STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CONNIE A. MERKEL, Complainant, vs. CITY OF GREENFIELD and DISTRICT COUNCIL 48, AFSCME, AFL-CIO, and its affiliated LOCAL 2, Respondents.	Case 90 No. 38744 MP-1971 Decision No. 24776-C

Appearances:

Mr. Gary M. Williams, Attorney at Law, P.O. Box 421, 12065 West Janesville Road, Hales Corners, Wisconsin 53130, appearing on behalf of the Complainant.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Daniel G. Vliet and Mr. Robert W. Mulcahy, 815 East Mason Street, Milwaukee, Wisconsin 53202-4080, appearing on behalf of the City of Greenfield.

Podell, Ugent & Cross, Attorneys at Law, by Ms. Nola J. Hitchcock Cross, Suite 315, 207 East Michigan Street, Milwaukee, Wisconsin 53202-4905, appearing on behalf of District Council 48, AFSCME, AFL-CIO, and its affiliated Local 2.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Lionel L. Crowley having on March 31, 1988, issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter wherein he concluded that Milwaukee District Council 48, AFSCME, AFL-CIO had not committed prohibited practices within the meaning of Sec. 111.70(3)(b)1 and 4, Stats., and that he therefore would not exercise jurisdiction to determine Connie A. Merkel's allegations that the City of Greenfield had violated Sec. 111.70(3)(a)5, Stats.; and Complainant Merkel having on April 19, 1988, filed a petition with the Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats.; and the parties having filed written argument in support of and in opposition to the petition for review, the last of which was received on June 8, 1988; and the parties thereafter having submitted written argument, the last of which was received on June 28, 1988, regarding Respondents' motions to strike certain portions of Complainant Merkel's addendum to a reply brief and the Respondent Union's motion to strike Complainant's counsel's reply brief; and the Commission having considered the matter and having reviewed the record, makes and issues the following

ORDER 1/

That the Examiner's Findings of Fact, Conclusions of Law and Order are hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld
S. H. Schoenfeld, Chairman

Herman Torosian, Commissioner

I dissent:

A. Henry Hempe, Commissioner

(See Footnote 1/ on Page 2).

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

CITY OF GREENFIELD

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE COMPLAINT

In her complaint initiating these proceedings, Complainant alleged that the Union and the City had committed prohibited practices in violation of Secs. 111.70(3)(b)1 and 4 and 111.70(3)(a)5, Stats., respectively, by the Union's violation of its duty of fair representation to Complainant by its agreement to withdraw her grievance and allow her to be terminated from her employment and by the City's violation of the Complainant's seniority rights under the parties' collective bargaining agreement.

THE EXAMINER'S DECISION

The Examiner concluded that the Union had not violated its duty of fair representation when it withdrew the Complainant's grievance. In doing so, he rejected Complainant's argument that the Union had withdrawn Complainant's grievance simply to satisfy certain other employes in the bargaining unit because it was politically expedient to do so. The Examiner reasoned as a general matter that a Union can make seniority decisions within a wide range of reasonableness in serving the interests of the employes it represents and that although the Union cannot make a decision solely for the benefit of a stronger, more politically favored group at the expense of a minority, the Union is not required to sacrifice the rights of the majority to placate the minority. The Examiner concluded that the record demonstrated that the Union elected to withdraw Complainant's grievance as a part of its effort to secure an agreement which benefited the bargaining unit as a whole. Thus, the Examiner concluded that "the evidence fails to prove that the Union did anything other than consider the legitimate concerns of its members and do what it thought was best for the majority." Thus, he concluded that there was no basis upon which to find that the Union's conduct toward the Complainant was arbitrary, discriminatory or in bad faith.

The Examiner rejected Complainant's assertions that the Union's action was akin to the relinquishment of established seniority rights on the part of an employe at the behest of a majority who stood to benefit from this action. After reviewing the cases cited by Complainant for the proposition that such conduct would constitute a breach of the duty of fair representation, the Examiner concluded that where, as here, the City had never recognized any accumulation of seniority on the part of Complainant, Complainant did not possess the undisputed seniority rights which were the basis for the finding of a violation in the cases cited by Complainaint. The Examiner noted that the grievance arbitration award upon which Complainant rests her assertion that she possessed such seniority rights can reasonably be interpreted in different manners. Thus, although the Complainant argued that the principles of stare decisis should be applied to the arbitration award, the Examiner rejected this claim and concluded that the Union could reasonably have determined that under the circumstances it was better serving the bargaining unit to secure contract language which definitively established the rights of temporary employes such as the Complainant. As to the assertions of Complainant which are premised upon the filing of a grievance by nine bargaining unit members seeking Complainant's termination because she had failed to take a civil service exam, the Examiner noted that even prior to the filing of said grievance, the Union had proposed contract language to the City which provided for the termination of temporary employes. Thus, the Examiner reasoned that even prior to the filing of the grievance by nine bargaining unit members, the Union had already tacitly conceded to the City that temporary employes would not gain seniority rights as part of the Union's overall effort to establish that temporary employes were members of the bargaining unit with certain other rights and benefits. The Examiner found that the Union's conduct and reasoning fell within the discretion it must exercise when representing all members of the bargaining unit.

Having concluded that the Union did not breach its duty of fair representation toward Complainant, the Examiner did not exercise jurisdiction to reach Complainant's breach of contract claim against the City and therefore dismissed the complaint in its entirety.

POSITIONS OF THE PARTIES

The Complainant

The Complainant asserts that the Examiner erred when he concluded that the Union had not breached its duty of fair representation. Complainant asserts that she had acquired seniority rights under the clear and unambiguous provisions of the contract and that her grievance seeking to confirm said rights was clearly meritorious. Complainant notes that the Union agreed with the Complainant's position as to her seniority rights and fully supported her grievance until the time at which nine other members of the bargaining unit filed a grievance contesting Complainant's continued employment. Complainant contends that although the Union initially attempted unsuccessfully to dissuade the nine bargaining unit members from pursuing their grievance, the Union ultimately determined that it was politically expedient to sacrifice Complainant's seniority rights to avoid a confrontation with this substantial faction in the bargaining unit. Complainant contends that the record does not support the Examiner's conclusion that Complainant's seniority rights were compromised as part of the give-and-take of collective bargaining. Complainant contends in this regard that the Union unilaterally changed its position as to Complainant's seniority rights without receipt of any consideration from the City. While Complainant agrees that the Union is ordinarily entitled to a wide range of reasonableness in reconciling the competing interests of employes within a bargaining unit, Complainant asserts that where, as here, the seniority rights of the minority are expressly confirmed by the applicable collective bargaining agreement, a union breaches its duty of fair representation when it sacrifices such rights based upon considerations of political expediency, citing NLRB v. General Truck Drivers, 545 F. 2d 1173, (9th Cir., 1976); Schoen v. Lodge 34, International Association of Machinists, 590 F. Supp. 193, (E. D. Wis., 1984); and Barton Brands, Ltd. v. NLRB, 529 F. 2d 793 (7th Cir., 1976).

In reply to arguments made by the City and the Union, Complainant asserts that the prior arbitration award which found that a temporary employe was entitled to the wages and fringe benefits paid to regular employes definitively establishes that Complainant was a regular employe under the contract possessing seniority rights despite her failure to pass the civil service examination. Although Complainant admits that the grievant in the prior arbitration award had passed the civil service examination, Complainant contends that this factor was never referred to by the Arbitrator in his discussion of the issues and thus had absolutely no bearing upon the outcome. Thus, Complainant rejects the City's assertion that because Complainant had not passed the civil service examination, her situation is distinguishable from that before the Arbitrator. The Complainant also notes that the City has treated her as a regular employe for the purposes of wages, fringe benefits, dues deductions and the filing of the instant grievance, all actions which are inconsistent with the City's current claim that Complainant was not a member of the bargaining unit possessing seniority rights. Thus, Complainant argues that the City clearly violated the collective bargaining agreement when it terminated Complainant's employment. As to the Union's assertions that the nine grieving employes had no animosity toward Complainant, Complainant asserts that the record clearly demonstrated that these employes were jealous of the fact that Complainant had been spared successful completion of the civil service exam when acquiring her position. Complainant asserts that it was the pressure from this "mean-spirited faction of employes" who wanted Complainant terminated which caused the Union's unilateral reversal of position on Complainant's status. Thus, Complainant argues that the Union's motive for dropping her grievance was not a hope or a "good faith" belief that such a concession would induce the City to make return concessions.

Given the foregoing, Complainant asks that the Examiner's decision be reversed and that an appropriate remedy be ordered by the Commission, including attorney's fees.

The Union

The Union urges the Commission to affirm the Examiner's conclusion that it did not breach its duty of fair representation as to Complainant. The Union asserts that while it believed that there was potential merit to Complainant's grievance, her case was not a sure winner because the arbitration award upon which

Complainant so heavily relies involved an employe in a different factual situation than was applicable to Complainant. The Union contends that it not only had a right, but a duty to evaluate the merits of her grievance in the context of the likelihood of success at arbitration as well as the advantages to the bargaining unit if the grievance was settled prior to arbitration. The Union alleges that its decision not to pursue the grievance was not arbitrary, discriminatory or in bad faith. The Union asserts that it agreed to drop several grievances, including Complainant's, in exchange for a settlement upon new language helpful to all members of the bargaining unit including temporary employes. The Union notes that it is not unusual for either side to seek modification of contract language after an arbitration award is received which is considered unfavorable. The Union asserts that that is exactly what the City was doing here, and that the Union was responding to the City's effort in a reasonable matter which ultimately produced a satisfactory settlement. Thus, the Union asserts that its decision cannot be characterized as arbitrary or without reason.

The Union contends that the decision to withdraw the Complainant's grievance was not discriminatorily motivated. In this regard, the Union argues that the only indication of any ill feelings toward Complainant was a grievance filed by certain unit employes who felt Complainant should be required to pass a civil service exam just as they had. The Union argues that Complainant has not shown that the Union representative or anyone on the Union bargaining team bore any animus toward Complainant. On the contrary, the Union asserts that the record demonstrates that the Union representative supported Complainant's grievance until the ultimate decision to drop same in exchange for other concessions. The Union contends that the record establishes that none of the grieving individuals were on the bargaining team and that no one on the bargaining team ever expressed any basis for discriminating against Complainant.

Citing State of Wisconsin, Dec. No. 23486-A (WERC, 12/86), the Union argues that the Commission has recognized that a collective bargaining representative sometimes has to make choices between conflicting interests of bargaining unit members and that the resultant dissatisfaction of some members does not constitute a violation of the duty of fair representation. The Union argues that the fact that it was unsuccessful in acquiring City agreement to proposals which would have been more beneficial to Complainant does not mean that it was acting in bad faith.

Given the foregoing, the Union asks the Commission to affirm the Examiner.

The City

The City urges the Commission to affirm the Examiner's decision. The City argues that Complainant did not have vested seniority rights under the existing contract as interpreted in a prior arbitration award. At best, the City argues that the arbitration award did not address Complainant's assertions regarding the seniority rights of temporary employes. The City also contends that the record demonstrates that the Union and the City engaged in extensive good faith collective bargaining regarding many issues surrounding use of temporary employes such as the Complainant and that the Union was able to obtain significant improvements as a result of those negotiations including inclusion of temporary employes in the bargaining unit. The City asserts that there can be little doubt that the settlement of Complainant's grievance as part of the overall bargain was in the best interest of the bargaining unit, especially considering the inapplicability of the prior grievance arbitration award to the Complainant's situation.

The City concurs with the Examiner's conclusion that had the Complainant's grievance been pursued to arbitration, another arbitrator could easily have concluded that the grievance lacked merit in which case the Union and the entire bargaining unit would have lost an opportunity to acquire contract language to resolve the issue. The City argues that the end result of the negotiations was to the benefit of the entire unit since the entire problem of the City's use of temporary employes was resolved rather than just the Complainant's grievance. Thus, the City asserts that the Complainant has failed to establish that the Union's conduct was arbitrary, discriminatory or in bad faith. This being the case, the City argues that there is no basis for the exercise of the Commission's jurisdiction to reach Complainant's breach of contract claim.

Therefore, the City requests that the Examiner's decision be affirmed.

DISCUSSION

We affirm the Examiner's well reasoned decision. He initially recited at length the standard against which the Union's conduct herein must be measured. He correctly cited Mahnke v. WERC, 66 Wis. 2d 524 (1975) and Coleman v. Outboard Marine Corp., 92 Wis. 2d 565 (1979) wherein our Supreme Court expressly adopted the "arbitrary, discriminatory or in bad faith" standard and wherein the Court quoted with approval applications of this standard which extend broad discretion to unions as they seek to represent their varying constituencies within a bargaining unit.

It is important to note that in duty of fair fair representation cases involving a union's decision not to pursue a grievance, the fact that the grievance may be meritorious is not determinative of whether a violation of law has occurred. It is only if the union's action in not pursuing even a meritorious grievance is arbitrary, discriminatory or in bad faith that there is a violation. It has long been held that a union has a great deal of discretion in deciding whether or not a grievance should be pursued through arbitration. 2/

As argued by the Complainant, a union cannot make a decision solely for the benefit of a stronger, more politically favored group at the expense of the minority. However, the Examiner aptly rejected Complainant's argument that this case is akin to those in which a union arbitrarily sacrificed the established seniority rights of a minority group. Here, although the rationale of the Slivon award gave the Complainant and the Union optimism that her grievance seeking permanent job status would be victorious in arbitration, it must be remembered that the City was vigorously opposing the grievance and seeking related changes in contract language. Further, as the Examiner noted, the Silvon award involved the entitlement of a temporary employe to contractual wage and fringe benefits and thus did not deal directly with the rights of temporary employes to permanent job status. 3/ Thus, although certain rationale contained the Silvon award would likely have been given some persuasive value in an arbitration proceeding, at the time Complainant's grievance was dropped, her job status rights, if any, had not been established and remained disputed by the City.

Furthermore, contrary to the Complainant's claim herein, the Union was free to consider the internal opposition of part of the bargaining unit to the Complainant's grievance when it was determining how to respond to the City's adamant opposition to the Complainant's grievance at the bargaining table. The limited testimony in the record regarding the motivation for the internal opposition establishes that there was a feeling among some unit members that Complainant should not acquire permanent status unless she passed the civil service exam. Whatever the contractual merits of this minority position might be, the record does not establish that it was based upon any personal ill will toward Complainant. 4/ More importantly, while the Union representative may have felt that he was "between a rock and a hard place" by the situation created by the nine objectors, the record establishes to our satisfaction that this minority opposition did not play a significant role in the Union's decision-making process. The Union leadership opposed the grievance seeking Complainant's termination. No member of the group filing the grievance had held any position of authority within the Union or had ever been active within the Union. There is no evidence of any contact between this minority group and the Union leadership regarding Complainant's rights aside from that which occurred when the Union leadership advised the group of the leadership's opposition to their grievance. Indeed, even

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2/ Manhke v. WERC, supra; Humphrey v. Moore, 375, U.S. 335 (1975).

3/ Given the difference in the issues involved in the Silvon award and the Merkel grievance, the principle of stare decisis would not be applicable. We also note that the principle of stare decisis is not always given great deference in arbitration.

4/ While our colleague correctly notes in his dissent that ill-will on the part of the Union is not necessary to a finding of arbitrary conduct by the Union, our comment is limited to the question of whether the nine employes filing the minority grievance bore Merkel any ill-will. However, we would nonetheless note that in the Local 13 case cited by our colleague in Footnote 14, the Court remanded the matter for a determination as the issue of Union ill-will toward the grievant.

after the minority group grievance was filed, the Union made another bargaining proposal which sought to give Complainant the permanent status she desired. 5/ It is also noteworthy that well before the minority grievance was filed, the Union had already acquiesced to the City's general position that temporary employes would lose their position when the job was filled from a civil service list. Thus, the filing of the minority grievance played no role in this aspect of the Union's conduct. The strength of the inference which Complainant asks us to draw from the timing of the Union proposal to drop Complainant's grievance in relation to the processing of the minority group grievance is blunted both by the foregoing and by the fact that successive proposals from one party during bargaining are not particularly rare in our experience.

In summary, we are satisfied that the record establishes that the Union considered the merits of Complainant's grievance, the likelihood of success in arbitration, the impact upon the Complainant of dropping her grievance and then reluctantly concluded that the grievance should be dropped as part of an overall effort to gain contractual concessions from the City at the bargaining table favoring a majority of the employes. In our view, such conduct as is established by the record herein is not arbitrary, discriminatory or in bad faith and instead falls well within the range of discretion which a union is granted when it seeks to fairly represent all members of the unit. Thus, we have affirmed the Examiner. 6/

Our colleague's dissent appears to be a classic example of the outcome of a duty of fair representation case being influenced by sympathy towards the grievance giving rise to the alleged breach.

Our colleague is apparently convinced that Merkel's grievance was dropped in negotiations for no other reason than political expediency. For reasons already discussed above and thoroughly discussed in the Examiner's decision at pages 17 and 18, we disagree.

In support of his conclusion, our colleague relies on the Barton Brands and Alvey cases. The distinguishing facts in those cases, however, are apparent. In those cases, the action by the unions was strictly based on political expediency - nothing else. That is not the case here. The Union's move to drop Merkel's grievance was not solely to satisfy the nine objectors, but rather was a move that was deemed best, in terms of a total package settlement, for a majority of the employes. Tr. 261-265; 1276. 7/ The move had to be weighed against available alternatives. The City was vigorously opposing the Merkel grievance. The Union was convinced the City would not yield in its desire to change language pertaining to temporary employes. True, the Union felt it had a good case in arbitration under the expired collective bargaining agreement language, but there was no assurance at all that the same language would prevail in negotiations or in

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5/ Our colleage in footnote 11 notes that February 19, 1986 was the last time a proposal was made by the Union that included a request that Merkel be permanently appointed to her position. We would note that on November 27, 1985 the Union proposed that "all existing full-time temporary help, hired before January 1, 1986 shall be grandfathered for all benefits" and on January 13, 1986 proposed that "all present temporary employees to be grandfathered in on all benefits." Both the purpose and effect of said proposals was to permanently establish Merkel in her position.

6/ In reaching our decision, we found it appropriate to review both the reply brief submitted by Complainant's counsel as well as the addendum thereto drafted by Complainant herself. However, our consideration of the addendum was limited to the argument Complainant made which was based upon the factual record made before the Examiner. Thus, we hereby grant Respondents' motion to strike to the extent that the addendum strayed from the existing record and deny the Union's motion to strike Complainant's counsel's entire brief.

7/ The Union in the total package proposal in which it proposed certain language changes and proposed to drop the Merkel grievance stated that the changes proposed " . . . are needed to show that we bargain in good faith for the majority of our members in this bargaining unit."

interest arbitration which the City had a right to invoke. In fact, the City invoked interest arbitration and prevailed over two issues which were not resolved in negotiations. Thus, the Union staff representative was aware that there was a very real possibility that if the Union held firm on Merkel's grievance, it could win the battle and lose the war. That is, it could win the Merkel grievance in grievance arbitration under the language of the expired agreement but find that Merkel, nevertheless, would lose her position by virtue of the City having its final offer, including its temporary employe language change, selected in interest arbitration. Furthermore, unlike a negotiated agreement, the Union under such a scenario would have gained nothing in exchange for the language change secured by the City. We feel the weighing of alternatives and the making of decisions such as this as to which best serves a majority of the employes is within the wide range of reasonableness allowed a statutory bargaining representative when serving the unit it represents. The Union's conduct simply was not arbitrary, discriminatory or in bad faith.

Further, this case is not like the Local 13, ILWU case cited by our colleague wherein the court, in remanding the case for further proceedings, stated that the ". . . sacrifice of a particular employe as the consideration for other objectives must be a concession the Union cannot make." In that case, the court recognized that the mere swapping of grievances does not establish a breach of the duty of fair representation and reasoned that "in this practical world such issues, susceptible of no absolutely 'right' solution, are often resolved by accomodation." The case was remanded, however, to determine if it was the union's hostility towards the grievant that motivated the union to swap his grievance for another.

Finally, the dissent comments upon the Union's conduct as to the timing and manner in which it advised the grievant that it had abandoned the grievance. Our colleague cites Robesky v. Quantas Empire AFL-CIO, 573 F.2d 1082 (9th Cir., 1978), and Coleman v. Outboard Marine Corp., 92 Wis.2d 565 (1979) as support for his comments. However, it should be pointed out that the court in Coleman did not find the union engaged in arbitrary conduct. It merely reversed an order granting summary judgment and remanded the case for further proceedings. Moreover, unlike the facts in this case, the complaint in Coleman alleged that the failure of the union to inform the grievant that a settlement had been reached caused the grievant to act to his detriment and to lose his job. Similarly, in Robesky, because of the failure of the union to notify the grievant that it had abandoned the grievance, the grievant rejected the employer's offer of settlement that he otherwise would have accepted and consequently the grievant was discharged. In Robesky, the rights of the employe were severely prejudiced because of the union's conduct vis-a-vis notification. In the instant case, there has been no such showing nor has Complainant alleged same. The record establishes that the Union consistently advised Merkel to take all tests offered by the City. Tr. 39, 69, 265; Ex. 38. Merkel elected not to take the third test, the timing of which is not definitively established by the record (Tr. 68, 74, 265), because of her health (Tr. 105) and her lawyer's advice Tr. 68. Thus, while we may agree that Merkel could have received a more timely update of her situation than she received, the lack of same by the Union would not constitute a breach of duty of fair representation under the facts herein.

Dated at Madison, Wisconsin this 23rd day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By S. H. Schoenfeld
S. H. Schoenfeld, Chairman

Herman Torosian, Commissioner

I dissent:

A. Henry Hempe, Commissioner

DISSENTING OPINION OF COMMISSIONER A. HENRY HEMPE

My colleagues in the majority profess to perceive no impropriety in the conduct of the Union towards one of its members, Connie Merkel.

I disagree.

I recognize that the demands of the collective bargaining process sometimes require difficult decisions by its participants, as bargaining representatives try to balance internally the demands of one faction with the needs of another -- or, as in this case, the needs of an individual member. Understandably, "(t)he complete satisfaction of all who are represented is hardly to be expected." Humphrey v. Moore, 375 U.S. 335, 349 (1964).

But, while the Union's broad authority in negotiating and administering collective bargaining agreements is undoubted, "it is not without limits." Hines V. Anchor Motor Freight, Inc., 424 U.S. 554, 564 (1976).

On balance, I am persuaded that when the Union abandoned Merkel's interests in the instant matter it exceeded those limits. Its action constitutes, in my view, a breach of its duty of fair representation.

Whether the Union breached its duty of fair representation to the employe is a question of fact. Coleman v. Outboard Marine Corp., 92 Wis.2d 565, 575, 285 N.W. 2d 631 (1979); Mahnke v. WERC, 66 Wis.2d 524, 533, 225 N.W. 2d 617 (1975); Clark v. Hein-Werner Corp., 8 Wis.2d 264, 272, 99 N.W. 2d 132, 100 N.W. 2d 317 (1959).

Here, there is no serious disagreement as to the factual sequence which occurred. The majority views this sequence as essentially benign. I do not. I see it, instead, as an unbroken chain of circumstantial evidence, the first links of which were brightly burnished with the polish of advocatory skill, but in the end all darkened with the tarnish of political expediency. Assessment of these competing factual interpretations requires a somewhat detailed factual knowledge.

* * *

Merkel was recruited and hired to fill a full-time permanent fire department vacancy in the slot of dispatcher/secretary. Although she did her job competently, her employment status remained "temporary" because she had been unsuccessful on two attempts to pass a City-sponsored civil service exam. Two months after she was hired, a respected, experienced arbitrator issued a lengthy and well-reasoned grievance arbitration award involving another "temporary" City employe. The arbitrator found that "temporary" employes, if full-time, were entitled to all labor contract benefits received by regular full-time employes, including the benefits of the seniority provisions. When the Union learned that the City, in apparent disregard of the principles established by this arbitration award, was advertising new civil service exams for the purpose of selecting a civil service certified candidate for Merkel's position, the Union filed a grievance on Merkel's behalf. 8/ This effectively blocked the City from

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8/ The Union asserted that Merkel, by serving the requisite continuous length of full-time service specified in the labor agreement, had attained sufficient seniority in her postion to be protected from discharge unrelated to just cause. The Union acknowledged that Merkel had not conformed to a City ordinance which required regular full-time employes to have first passed a civil service exam, but correctly pointed out that the collective bargaining agreement expressly provided that to the extent its terms conflicted with existing ordinances or resolutions " . . . this agreement shall control."

immediately replacing Merkel, and, as a practical matter, enabled Merkel to keep her position for an additional eleven months. 9/

Collective bargaining between the City and Union as to the terms of a successor agreement began in late 1985. Although on January 28, 1986, the Union had requested and obtained from this Commission a panel of names from which an arbitrator could be selected to hear the Merkel grievance, resolution of the Merkel grievance was subsequently included within the purview of the successor labor contract negotiations at the City's suggestion. Inferentially, this appears to be the reason no arbitrator was ever selected to hear the matter. 10/

In early February, 1986, the Union found itself in an embarrassing position. Nine members of the twenty-five person bargaining unit had filed a "grievance" with the City demanding that Merkel be fired because she had not passed a civil service exam. There is no evidence to suggest any collusion between the nine "grievants" (who had not been previously active in union affairs) and union leadership, nor did the Union represent them when the matter was taken up by the City's Personnel Committee. At the same time, the unauthorized "wildcat" action of the nine unit members caused the Union staff representative to agree that he was ". . . between a rock and a hard place." Tr. 281-2.

In a subsequent face to face conversation between the Union staff representative and a worried Merkel on February 21, 1986, however, the Union representative reassured Merkel that (1) the "grievance" filed by the nine dissidents did not address a grievable issue, (2) the Union would continue its efforts to take Merkel's grievance to arbitration, and (3) the Union was attempting to gain permanent job status for her in the successor collective bargaining agreement then being negotiated. 11/

But on March 11, 1986 - only 21 days after Merkel received these unequivocal reassurances from her Union staff representative - he sent a new written collective bargaining proposal to the City in which he offered, inter alia, to withdraw Union support of Merkel and drop her grievance. Merkel was given no inkling of this drastic change of position by her Union. Tr. 242. Nor had this overture to the City been made in response to any counter-offer to the Union's immediate past proposal of February 19, for there had been none. Tr. 236, 277. 12/ It was an astounding, unilateral change of position by the Union.

9/ Merkel's 26 months of continuous employment began in January, 1985. The collective bargaining agreement then in effect would expire on December 31, 1985. Her local Union ratified a new collective bargaining agreement on May 26, 1986. However, such agreement was neither ratified nor placed in effect by the City because of two additional items on which the City and Union were at impasse which went to interest arbitration for resolution. That process took an additional ten months. The City ultimately ratified the new agreement (which included the two items by then resolved through interest arbitration) on March 17, 1987. That sounded the death knell of Merkel's City employment. Her 26 months of continuous employment ended in April, 1987.

10/ This, however, was not communicated to Merkel.

11/ The Union proposal dated February 19, 1986, had included a specific request that Merkel be permanently appointed to her position. It was the last time a proposal on Merkel's behalf was made by the Union.

Previously, the Union had tentatively agreed to language originally proposed by the City which enumerated the benefits to which temporary employes were entitled. One benefit conspicuously absent from this list was "seniority." Contemporaneous with such agreement, however, the Union proposed that "all present temporary employees be grandfathered in on all benefits." As the majority notes, the purpose and effect of this proposal was to protect Merkel (footnote 5).

12/ The majority observes ". . . that successive proposals from one party during bargaining are not particularly rare in our experience . . ." Neither are they common. Experienced bargainers usually refer to this practice as "bargaining against yourself." The description is apt.

It remains astounding only until a crucial, new fact is learned. Although the 21 day period had not produced a counter-offer from the City, it had produced the publication of an agenda for the meeting of the City's Personnel Committee scheduled for March 12 -- the day after the new union proposal to the City had been dated and mailed. Listed on the agenda as a discussion item for the March 12 meeting, but in executive (not open to the public) session, was the "grievance" (apparently by then at the third step) 13/ which the nine dissidents had continued to pursue without Union help and despite Union counsel that it did not address a grievable issue.

From the record, it is clear that almost all of these nine actually appeared at the March 12 committee meeting. Tr. 230. The Union staff representative also appeared, though he was not representing any of the nine. It is equally clear that the scheduled executive session discussion with these dissidents had been rendered moot by virtue of the Union's abandonment of Merkel the day before. Under these circumstances, only educated conjecture could possibly adduce whatever assurances they were given, for records of executive session discussions are not normally available for public scrutiny, or, indeed, in many cases, not even made.

Whatever they were told, however, seemed to satisfy them; the record shows no evidence that they continued to be visible players in the Merkel drama after the March 12 committee meeting. It is worth noting, however, that their "grievance" demanding that Merkel be fired, though formally neither denied nor granted by the Personnel Committee, was given de facto recognition and effect by the tentative agreement ultimately reached and ratified by both City and Union, which included, of course, the Union's decision to drop the Merkel grievance. 14/

The tentative agreement was ratified by vote of 18 - 4 at a meeting of the local Union membership at which Merkel was present. The new contract items were presented as a package. There is no indication that the membership present was ever advised that dropping the Merkel grievance was a necessary quid pro quo for any part or all of the package.

At hearing, however, on direct examination, the Union staff representative testified that he had obtained seven concessions in exchange for dropping the Merkel grievance. Tr. 274. Under cross-examination, he asserted that it was not only the abandonment of Merkel's interests, but the dropping of other grievances, as well, which produced the seven concessions. Tr. 275. Under continued cross-examination, he then stated only that the tentative agreement taken back to the local unit for ratification was a total settlement package. Tr. 276.

Merkel, herself, first learned of her abandonment by the Union at the contract ratification meeting of her local on May 27, 1986, although the abandonment had actually taken place almost three months earlier. Merkel also perceived herself as the target of some verbal abuse from other members of her local Union. 15/ The record neither compels nor rejects the inference that the dissenters were the source of this.

* * *

13/ Ex. 1, (1983-85 Labor Agreement between City of Greenfield and Local 2, AFSCME, AFL-CIO) Article 7, E, p. 7.

14/ Ex. 11, Stipulation of Agreed Upon Items between the City of Greenfield and Local 2, AFSCME, AFL-CIO (Clerical).

15/ "This (ratification meeting) had been my third union meeting that I had attended, none of which had been -- none of them have received me with any open arms. I have been -- I have had snide comments from other union members. I felt a little outnumbered . . ." Tr. 118.

And later: ". . . I did not want to sit there and battle by myself in a room full of people who were obviously against me." Tr. 119.

Unlike other jurisdictions which attach substantial significance to the merit of an employe's grievance ultimately dropped or traded 16/, Wisconsin expressly permits a union to reject even an employe claim that has merit -- unless the action is arbitrary or in bad faith. Mahnke v. WERC, 66 Wis.2d 524, 531 (1975) citing Moore v. Sunbeam Corp., 459 F.2d 811, 820 (7th Cir., 1972).

Thus, only if dropping Merkel's grievance was arbitrary or in bad faith did the Union breach its duty of fair representation to Merkel. Determination of the degree of merit contained by her grievance is of at least initial assistance, however, in assessing whether the Union's act in dropping it was arbitrary. If the grievance had little merit, the inquiry ends; if it had a high degree of merit, while not necessarily dispositive, such becomes a relevant factor to consider with such others as may exist.

Turning, then, to the merit of Merkel's grievance, key to its success was whether she, as an employe on "temporary" status, was entitled to the benefit of the seniority provisions appearing in the labor agreement. If so, she held a valuable property right of which she could not be divested without due process of law. Clark v. Hein-Werner Corp., 8 Wis.2d 264, 274 (1959) citing Estes v. Union Terminal Co., 89 F.2d 768 (5th Cir., 1937) and Primakew v. Railway Express Agency, 56 F. Supp. 413 (D.C. Wis., 1943). Under this circumstance, her continued employment with the City would be as secure as that of "permanent" employes, regardless of her success in passing a civil service exam for her position.

Merkel's grievance, of course, claimed her entitlement to this most valuable labor agreement benefit. It was a credible, persuasive contention, considerably enhanced by an earlier arbitration award involving Merkel's bargaining unit which had interpreted, inter alia, the same provision from the same labor contract as that relied on by Merkel. In the earlier case (identified by the majority as the Slivon award) the arbitrator had expressly found the seniority rights set forth in the labor agreement to be a benefit to which even "temporary" employes were entitled.

The parallel between that finding and the result sought by Merkel is striking. The majority, however, is unimpressed, commenting that the principle of stare decisis is not always followed in grievance arbitrations.

This broad generalization, however, misses the mark in the instant case, and unduly diminishes the meritorious nature of Merkel's grievance. As the majority is surely aware, the persuasive value of precedent cases cited by either party in a grievance arbitration proceeding depends on several factors. Normally, however, when required to interpret a contract provision, arbitrators give substantial deference to past awards which have interpreted the same contract provision from the same labor agreement, applied to the same bargaining unit. Moreover, "(i)n particular, the considered judgment of any widely known and respected arbitrator cannot be dismissed lightly or ignored." 17/

16/ E.g., this example from the 4th Circuit:

> "Proof of a grievances's merit is circumstantial evidence that the failure to process the claim constitutes bad faith." Harrison v. United Transportation Union, 530 F.2d 558, 561 (4th Cir., 1975); cert denied 96 S.Ct. 1734 (1976).
>
> And this, from the 9th Circuit:
>
> "What we hold is that a union may not agree with an employer, either expressly or tacitly, to exchange a meritorious grievance of an individual employee for some other supposed benefit." Local 13, International Longshoremen's Labor Organization v. Pacific Maritime Ass'n, 441 F.2d 1061, 1068, Footnote 11 (9th Cir., 1971).

17/ Elkouri & Elkouri, How Arbitration Works, 4th Edit., 1985 BNA, Wash. D.C., 430-1.

Applied to the Merkel grievance, these fundamental arbitration principles made its success highly probable. Clearly, her grievance had a high degree of merit. 18/

Thus, the question remains: why did Merkel's Union cease to pursue her obvious advantage?

Certainly, it wasn't through ignorance or lack of consideration. As the majority correctly finds: " . . . the Union considered the merits of Complainant's grievance, the likelihood of success in arbitration, (and) the impact upon her of dropping her grievance . . ."

Astonishing to me is the apparent belief of the majority that the Union action it describes constitutes compliance with the mandates of Mahnke v. WERC 19/, on which the majority relies.

For the Union staff representative acknowledged his continuing (and accurate) belief as to the meritorious nature of Merkel's grievance; he was confident it would be successful; he knew that dropping it would cost Merkel her job.

Then he dropped the grievance!

If consideration of this sort is deemed compliance with the Mahnke mandate as to the duty of fair representation, then the mandate has been diminished to mere rhetoric, a pro forma exercise given ritualistic lip service, but without meaningful value.

I think it unlikely the Mahnke Court approved so narrow a view. 20/ For surely any grievance decision by a union which Mahnke requires take into account the factors therein enumerated must do so in good faith and with the implicit understanding and purpose that any subsequent union action or nonaction reflect some consistency with the assessment. If that does not occur, absent further explanation, the result is irrational.

Absent further explanation here, "irrational" aptly describes the Union action in the instant matter. It is simply not a rational act for a skilled advocate to surrender a cause having a high probability of winning -- unless there is a compelling reason, overt or hidden.

The majority finds that reason in the recollection of the Union staff representative who justified his decision to drop Merkel's grievance in terms of "total package settlement." The fact that this was the third explanation offered, each varying by several degrees from the one preceding it, does not inspire confidence in the accuracy of the recollection. It also strikes me as speculative, inconclusive, arguably self-serving -- and not particularly supported by the bargaining history. When weighed against the unbroken chain of circumstantial evidence supporting a contrary conclusion, it becomes to me, at best, unconvincing.

18/ As a practical matter, even the City seemed far more willing to concede this point than does the majority. Had the City seriously disputed that Merkel was entitled to the contractual seniority rights she claimed, it seems unlikely it would have postponed her termination until the new labor agreement (with its modified benefit language and the Merkel grievance drop) went into effect. Indeed, there is no compelling reason for the City to have even proposed language which amended the Slivon award, had it not been aware of the high persuasive value the award would likely be given in subsequent arbitration proceedings (like Merkel's).

19/ 66 Wis.2d 524 (1975).

20/ "Vaca also requires the union to make decisions as to the merits of each grievance. It is submitted that such decision should take into account at least the monetary value of (the) claim, the effect of the breach on the employee and the likelihood of success in arbitration." Mahnke at 534.

The majority disagrees. While somewhat ambivalent as to the size of the role played by the dissident demand that Merkel be fired ("no role" versus "not . . . a significant role"), it seems sure at least that the Union's decision " . . . was not solely to satisfy the nine objectors." As if reassuring itself on the matter, it further finds " . . . that the record does not establish that it (demand that Merkel be fired) was based on any ill-will towards (her) . . . ."

Acceptance of the former - the notion that the dissidents were not the cause of the Union dropping Merkel's grievance - in the end requires a degree of credulity I do not possess.

As to the latter finding, putting aside whatever perceptual insensitivities it may possess, it is not necessarily of material concern in this case. Ill-will or malice (on the part of Union members) is not necessary to establish arbitrary conduct on the part of the Union. 21/ In the instant matter I believe the Union's action to be arbitrary apart from any considerations of whether it was colored by any ill-will towards Merkel felt by any of her fellow local Union members.

Regardless of whether the dissidents' were being malicious, mean-spirited, or had some other reason for filing their "grievance" against Merkel, the size of their group (9 out of 25), alone, assured that careful and solicitous attention would be paid to its members' view. Thus, when the Union learned of the scheduled third step grievance meeting that was to take place between the dissidents and the City Personnel Committee, it became acutely aware that 1) the group's objective of getting Merkel fired had been neither dissolved nor even diluted, and 2) any collective bargaining concessions or arbitration victory for Merkel would be regarded with hostility by the group.

The majority notes that none of Merkel's detractors held any union office, had been previously active in the union, or had entered into a conspiracy with union leadership. But none of these factors was remotely necessary to give union leadership an accurate understanding that its support of Merkel had caused an acute internal political problem with a strong contingent of fractious, independent bargaining unit members. It is difficult to conceive of circumstantial evidence which could more plainly reveal the sole, impelling political expediency which ordained that the Union withdraw from Merkel's cause.

Under these circumstances, the obvious and narrowly focused concerns of more than one-third of the bargaining unit could be disregarded or dismissed as insignificant by the Union staff representative only if he were politically naive or recklessly unheeding of ratification considerations.

Given the swiftness with which Merkel was abandoned by the Union staff representative once he learned of the third step grievance hearing involving the City's Personnel Committee and the nine dissidents scheduled for March 12, political naivete was not a malady from which he suffered. Given further that it was not the City, but the Union's internal "rock and a hard place" political crisis, which seemed to demand the Union choose between the rock or the hard place by March 12, and a plausible reason behind the otherwise inexplicably rapid pace of Merkel's abandonment emerges with some clarity. The Union's concern was focused solely, at that point, on extinguishing a potentially devastating internal fire.

Once the decision was made to withdraw Union support from Merkel because of the dissident pressure, it is entirely possible that the Union staff representative tried to make the best of a bad thing by seeking some sort of quid pro quo from the City. If he obtained any -- and the record is inconclusive here -- it is immaterial, for the decision to jettison Merkel's grievance had already been made solely for reasons of political expediency. Even if the City offered nothing for it, the Union's decision -- already made -- was irrevocable. It was required by considerations of family peace.

I am persuaded of this primarily by four factors.

21/ Ryan v. New York Newspaper Printing, etc., 590 F.2d 451 (2nd Cir., 1979); Harrison v. United Transportation Union, 530 F.2d 558, 563 (4th Cir., 1975), cert. denied 96 S.Ct. 1739 (1976).

First, the reassurances of the majority notwithstanding, in my experience successive proposals in collective bargaining are not common. Since they are a risky tool to use, potentially erosive to the bargaining posture of their proponents, experienced negotiators limit their use to emergency situations. Clearly, this was one such situation.

Second, the timing of the particular successive proposal which offered to drop the Merkel grievance had the proposal being dated and mailed on the eve of the third step grievance hearing between the dissidents and the City's Personnel Committee. Presumably, it arrived at the City offices on the day of hearing. I view this timing as more than mere coincidence.

Third, the record does not adequately establish the Union's argument that the "total package settlement" included the Merkel grievance drop as a sine qua non for any or all of the package. There was no testimony or evidence which directly or circumstantially established that the same total package without the Merkel grievance drop was unobtainable. Such testimony, if truthful, could have been easily enough obtained from City bargaining personnel. It was not.

Fourth, the Union staff representative continued to have an accurate belief that the Merkel grievance, if heard, would probably be successful. It is clear that he didn't drop the grievance because he had lost confidence in its high degree of merit; he simply had a more compelling need.

Thus, I believe "political expediency" emerges with some clarity as the sole reason for Union action as to Merkel. But difficult as was the situation facing the Union staff representative, tempting as such political expediency may have then appeared to him, and excusable as it may now seem to others, it is an option I believe the law does not permit:

> "In summary, since the established seniority rights of a minority of the Barton employes have been abridged by the 1972 collective bargaining agreement for no apparent reason other than political expediency, there seems to be sufficient grounds in this case to support the Board (N.L.R.B.) order" (which had found the Union to have breached its duty of fair representation). Barton Brands Ltd. v. NLRB, 529 F.2d 793, 800 (7th Cir., 1976).
>
> "The record suggests that the Union acted solely on grounds of political expediency . . . such decisions (adversely affecting seniority rights of a minority group of employees) may not be made solely for the benefit of a stronger, more politically favored group. To allow such arbitrary decision making is contrary to the union's duty of fair representation which compensates employees for the opportunity to bargain for themselves which they lost when the union became the exclusive bargaining representative for the unit." Schoen v. Lodge 34, International Ass'n of Machinists, etc., 590 F. Supp. 193 (Eastern District Wis., 1984), citing Barton Brands Ltd., 529 F.2d 793 at 798-99.

That the majority remains unmoved by these considerations may serve to identify the differing vantage points from which we gain our respective views of the facts of this dispute. To me, the majority's view seems to be taken from the standpoint of permissive and forgiving partisans of a free-wheeling, rambunctious style of collective bargaining, encumbered, if at all, with the barest minimum of external restraints -- for restraints can sometimes be impediments to voluntary settlements. Thus, the exculpatory interpretation of the instant facts adopted by my colleagues in the majority becomes a sort of uncritical homage they pay to this kind of a bargaining model.

It is a model to which I am not unsympathetic - except to the extent to which it can be unfairly used to the detriment of "individuals stripped of traditional powers of redress." Vaca v. Sipes, 386 U.S. 171, 182 (1967). To allow such instances of inequity to pass unchallenged and uncorrected, in my view, defends the indefensible and permits the impermissible. Not only is an individual abused, but the very collective bargaining process which the majority here seems intent on

protecting is thus, ironically, abased. For "(w)ithout external supervision of union actions vis-a-vis the individual, the supposed beneficiaries of union strength might never see their share of the fruits." 22/

* * *

A potentially troublesome aspect of this case was the Union's belated disclosure to Merkel of its withdrawal of support. The record shows that although Union support of Merkel presumably ended formally on the date the Union proposed that her grievance be dropped (March 11, 1986), Merkel didn't learn of this until the Union ratification meeting on May 27, 1986.

This is not to suggest the delay in notification and disclosure to Merkel was by deliberate, invidious Union design. Very likely it was caused by an understandable desire on the part of the Union staff representative to avoid for as long as possible what he suspected might be an unpleasant situation.

But the record also establishes that the City offered yet a third civil service test in order to fill Merkel's position, and that she decided not to take it. In fairness, the Union staff representative apparently recommended to Merkel that she take the exam. However, the closest the record can come to establishing the date of the third exam is, inferentially, sometime between mid to late February, 1986 to May 27, 1986.

Thus, what is unknown from the record is whether the exam was given after the Union withdrew its support of Merkel. If that occurred, but Merkel wasn't informed that she had lost her Union's support and her decision not to take the exam was primarily based on her continued, but by then erroneous, assumption that she still had full Union support both on her grievance and in collective bargaining, there could be another basis for finding a breach of the duty of fair representation. See Coleman v. Outboard Marine Corp., 92 Wis.2d 565 (1979), citing Robesky v. Quantas Empire Airways, Ltd., 573 F. 2d 1082 (9th Cir., 1978).

However, while the record does not eliminate the actual occurrence of this hypothetical possibility, neither does it establish it. Accordingly, while the belated disclosure of the Union's change of position to Merkel is not a practice which can be prudently emulated by others, on the record of this case, it does not constitute an additional basis for finding the Union breached its duty of fair representation.

* * *

These, then, are the facts as I see them. The majority characterizes them as falling " . . . well within the range of discretion which a union is granted when it seeks to fairly represent all members of the unit." The conduct which I would constrain, the majority condones.

But not even the convenient skeins of claimed collective bargaining in which the majority takes hopeful refuge can obscure the grim picture thrust out by the facts. They form an emergent mosaic of "political expediency" of which I believe the law is properly intolerant.

I take no pleasure in this conclusion. But given the beneficial, vital nature of organized labor's statutory purpose, the not inconsiderable array of statutory weaponry available to it to carry out those purposes, the consequent diminishment of individual bargaining opportunity for the purpose of achieving a greater collective strength, and the proud, courageous history of what has been, for the most part, a responsible use of its statutory powers, organized labor must also be held accountable should it stray from those purposes or misuse its powers to the unfair, significant detriment of individual members. This is, in my view, particularly important in employe discharge situations - "the employment equivalent of capital punishment." 23/

22/ Clark, Julia Penny, "The Duty of Fair Representation: A Theoretical Structure", 51 Tex. L. Rev., 1119, 1121 (1973).

23/ Griffin v. International Union, etc., 469 F. 2d 181, 183 (4th Cir., 1972).

Mere supposed or actual sympathy for an individual member thus aggrieved is an inadequate basis for demanding such accountability. It is, instead, compelled by the balancing limitations of the same body of law from which the Union, also, draws sustenance.

It is on this basis I dissent.

Dated at Madison, Wisconsin this 23rd day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Commissioner