

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOHNNY L. WADE, :
 :
 :
 Complainant, :
 :
 vs. :
 :
 WISCONSIN DISTRICT COUNCIL 48, :
 AFSCME, AFL-CIO and its affiliated :
 LOCAL 1055 :
 :
 and :
 :
 MILWAUKEE COUNTY (MEDICAL COMPLEX), :
 :
 Respondents. :
 :

Case 312
No. 46107 MP-2511
Decision No. 27040-A

Appearances:

Mr. Johnny L. Wade, 1953 North 26th Street, Milwaukee, Wisconsin 53205, appearing pro se.
Podell, Ugent and Cross, S.C., Attorneys at Law, by Mr. Alvin R. Ugent, Suite 200, 611 North Broadway Street, Milwaukee, Wisconsin 53202, appearing on behalf of Milwaukee District Council 48 and its affiliated Local 1055.
Mr. Timothy R. Schoewe, Deputy Corporation Counsel, 901 North Ninth Street, Room 303, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County (Medical Complex).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 12, 1991, Johnny L. Wade filed a complaint with the Wisconsin Employment Relations Commission alleging that Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 1055 and Milwaukee County had committed prohibited practices within the meaning of the Municipal Employment Relations Act. The Commission, on October 2, 1991, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held in Milwaukee, Wisconsin on December 6, 1991, at which evidence was presented and the parties made oral arguments as to their respective positions. The transcript of the proceeding was received on January 6, 1992. 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. The Complainant Johnny L. Wade is an individual residing at 1953 North 26th Street, Milwaukee, Wisconsin 53205.

2. Milwaukee District Council 48 and its affiliated Local 1055, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h) and its offices are located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208. Ms. Gerty Purifoy is the Union's staff representative and has acted on its behalf.

3. Milwaukee County, hereinafter referred to as the County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal offices located at the Milwaukee County Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin 53233.

4. The Milwaukee County Personnel Review Board, hereinafter referred to as the Board, was established pursuant to Chapter 33 of the General Ordinances of Milwaukee County to administer the quasi judicial duties formerly performed by the Milwaukee County Civil Service Commission as they relate to the discipline and discharge of County employes as set forth in Secs. 63.10 and 63.12, Stats..

5. Johnny L. Wade was employed as a custodial worker at the Milwaukee County Medical Complex. In the spring of 1990, Mr. Wade served a one-day suspension for allegedly being inattentive during work hours. On September 14, 1990, the County filed charges against Mr. Wade asking that he be discharged.

6. On September 17, 1990, Mr. Wade spoke with Gerty Purifoy about handling his case before the Board. On September 24, 1990, Mr. Wade met with Gerty Purifoy to prepare for the hearing before the Board and during the course of this meeting Mr. Wade indicated that he would be willing to enter into settlement discussions with the County to avoid a hearing before the Board and return to work. Gerty Purifoy entered into settlement discussions with the County and initially the County was not interested in discussing a possible settlement. Subsequently, on October 8, 1990, the County proposed terms of a possible settlement. Mr. Wade was informed of these terms but they were not acceptable to him and a counterproposal was made by the Union to the County on October 10, 1990. On October 30, 1990, the County indicated acceptance of the Union's counterproposal.

7. Mr. Wade reviewed the proposed agreement and asked for several changes in the language and indicated he did not wish to sign the proposed agreement. Mr. Wade was reluctant to sign the agreement as it provided for a reevaluation period of six months during which he could be discharged without recourse. Gerty Purifoy told Mr. Wade that his options were to proceed to a hearing before the Board or to sign the settlement agreement and return to work and attempt to reprove himself. Gerty Purifoy advised Mr. Wade that in her opinion if they went to a hearing before the Board, they would not prevail. She indicated that the choice was his and Mr. Wade indicated that he would reluctantly sign the settlement agreement and did so "under protest."

8. On December 11, 1990, Mr. Wade signed the following:

SETTLEMENT AGREEMENT Johnny Wade

The parties to this matter having sought a resolution short of a hearing by virtue of the mutual covenants

and consideration expressed herein, propose a Settlement Agreement as follows:

1. That the time off will serve as a suspension.
2. That the employe will return to work on December 17, 1990.
3. That the charges are well founded.
4. That the County shall withdraw all charges.
5. That the employe will serve a six month re-evaluation period on paragraphs k,o,q,r,s, and u of Civil Service Rule VII, Section 4 per PRB Rule VI, Section 8.
6. That if the employe's performance under Rule VII, Section 4 as noted above is not satisfactory or should he be absent more than three days, aside from a hospitalization, the employe will be immediately terminated from County employment during the re-evaluation period without further review by the Personnel Review Board.
7. That, in addition, during the six month re-evaluation period, the employe will meet with the Union and the Department at six week intervals for a review of his progress.

Johnny Wade /s/
Johnny Wade

12-11-90
Date

Minnie Linyear /s/
Minnie Linyear
Asst. Hospital Administrator

12-11-90
Date

The Board sent the following letter dated December 12, 1990 to Mr. Wade:

Mr. Johnny Wade
1953 North 26th Street
Milwaukee, Wisconsin 53205

Re: Charges for Discharge Against Johnny Wade,
Signed by Ms. Julie Hanser, Hospital
Administrator, MCMC, Dated September 14, 1990

Dear Mr. Wade:

This is to confirm that the Milwaukee County Personnel Review Board at its meeting held December 11, 1990, accepted the stipulation agreed to by you and all involved parties to the above subject charges and closed the case.

A copy of the signed agreement is attached. Items number 5, 6 and 7 of the above agreement refer to a reevaluation period to be served by you and designates the length of time and the scope of your department in that period all pursuant to Rule VI, Section 8 of the Rules of Procedure of the Personnel Review Board.

The Board hereby places you on notice that this reevaluation period provides you an opportunity to rectify your conduct so as to conform to the standards required by County management for such conduct and that failure on your part to do so to the satisfaction of County management may result in your being separated from County employment by the appointing authority at any time during this reevaluation period and that such separation shall be without further review by the Personnel Review Board.

Very truly yours,

MILWAUKEE COUNTY PERSONNEL REVIEW BOARD

Fred J. Bleidorn
Executive Secretary

9. On June 12, 1991, Mr. Wade was terminated. On June 12, 1991, Mr. Wade contacted Gerty Purifoy about his termination and she indicated that the settlement agreement provided no recourse from said termination.

10. The Union's handling of Mr. Wade's Personnel Review Board matter and its negotiating of a settlement agreement which resulted in his reinstatement and six months to reprove himself but which ultimately resulted in the termination of his employment without recourse was not arbitrary, discriminatory or done in bad faith and the Union at all times material herein fairly represented the Complainant.

11. The evidence failed to establish that the County terminated Mr. Wade based in whole or in part on any protected concerted activity on his part.

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

makes the following

CONCLUSIONS OF LAW

1. District Council 48, AFSCME, AFL-CIO and its affiliated Local 1055 did not violate its duty of fair representation with respect to Mr. Wade by its handling of Mr. Wade's Personnel Review Board matter and negotiating a settlement agreement and accordingly did not violate Sec. 111.70(3)(b)1 of the Municipal Employment Relations Act.

2. Milwaukee County did not violate Sec. 111.70(3)(a)3, Stats. in terminating the grievant on June 12, 1991.

Upon the basis of the above and 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 6th day of February, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

(Find Footnote 1/ on page 6)

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 COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In his complaint initiating these proceedings, Mr. Wade alleged that the Union violated its duty of fair representation to him by allowing the County to unfairly terminate and harass him. He asserted that he was reluctant to sign the settlement agreement but was persuaded by the Union to sign it without knowing that the settlement agreement was a way to set him up to be terminated without recourse. Mr. Wade alleged that the County terminated him because of a personal vendetta because he had previously filed a complaint with Affirmative Action and filed a grievance which was decided in his favor. The Union denied that any conduct on its part was improper or violated any laws and asserted that it had at all times fulfilled its duty of fair representation to Mr. Wade.

It further asserted that the complaint did not state the elements of a prohibited practice. The County contended that the actions of the Milwaukee County Personnel Review Board are excluded from the parties' collective bargaining agreement and the Commission lacks any jurisdiction in the matter and it alleged that the complaint failed to allege that the County committed any prohibited practice.

Complainant Wade's Position

Mr. Wade contends that he was terminated for personal as well as political reasons. He submits that it was in the economic interest of the County to terminate him because he was a long term employe and his position could be filled by employes at lower pay. Mr. Wade asserted that his supervisor had a personal vendetta against him and the supervisor never forgot the case in which Mr. Wade prevailed. Mr. Wade argues that the Union and County worked hand-in-hand in agreeing to a settlement agreement which permitted his termination without recourse and that he should not have signed the settlement agreement but did so because of the advice of the Union.

Union's Position

The Union contends that it did more for Mr. Wade than in almost all other cases. It points out that it previously went to bat for him and won the case.

It submits that Mr. Wade was brought up on charges on September 14, 1990 and based on these, the Union determined that if it proceeded to a hearing, Mr. Wade stood an excellent chance of being terminated. The Union notes that it explained this to Mr. Wade and also presented the possibility of getting a settlement. It asserts that it negotiated with the County a settlement agreement which limited his reevaluation to violations of only specific rules.

It claims that this took a lot of work because when the County is intent on getting rid of an employe it is not inclined to agree to a settlement. It contends that Mr. Wade confuses being advised of the hard facts with being pressured to sign the settlement. It maintains that the Union told him that if he went to hearing he stood a good chance of getting fired and if he signed the settlement and didn't straighten out his work performance, he stood a good chance of getting terminated as well. It asserts that no one put a gun to Mr. Wade's head and he elected to do what he did. It submits that he had the opportunity to straighten himself out and he didn't. The Union concludes that there was no failure of representation, but on the contrary, Mr. Wade was given excellent representation.

County's Position

The County submits that it should be dismissed from this matter. It submits that it entered into the settlement agreement with Mr. Wade, who did so voluntarily. It contends that some people make their own luck and Mr. Wade was given the chance to straighten himself out as others have done but Mr. Wade failed. It argues that no evidence was presented other than Mr. Wade's opinions that people were against him. It points out that Mr. Wade knew what he was signing and the settlement agreement indicates that the charges were well founded. It submits that the complaint should be dismissed.

DISCUSSION

The issue presented here is whether the Union violated its duty to fairly represent Mr. Wade. The duty of fair representation obligates a union to represent the interest 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 breached only when the union's actions are arbitrary, discriminatory, or taken in bad faith. 3/ Generally, the Union has to take some affirmative action adverse to the employe or to refuse or fail to take some action it should have in the interest of the employe to meet the requirements set out above for it to breach its duty of fair representation.

A union is not under any absolute duty to pursue a grievance and a violation of the duty of fair representation is not established merely by proving that the underlying grievance was meritorious. 4/ (Citations omitted)

Also the Union is not obligated to proceed on a case it deems not to have a good probability of success. Here, the evidence establishes that the Union was willing and ready to proceed on the merits of Mr. Wade's case before the Board even though it felt it would lose. The Union's opinion that they would most likely lose was not seriously contested and in the settlement agreement signed by Mr. Wade, it states that the charges were well founded. 5/

The thrust of Mr. Wade's case is that the Union breached its duty of fair representation by its recommendation that he sign the settlement agreement rather than proceed to a hearing before the Board where the settlement agreement allowed the County to discharge him without recourse. As noted above, the Union did not refuse to take Mr. Wade's case before the Board. The Union informed him that it was likely that the Board would sustain his discharge so it was recommending that he sign the settlement agreement. 6/ Mr. Wade testified that he got bad advice which would come under the same heading as misrepresentation. 7/

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/ Stanley v. General Foods Corp., 88 LRRM 2862 (5th Cir., 1975).

5/ Ex - 4.

6/ TR - 17, 18, 24, 35, 51 and 84.

7/ TR - 36.

Mr. Wade is refusing to accept the reality of his situation. He was faced with making a difficult choice of going to a hearing before the Board where the consensus was that he would be fired or to sign a settlement agreement where he would be given a second chance but if he failed he could be terminated without any recourse. He was between "a rock and a hard place," 8/ but the position he found himself in was of his own doing and it was not the Union's fault that he was in this position rather it was through the Union's efforts that he had any choice at all. Mr. Wade's allegation that he got bad advice by not going ahead with the hearing before the Board is not supported by any facts other than the end result was not to his liking. Even supposing it was bad advice that Mr. Wade should not proceed to the hearing but enter into a settlement, this would not be enough to support a claim of unfair representation. 9/ Mr. Wade made the choice and if he had chose to go to a hearing and lost, he could argue that he was given bad advice for not signing the settlement agreement. The Union was willing to proceed to a hearing or settle the matter and it was Mr. Wade's decision as to which action to take. The Union merely made a recommendation based on good faith factors. The evidence presented fails to establish that the Union's opinion with respect to success before the Board was erroneous. On the contrary, it appears to be entirely correct. Mr. Wade was fully informed of this by the Union. 10/ The Union after discussing the matter with Mr. Wade entered into settlement discussions and after some negotiations reached a settlement agreement. 11/ Although Mr. Wade was reluctant to sign the settlement agreement, he signed it and was aware of its terms because that is precisely why he was reluctant to sign it. 12/ No evidence established action or inaction by the Union which constituted unfair representation. There was no evidence presented that the Union could have done more to get better terms than the settlement agreement. Mr. Wade thereafter had his chance for reevaluation but he failed to take advantage of this opportunity. He cannot blame the Union for his plight.

In conclusion, Mr. Wade has made conclusory allegations that the Union did not fairly represent him but these are insufficient to establish that the Union breached its duty of fair representation. The facts established that the Union was willing to go to the hearing before the Board even though it was of the opinion it would result in the termination of Mr. Wade, and negotiated a settlement agreement and gave Mr. Wade the choice to sign the agreement or go to hearing. 13/ The evidence establishes that it gave him sound advice. Under these facts, the Union's conduct was not arbitrary, perfunctory or in bad faith and the Union therefore did not violate its duty of fair representation to Mr. Wade. 14/

8/ TR - 24.

9/ Cannon v. Freightways Corp., 90 LRRM 2996 (7th Cir, 1975).

10/ TR - 84.

11/ Tr - 80-84.

12/ Ex - 4.

13/ TR - 51.

14/ Powell v. Globe Industries, 94 LRRM 3140 (N.D., Ohio, 1977).

Having concluded that the Union did not breach its duty of fair representation toward Mr. Wade, the Examiner has no authority to consider any breach of contract claims against the County. 15/

With respect to Mr. Wade's assertion that he was discharged based on his having been successful in a prior matter involving the County, the evidence simply fails to establish this allegation. In the settlement agreement, Mr. Wade agreed that the charges were well founded. 16/ Although Mr. Wade asserted that Mr. Berget had a vendetta against him, the final decision to terminate him was made by Minnie Linyear, the County's Assistant Administrator. 17/ Under the settlement agreement the Union, the Department and Mr. Wade met at six week intervals for a review of his progress. 18/ No evidence was presented that these did not take place or that Mr. Wade was not aware of his progress. Additionally, the settlement agreement limited the review of his performance to only certain factors. No evidence was presented that these factors were not the basis of his termination. In short, other than the conclusory statements by Mr. Wade that his termination was made for personal and political reasons, no evidence was submitted that the County terminated Mr. Wade because of his concerted protected activity. Therefore, all allegations of prohibited practices against the County have been dismissed.

In conclusion, the Union was not shown to have unfairly represented Mr. Wade and the County was not shown to have engaged in any prohibited practices, consequently the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 6th day of February, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

15/ Mahnke v. WERC, 66 Wis.2d 524 (1975) at 532.

16/ Ex - 4.

17/ TR - 127.

18/ Ex - 4.