

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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DAVID MITCHELL, :  
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 Complainant, :  
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 vs. : Case 58  
 : No. 42507 MP-2253  
 : Decision No. 26148-A  
 MILWAUKEE DISTRICT COUNCIL 48, :  
 LOCAL 80 and CITY OF WEST ALLIS, :  
 :  
 Respondents. :  
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Appearances:

Padway & Padway, Ltd., by Mr. M. Nicol Padway, 606 West Wisconsin Avenue, Milwaukee, Wisconsin, appearing on behalf of the Complainant.  
Podel, Ugent & Cross, S.C., by Mr. Alvin R. Ugent, 207 East Michigan Street, Milwaukee, Wisconsin, appearing on behalf of Milwaukee District Council 48, Local 80.  
Ms. Sheryl L. Kuhary, Assistant City Attorney, City of West Allis, 7525 West Greenfield Avenue, West Allis, Wisconsin, appearing on behalf of City of West Allis.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

On July 12, 1989, David Mitchell filed a complaint alleging that Wisconsin District Council 48, Local 80 had failed to represent him fairly and that the City of West Allis had failed to abide by an Arbitration Award in violation of Secs. 111.70(3)(b)1, 4, and 111.70(3)(a)5, Wis. Stats. Hearing in the matter was held in abeyance pending an informal attempt to resolve the dispute. Thereafter, the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., a member of its staff, to act as Examiner and to make and issue Findings of fact, Conclusions of Law and Order. Hearing in the matter was scheduled for October 5, 1989, and rescheduled and held on November 21, 1989 in West Allis, Wisconsin. During the course of the hearing the parties agreed to bifurcate the hearing and first hear the question of unfair representation. A stenographic transcript of the hearing was prepared and received by the Examiner on December 14, 1989. The Complainant and Wisconsin District Council 48, Local 80 submitted post-hearing arguments with the Examiner by February 8, 1990. 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 Wisconsin District Council 48, Local 80, hereinafter referred to as the Union, is a labor organization maintaining its offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin; that said Union employs Earl Gregory as a staff representative; and, that Gregory's duties include representing the Union in collective bargaining, acting as the Union's chief spokesman, and advising the Union on grievance and arbitration matters.

2. That the City of West Allis, hereinafter referred to as the City, is a municipal employer maintaining its offices at 7525 West Greenfield Avenue, West Allis, Wisconsin; and, that amongst its various governmental operations the City operates a Water Department.

3. That at all times material herein the City and the Union have been parties to a collective bargaining agreement; that the current collective bargaining agreement is in effect from January 1, 1989 through December 31, 1990; that said collective bargaining agreement contains a grievance procedure which culminates in final and binding arbitration of grievances; and, that said grievance procedure contains the following provisions pertinent hereto:

ARTICLE IX

GRIEVANCE AND ARBITRATION PROCEDURE

A. Grievance Procedure

1. Except as modified below, the Civil Service Commission is hereby designated as the official agency for the settlement of bargaining unit employee complaints or requests.

2.Changes in salary, fringe benefits, overtime and overtime allowances, or other matters requiring action by the Common Council are not to be included in the grievance procedure.

3.Department heads may establish such reasonable rules and regulations as may be necessary to properly perform the work of the department. Such rules shall be consistent with West Allis ordinances, Civil Service Rules and any agreement between the City and the Union.

B. Steps in Grievance Procedure

1.Step 1. If an employee has a grievance, it shall first be presented orally to the employee's immediate supervisor either alone or accompanied by a union representative. The supervisor will reach a decision and communicate it orally to the employee before the end of the next working day.

2.Step 2. If the grievance is not settled at Step 1, it shall be reduced to writing by the employee or the union representative and presented to the division head within five (5) working days. Within five (5) working days, the division head shall furnish the employee and the union with a written answer to the grievance.

3.Step 3. If the grievance is not settled at Step 2, the Union or the employee may appeal in writing within ten (10) working days to the department head or in the case of Public Works employees, the Assistant Director of Public Works Operations. The department head or the Assistant Director of Public Works Operations shall submit his/her decision in writing to the employee and the Union within five (5) working days after his/her receipt of the appeal.

4.Step 4. If the grievance is not settled at Step 3, the employee or the Union may appeal in writing to the Civil Service Commission within fifteen (15) working days. The Commission shall schedule the matter for a hearing within ten (10) working days following the filing of the appeal. The failure of the employee or the Union to provide proper and timely notice shall be deemed a waiver of its right under this section. The Commission shall render a decision in writing within five (5) working days after hearing the department head, the employee and the Union.

5.Any time limit prescribed by this subsection may be extended at any step by the written mutual consent of the parties.

C. Arbitration

1.Who May Invoke

The City or the Union may invoke the provisions of this section in the manner and at the times hereinafter set forth.

2.When Applicable

The procedure hereinafter set forth shall be available as an alternative to the City or the Union in cases:  
(1) involving suspension, demotion, discharge or discipline under Section 2.76 (7); (2) in cases involving grievances at Step 4; and (3) in cases involving the application, meaning or interpretation of the labor agreement between the City and the Union. Proceedings may be commenced by either party upon notice to the other in writing. In cases arising under Section 2.76 (7) such notice shall be given within ten (10) working days after the employee has been provided with a copy of the charges; and in cases arising out of grievances at Step 4 such notice shall be given within fifteen (15) working days after the department head has rendered a decision. The failure of a party to

provide a proper and timely notice shall be deemed a waiver of its rights under this section. However, any time limit prescribed by this subsection may be extended by mutual written consent of the parties.

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4. That for the past thirty (30) years the City has employed the Complainant, David Mitchell, in the City's Water Department; that for the last seventeen (17) years Mitchell has held the position of maintenance repairer; that over the years Mitchell has held several positions in the Union, including the positions of Steward, Chief Steward, member of the Executive Board and Vice-President; that in 1987 and 1989 Mitchell ran for the position of President, losing both times to current Union President Greg Radtke; and, that Mitchell is currently a Union Steward.

5. That in 1984 Mitchell filed a grievance concerning the City's assignment of an Equipment Operator from another Division to perform work on a temporary basis in the City's Water Department; that said grievance was processed to arbitration; and, that in January 1985 an arbitrator rendered a decision concluding the City's actions violated the collective bargaining agreement.

6. That on March 29, 1989 Mitchell filed a grievance because the City limited a training program for Equipment Operator II positions to only employees who were Equipment Operator I's; that Gregory informed Mitchell his grievance had no merit and that he would recommend to the Union that the Union not take the matter to arbitration; that Gregory based his decision on his knowledge of the contract, civil service procedures, past practice, negotiations and discussions with the Union President and other officers of the Union; that Mitchell received a Step 2 response on March 30, 1989 and a Step 3 response on April 13, 1989; that during a Union meeting in April, 1989 Mitchell raised his grievance; that Mitchell did not appeal his grievance to Step 4 of the grievance procedure; and, that there is no evidence Mitchell requested the Union to appeal his grievance to arbitration.

7. That in early 1989 the City's only Equipment Operator II in the Water Department retired; that thereafter Mitchell and other employees of the Water Department learned that the City intended to allow an Equipment Operator II from another Department to transfer into the Water Department's vacant Equipment Operator II position; that Mitchell believed the City's action would violate the Water Department's past practice of promotion from within; that Mitchell requested that Gregory meet with employees of the Water Department to discuss the problem; that Gregory informed Mitchell and several employees of the Water Department in early May, 1989 that Mitchell had no grievance and that if Mitchell filed a grievance over the City's actions he would advise the Union not to take the matter to arbitration; that Gregory advised Mitchell and the other employees of the Water Department that he would resolve the matter by retitling Mitchell's position to Tradesman Operator; that thereafter Gregory directed Radtke to meet with the City's managers to resolve the matter; and, that thereafter Street and Sewer Department Equipment Operator II Gene Wolf transferred into the vacant Water Department Equipment Operator II position

8. That on May 23, 1989 Mitchell filed a grievance alleging that the transfer of Wolf to the Water Department violated the collective bargaining agreement; that the grievance was denied at Step 2 of the grievance procedure on May 24, 1989; that on May 31, 1989 Mitchell appealed his grievance to Step 3 of the grievance procedure; that on May 31, 1989 Assistant Director of Public Works Michael Pertmer denied the grievance; that Mitchell did not appeal his grievance to Step 4 of the grievance procedure; and, that there is no evidence Mitchell ever requested the Union to process his May 23, 1989 grievance to arbitration.

9. That Radtke testified that when either an employe or steward initially files a grievance he is informed of the matter; that thereafter Radtke receives copies of the grievance as the grievance is processed through the grievance procedure; that prior to arbitration the employe or steward who is processing the grievance makes a request either to the Vice-President of the Union or to Radtke that they would like the matter to proceed to arbitration; that if a request is not made the Union considers the matter to be dropped; that if a request is made the matter is taken to the Union's Executive Board; that the executive Board consists of seven (7) voting members and the Union President, who is a non-voting member; and, that the voting members determine whether a grievance should be taken to arbitration.

10. That at a Union meeting in May, 1989 Mitchell raised a question concerning his grievances; that Radtke responded he thought Mitchell and Gregory had resolved the matter and suggested Mitchell meet with Gregory after the meeting; that Gregory again informed Mitchell that, in his opinion, Mitchell did not have a grievance; that the Union's Executive Board did not hold a May, 1989 meeting as there was not a quorum present; and, that Gregory, upon learning that Mitchell had filed a grievance concerning the transfer of Gene Wolf to the Water Department, directed Radtke to cease efforts to

voluntarily resolve the matter.

11. That Mitchell has in the past processed grievances up to and including Step 4 of the grievance procedure; that Mitchell has in the past had grievances sustained at Step 4 of the grievance procedure by the City's Civil Service Commission; and, that Mitchell did not exhaust the grievance procedure concerning either the March 29, 1989 or May 23, 1989 grievances.

12. That Mitchell was aware that if he wanted to have the Union arbitrate his grievances he had to so inform the Union's President or Vice-President; that when Radtke asked Mitchell about his grievances, Mitchell refused to talk to Radtke; and, that Mitchell never requested that the Union arbitrate his March 29, 1989 or May 23, 1989 grievances.

13. That the Union's handling of Mitchell's grievances was not arbitrary, discriminatory or done in bad faith; and, that the Union at all times material herein fairly represented Mitchell.

CONCLUSIONS OF LAW

1. That Milwaukee District Council 48, Local 80 did not violate its duty of fair representation with respect to David Mitchell by its failure to arbitrate two grievances on his behalf and accordingly did not violate Secs. 111.70(3)(b)1 and 4, Wis. Stats.

2. That having concluded that Milwaukee District Council 48, Local 80 did not violate its duty of fair representation to David Mitchell, there is no jurisdiction to determine that the City of West Allis violated Sec. 111.70(3)(a)5, Wis. Stats.

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 2nd day of April, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
Edmond J. Bielarczyk, Jr., Examiner

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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.

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 12, 1989 David Mitchell filed the Complaint initiating these proceedings. Therein Mitchell alleged the Union failed in its duty to fairly represent employes concerning two grievances he had filed. Mitchell also alleged that the City had failed to abide by an arbitration case he had won in January, 1985. Both the City and the Union denied they had committed any prohibited practice. At the hearing the parties agreed to bifurcate the matter, the question of unfair representation going first, with the question of whether the City violated the terms of the collective bargaining agreement being scheduled for hearing if unfair representation was proved. The City did not take a position or file written arguments on the unfair representation question.

COMPLAINANT'S POSITION

During 1989 Mitchell filed two (2) grievances. One on March 29, 1989 concerned limiting a training program for Equipment Operator II to only Equipment Operator I's. Mitchell filed a second grievance on May 23, 1989 concerning the transfer of an employe from another Department into a vacant Water Department Equipment Operator II position. Complainant argues the Union's decisions not to pursue Mitchell's grievances were not made in good faith. Complainant asserts that a Union's decision not to proceed to arbitration must demonstrate good faith and include, at a minimum, consideration of the following factors: (1) Monetary value of the employe claim; (2) Effect of the breach on the employe; and (3) Likelihood of success in arbitration. The Complaint points out no Union official ever considered the monetary value of Mitchell's grievances before the decision not to arbitrate was made by Gregory and Radtke. Nor did any Union official consider the effect of the breach on Mitchell or other Water Department employes in their refusal to arbitrate Mitchell's grievances. The Complainant also argues that Gregory's and Radtke's decisions not to pursue arbitration did not take into consideration the likelihood of success in arbitration.

The Complainant also contends the Union's conduct was arbitrary, discriminatory and in bad faith. The Complainant points out that Gregory testified that it is not his position to make the decision whether or not a grievance goes to arbitration, but only a recommendation. However, the Complainant argues that Gregory made the decision that Mitchell's grievance was not to be considered a grievance. 2/ Further, that Gregory determined that Mitchell did not have a grievance. 3/ The Complainant also argues Radtke testified that the decisions not to pursue the grievances were made between himself and Gregory. 4/ The Complainant also argues that Radtke's and Gregory's decision to drop pursuit of the reclassification to Tradesman Operator position when Mitchell pursued his grievances evidences their discriminatory actions.

The Complainant concludes the conduct of Gregory and Radtke in disregarding Mitchell's grievances was arbitrary, discriminatory and in bad faith, not to mention a substantial departure from the Union grievance procedure. The Complainant asserts their conduct constitutes a breach of the duty of fair representation.

UNION'S POSITION

The Union argues that Mitchell had the responsibility to determine whether he wanted to arbitrate his grievances, go to the Civil Service Commission, or to drop the matter. If Mitchell wanted to arbitrate, he had to make such a request before the Union could decide whether it was willing to arbitrate the matters. The Union argues that Mitchell knows the rules and points out that

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2/ Transcript, p. 160, lines 3-5.

3/ Transcript, p. 32, lines 22-23.

4/ Transcript, p. 184, line 18.

Mitchell has, in the past, gone to the Civil Service commission. The Union stresses the fact that no Union permission is necessary to go to the Civil Service Commission.

The Union contends Mitchell never asked the Union to arbitrate his cases within a timely matter. If he had, Gregory would have recommended that it not go to arbitration because, in Gregory's opinion, the grievances lacked merit. Gregory informed Mitchell and other employes of the Water Department of his opinion and they agreed to have Gregory try to negotiate a change. Thereafter, Mitchell lost faith in Gregory's ability to negotiate a change and asked about his grievance at a Union meeting. However, Mitchell never asked to have his grievances arbitrated and there is no evidence Gregory either lied to or tricked Mitchell into not pursuing his grievances.

The Union concludes it has not been unfair to Mitchell, that the charges levied against the Union have no merit, and that the complaint should be dismissed.

#### DISCUSSION

The issue presented herein is whether the Union violated its duty to fairly represent Mitchell. The duty of fair representation obligates a Union to represent the interests of its members without hostility or discrimination, to exercise its discretion with good faith and honesty, and to eschew arbitrary conduct. 5/ The Union's duty to fairly represent its members is only breached when the Union's actions are arbitrary, discriminatory, or taken in bad faith. 6/

The thrust of Mitchell's case is that Gregory and Radtke violated the duty of fair representation when they failed to advance Mitchell's grievances to arbitration. However, Radtke testified that the grievance procedure allows employes to advance grievances on their own through Step 3. If an employe desired to have the grievance go to arbitration, the employe must inform either the President or Vice-President. The matter is then taken to the Union's Executive Board, seven voting members and Radtke, who make the decision of whether to pursue the grievance. Radtke does not vote. 7/ Radtke further testified that Mitchell never requested that either of his grievances go to arbitration. 8/ Also, that Mitchell would not talk to him about the grievances. 9/

Mitchell testified he brought up the first grievance at the Union's April, 1989 meeting and that he raised the second grievance at the Union's May, 1989 meeting. 10/ Mitchell also testified that the Union's Chief Steward informed him that if he wanted the Union to advance his grievances to arbitration, he'd have to ask the President. 11/ However, there is no evidence that Mitchell ever requested that the Union take his grievances to arbitration.

At most, the record demonstrates that Mitchell was aware that Gregory would recommend against arbitration of either grievance because Gregory had informed Mitchell of his opinion on both matters. Mitchell did not dispute Radtke's testimony that Mitchell refused to talk to him about his grievances; however, as noted above, Mitchell acknowledged he was aware he had to ask the Union President if he wanted to have his grievances arbitrated. Such a request was therefore never made.

The record also demonstrates that Mitchell never availed himself of Step 4 of the grievance procedure. This Step provides that Step denials of grievances can be appealed to City's Civil Service Commission. Mitchell has, in the past, appealed grievances to Step 4 and has had grievances sustained at this Step. The record thus demonstrates that Mitchell did not exhaust the grievance procedure, that Mitchell was aware of this, and that he had, in the past, been successful at Step 4 of the grievance procedure.

The record also demonstrates that Mitchell raised questions about his first grievance at the Union's April meeting and his second grievance at the Union's May meeting. However, the record is silent concerning whether Mitchell asked questions about his grievance in April before or after he received the Step 3 response on April 15, 1989. While the record is clear that Mitchell asked questions about his second grievance at the May meeting, this was prior

5/ Vaca v. Sipes, 386 U.S. 171, 177, 64 LRRM 2369, 2371 (1967); Mahnke v. WERC, 66 Wis.2d 524 (1974).

6/ Vaca v. Sipes, supra; Coleman v. Outboard Marine Corp., 92 Wis.2d 565 (1979).

7/ Transcript, p. 173, lines 5-9.

8/ Transcript, p. 173, lines 16-19.

9/ Transcript, p. 179, lines 15-23.

10/ Transcript, p. 78, lines 4-23.

11/ Transcript, p. 77, line 7.

to his receiving the Step 3 response on May 31, 1989. There is no evidence Mitchell raised the issue of arbitrating the second grievance after his receipt of the Step 3 response.

The evidence fails to prove that the Union did anything other than to treat Mitchell as required. Mitchell, as a steward and former officer of the Union, was aware he could file a Step 4 appeal. He was also aware he needed to tell the Union President he desired to have his grievances arbitrated. Mitchell neither filed a Step 4 appeal nor did he inform Radtke that he wanted his grievances arbitrated. Given Radtke's undisputed testimony that Mitchell refused to even talk to him about his grievances, there is no basis to conclude that the Union's conduct towards Mitchell was arbitrary, discriminatory or in bad faith. Thus the Union did not violate its duty to fairly represent Mitchell.

The record does demonstrate that at some point in time Gregory informed Mitchell he would recommend that the Union not arbitrate either grievance because he did not feel Mitchell had a grievance. Gregory testified that his recommendation was based upon reading the grievances, talking matters over with the President and other officers of the Union, and his knowledge of negotiations, civil service procedure, and past practice. 12/ Though Mitchell herein disputed Gregory's conclusions, there is no evidence that in determining his recommendation Gregory was arbitrary, discriminatory or that he acted in bad faith.

Having concluded that the Union did not breach its duty of fair representation toward Mitchell, the Examiner has no authority to consider the breach of contract claims against the City. 13/ Therefore, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 2nd day of April, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
Edmond J. Bielarczyk, Jr., Examiner

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12/ Transcript, p. 32, lines 18-23.

13/ Mahnke v. WERC, 66 Wis.2d 524 (1975).

