke, supra. Relying on the U.S. Supreme Court's decision in Vaca v. Sipes, 2/ the Wisconsin Court held that: (1) where the contract grievance procedure has not been exhausted, in order for the complaining employe to bring suit against the employer for a breach of contract claim the union must be showed to have breached its duty of fair representaion in refusing to process the grievance; (2) such a breach of the duty of fair representation "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith;" 3/ (3) "a union has considerable latitude in deciding whether to pursue a grievance through arbitration," 4/ however, in exercising its discretion "a union must, in good faith and in a nonarbitrary manner, make decisions as to particular grievances." 5/

Here it has been alleged and admitted that the contractual grievance procedure was not exhausted. Therefore, to proceed against the Board with his claim of an unjust discharge, the Complainant must first prove that the Union breached its duty of fair representation in the manner it processed his grievance and/or by refusing to appeal it to arbitration. To do so, the Complainant must show that the Union's conduct toward him was arbitrary, discriminatory or in bad faith.

As set forth in the Findings of Fact, at the time of the March 19, 1985 hearing on the Complainant's suspension/potential discharge the Union was made aware of the bases of the Board's charges, i.e., the evidence that the Complainant had been leaving work early and that he had signed his time sheets showing he had worked his full hours, Complainant's recent written warnings and his work record. The Union's Business Representative, Grady, had two months previously arranged and been present at an informal meeting between the Complainant and his supervisor to discuss his absenteeism problem and to permit the Complainant to tell them his problems in working for Rebella. Grady was present with the Complainant at the March 19 meeting and the second and third step grievance meetings and was shown the evidence against the Complainant and was aware that the Complainant did not deny that he had been leaving early, but felt he was not wrong for doing so under the circumstances. The record indicates that at each meeting the Complainant was given the opportunity to give his reasons for what he did and why he felt he should not be held responsible for the inaccurate time sheets. The record also indicates that while the grievance did not move through the steps of the procedure as quickly as the Complainant wished, the delay was not all on the part of the Union and there was no issue raised that the grievance appeals were untimely. Iverson credibly testified that when the third step denial of Complainant's grievance was received, he reviewed the grievance, the Board's evidence, and the Complainant's work record and determined that it was unlikely that the grievance would be sustained in arbitration.

The Complainant's complaint against the Union and Grady, other than the delay in the processing of the grievance, appears to be that they did not share his belief that he had not done anything improper and that he was a victim of a conspiracy between his supervisors, and therefore did not press his arguments in that regard with sufficient zeal. Such feelings are understandable. There is, however, no evidence that the Union conducted itself differently in this case than it has in processing other grievances or that its representatives bore the Complainant any ill will. It is fully within the Union's role as the exclusive collective bargaining representative to assess the evidence and make a good faith determination as to whether to process a grievance to arbitration and the Union is given wide latitude in making that decision. 6/ That the Union reviewed the evidence and came to a different conclusion from that of the Complainant is not sufficient to establish arbitrary, discriminatory or bad faith conduct.

2/ 386 U.S. 171 (1967).

3/ 66 Wis. 2d at 531 (citing Vaca, 386 U.S. at 190).

4/ Ibid.

5/ Ibid.

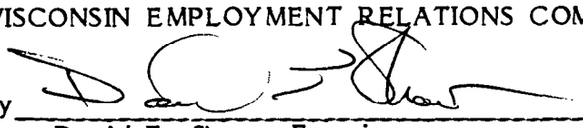
6/ Mahnke, 66 Wis. 2d at 531-32.

It has, therefore, been concluded that the Complainant has not shown that the Union has violated its duty of fair representation, either in the manner it processed the Complainant's grievance or by refusing to appeal the grievance to arbitration. Having reached that conclusion, the Examiner is without jurisdiction to consider Complainant's claim against the Board.

The Board has requested that the Complainant be ordered to pay it costs and/or reasonable attorneys fees. As the Commission has held that such relief is not available in the absence of specific statutory language requiring it or the parties having contractually agreed otherwise, 7/ it has been denied. Further, in these circumstances such an order would be penal in nature, and not part of a make whole remedy, and would have an unwarranted chilling effect on individual employes bringing suit challenging their union's and employer's actions and, therefore, would be contrary to the purpose of permitting such suits.

Dated at Madison, Wisconsin this 9th day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 

David E. Shaw, Examiner

7/ Madison Metropolitan School District, Dec. No. 16471-D (WERC, 5/81), affirmed in relevant part, (Ct. App. IV) 115 Wis. 2d 623 (1983).