

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SANDRA J. TURANY,

Complainant,

v.

CHIPPEWA COUNTY and GENERAL
TEAMSTERS UNION, LOCAL NO. 662,

Respondents.

Case 145
No. 38646 MP-1958
Decision No. 24922-A

Appearances:

Ms. Sandra J. Turany, 3220 Mars Avenue, Eau Claire, Wisconsin 54703,
appearing pro se.

Mr. Mel Bollom, Personnel Director, Chippewa County, P.O. Box 550,
Chippewa Falls, Wisconsin 54729, appearing on behalf of Chippewa County.

Mr. Merle Baker, President, General Teamsters Union, Local No. 662,
P.O. Box 86, Eau Claire, Wisconsin 54702, appearing on behalf of Local
No. 662.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

Sandra J. Turany having, on April 9, 1987, filed a complaint with the Wisconsin Employment Relations Commission alleging that Chippewa County had committed a prohibited practice within the meaning of Sec. 111.70, Stats., by bumping her from her position as Account Clerk II in Unified Services; and the Commission having, on October 26, 1987, appointed James W. Engmann, 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. 111.70(5), Stats.; and the Complainant having, on October 30, 1987, filed a letter with the Examiner specifying that she was alleging that the County had violated Sec. 111.70(3)(a)5, Stats., by violating Article 8, Sections 1, 2 and 4 of the collective bargaining agreement; and the Complainant having in the same letter stated she wished to amend her complaint to allege that General Teamsters Union, Local No. 662, had committed prohibited practices within the meaning of Sec. 111.70(3)(b)1, Stats., by refusing to arbitrate her grievance involving the alleged improper bumping; and hearing on said complaint scheduled on November 16, 1987 having been postponed pending the parties efforts to resolve this dispute; and hearing on said complaint having been held in Chippewa Falls, Wisconsin on January 27, 1988; and the Complainant having moved to amend her complaint to name the Union as a Respondent; and the Examiner having granted Complainant's motion to amend complaint; and the parties having filed post hearing written arguments without the benefit of transcript which were exchanged on March 14, 1988; and the Examiner having received the transcript of the hearing on March 15, 1988; and the Examiner having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Sandra J. Turany, hereinafter referred to as the Complainant, is an individual residing at 3220 Mars Avenue, Eau Claire, Wisconsin 54703.

2. That Respondent Chippewa County, hereinafter referred to as the County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.; that its mailing address is P.O. Box 550, Chippewa Falls, Wisconsin 54729; and that Mel Bollom is the County's personnel director and has served as its agent and acted on its behalf.

3. That Respondent General Teamsters Union, Local No. 662, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(4), Stats.; that its mailing address is P.O. Box 86, Eau Claire, Wisconsin 54701; that the Union is the exclusive bargaining representative of all

regular full-time and regular part-time employees of the Courthouse, Social Services Department, Unified Services, Institutions and Highway Department, excluding professional, administrative, managerial, confidential, temporary and part-time employees employed less than 976 hours per year; and that Merle Baker is the Union's president and has served as its business agent and acted on its behalf.

4. That the County and the Union have been parties to a series of collective bargaining agreements covering the wages, hours and conditions of employees in the bargaining unit described above, including an agreement effective by its terms covering a period of January 1, 1986 to December 31, 1988; and that said agreement contains the following provisions:

ARTICLE 8

SENIORITY, JOB POSTING AND PROMOTION

Section 1. Seniority shall begin at the time of original employment and shall not be diminished by temporary layoffs due to lack of work or funds, not to exceed twelve (12) months; however, an employee who terminates for any reason and is subsequently rehired, seniority and longevity shall then accumulate from the most recent date of hire. Seniority shall exist within job classification and shall not be inter-departmental, except as specified in other sections of this Article. The seniority list, established effective with the adoption of this Agreement, shall prevail unless grieved within thirty (30) days of said adoption.

Section 2. In reducing employee personnel, the last person hired shall be the first person laid off, and the last person laid off shall be the first person rehired, if in the opinion of the County said individual is qualified to perform the work for which recalled.

. . .

Section 4. When an employee is laid off due to shortage of work, lack of funds, or the discontinuance of a position, such employee may displace the least senior employee in a similar position with like responsibilities for which he/she qualifies, or that his/her seniority will permit him/her to hold, which may be open at the time of his/her layoff. Should the senior employee not be granted the displacement, the employee shall have the opportunity to meet with the governing committee; describe why they are qualified/experienced for the position(s) in question. The Personnel Committee shall make a final determination based on qualifications on whether the senior employee should displace the least senior employee. The decision is not grievable to the Wisconsin Employment Relations Commission.

5. That during the term of this collective bargaining agreement, the County sold its health care center; that approximately 15 employees of the health care center were employees represented by the Union; that the County and Union met to bargain the impact of the County's decision to sell its health care center; and that the County and Union come to an agreement whereby eight of these employees would each bump a less senior employee in a like classification if the health care center employee was qualified for the position.

6. That all placements were resolved except the placement of Doris Degaro; that Degaro had seniority over and could bump the following persons in the following order:

P. Schemmel, Deputy II, Treasurer's office
A. Reinolt, Account Clerk II, Unified Services
J. McVinnie, Secretary II, Forest & Parks

D. Finch, Deputy II, County Clerk office
S. Turany, Account Clerk II, Unified Services
S. Fox, Deputy II, Clerk of Courts

That P. Schemmel was least senior; that under the agreement between the County and the Union, Degaro was required to bump into this position if she was qualified for the position; that Schemmel's position as Deputy II in the Treasurer's office required ability and skills in data processing; that Degaro was given a test in data processing; that Treasurer Arlene M. Zwiefelhofen on behalf of the County interviewed Degaro, checked her test results, and studied her past education and job skills; that the County determined Degaro was not qualified for this position; and that Degaro and the Union concurred in that determination.

7. That the next position which Degaro could bump into was Account Clerk II in Unified Services, which position was occupied by A. Reinolt; that said position required a degree in accounting; that Degaro did not have such a degree; that the County determined that Degaro was not qualified for this position; that Degaro and the Union concurred in that determination; that the next position which Degaro could bump into was Secretary II in Forest and Parks, which position was occupied by J. McVinnie; that Degaro had held a Secretary I position in Forest and Parks some 12 years before; that the Secretary II position was substantially different in duties and responsibilities; that the position also requires shorthand ability; that Degaro advised the County she was not qualified for this position; that Doyle L. Richards, Administrator of Forest and Parks, agreed with Degaro; that the County determined Degaro was not qualified for this position; that the Union concurred in that determination; that the next position which Degaro could bump into was Deputy II in the County Clerk's office which position was occupied by D. Finch; that the duties of this position involve being an election clerk and an offset press operation; that the procedure in the past has been to train someone as a Deputy I for at least one year and then to promote him or her to Deputy II; and that the County, Degaro and the Union agreed that Degaro was not qualified for this position.

8. That the next position which Degaro could bump into was Account Clerk II in Unified Services, which position was occupied by the Complainant; that the County, Degaro and the Union agreed Degaro was qualified for this position; that the Complainant does not allege that Degaro was not qualified for this position; that under the agreement between the County and Union, Degaro could not refuse a position for which she was qualified to apply for the position next on the bumping list; and that therefore Degaro could not refuse the Complainant's position and apply for the position of Deputy II, Clerk of Courts, currently occupied by S. Fox.

9. That the Complainant was then allowed to bump into a position lower in seniority than hers for which she was qualified; that the County determined and the Union concurred that the Complainant was not qualified for either the Deputy II position in the Treasurer's office or other Account Clerk II position in Unified Services; that the Complainant did not dispute this determination; that the Complainant tested for and was determined qualified for the next position, that of Secretary II in Forest and Parks; and that the Complainant bumped into the position of Secretary II in Forest and Parks.

10. That on December 16, 1986, the Complainant was advised that Degaro was bumping into her position; that on December 18, 1986, the Complainant filed a grievance alleging a violation of Article 8, Sections 2 and 4; and that in said grievance the Complainant described the facts of the grievance as follows:

Reason: Bumping out of order. My position was bumped by Doris Degaro on December 16, 1986. I was not in line for bumping. The least senior person was not bumped. I have worked for Chippewa County since April of 1978.

11. That the Union processed the grievance through the procedure as stated in Article 4 of the collective bargaining agreement; that on January 13, 1987, the Union through Merle Baker, business agent, sent a letter to Melvin D. Bollom, personnel director for the County, regarding the Complainant's grievance; and that said letter stated as follows:

Please let this letter serve as notice to you and the Personnel Committee that the Union wishes to proceed with the

above mentioned grievance to the next step of the Grievance Procedure, Arbitration.

I would request, due to the circumstances, that the time limits be extended to some future date before actual procedure.

If you are not in agreement, please advise.

12. That Bollom wrote back to Baker on January 15, 1987; and that said letter stated as follows:

This letter is to acknowledge your request of January 13, 1987 for extension of time limits in regards to Sandra Turany's grievance. The County extends the date until April 1, 1987 with the belief that problems may be solved in this regard with the addition of new positions, etc.

If you proceed with the grievance prior to April 1, 1987, we would appreciate an advance notice of your intent to file for arbitration with the WERC.

13. That the Union met with the County on several occasions to attempt to resolve the Complainant's grievance; that the parties were unable to resolve the grievance; that the Union determined that the County had complied with the collective bargaining agreement in the bumping process; that therefore the Union determined that the County did not violate Article 8, Sections 2 and 4, of the collective bargaining agreement when it determined that Degaro would bump the Complainant; that therefore the Union determined that the Complainant's grievance had no merit; that the Union advised the Complainant in a letter dated March 4, 1987, that it had determined her grievance was without merit and that the Union would not proceed to arbitration; that the Union's handling of Complainant's grievance and the Union's decision not to proceed to arbitration on said grievance were not arbitrary, discriminatory or in bad faith; and that the Union at all times material herein fairly represented the Complainant.

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

CONCLUSIONS OF LAW

1. That General Teamsters Union, Local No. 662, did not violate its duty of fair representation with respect to the Complainant by refusing to submit her grievance to arbitration and, accordingly, did not violate Sec. 111.70(3)(b)1 of the Municipal Employment Relations Act.

2. That having concluded that General Teamsters Union, Local No. 662, did not violate its duty of fair representation to the Complainant, there is no jurisdiction to determine the allegations that Chippewa County violated Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act.

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

ORDER 1/

IT IS ORDERED that the Complaint filed herein be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 13th day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James W. Engmann
James W. Engmann, Examiner

(Footnote one found on page five.)

(Footnote one from page four.)

- 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.

CHIPPEWA COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In her complaint initiating these proceedings, the Complainant alleged that the County had committed a prohibited practice in allowing another employee to bump into her position. She also alleged that the Union had acted improperly in not proceeding to arbitration, although she did not name the Union as a Respondent. In neither case did she allege specific statute violations.

Following an attempt by the Examiner to mediate the dispute, the Complainant filed a letter with the Examiner. Said letter was accepted as a motion to amend her complaint. In said letter the Complainant alleged that the County had violated Article 8, Sections 1, 2 and 4 of the collective bargaining agreement and, therefore, had violated Sec. 111.70(3)(a)5, Stats. She also alleged in said letter that the Union had not fairly represented her, a violation of Sec. 111.70(3)b)1, Stats. At hearing the Complainant moved to add the Union as a Respondent. As there were no objections to these proposed amendments, they were granted.

COMPLAINANT'S POSITION

The Complainant contends that she was bumped in violation of the collective bargaining agreement. Basically, she alleges that the person who bumped into her position could and should have bumped into any of the four positions less senior to the Complainant. As to the Deputy II position in the Treasurers office, the Complainant argues that Degaro had the data processing skills to fulfill this position; that Degaro had done computer work at the Health Care Center; and that if the current occupant quit, the County would have to train someone so why not Degaro. As for the Account Clerk II position in Unified Services, the Complainant argues that Degaro was an Account Clerk II; that she bumped the Complainant, an Account Clerk II; and that she should have bumped the least senior Account Clerk II position instead of the one held by the Complainant. As for the Secretary II position in Forest and Parks, the Complainant argues that Degaro was qualified since she had worked in the department before and since the Complainant has only done a small amount of shorthand since she bumped into this position. Finally, as to the Deputy II position in the County Clerk's office, the Complainant argues that Degaro was qualified since she had previously worked in this office and that the County would have to train someone to take this position when the incumbent leaves so it could train Degaro.

The Complainant also contends that the Union did not properly represent her in the grievance procedure; that at a grievance meeting with the County on January 6, 1987, the Union invited Degaro to attend; that the result of this meeting was that Degaro was allowed to bump into the Complainant's position; that the Complainant asked the Union to submit her grievance to arbitration; and that the Union refused, saying she might like her new position better.

For relief, the Complainant seeks to be returned to her former position.

UNION'S POSITION

The Union seeks dismissal of all charges filed against it by the Complainant. The Union argues that it did not violate its duty to fairly represent the Complainant; that Degaro was properly prevented from bumping the four incumbents less senior than the Complainant; that Degaro properly bumped into the Complainant's position; that the County did not violate Article 8, Sections 1, 2 and 4 of the collective bargaining agreement; that the bumping that occurred was consistent with the collective bargaining agreement; that the Complainant's grievance was therefore without merit; and that, therefore, the Union acted properly in not arbitrating Complainant's grievance.

COUNTY'S POSITION

The County contends that the Complainant failed to prove that the County violated Sec. 111.70(3)(a)5, Stats., and requests dismissal of the charges made by the Complainant. The County argues that Article 8, Section 1 states that seniority shall exist within classifications; that Article 8, Section 4 limits an employee to bumping the least senior employee in a similar position with like responsibilities for which the employee qualifies; that Article 8, Section 2 verifies that whether an employee is qualified to perform the work is determined solely by the County; that the testimony and exhibits show the County fully complied with the collective bargaining agreement; and that the evidence fully refutes any allegations that the County violated state statutes.

DISCUSSION

The collective bargaining agreement involved herein contains a grievance procedure which culminates in final and binding arbitration to resolve disputes arising under that agreement. It is a long-established policy of the Commission not to assert its jurisdiction to determine an allegation that one party has violated the terms of that agreement where the parties to the agreement have agreed to submit to final and binding arbitration disputes which arise over alleged violations of that agreement. 2/ However, the Commission will determine the merits of a claim that a party has violated the terms of a collective bargaining agreement when the grievance procedure has not been exhausted because the employee's bargaining representative has breached its duty to fairly represent the employee. 3/

Therefore, before the Examiner will assert the Commission's jurisdiction to determine the merits of the Complainant's allegation that the County breached the collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats., the Complainant must show that her failure to exhaust the grievance procedure was caused by the Union's breach of its duty to fairly represent her. 4/ The Complainant must sustain her burden of proof by a clear and satisfactory preponderance of the evidence. 5/ Thus, the first issue presented is whether the Union violated its duty to fairly represent the Complainant when it failed to proceed to arbitration on the Complainant's grievance.

The duty of fair representation obligates a Union to represent the interest of all its members without hostility or discrimination, to exercise its discretion with good faith and honesty, and to eschew arbitrary conduct. 6/ The duty applies to both the negotiation of a collective bargaining agreement and the administration of a collective bargaining agreement by processing a grievance. 7/ The scope of the duty of fair representation allows the Union a wide range of discretion, subject always to complete good faith and honesty of purpose, in the exercise of this discretion. 8/ The law recognizes that a union is made up of many diverse interests, each of which has its own narrow perspective, and that, inevitably, the interest of one person or group will come into conflict with the interest of another. The union has to reconcile conflicting views and, in doing so, it may adopt a position adverse to one person

2/ La Crosse County, Dec. 15191-A (Henninpen, 4/78); Beloit Jt. School District, Dec. 14702-B, C (ERC, 4/77).

3/ La Crosse County, supra.

4/ La Crosse County, supra; Mahnke v. WERC, 66 Wis2d 524 (1974).

5/ Sec. 111.07(3), Stats.

6/ City of Greenfield, Dec. 24776-B (Crowley, 3/88); Mahnke v. WERC, supra; Vaca v. Sipes 386 U.S. 171, 177, 64 LRRM 2369, 2371 (1967).

7/ City of Greenfield, supra; Flight Officers v. United Air Lines, 114 LRRM 3347 (N.D. ILL, 1983).

8/ City of Greenfield, supra; Ford Motor Co. v. Hoffman, 345 U.S. 330, 31 LRRM 2548 (1953).

or group, but this does not by itself establish a breach of the duty. 9/ The Union's duty to fairly represent its members is breached only when the Union's actions are arbitrary, discriminatory or taken in bad faith. 10/

The Complainant contends that the Union did not properly represent her in the grievance procedure. First, she alleges the Union included Doris Degaro, the employee who bumped her, in the grievance meeting at which all the parties except the Complainant agreed the bump was appropriate. In and of itself, it is not inappropriate to have all persons affected by a grievance to attend a meeting to discuss said grievance. The Complainant presented no evidence that the actions of the Union at this meeting were based on hostility or discrimination by the Union against the Complainant, or that the Union's actions were in bad faith, dishonest or arbitrary. Indeed, all the evidence points to a Union trying to resolve this matter in a way to satisfy the Complainant, and to a Union that reasonably concluded that the County properly determined that the Complainant's position was the one that Degaro should bump into. Therefore I find no violation of the Union's duty of fair representation based on this allegation.

Second, the Complainant alleges that the Union's refusal to arbitrate her grievance was a violation of its duty to fairly represent her. The Union determined that under the contract the County could determine if an employee qualified for any specific position, that the County correctly determined that Degaro was not qualified for any of the positions with incumbents less senior than the Complainant, and that Degaro did qualify for the Complainant's position. Therefore the Union determined that the Complainant's grievance was without merit and the Union decided not to proceed to arbitrate said grievance.

The evidence shows that the Union reasonably concluded that the County did not violate Article 8 of the collective bargaining agreement when it allowed Degaro to bump into the Complainant's position. The Complainant presented no evidence of bad faith or dishonesty on the part of the Union in coming to its determination that her grievance was without merit. The record supports the Union's assertion that its decision not to arbitrate the Complainant's grievance was made in good faith and honesty. Thus, I find that the Union did not violate its duty to fairly represent the Complainant by refusing to arbitrate her grievance.

Perhaps the duty of fair representation is misnamed. When the interests of two individuals are in conflict and a decision maker decides for one, the other may feel that the decision is unfair. That is not the kind of unfairness referred to in a violation of the duty of fair representation. As noted above, "unfair" in this context means decisions or actions that are arbitrary or discriminatory or in bad faith. 11/ The Complainant has failed to prove by a clear and satisfactory preponderance of the evidence that the Union acted herein in such a manner. Therefore this Examiner concludes that the Union did not breach its duty of fair representation toward the Complainant.

As to the second issue of whether the County violated the collective bargaining agreement by allowing Degaro to bump into the Complainant's position, the Examiner has no authority to consider this claim. The policy of the Commission is to defer disputes arising under a collective bargaining agreement to the parties grievance procedure when said grievance procedure provides for final and binding arbitration. 12/ This is the policy even in cases such as this where

9/ Id.

10/ City of Greenfield, supra; Coleman v. Outboard Marine Corp., 92 Wis2d 565 (1979); Vaca v. Sipes, supra.

11/ Id.

12/ La Crosse County, supra; Beloit Jt. School District, supra; Mahnke v. WERC, supra.

the grievant had wanted to procede to arbitration and the Union, consistent with its duty of fair representation, had determined not to seek arbitration.

Therefore the Complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 13th day of May, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James W. Engmann
James W. Engmann, Examiner