STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MATHEW J. MUSGRAVE, Complainant, vs. MARATHON COUNTY AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2492-A, Respondents.	Case 138 No. 4118 MP-2140 Decision No. 25757-B
MATHEW J. MUSGRAVE, Complainant, vs. PATRICIA ACHESON, KATHLEEN CONWAY, ROBERT NICHOLSON, DOUG THOMAS, SANDRA WADZINSKI, JAMES DALLAND, BRAD KARGER, JOHN SEFERIAN, CONSTANCE BROWN, TOM HENNESSY, HOWARD N. JORGENSON, JEAN LAMBIE, ARTETHA PAYNE, GARY RODRIGUES, NATE SMITH, PHYLLIS ZAMARRIPA, ROBERT LYONS, SAM GILLESPIE, AND PHIL SALAMONE; MARATHON COUNTY, AFSCME LOCAL 2492-A, AFSCME COUNCIL 40 AND AFSCME, Respondents.	Case 142 No. 41463 MP-2171 Decision No. 25908-B

Appearances:
Mr. Mathew J. Musgrave RR2, Box 190-A, Westfield, Wisconsin 53964, appearing pro se.
Lawton & Cates, Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, by Mr. Richard V. Graylow, appearing on behalf of Respondents AFSCME Local 2492-A, AFSCME Council 40, AFSCME, AFL-CIO and individual Respondents Acheson, Conway, Nicholson, Thomas, Wadzinski, Seferian, Brown, Hennessy, Jorgenson, Lambie, Payne, Rodrigues, Smith, Zamarripa, Lyons, Gillespie, and Salamone.
Mulcahy & Wherry, S.C., Attorneys at Law, P.O. Box 1004, Wausau, Wisconsin 54401-1004, by Mr. Dean R. Dietrich, appearing on behalf Marathon County and individual Respondents Dalland and Karger.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 26 and December 21, 1988 Mathew J. Musgrave, an individual, filed two complaints with the Wisconsin Employment Relations Commission alleging that Marathon County had discriminated against him because of union activity and that Local 2492-A of AFSCME, as well as various related organizations and individuals, had processed grievances filed by Complainant in bad faith. The complaints allege that these acts violated the rights of Complainant guaranteed in Sec. 111.06, Stats. 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, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing was initially scheduled (in Case 138) for January 5, 1989, but was subsequently postponed by agreement of the parties on several occasions. Hearing was conducted in both matters on September 19 and 20, 1989 at Wausau, Wisconsin.
Briefs were filed by all parties, a transcript was made, and the record was closed on November 8, 1989. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Mathew J. Musgrave, herein referred to as Complainant, was at all times material herein a municipal employe within the meaning of Sec. 111.70(1)(i), Wis. Stats., and was employed by Respondent Marathon County as a Social Worker in its Department of Social Services.

2. Respondent Marathon County is a municipal employer within the

meaning of Sec. 111.70(1)(j), Wis. Stats., and has its principal offices at 500 Forest Street, Wausau, Wisconsin 54401. Brad Karger is Personnel Director of Marathon County; James Dalland is Director of Social Services of Marathon County; and both are the County's agents.

3. Local 2492-A, AFSCME, AFL-CIO; Council 40, AFSCME; and American Federation of State, County and Municipal Employees, AFL-CIO are labor organizations within the meaning of Sec. 111.70(1)(h), Stats. Local 2492-A has its principal offices at 400 East Thomas Street, Wausau, Wisconsin 54401; Council 40 has its principal office at 5 Odana Court, Madison, Wisconsin 53719; and AFSCME, AFL-CIO has its principal office at 1625 L Street, Washington, D.C. 20036. Robert Lyons is Executive Director of AFSCME Council 40; Sam Gillespie is Associate Director of Wisconsin Council 40; and Phil Salamone is District Representative of Council 40, AFSCME, and all are its agents. Respondents Acheson, Conway, Nicholson, Thomas and Wadzinski are members of the Executive Board of Local 2492-A and its agents. Respondents Seferian, Brown, Hennessy, Jorgenson, Lambie, Payne, Rodrigues, Smith and Zamarripa are members of the Judicial Panel of AFSCME, AFL-CIO and its agents.

4. At all times material to this proceeding, Respondent Local 2492-A has been the exclusive bargaining representative of all regular full-time and regular part-time professional employes of Marathon County Department of Social Services.

5. Respondent Local 2492-A and Respondent County have been parties to a series of collective bargaining agreements, of which the agreement in effect during the period involved herein extended from January 1, 1987 to December 31, 1988. This agreement provides the following provisions relevant to this matter:

> This Agreement made and entered into by and between the County of Marathon, a municipal corporation in the State of Wisconsin, hereinafter referred to as the "County", "Department", or "Employer", and the Marathon County Department of Social Services and Courthouse Employees, Local 2492-A, (professional unit), American Federation of State, County and Municipal Employees, AFL-CIO hereinafter referred to as the "Union", is as follows:
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> ARTICLE 1 - RECOGNITION
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> The County hereby recognizes the Union as the exclusive bargaining representative for all regular full-time and regular part-time professional employees of the Marathon County Department of Social Services for the purposes of conferences on wages, hour and conditions of employment. Employees expressly excluded from repre-sentation include nonprofessional employees, the courier, janitor and all managerial, confidential and supervisory employees.
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> ARTICLE 2 - MANAGEMENT RIGHTS
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> The County possess the sole right to operate the department and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following:
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> D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
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> ARTICLE 3 - GRIEVANCE PROCEDURE
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> A. Definition and Procedure: A grievance shall be defined as a dispute over interpretation and application of the provisions of this collective bargaining agreement between the County and the Union. Grievances shall be handled and settled in accordance with the following procedure:
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> Step 1: An employee covered by this Agreement who has a grievance is urged to discuss the employee's grievance with his/her immediate supervisor as soon as the employee is aware that he/she may have a grievance. In the event of a grievance, the employee shall continue to perform his/her

assigned task and grieve his/her complaint later. Within ten (10) days employee knew or should have known of the event giving rise to the grievance, the employee shall set forth his/her grievance in writing, date it, sign it and give it to his/her department head for consideration.

Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and the position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific section of the agreement alleged to have been violated, if any, and the signature of the grievant and the date.

The department head shall investigate the grievance and discuss the matter with the employee and the Union, if the employee so desires, and provide a written answer to the grievance within ten (10) working days.

Step 2: In the event the grievance is not satisfactorily settle in Step 1, the grievant may appeal in writing by submitting a letter, memo or note to the Human Resources Director within ten (10) working days of the disposition by the Department Head. The Human Resource Director shall provide a written answer to the grievance within ten (10) working days.

Step 3: In the event the grievance is not satisfactorily settled in Step 2, the grievant may appeal to the Human Resources Committee of the Marathon County Board in writing within ten (10) days of the disposition by the Human Resources Director. The Human Resources Committee shall conduct a meeting within thirty (30) days at a time mutually agreeable between the grievant, union representatives and the Committee and respondent in writing within ten (10) days following the meeting.

B. Arbitration:

1. Notice: If a satisfactory settlement is not reached in Step 3, the Union must notify the Human Resources Committee in writing as soon as possible thereafter but no longer than twenty (20) working days that they intend to process the grievance to arbitration.

. . .

6. At all times material to these proceedings Complainant was employed as a Social Worker in the County's Department of Social Services. On April 18, 1988 Complainant received a written reprimand signed by Respondent Dalland, for allegedly threatening a fellow employe. Complainant filed a grievance, which was processed by the Grievance Committee of Local 2492-A through the first step of the contractual grievance procedure, but which was thereafter dropped by the Committee. Complainant appealed the grievance committee's dropping his grievance to the Executive Board of Local 2492-A, which refused to reinstate representation of Complainant with respect to said grievance. The record demonstrates that both the Grievance Committee and the Executive Board considered the merits of the grievance in determining not to represent Complainant further with respect to it, and fails to demonstrate by a clear and satisfactory preponderance of the evidence that Respondent Local 2492-A's handling of Complainant's April 18, 1988 grievance was arbitrary, discriminatory or in bad faith.

7. On September 26, 1988 Complainant filed the original complaint in Case 138, alleging that the Executive Board of Local 2492-A failed to represent Complainant fairly by refusing to process the April 18 grievance further and by alleged procedural failings in the dates and persons with whom the first step grievance meeting was conducted. This complaint also alleged that Respondent County violated the collective bargaining agreement and thereby violated the Municipal Employment Relations Act by failing to conduct a Step 1, Step 2 or Step 3 grievance meeting pursuant to the collective bargaining agreement.

8. On October 7, 1988 Complainant received a one-day disciplinary layoff for "poor job performance in the area of establishing effective work

relationships". Complainant filed a grievance on October 11, 1988 contending that this discipline was without just cause, and the Grievance Committee of Local 2492-A met on October 11, 1988 with Linda Duerkop, Complainant's supervisor and with Complainant; and met again on November 2, 1988 with Respondent Dalland, concerning the October 11 grievance. The record demonstrates that the Grievance Committee member present on October 11 argued with management that just cause did not exist for the discipline, but that management averred to the contrary, and further demonstrates that following the second step meeting the grievance committee dropped the grievance. The record shows that the Grievance Committee did not notify Complainant of this act and that Complainant learned of it indirectly from Respondent Karger. The record also shows, however, that Respondent Salamone on behalf of the Union obtained from the Employer a settlement offer which would have granted the Complainant back pay and removed the discipline from his record, but that Complainant refused either to accept or reject the offer. The record therefore demonstrates that the Union dropped all representation of Complainant as to this grievance only after Complainant failed to respond to the Employer's settlement offer, and fails to demonstrate by a clear and satisfactory preponderance of the evidence that the Grievance Committee or other Union officials acted for reasons which were arbitrary, discriminatory or in bad faith.

9. On December 21, 1988 Complainant filed the complaint in Case 142, contending that the Executive Board of Local 2492-A failed to fairly represent him with respect to the October 11 grievance; that the County issued the discipline involved as retaliation for Complainant's earlier complaint filed against the County; that the County violated the collective bargaining agreement and thereby violated MERA by failing to process the grievance timely or properly in other procedural respects; and that Council 40 and the Judicial Panel of AFSCME violated MERA by failing to cause the Executive Board of Local 2492-A to reverse its decision not to process Complainant's grievances further.

10. The record demonstrates that the Complainant was first given notice of the possibility of discipline because of failure to maintain adequate working relationships by a letter dated September 26, 1988 and signed by his supervisor Duerkop. The record shows that that letter followed by twelve days a memorandum from Duerkop to Complainant requesting a meeting to discuss complaints concerning his job performance, and that the September 26 letter gave Complainant until October 3, 1988 to answer two pages of specific complaints concerning his performance. The record shows that the complaint in Case 138 was first filed with the Commission on September 26, 1988 and that a copy of it was first served on the County Clerk of Marathon County on October 3, 1988. The record fails to demonstrate by a clear and satisfactory preponderance of the evidence that Duerkop was motivated even in part by the existence of the complaint filed by Complainant, or by Complainant's prior grievances, in deciding on October 7 to issue the discipline suggested by her prior letters.

11. The record fails to demonstrate that either Council 40 or the Judicial Panel of AFSCME, AFL-CIO have any role or power in determining which grievances should be processed by Local 2492-A and which abandoned.

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

CONCLUSIONS OF LAW

1. Respondent AFSCME Local 2492-A did not commit prohibited practices within the meaning of Sec. 111.70(3)(b)1 or Sec. 111.70(3)(b)2, Stats., by refusing to process Complainant's grievances beyond the steps at which they were respectively dropped.

2. Respondents AFSCME Council 40 and AFSCME, AFL-CIO, together with the named individual Respondents associated therewith, did not commit prohibited practices within the meaning of Sec. 111.70(3)(b)1 or Sec. 111.70(3)(b)2, Stats., by refusing to overturn Local 2492-A's decision not to process said grievances further.

3. Respondent Marathon County did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)1 or Sec. 111.70(3)(a)3, Stats., by giving Complainant a one day disciplinary layoff on October 7, 1988.

4. The Commission will not exercise its jurisdiction to determine the existence of a violation of a collective bargaining agreement, where arbitration is provided for by the collective bargaining agreement, the labor organization involved has declined to process the grievance further, and a violation of the duty of fair representation has not been found.

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

ORDER 1/

That the complaints filed in the this matter be, and the same hereby are dismissed in their entirety.

Dated at Madison, Wisconsin this 27th day of December, 1989.

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.

(Footnote 1/ continued on page 6).

1/ Continued

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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The first complaint alleges that Respondent Union and various of its affiliates and individual representatives failed to represent Complainant fairly in its handling of an April 18, 1988 grievance concerning a written reprimand, and alleges that Respondent County and its named individuals violated MERA by violating the collective bargaining agreement in their procedural handling of the grievance. The second complaint alleges that Respondent Union and its officials failed to represent Complainant fairly with respect to his October 11, 1988 grievance protesting a one-day disciplinary layoff, and that Respondent County and its officials violated MERA both by violating the collective bargaining agreement's specified procedural methods for handling grievances and by issuing the suspension because of Complainant's union activity. Some of the essential facts are stated in the Findings and will not be repeated here.

BACKGROUND

For some years Complainant was employed as a Social Worker in the County's Department of Social Services. During that time, the record demonstrates, he filed several grievances. Complainant was represented by Local 2492-A in an arbitration proceeding which took place in February, 1988, and the record is replete with references to other disputes; but the particular chain of events which led to these two complaints began when Complainant received a written reprimand from Department Head James Dalland in April, 1988. On April 11 of that year Complainant filed a grievance protesting the written reprimand, which the Grievance Committee of the Union processed to a meeting with Personnel Director Brad Karger. According to various documents introduced into evidence by Complainant, the County bypassed Step 1 of the grievance procedure by omitting any discussion with the Union conducted by Dalland, and proceeding directly to a discussion with Karger. The Union's grievance committee, according to uncontradicted testimony by one of its members, John Nicholson, represented Complainant at the meeting with Karger, which took place on May 6, 1988. Complainant, as well as Karger, Dalland and three grievance committee members, was present. Nicholson gave uncontradicted testimony that the grievance committee, after some discussion, proposed a settlement of the grievance to both Dalland and Musgrave. The proposed settlement was that the letter of reprimand be withdrawn from Musgrave's file, provided that Musgrave file a letter of explanation regarding the incident in question. (The incident in question involved an alleged threat made by Musgrave to another employe.) There is nothing in the record to rebut Nicholson's testimony that Karger agreed to this settlement subject to seeing the content of Musgrave's letter, that Musgrave agreed to file such a letter, and that all parties were satisfied that this would resolve the matter. Subsequently, Nicholson testified without contradiction, Musgrave wrote a brief letter of explanation, but then retracted it. The grievance committee thereafter declined to process the grievance further. Nicholson testified that the Union's reason for so doing was that the grievance committee considered that a fair settlement had been achieved or could have been achieved, involving the withdrawal of the reprimand from the file, and that it was not obligated to proceed further. Musgrave was advised of the grievance committee's decision by a memorandum.

Complainant was not satisfied with this disposition, and proceeded to appeal within the Union at various stages, the results of which are amply demonstrated in some 400 pages of testimony and some 130 documents which make up the record in this consolidated case. Complainant also attempted to persuade the County to continue to process the grievance despite the fact that the Union had dropped it, and numerous documents in the record attest to these attempts.

The first complaint against the County and the Union comprises those events, and was filed with the Commission on September 26, 1988. On September 14, 1988 Complainant had received a memo from his immediate supervisor, Linda Duerkop, requesting a meeting concerning complaints about his job performance. A second memo, dated the following day, essentially also requested such a meeting. On September 26, the same day as the original complaint in this matter was filed with the Commission, Duerkop wrote a two page letter to Complainant concerning "poor job performance in the area of establishing effective work relationships" and citing four incidents in particular. Duerkop gave Complainant until October 3, 1988 to respond in writing, as he had requested, to the allegations contained in the letter. On October 3rd, Complainant filed his response to the letter; on the same date, the County Clerk of the County and the Union's president received copies of the first prohibited practice complaint. On October 7, 1988 Duerkop issued a letter of discipline to Complainant based on the same allegations contained in her September 26 letter, and imposing a one day disciplinary layoff. Complainant filed a grievance concerning this on October 11.

Processing of the grievance was held up by some days as a result of Dalland's vacation; and a memo dated October 13 from a Union representative to

Dalland extending the time for responding to the grievance was introduced into evidence. On October 26 Dalland wrote to Musgrave and Union representatives requesting their available times for a grievance hearing, and a date was subsequently set, by mutual agreement, for November 2. On November 2, Musgrave encountered a scheduling conflict, and failed to appear at the grievance meeting. The grievance committee met with Dalland in Musgrave's absence and, according to uncontradicted testimony of those present, argued that the disciplinary layoff was without just cause. Dalland refused to modify the discipline.

Subsequently, the record indicates that the grievance committee withdrew representation of Complainant; exhibits in the record prepared at the time by Complainant indicated that the grievance committee had done so without notifying Complainant, and testimony by Deborah Morris, a member of the grievance committee, appears to support this. 2/ AFSCME Council 40 District Representative Salamone, however, testified without contradiction that at approximately this time Complainant resigned his employment with the County voluntarily, and Salamone was notified that the local union was withdrawing representation of Complainant concerning this grievance. Salamone indicated that he could not remember how he had learned of this. But Salamone testified further that upon hearing of this possibility, he called the County's Personnel Director Karger on the telephone and obtained a settlement offer on the grievance. Salamone testified that Karger offered to settle the grievance at that point by withdrawing the discipline from Complainant's personnel file, repaying him for the wages lost as a result of the suspension, and giving him a general reference without negative content. Salamone testified, again without contradiction, that he called Musgrave and relayed this settlement offer to him, and that Musgrave indicated a desire to see it in writing. Salamone told Musgrave that if he was agreeable to the settlement it would be reduced to writing, but testified (without contradiction) that Musgrave never called him back to indicate whether he agreed to the settlement or not. There is no dispute that following this incident the Union declined to process the grievance further.

On December 21, 1988 Complainant filed the second complaint in this matter, which is concerned with the Union's handling of the October grievance and the Employer's alleged violation of MERA by violation of the collective bargaining agreement's required grievance procedure. This complaint also included an allegation that the disciplinary layoff imposed on Complainant was based on Complainant's union activity in filing earlier grievances and on Complainant's action in filing the first complaint proceeding before the Wisconsin Employment Relations Commission.

THE PARTIES' POSITIONS

Complainant's Position

Complainant contends that the Union is shown to have processed his first grievance in a perfunctory and arbitrary manner, and that several of the Union officials involved, including the most recent union president and members of both the grievance committee and executive board, were personally hostile towards him. Complainant contends that collusion charges had been filed by the Complainant concerning the Union prior to the Union's dropping of his first grievance, "producing bad faith on the part of the Union Executive Board regarding the grievant." Complainant contends that the County knowingly violated the collective bargaining agreement by not offering a Step 1 meeting and failing to issue a timely Step 2 response, and thereby violated the Municipal Employment Relations Act.

With respect to the second complaint, Complainant argues that the record shows that the Union and several of its subsidiary organizations including its Judicial Panel failed to correct the alleged abuses of the Local, and that the Local failed to fairly represent him with respect to the October grievance. Complainant notes that an exhibit introduced in the record shows that members of the Executive Board pursued the Complainant's expulsion as a member of the Union approximately a month prior to the filing of the October grievance, and that the grievance committee abandoned representation of the grievant after Step 1 despite Morris' testimony that in her opinion the grievance had merit. Complainant contends that this shows that the Union's action with respect to the second grievance was arbitrary, discriminatory and in bad faith. Complainant argues with respect to the charge against the Employer that the Employer had been served with notice of the prior complaint on or about October 4, and suspended the grievant on October 7. Complainant argues that numerous documents in the record support a claim of Employer hostility towards Complainant. Complainant further argues that the course and conduct of the Union's failure to represent him virtually invited the Employer to take action against him, because it knew he would not be defended by the Union. Complainant requests that his suspension be overturned, his costs and expenses

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2/ The testimony is in the form of a written transcript of an interview conducted by Complainant with Morris privately, to the accuracy of which Morris testified at the hearing.

be ordered paid by the other parties, and that his record be cleared.

The County's Position

The County contends that Complainant must prove by a clear and satisfactory preponderance of the evidence that the County engaged in some conduct which violated the collective bargaining agreement, and argues that Complainant has failed to meet this burden in every particular. The County argues with respect to the processing of the first grievance that the record shows that Dalland was the person issuing the reprimand, and that it is apparent that it would be pointless for the grievance to be reviewed at Dalland's step. The County argues that Dalland testified that a Union representative agreed with him to move the grievance to the second step of the grievance procedure, and that Exhibit 89 shows that both Musgrave and the local union were advised of this decision in writing. With respect to the County's processing of the grievance beyond the second step, the County notes that Personnel Director Karger was advised on three different occasions that the local union had chosen not to process the grievance any further. The County contends that Karger's decision not to process the grievance was taken in good faith in reliance upon the Union's statements. With respect to the processing of the second grievance, the County contends that Karger relied in good faith on the statement of Salamone that the Union would not proceed further with the grievance, and therefore did not proceed to schedule another meeting concerning it.

With respect to the allegation of discrimination due to union activity, the County contends that the Complainant had a prior written reprimand for similar complaints, and that the complaints which led to his one-day disciplinary suspension were known to Complainant prior to the date on which the County Clerk was first served with notice of the existence of a prohibited practice complaint. The County contends that both the facts in the record demonstrating the reasonableness of the discipline against Complainant and the timing of the discipline demonstrate that there was no relationship between that discipline and the fact of the prohibited practice complaint.

The Union's Position

The Union contends that the Complainant does not have any absolute right to arbitration of his grievances, and that negligence does not rise to the seriousness of a duty of fair representation violation, citing Marinette County. 3/ The Union contends that settlement of grievances is obviously part of the scheme of labor relations, and that failure to notify an individual grievant of a settlement is not a violation of the duty of fair representation, citing Eau Claire Association of Educators. 4/ The Union also contends that even if a union violates its own constitution or bylaws, this does not constitute a violation of the duty of fair representation, citing School District of West Allis-West Milwaukee. 5/ Finally, the Union contends that in both instances the Union obtained the best settlements it felt it could for Complainant, and argues that the Union witnesses Salamone, Nicholson and Karger are credible in their testimony as to the rationale for settlement of these two grievances.

Motion to Strike Testimony

On October 18, 1989 Respondent Union filed with the Examiner a motion to strike testimony, contending that subpoena fees owing by Mathew Musgrave based on his subpoenaing witnesses Robert Lyons, Sam Gillespie and Philip Salamone were not paid, because Complainant had issued stop-payment orders on the checks drawn in payment of those subpoena fees. Respondent Union contends that these particular witnesses were all called by Complainant, and testified at his request; and that no reason for the stop payment orders exists. Respondent Union argues that in consequence, all of their testimony should be struck from the record.

I am not aware of any support in law for the contention that nonpayment of witness fees justifies striking testimony already received from the witness involved, and Respondent Union cites no support for its motion. It is well settled that payment of subpoena fees is not a matter within the Commission's jurisdiction; and presumably, this would apply also to claims for unpaid or underpaid subpoena fees. The motion is accordingly denied.

DISCUSSION

Upon mining through the substantial mound of testimony and exhibits compiled in this matter, I conclude that a relatively few salient facts

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3/ Decision No. 19127-C, WERC, 11/82.

4/ Decision No. 20858-B, WERC, 4/84.

5/ Decision No. 20922-D, WERC, 10/84 at pages 26-27.

determine the disposition of these consolidated cases. At bottom, this matter is about the dropping of two grievances filed by Complainant; it is settled law that in the absence of a finding of violation of the duty of fair representation by a union, the associated complaint against the employer for breach of contract will not be entertained by the Commission, because it is within the union's proper discretion to decide which cases to process to arbitration and which not to. 6/ Accordingly, in the absence of a violation of the duty of fair representation, the contract-violation aspects of the case against the County are irrelevant; and I find that no violation of the duty of fair representation has occurred with either grievance.

The salient fact in both cases is that at some level the Union did effectively represent the grievant and in fact obtained a settlement for him, which consisted in each instance of considerably more than half a loaf. In the first grievance, Nicholson gave uncontradicted and credible testimony that a settlement was reached with the grievant's and Employer's consent, by which the reprimand complained of would be withdrawn from the grievant's record, and a mere letter of explanation of the incident involved would be filed by Complainant. Complainant agreed to this, but subsequently backed out. While he may have had reasons (not disclosed in the record) for not wishing even his own opinion of the incident to be recorded, the key fact is that the reprimand was by this settlement to be removed, and nothing would be left on the grievant's file except his own explanation of an incident. This is hardly an unreasonable settlement by traditional labor-management standards, and there is no reason to consider the Union obligated to continue further representation of the grievant once he decided that this was insufficient to meet his needs. It is settled law that a union has broad discretion as to how to pursue its aims so long as actions taken affecting a given employe are not arbitrary, discriminatory or in bad faith. 7/ The determination made by the Union clearly took into account the merits of the grievance; the Union processed the grievance to a step at which a settlement was reached; and it was Complainant's own refusal, without any adequate explanation in the record, to consummate the settlement which caused the Union to withdraw further representation. Clearly, the Complainant received all the representation due him in that instance.

With respect to the second grievance, the record does not make entirely clear the sequence of events by which the Local grievance committee apparently reached a conclusion that it would not represent the grievant beyond the first step of the grievance procedure. Complainant contends vigorously that this decision was due to unjustified personal hostility against him on the part of local officers, and there is evidence that by that time local officers were, at least, hostile to him. It is also at least arguable that that grievance had merit, particularly in view of Morris' testimony to that effect. But at the same time, it is clear that another Union official, Salamone, obtained on the Local's behalf a settlement for the Complainant, which again amounted to virtually everything which might have been gained had the Union proceeded all the way to arbitration. The customary remedy to a grievance protesting a one-day disciplinary suspension, if ordered by an arbitrator, is that the grievant's record be cleared and he be repaid for the lost time involved. This was precisely the scope of the settlement obtained by Salamone, to which was added the Employer's offer to give the grievant a "general" reference with no unfavorable content. This was not an ungenerous offer; but Complainant refused either to accept or reject it. There is nothing in the record to counter Salamone's testimony that Respondent Union, as an institution, refused to represent Complainant further with respect to this grievance only after Complainant had taken this peculiar position. Again, there is nothing in this sequence of events to indicate a violation of the duty of fair representation: Even if unjustified hostility towards Complainant by the grievance committee is, for purposes of argument, assumed, its effects would have been nullified by Salamone's actions.

With respect to the complaint that the disciplinary suspension was grounded in hostility generated by Complainant's prior prohibited practice complaint against the Employer, I note that the language of Duerkop's September 14, 15 and 26 memos and letters to Complainant clearly implied that discipline at some level was pending. All three of these documents were issued prior to the filing of the prohibited practice complaint, and only the Complainant's request for a period of time in which to answer the complaints against his conduct caused the delay until early October. By that time at least some officials of the County knew of the existence of the prohibited practice complaint (though it is not established in the record that Duerkop knew of it by October 7). But Complainant already had a written reprimand on his record within the preceding year, and a common application of industrial discipline would imply that the next disciplinary act would be of greater size.

6/ University of Wisconsin - Milwaukee (Housing Dept.) (sub-nom, Guthrie vs. WERC), Dec. No. 11457-H (WERC, 5/84); School District of West Allis-West Milwaukee, Dec. No. 20922-D, E (WERC, 10/84).

7/ Vaca vs. Sipes, 386 U.S. 171, 190 (1967), Mahnke vs. WERC, 66 Wis. 2d 524 (1974); Ford Motor Company vs. Huffman, 345 US 330 (1953).

A one-day disciplinary layoff is not normally considered out of proportion to a second related offense within a year, and both the timing of the disciplinary layoff and the language of the memos issued in advance of the prohibited practice complaint indicate that there was no relationship between the existence of the prohibited practice complaint and the discipline. At best, the discipline reflects the frustrations of a given supervisor and may have been issued without just cause; but there is not the clear and satisfactory preponderance of evidence required to show a nexus between the discipline and the prohibited practice complaint.

The remainder of the complaints concern allegations leveled against various individuals and organs of AFSCME not employed by the local union. The record evidence shows that only the local union is signatory to a contract with the Employer and it is the local union which determines the processing or refusal to process a grievance. The allegations against the remainder of the union's officials are thus a matter of internal union affairs. Moreover, it is axiomatic that even if the appellate organs of AFSCME were found to have effective power to overturn the decisions of the Local with respect to grievance processing, they could not violate the duty of fair representation by refusing to do so where the Local's actions were not improper to begin with.

For the foregoing reasons, I find the complaints to be without merit in each of their particulars, and it is dismissed.

Dated at Madison, Wisconsin this 27th day of December, 1989.

By _____
Christopher Honeyman, Examiner