STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BETTY J. WARD, Complainant, vs. WISCONSIN COUNCIL NO. 40 OF COUNTY AND MUNICIPAL EMPLOYEES, ROCK COUNTY EMPLOYEES LOCAL 2489 and ROCK COUNTY, WISCONSIN, Respondents.	Case 234 No. 40774 MP-2110 Decision No. 25662-A

Appearances:

Ms. Betty J. Ward, 1424 Athletic, Beloit, Wisconsin 53511, appearing pro se.

Lawton and Cates, S.C., by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703, appearing on behalf of Respondent Union.

Thomas A. Schroeder, Corporation Counsel, 51 South Main Street, Janesville, Wisconsin 53545, appearing on behalf of Respondent County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING MOTION TO REOPEN HEARING AND DISMISSING COMPLAINT

Betty J. Ward filed a complaint on June 22, 1988 with the Wisconsin Employment Relations Commission, alleging that Wisconsin Council 40 of County and Municipal Employees and its affiliated Rock County Employees Local 2489 had violated unspecified sections of Section 111.70, Wis. Stats., by failing to process her grievance to arbitration and by not giving adequate reason or notification for its actions; and that Rock County had violated unspecified sections of Section 111.70, Wis. Stats., by violating sections of a collective bargaining agreement with Respondent Union by failing to grant Complainant a position for which she had applied. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusion of Law and Order as provided in Section 111.07(5) Wis. Stats. A hearing was held in Janesville, Wisconsin on October 6, 1988, at which time all parties were given full opportunity to present their evidence and arguments. All parties argued orally at the hearing and waived briefs. On October 20, 1988 Complainant filed with the Examiner a motion to reopen the hearing for purposes of admitting additional evidence, and by October 28, 1988, both Respondents had filed objections to reopening the hearing. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order Denying Motion to Reopen Hearing and Dismissing Complaint.

FINDINGS OF FACT

1. Wisconsin Council of County and Municipal Employees No. 40, AFSCME, AFL-CIO and its affiliated Rock County Employees Local 2489 are labor organizations within the meaning of Section 111.70(1)(h), Wis. Stats., and have their principal office at 5 Odana Court, Madison, Wisconsin 53705.

2. Rock County is a municipal employer within the meaning of Section 111.70(1)(j), Wis. Stats., and has its principal office at 51 South Main Street, Janesville, Wisconsin 53545.

3. At all times material to this proceeding, Respondent Union Local 2489 has been the exclusive bargaining representative of all regular full-time and regular part-time clerical employes in the Rock County Courthouse (Janesville), Rock County Airport, the Rock County Administrative Building (Beloit), the Rock County Youth Shelter Facility, the Rock County Department of Social Services

(Public Welfare), the Rock County Highway Department, the Rock County Sheriff's Department, Beta Building, and all full-time and regular part-time matrons, cook/matrons, food service supervisors and non-deputized dispatchers of the Rock County Sheriff's Department, but excluding all confidential, supervisory, craft, professional and all other employes of Rock County and all regular full-time and regular part-time employes of the Rock County Huber Facility, excluding confidential, supervisory, craft and professional employes.

4. Respondent Union and Respondent County have been parties to 1986-87 and 1988-89 collective bargaining agreements, both of which provide the following provisions relevant to this matter:

ARTICLE 5 - SENIORITY, PROMOTIONS

> 5.02 Any vacancies or new positions shall be immediately posted on all bulletin boards within the bargaining unit that the vacancy or new position exists. Copies of such postings shall be sent to all local union presidents who shall post such vacancies or new positions on the bulletin boards within their respective bargaining units. Such postings shall be uniform and shall remain posted for five days, excluding Saturdays, Sundays and holidays from the date received, and shall include the job location, job shift, and the rate of pay; and shall also provide a space for those employes who are interested in the vacancies or new positions to affix their names. Present county employes will be given consideration before new employes are hired.
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> 5.03 In filling job vacancies or new positions, employes within that department shall be given preference. Employes with the greatest seniority, provided that said employe is qualified for the position to be filled and his/her qualifications are at least equal to the qualifications of all other applicants, shall be granted the position. The determination of such qualifications shall rest with the department head and shall be subject to the grievance procedure hereinafter described.

5. Complainant Betty J. Ward has been at all times material to this proceeding a Deputy Clerk of Courts employed by Respondent County and represented by Respondent Unions as part of the bargaining unit described in Finding of Fact 3 above. In or about December, 1987, Respondent County posted two vacant positions for Child Support Reimbursement Specialists in the county's child support office, and Complainant applied for these openings. The record demonstrates that in or about January, 1988, Complainant was deemed qualified for the positions, and was granted an interview along with seven other applicants. The record shows that following the interviews, Complainant was rated the fourth best qualified applicant of the eight, but that the first and second-rated applicants were awarded the vacant positions.

6. On or about January 20, 1988 Complainant filed a grievance protesting Respondent County's action in awarding the two positions to new hires.

7. The record shows that during the succeeding several months, Respondent Union processed Complainant's grievance through three steps of the grievance procedure. In or about June, 1988, however, Respondent Union's executive board was polled by telephone by Local 2489 Chief Steward Brad Evans as to whether or

arbitrary, discriminatory or bad faith grounds, or that Local 2489's executive committee failed to make a good-faith effort to process Complainant's grievance.

9. The record does not demonstrate that the grounds alleged for reopening the record by Complainant on October 20, 1988 are or could be new evidence not ascertainable or discoverable prior to the close of the hearing in this matter, and good cause has therefore not been shown for reopening the hearing.

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

CONCLUSIONS OF LAW

1. Complainant's motion to reopen the hearing is not for good cause within the meaning of W.E.R.C. Rule ERB 10.19.

2. By refusing to process Complainant's grievance to arbitration, Respondent Unions did not violate any section of Section 111.70(3)(b), Wis. Stats.

3. The Examiner is without jurisdiction in the absence of a violation of 111.70(3)(b), Wis. Stats., to entertain Complainant's complaint of violation of contract against Respondent County.

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

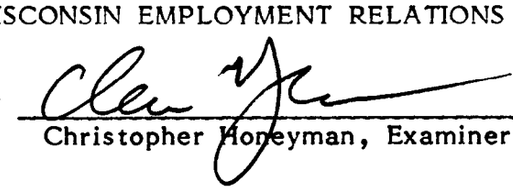
ORDER 1/

1. That the motion to reopen the hearing in this matter is denied.

2. That the complaint is dismissed in its entirety.

Dated at Madison, Wisconsin this 2nd day of December, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

ROCK COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING MOTION TO REOPEN HEARING AND DISMISSING COMPLAINT

The complaint alleges that the Union violated unspecified sections of Section 111.70 essentially by the manner in which it processed the Complainant's job posting grievance, particularly in its decision not to process the grievance to arbitration; and that the County violated the statute by violating the collective bargaining agreement, by refusing to give Complainant the requested job. The complaint also alleges that the Union is in violation of its own constitution by such actions, an allegation which as an independent count of the complaint bears no relationship to the statute and will not be addressed here.

BACKGROUND

The testimony at the hearing established that the Complainant, a Deputy Clerk of Courts, was considered a qualified applicant by those interviewing her for the position of Child Support Reimbursement Specialist. But there is no evidence to contradict Child Support Unit supervisor Christine Baker's testimony that the Complainant was not found to be one of the two best qualified applicants. Testimony by several members of the Union's executive committee established without contradiction that the Union processed the Complainant's grievance through the first three steps of the grievance procedure but, about late May or early June, 1988, determined in a telephone poll of the five members of the committee not to proceed to arbitration with the grievance. There is nothing in the record to rebut the testimony of several executive committee members that each of them gave as one reason why the grievance should not be taken to arbitration the unlikelihood of prevailing on the merits. While Complainant alleges that she was told only that the cost for hiring an attorney to try the arbitration case would be too high, she did not give testimony to that effect, nor did any other witness confirm this allegation in sworn testimony. Complainant introduced testimony to the effect that another job posting grievance filed by Gale Haase had been successful; the arbitration award in that matter introduced by the County indicates that the County had in that case failed to grant Haase an interview for the requested position. There is no evidence that this procedural error was repeated in the Complainant's case.

Each of the Union witnesses testifying stated essentially the same thing, that with respect to the merits of the grievance he or she felt that the contract language in dispute did not provide strong support for an existing employe's claim to the requested position. Review of the language of Sections 5.02 and 5.03 of the collective bargaining agreement (see Finding of Fact 4 above) can only be said to support this view; and no testimony was introduced to rebut it other than the Haase case already noted.

Complainant questioned Union executive committee member Rollie Plautz concerning the date of a letter in which Plautz formally advised Complainant that her grievance was being dropped. While Complainant attaches significance to Plautz's arguable inaccuracy in dating the letter, it is clear from all of the testimony that the decision not to process the grievance was effective immediately upon being reached by the executive committee in its telephone poll, and that Complainant had been advised at least orally of this decision well before she received confirmation in writing.

THE PARTIES' POSITIONS

Complainant contends that the several representatives of the Union who testified exhibited negligence and acted in bad faith in their handling of the grievance. Complainant alleges that former local President Bonnie van Blaricom led the grievant on to believe that her grievance would be taken all the way to arbitration by the Union, and made no effort seriously to obtain a settlement at the third step of the grievance procedure, explaining to Complainant that this was a fruitless step at which nothing could be accomplished. Complainant alleges that in each case she had to make the contact with the Union representatives and that they did not call her, and that Plautz was lying when he stated that he had given written confirmation of the executive committee's decision to the Complainant in June, 1988 instead of July. With respect to the County, the Complainant alleges

that the County has violated the collective bargaining agreement for the same reasons as were found by the arbitrator to demonstrate a violation in the Haase case.

The County contends that it has no role in this case because the matter is essentially a dispute between Complainant and Respondent Union, and that nothing has been alleged against the County. The County contends, however, that the Haase case was not similar to the Grievant's and that the arbitrator in that matter found that the County was in fact permitted to advertise a position for new hires at the same time as it posted a position for internal transfers and promotions. The County also notes unrebutted testimany from Christine Baker that the Complainant was not the most qualified applicant for the position.

Respondent Union contends that the Union made good faith attempts to process the grievance through the third step of the grievance procedure, and that it properly determined thereafter that the likelihood of success was small in arbitration, while the costs were substantial. Respondent Union contends that under accepted principles governing the duty of fair representation, its decision not to arbitrate was lawful and indeed a necessary decision for unions to make in a large variety of cases. Respondent Union contends that there is no evidence that Plautz lied in his testimony, and that Complainant is an individual who simply cannot accept the fact that she has not gotten what she wanted.

DISCUSSION

Motion to Reopen Record

On October 20, 1988 Complainant filed a motion to reopen the record to submit several documents: the job description of the Child Support Reimbursement Specialist; job description of the Deputy Clerk of Courts; Complainant's resume; and an affidavit of another Deputy Clerk of Courts to the effect that the written confirmation of the executive board's decision was in fact received by Complainant on July 12, 1988. Both Respondent Union and Respondent County object to reopening the record, based essentially on failure of Complainant to demonstrate evidence that the newly offered evidence was not discoverable or ascertainable prior to the close of the hearing. I agree with Respondents; there is nothing on the face of these documents to indicate that any of them, or for that matter testimony to the same effect, was not available to Complainant prior to the close of the hearing. In order to give the Commission a full disposition of the matter, however, I will further note that even if everything contained in these documents is accepted as true, I would still not find a violation of Section 111.70 to have occurred here by either the County or the Union, because none of the facts offered tends to establish arbitrary, discriminatory or bad faith conduct of the Union by a clear and substantial preponderance of the evidence.

The Merits

Although Complainant did not cite specific statutory sections alleged to be violated, I take it that the allegation made against the County is that it violated Section 111.70(3)(a)(5), Stats., the section which makes it a prohibited practice to violate a labor agreement. Violations of this section of the statute parallel grievances filed under collective bargaining agreements, however, and the Commission has not exercised its jurisdiction over breach of contract claims where final and binding arbitration is available to the union concerned, unless it first has found that the union involved breached its duty of fair representation with respect to the complainant in a particular case. 2/

Again, Complainant has not cited specific statutory language with respect to its complaint against Respondent Union, but it is clear that what is contemplated here is violation of Section 111.70(3)(b)(1), the section governing the duty of fair representation of employes.

It is settled law that the standard governing evaluation of the Union's con-

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2/ University of Wisconsin-Milwaukee (Housing Department)(sub. nom Guthrie vs. W.E.R.C.), Decision No. 11457-H (W.E.R.C., 5/84); School District of West Allis - West Milwaukee, Dec. No. 20922-D (Schiavoni, 10/84, affrm'd by operation of law, Dec. No. 20922-E (W.E.R.C., 10/84).

duct in processing grievances is set forth in Mahnke vs. W.E.R.C., 3/ in which the Wisconsin Supreme Court quoted Vaca vs. Sipes 4/ as stating that that case:

> . . . provides that suit may be brought subsequent to an arbitrary, discriminatory or bad faith refusal to arbitrate by the union. Vaca also requires the Union to make decisions as to the merits of each grievance. It is submitted that such decisions should take into account at least the monetary value of his claim, the effect of the breach upon the employe and the likelihood of success in arbitration. Absent such a good faith determination, a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the Union's duty of fair representation.
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> This is not to suggest that every grievance must go to arbitration, but at least that the Union must in good faith weigh the relevant factors before making such a determination. 5/

It is also settled law that as long as a union acts in good faith and with honesty of purpose, it is granted broad discretion in its decisions under the legal scheme. 6/ A union need not carry a grievance through all steps of the grievance procedure or press it to arbitration in order to satisfy the law's demands, and the Commission will not sit in judgment over the wisdom of union policies and decision-making relative to the disposition of grievances so long as the good faith test is met. 7/ Finally, as in other types of case under Sec. 111.70, the Complainant has the burden of establishing a violation by a clear and satisfactory preponderance of the evidence; absent such proof, the Commission has refused to draw an inference of perfunctory or bad faith handling of a grievance. 8/

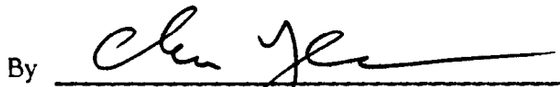
I can find nothing here to establish that the Respondent Union processed Complainant's grievance in so perfunctory a manner as to evidence bad faith, and none of the other conduct alleged by Complainant to constitute bad faith is of such weight as to demonstrate anything more than ordinary inefficiency. At most, Complainant has established that Respondent Union does not hold executive board meetings frequently and that it sometimes makes decisions in the absence of an actual meeting. But Complainant offers no support for the proposition that that constitutes bad faith handling of employe grievances; I am independently aware of no such case law; and it is noteworthy that at least some other employes' grievances were likewise discussed and disposed of in the course of telephone polls instead of meetings. Meanwhile, the Union representatives' testimony that meetings were difficult to arrange in a widely-spread bargaining unit is understandable. Complainant's allegation that van Blaricom led her on to believe that the Union would arbitrate her grievance does not demonstrate that van Blaricom did so with any improper intent; and this allegation was in any case unsupported in testimony, as Complainant did not testify herself and van Blaricom's testimony does not bear out the allegation. Also, even if Plautz did in fact delay by several weeks his written confirmation of the executive committee's decision not to proceed with the grievance, nothing resulted from that omission, because the decision had already been made and communicated to Complainant. Finally, on the face of the collective bargaining agreement there is nothing to demonstrate that the Complainant could have prevailed in arbitration, when that contractual language is examined in the light of the Haase decision and the testimony given by the department supervisor, which was not rebutted. Even

though a decision not to arbitrate a grievance need not be correct in its analysis of the likelihood of prevailing in order to satisfy the duty of fair representation, an independent analysis of the grievance and circumstances as adduced at the hearing in this matter fails to demonstrate substantial evidence that the grievance in fact had merit under the contractual standard. This, of course, tends to support the Union's decision.

As I have found that there is not a clear and satisfactory preponderance of the evidence sufficient to demonstrate a violation of the Union's duty of fair representation, it follows that jurisdiction to determine the merits of the complaint of contract violation against the County should not be exercised, for the reasons outlined above. The complaint against both Respondents is therefore dismissed.

Dated at Madison, Wisconsin this 2nd day of December, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner