

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THOMAS E. REPISCHAK,	:	
	:	
Complainant,	:	
	:	
vs.	:	Case 1
	:	No. 43992 Ce-2101
	:	Decision No. 26497-B
MILWAUKEE POLICE ASSOCIATION,	:	
BILL KRUEGER and KENNETH MURRAY,	:	
	:	
Respondents.	:	
	:	

Appearances:

Mr. Thomas E. Repischak, W173 S10626 Muskego Dam Drive, Muskego, Wisconsin 53150, appearing pro se.
 Adelman, Adelman and Murray, S.C., Attorneys at Law, by Ms. Laurie A. Eggert, 1840 North Farwell Street, Milwaukee, Wisconsin 53202, appearing on behalf of Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Mr. Thomas E. Repischak, on May 9, 1990, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission against the Milwaukee Police Association, Bill Krueger and Kenneth Murray. On May 24, 1990, the Commission appointed Dennis P. McGilligan, a member of its staff, to act as Examiner in the matter. A hearing was scheduled for June 26, 1990 in the Milwaukee City Hall, Milwaukee, Wisconsin; and subsequently postponed to August 22, 1990, also in the City Hall, Milwaukee, Wisconsin. On June 19, 1990, the Respondents filed an Answer, a Motion to make More Definite and Certain, and a Motion to Dismiss Complaint as to Respondent Kenneth Murray. On July 12, 1990, Thomas E. Repischak filed a Motion in Opposition to Respondents' Motion for Dismissal as to Respondent Kenneth Murray. On July 13, 1990, Thomas E. Repischak filed a Motion in Opposition to Respondents' Motion for More Definite and Certain Answer. On July 18, 1990, the Examiner issued an Order Denying Motion to Make More Definite and Certain and Denying Motion to Dismiss Complaint as to Respondent Murray. A hearing was conducted by the undersigned on August 22, 1990, in the Milwaukee City Hall, 200 East Wells Street, Milwaukee, Wisconsin. The hearing was transcribed, and the Respondents filed a brief on October 15, 1990.

The Examiner, having considered the evidence and argument of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Thomas E. Repischak, herein referred to as the Complainant, was at all times material herein a municipal employe within the meaning of Sec. 111.70(1)(i), Stats., and was employed by the City of Milwaukee as a police officer.

2. Respondent Milwaukee Police Association is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal offices at 1840 North Farwell Street, Suite 400, Milwaukee, Wisconsin 53202. Bill Krueger was President of the Milwaukee Police Association at the time of Complainant's request for legal representation over his recall to active duty on the police department from duty disability retirement, and Kenneth Murray was the Association's Attorney; and both were its agents.

3. At all times material to this proceeding, Respondent Milwaukee Police Association has been the exclusive bargaining representative of certain law enforcement officers including the grievant in the employ of the City of Milwaukee Police Department.

4. Respondent Milwaukee Police Association and the City of Milwaukee 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 January 1, 1989. This agreement provides the following provision relevant to this matter:

ARTICLE 7

GRIEVANCE AND ARBITRATION PROCEDURE

- 1. GRIEVANCE PROCEDURE
 - A. EFFECTIVE DATE

All grievances initiated after the execution date of this Agreement shall be processed under this Grievance Procedure.

All grievances initiated prior to the execution date of this Agreement shall be processed in accordance with the same provisions as were provided for under the Grievance Procedure in effect during the term of the 1985/1986 Agreement between the City and the Association.

B. GRIEVANCES

1.

Differences involving the interpretation, application or enforcement of the provisions of this Agreement or the application of a rule or regulation of the Milwaukee Police Department affecting wages, hours, or conditions of employment shall constitute a grievance under the provisions set forth below. Matters of departmental discipline involving application of the rules or regulations of the Milwaukee Police Department which are not subject to appeal to the Board of Fire and Police Commissioners, shall constitute a grievance under the aforementioned provisions and matters of departmental discipline involving application of the rules or regulations of the Chief of Police which are subject to appeal to the Board of Fire and Police Commissioners shall not constitute a grievance under the aforementioned provisions. Matters involving approval of medical (or dental) insurance claims filed by an employee, or medical (or dental) insurance claims filed by an employee on behalf of his/her dependents, shall not constitute a grievance under the aforementioned provisions.

Obligations of the City under Chapter 65, Wisconsin Statutes, and any pension matter under the exclusive jurisdiction or control of any duly constituted pension board shall not constitute a grievance under the provisions aforementioned.

5. Respondent Milwaukee Police Association has a Constitution and By-Laws which provides in material part:

6.03

. . .

A. No member of the Association shall at any time employ legal counsel to start any action regarding wages, hours and working conditions without first notifying the Board of Trustees, by letter, and receiving their approval. If this section is not strictly adhered to, the Board may refuse all financial aid and be relieved of all further responsibility.

A copy of the Constitution and By-Laws is taken to the monthly membership meetings which are open to all members of the Association. A copy is distributed to every union steward, and is made available to members upon request.

6. Complainant was employed as a City of Milwaukee Police Officer until he was awarded a duty disability pension in March of 1983. He remained on duty disability retirement until April 25, 1988, when the Milwaukee Annuity and Pension Board removed him from his disability pension and recalled him to duty on the Milwaukee Police Department. On April 26, 1988, Complainant reported to the Milwaukee Police Administration Building whereupon he was assigned to the Police Academy. While at the Academy, around 11:00 a.m., Complainant called the Milwaukee Police Association and spoke with Bill Krueger. He asked the Association to represent him in his appeal through the Employee's Retirement System of the decision to recall him. Krueger did not respond that the Association and its lawyers were too busy in interest arbitration proceedings to handle his case. Krueger also did not advise Complainant to get his own lawyer, and that the cost of such lawyer would be paid by the Association (since his dispute over the recall was a union matter).

7. Complainant also spoke with Kenneth Murray on April 26, 1988. He asked Murray if the Milwaukee Police Association would provide legal representation for him to fight the recall. Murray responded that if he wasn't tied up in contract negotiations he would be able to sit down and counsel Complainant regarding the matter. Murray did not tell Complainant that in his opinion the Association would pay for an attorney to fight the recall since it was a union matter.

8. At no time material herein did Complainant make a written request of the Milwaukee Police Association or its Board of Trustees for permission to hire an attorney at the Association's expense to fight the aforesaid recall.

9. Thereafter, Complainant hired John Fuchs to represent him in regard to the recall. Sometime in the latter part of 1989, Complainant submitted a bill of approximately \$2,000 for legal services from said attorney to the Milwaukee Police Association for payment. In response, the Association sent Complainant a letter informing him that the Association would not pay for such services. The Association denied the request for payment of Complainant's attorney's fees because: one, the Association did not provide representation for such matters; and two, the Complainant did not make a request in writing for legal representation as required by the Association's By-Laws.

10. Except as noted in Finding of Fact 11 below, the Milwaukee Police Association, at all times material herein, has not represented anyone with respect to any issue relating to recall from duty disability retirement.

11. The Milwaukee Police Association initially challenged the Milwaukee Police Chief's limited duty program through a prohibited practice complaint filed with the Wisconsin Employment Relations Commission. After that challenge was unsuccessful, the Association, along with several other plaintiffs chosen for standing, filed an action in the Circuit Court of Milwaukee County for a declaratory judgment and injunction regarding the authority of the Chief and City of Milwaukee to unilaterally create a limited duty classification. The purpose of the law suit was to determine whether or not limited duty existed and whether the City of Milwaukee and the Police Chief had the authority to establish it without collective bargaining, rather than to determine if a particular individual was eligible for a duty disability pension. The law suit also raised the issue of how limited duty might affect people who would apply for disability retirement or be called back from disability retirement. The Association brought these actions to protect all its members, including the Complainant, who might be affected by the City's unilateral implementation of limited duty.

12. The Milwaukee Police Association has provided Complainant with representation in other grievances since he was called back to duty as an active employe.

13. The Milwaukee Police Association Executive Board established a policy when the limited duty protocol was modified by the Chief of Police. Under said policy, people who were being returned from duty disability retirement were told that the Association did not provide legal representation and would not pay any bills related to such representation. Such policy was consistently applied for fourteen months before Complainant made his request for legal representation.

14. The Milwaukee Police Association's and its aforesaid agents' handling of Complainant's request for legal representation regarding his recall to limited duty from disability retirement was not arbitrary, discriminatory or in bad faith; and, the Association at all times material herein fairly represented Complainant.

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

CONCLUSIONS OF LAW

1. Respondents Milwaukee Police Association and Bill Krueger met their obligation to fairly represent Complainant herein; and, therefore, said Respondents did not commit prohibited practices within the meaning of Sec. 111.70(3)(b)1, Stats.

2. Respondent Kenneth Murray did not commit prohibited practices within the meaning of Sec. 111.70(3)(c) Stats., by his actions herein.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues 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 December, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Dennis P. McGilligan, 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.

MILWAUKEE POLICE ASSOCIATION

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On May 9, 1990 Thomas E. Repischak filed the Complaint initiating these proceedings. Therein Repischak, hereinafter Complainant, alleged the Union failed in its duty to fairly represent employes by failing to pay legal costs incurred by Complainant in fighting his recall to limited duty from duty disability retirement. The Union and its agents denied committing any prohibited practice by their actions in the instant case. The Respondents filed a brief on October 15, 1990. Complainant did not file written arguments.

COMPLAINANT'S POSITION

Complainant argues that he was entitled to legal representation provided by the Union in regard to his recall to limited duty from duty disability retirement. Complainant maintains that the Milwaukee Police Association as his collective bargaining representative has the responsibility to represent him on such matters. In addition, Complainant maintains that Bill Krueger, the President of the Union, and Kenneth Murray, the Union's attorney, told him to get his own attorney to handle the matter, and the Union would pay for his legal representation since the recall was job-related and the Union was too busy to provide representation. Finally, Complainant argues that he did not have to make a written request for representation by the Union since he received assurances from the aforesaid Union representatives concerning representation and no one informed him of the requirement that he needed to put any such request in writing. For a remedy, Complainant asks that Respondents be ordered to pay his legal costs in the amount of \$5200.

RESPONDENTS' POSITION

Respondents maintain that the Milwaukee Police Association did not violate its duty of fair representation to Complainant.

In support thereof, Respondents first argue that the Association's refusal to provide free legal representation to Complainant in his appeal through the Employee's Retirement System is not arbitrary, discriminatory, or in bad faith. Respondents opine that the Association has consistently refused to provide free legal services for appeals through said Retirement System and has treated each of its members consistently by refusing to provide such free legal services.

Secondly, Respondents argue that their conduct in refusing Complainant's request does not violate the duty of fair representation because such duty does not extend to matters outside of processing grievances and engaging in collective bargaining.

Third, Respondents argue that the fact the Association filed a civil action for declaratory judgment and injunction in the Stamper case does not lead to an obligation to provide free legal services to Complainant in his appeal of his recall by the Annuity and Pension Board decision. Respondents note that the purpose of the law suit was to determine whether or not limited duty existed and whether the City and Chief had the authority to establish it without collective bargaining, rather than to determine if a particular individual was eligible for a duty disability pension. Respondents claim the individuals were named in the action only to guarantee standing to bring the action. In addition, Respondents maintain even if appeals from recalls were matters on which the Association owed a duty of fair representation, the Association would not have breached such duty by its decision to bring the civil action, while at the same time deciding not to provide free legal services for Complainant's appeal. "The duty of fair representation does not obligate a union to take all meritorious cases; the union's obligation is only to exercise discretion with good faith and honesty. (City of West Allis, 26148-A, 4-2-90) The WERC should not sit in judgement over the wisdom of the union's policy and decision-making regarding the disposition of matters which are subject to the duty of fair representation. (Marinette County (Sheriff's Department), 19127-C, 11-23-82)"

Respondents add that there has been no allegation that the Association or any of its agents bore any hostility or discrimination against Complainant. In fact, Respondents point out that the Association has provided Complainant with representation in grievances since he was called back to duty as an active employe according to Respondents.

Fourth, Respondents deny that Krueger and Murray informed Complainant that he should obtain his own attorney and that the Association would pay for the cost of such attorney because the issue was "job-related." To the contrary, Respondents claim the Association had a policy where people being returned from duty disability retirement were told that the Association did not provide legal representation and would not pay any bills related to such representation. Respondents argue such policy was consistently applied for 14 months before Complainant made his request for legal representation. Finally, Respondents note that even if the Association had an obligation to handle Complainant's recall Complainant did not follow the procedures mandated by the Association's Constitution and By-Laws. "As a result, the MPA did not breach its duty, if one existed."

DISCUSSION

The issue presented herein is whether the Union violated its duty to fairly represent Complainant. 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. 2/ 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. 3/

The thrust of Complainant's case is that the Association violated the duty of fair representation when it failed to provide legal representation to Complainant in his appeal through the Employee's Retirement System of the Annuity and Pension Board's decision to recall him from duty disability retirement. However, the Association's policy was to tell people who were being returned from duty disability retirement that the Association did not provide legal representation and would not pay any bills related to such representation. 4/ Such policy was uniformly applied for 14 months before Complainant made his request for legal representation. 5/ Complainant provided no evidence to the contrary.

At hearing, Complainant raised an issue relating to the Association's action in the Circuit Court of Milwaukee County for a declaratory judgment regarding the authority of the Chief and City of Milwaukee to unilaterally create a limited duty classification. However, the purpose of the law suit was to determine whether or not limited duty existed and whether the City and Chief had the authority to establish it without collective bargaining, rather than to determine if a particular individual was eligible for a duty disability pension. 6/ As such, the suit benefited all officers similarly situated including the grievant rather than any one individual. In fact, the individuals were named in the action only to guarantee standing to bring the action. 7/ Complainant provided no example of the Association representing any other individual recalled to active duty fighting same like Complainant.

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

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

4/ Tr. 73.

5/ Tr. 75.

6/ Tr. 47.

7/ Tr. 45.

The record indicates that neither the Association or any of its decision-makers or agents bore any hostility or discriminatory motive against Complainant. In fact, the Association has provided Complainant with representation in other grievances since he was called back to duty as an active employe. 8/

Nor does the record support a finding that Krueger and Murray informed Complainant that he should obtain his own attorney and that the Association would pay for the cost of such attorney because the issue was "job-related." Although the record is in some respects unclear as to exactly what was said, the Examiner finds it reasonable to conclude that Complainant did not meet his burden of proof on this point.

Finally, the record indicates that Complainant could have requested representation on his recall from duty disability retirement by following certain procedures provided for in the Association's Constitution and By-Laws.

However, it is uncontested that Complainant did not file a written request for legal representation in his appeal from the recall from duty disability retirement as required by Section 6.03(A) of the Constitution and By-Laws of the MPA. 9/ Complainant contends that he was not bound by such provision because the MPA did not inform him of the requirement. However, the Examiner is of the opinion that the Association was under no obligation to specifically inform him of the requirements of Section 6.03(A). Complainant had access to the Constitution and By-Laws at every monthly membership meeting. 10/ In addition, each union steward has a copy of the Constitution and By-Laws; 11/ and there was a union steward at the Academy where Complainant was assigned. Further, Section 6.03(A) has been in effect since November 3, 1974 and was read at open membership meetings for three successive months between August 1974 and October 1974, during which time Complainant was in active service. 12/ During this time, Section 6.03(A) was posted on MPA bulletin boards throughout the Milwaukee Policy Department. 13/

Based on all of the foregoing, and the record as a whole, the Examiner finds it reasonable to conclude that the Association's actions toward Complainant herein, were not arbitrary, discriminatory or taken in bad faith. Having concluded that the Association (and its agents) did not breach its duty of fair representation toward Complainant, the Examiner has dismissed the complaint in its entirety.

Dated at Madison, Wisconsin this 13th day of December, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Dennis P. McGilligan, Examiner

8/ Tr. 36.

9/ Joint Exhibit 1.

10/ Tr. 86.

11/ Ibid.

12/ Tr. 87.

13/ Ibid.