STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WESLEY O. JAHNS, Complainant, vs. WISCONSIN STATE EMPLOYEES UNION COUNCIL 24, REPRESENTATIVES WILLIAM SCHMIT, and LEONARD CODY, Respondents.	Case 5 No. 46245 Ce-2122 Decision No. 27103-A

Appearances:
Mr. Wesley O. Jahns, Complainant, 7615 Forest Trail, Lake Tomahawk, Wisconsin 54539.
Lawton & Cates, by Mr. Richard V. Graylow, 214 West Mifflin Street, Madison, Wisconsin 53703-2594.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wesley O. Jahns, an individual, having on September 13, 1991, filed a complaint with the Wisconsin Employment Relations Commission alleging that Wisconsin State Employees Union Council 24, William Schmit, and Leonard Cody had violated Chapter 111 of the Wisconsin Statutes by failing to fairly represent him at a pre-disciplinary hearing and by failing to represent him in the processing of a grievance over the receipt of a two (2) day suspension; and the Commission having appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in this matter as provided in Sec. 111.07(5), Stats.; and hearing on said complaint having been held on February 19, 1992, in Woodruff, Wisconsin; and the transcript having been received on March 25, 1992; and the parties having made oral arguments at the time of hearing; and 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. Complainant, Wesley O. Jahns, an individual, hereinafter referred to as Complainant or Jahns, is an employe of the State of Wisconsin, Department of Natural Resources, and represented by Respondent Wisconsin State Employees Union Council 24 for purposes of collective bargaining.

2. Respondent Wisconsin State Employees Union Council 24, hereinafter referred to as Respondent Union or the Union, is a labor organization within the meaning of Sec. 111.81(12), Wis. Stats. and has its principle offices at 5 Odana Court Madison Wisconsin 53705; and that William Schmit, Leonard Cody, and Karl Hacker are and were at all times relevant, agents of Respondent Union occupying the positions of President, Field Representative, and Assistant Director of Respondent Union respectively.

3. Jahns, on July 26, 1990, received a memo from his supervisor advising him to appear for a pre-disciplinary hearing at the Department of Natural Resources (hereinafter the Department) District headquarters in Rhinelander, Wisconsin on Monday, July 30, 1990. Jahns spoke with his supervisor about the possibility of delaying the hearing so that he might secure legal counsel and was advised that the hearing could be delayed if necessary. Jahns then spoke with Union President Leonard Cody who was serving as steward in the matter. Cody told Jahns to have the Department's representative contact him. Cody said that if the Department did not contact him it was their (referring to the State) problem. Cody then changed his mind and told Jahns to contact the Department's representative and to tell them that Cody would prefer not to have the hearing while he was on vacation but that if the Department insisted he would be available on Monday, July 30. Jahns at this point mentioned that he intended to seek legal counsel. Cody informed Jahns that if Jahns did so, he (Cody) would not need to be present at the pre-disciplinary hearing. Jahns reminded Cody that it was Cody who previously advised Jahns that only Cody could represent him from a contractual standpoint and that a private attorney would be needed for civil or legal matters. Jahns then reiterated that because of the wording in the notice from the Department, that he would probably want an attorney present. Cody again stated that he did not want to attend the hearing if Jahns had an attorney. Jahns asked Cody if Cody was refusing to represent him. Cody said that he was not refusing. He told Jahns that the Union had the first right to represent him in this case and that the Union must relinquish that right before Jahns could have an attorney handle the case. Cody requested copies of the DNR Manual which were allegedly violated telling Jahns to secure copies from the District Personnel Specialist.

4. Jahns retained a private attorney, Jeff Jackemino, who informed Jahns that he would have the July 30 pre-disciplinary hearing postponed and a new date scheduled. That evening, Jahns spoke with Cody. Cody had called the Department's attorney and notified him that he could not make the meeting scheduled for Tuesday morning. Cody said that he wanted to be present but could not make the meeting the next day because he had other plans. He did not request a postponement from the Department's attorney. Jahns asked Cody why he did not request a postponement from the Department's attorney because Jahns had made it clear that he wanted to have a Union representative present. Cody simply told Jahns to postpone the meeting.

5. The next day Jahns was unable to secure a postponement and the pre-disciplinary hearing was held on July 31, 1990, without a Union representative being present. Jahns did, however, have his private attorney present during this hearing. That evening Jahns again contacted Cody who wanted information as to the hearing. Jahns asked Cody to talk directly with his attorney because he was nervous during the hearing and presumably unable to recall all that transpired. He said that his attorney would be better able to answer the specific questions which Cody was asking. During this conversation Cody agreed to contact Jahns' attorney on August 1 and to get back to Jahns.

6. Cody did not contact Jahns' attorney but sent Jahns the following letter dated August 2, 1990:

> Dear Wes:
>
> I am writing because of my concern about the rumors that are circulating, indicating that the Union has failed to represent you, or is refusing to represent you.
>
> For the record, just the opposite is the case.

We have had several conversations regarding that matter. I have assured you that the Union is representing you in the matter pending against you by the DNR. Further, I have been working with you to gather information and prepare for your protection under the provisions of our agreement with the State.

On 7-26-1990 you informed me you had retained an attorney, and that he would be present at your pre disciplinary hearing. Once again I informed you that the Union was going to represent you in this matter.

On 7-27-90 you indicated your attorney "got the hearing dates cancelled", and will reschedule on Monday. On 7-30-90 you advised that your attorney scheduled the hearing for 7-31-90 at 8:00 a.m. at the NCD Headquarters. Once again I told you that it would be impossible for me to attend because of my schedule. You agreed and said you were going to get the date changed, so the Union could be there. You are also aware that I attempted to have field representative Schmit present. He could not attend because of a scheduling conflict.

The scheduling changes made by your attorney in cooperation with the DNR, were done without consulting me and without respect for my schedule.

Throughout the process of scheduling a date for your hearing, you were very understanding of my vacation and my schedule, and even indicated that nothing should be done until my vacation was over.

Please be advised that the Union will be representing you on matters covered under the provisions of our negotiated agreement with the State of Wisconsin.

7. Jahns responded to Cody by letter dated August 3:

Dear Pete:

I don't believe that letter writing is the proper way to handle this situation, but I felt I must respond to your letter.

First of all, as of July 26, 1990 I had not yet retained an attorney - I only said that I would prefer to speak with him before the scheduled meeting and that I probably would want him present, but needed to speak with him first. You repeatedly attempted to persuade me that I did not need an attorney and you said if the attorney was going to be present, you did not need to be at the hearing. It was at that point I asked if you were refusing to represent me and you said "no", you would represent me.

During the conversation referenced above, you asked me for copies of the alleged manual code violations listed in the letter I received from Henneger. I said I looked in my office, but couldn't find the codes listed and that I thought you would have them. At that point you told me you did not have access to the manual codes. I could not and do not believe that, and this statement justifiably caused me to have serious doubts as to your representing me.

On July 30, 1990 the DNR, presumably District and/or Henneger contacted Jackemino's office and pushed for the 8 a.m. hearing. That evening you spoke to Henneger prior to speaking with me and informed him you could not make the meeting. My question at this pint (sic) is if the Union has the legal right of representation, why did you not call off the re-scheduled meeting at this time?

We both know calling field representative Schmit the night before the scheduled meeting was a "shot in the dark." I, myself think that request is unreasonable of anyone and that the hearing should have been delayed. I also acknowledge the fact that the respective attorneys were responsible for re-scheduling without consulting you.

I appreciate your acknowledgement of my understanding for your schedule. Throughout this whole ordeal I have sincerely tried to cooperate as best I can. I confess to ignorance concerning these proceedings which is why I have asked for counsel from both you and Jackemino. My intent is to do what is best for me, whatever course of action that means.

In the above I have only attempted to explain to

> you how and/or why myself and other individuals have had some questions regarding union representation in this case.
>
> I believe it is in the best interest of both parties to work together to get this thing resolved. I have tried and will continue to try to cooperate with you as best I can. All I ask is that you do the same.

8. Jahns telephoned Cody on August 5 to inquire why Cody had not contacted his attorney. Cody stated that he would not call because he thought Jahns was putting together a lawsuit against the Union. Jahns denied this. He reiterated that he just wanted the grievance settled. Jahns again inquired as to why Cody did not postpone the hearing to which Cody responded that he was unaware that the hearing could be postponed. According to Jahns, Cody told him that he was worried about his credibility.

9. On August 14, 1990, Jahns received a two-day suspension without pay, which was dated August 8, 1990. The Department based its disciplinary action on Jahns' wearing a hat with the logo "Reel Fishermen Don't Use Spears" while advising a Chippewa Youth Employment Program crew. Crew members are from the Lac du Flambeau tribe and were working at a fish management habitat project with Jahns serving as the Department's technical advisor. The Union grieved the suspension on August 23, 1990.

10. On September 9, 1990, Jahns attempted to send Cody a certified letter asking for an opinion from the Union's attorney as to any rights which he might possess in addition to those granted pursuant to the contract. Cody did not pick up the certified letter.

11. On or around September 19, Jahns met with Cody and Field Representative William Schmit at Cody's house. At this meeting, Jahns persuaded Cody to pick up the certified letter. Schmit, Cody, and Jahns then discussed strategy for the third-step grievance meeting. According to Jahns, they were going to argue that Jahns was being "made an example of" for other employes' treaty rights-related political activities.

12. Jahns spoke with Cody again on Friday, September 28. Cody informed Jahns that he was not going to pick up the certified letter referred to in Findings of Fact 10 and 11 above because he thought that Jahns was building a case against him and the Union. Cody reiterated to Jahns that he did not have access to the DNR Manual Codes and did not want to ask for them. According to Jahns, Cody accused Jahns of not cooperating by going to the pre-disciplinary hearing with Jackemino. Jahns again asked Cody why he did not have the meeting called off when he spoke with the Department's attorney. Cody also complained that Jahns had told the Department's attorney that Cody had initially advised Jahns that it was all right to wear the hat in question. The conversation culminated in Cody informing Jahns that he would no longer be working with him on the grievance and that Jahns should deal directly with Schmit.

13. On October 2, 1990, Jahns sent the following letter to Schmit:

> Enclosed is the certified letter which I sent to Pete Cody on Sept. 10, 1990 which he never picked up, even after he told me he would the night of our meeting at his house on September 19, 1990. On September 28, I asked Pete if he had picked up the certified letter. He told me he hadn't and that he wasn't going to because he felt I was "putting together a case against

him and the Union." A heated discussion followed.

> I do not know why Cody feels this way and I told him it was not true. The only thing I can even speculate is that Cody knows he has not cooperated with me and knows he has not done an adequate job of representing me. He has used this excuse from the start which was totally unjustified.
>
> Pete told me not to correspond with him anymore and that you were handling the case. I should correspond with you. Please forward the enclosed letter to the union attorney. I am not asking for a legal opinion, just a clarification of my rights concerning this case as it pertains to the Union contract and believe it is my right as a Union member to receive clarification by a union attorney without charge to myself. I would greatly appreciate your expediency as there has been a considerable time delay already because Cody refused to pick up the letter.
>
> I can honestly say that I have tried to cooperate with Pete as best I can, but when he tells me he does not have access to the manual codes I can only feel that he is not cooperating with me.
>
> Thank you for your time and effort and I await the date of the hearing.

14. On October 16, 1990, the third-step grievance hearing was held at the DNR district office with Schmit and Cody present. According to Jahns, the Union's main argument was that Jahns was not aware of the work rules, the manual codes, that had allegedly been violated. This argument was never mentioned in previous discussions with Jahns, who knew that he had been required to read the work rules as a new employe. The Union did not mention Jahns' right to free speech or that the pre-disciplinary hearing was held illegally. Cody did advise, however, the Department's attorney that the hearing was being attended under protest because he was not at the pre-disciplinary hearing.

15. On November 10, 1990, Schmit sent Jahns the following letter:

> The EMPLOYER has denied your grievance heard at the 3rd step of the grievance procedure. As you may know grievances must follow the time limits and steps contained in the labor AGREEMENT. Therefore, all requests for arbitration start by filing the attached form with the EMPLOYER in a timely manner. Accordingly, I have completed the enclosed form and processed your grievance to the next step.
>
> Wesley, this is not to say that the grievance will go to arbitration. The purpose of this form is to appeal the case to arbitration under the requirements of the AGREEMENT. All grievances belong to the UNION and ONLY the UNION shall determine whether grievances go to arbitration. You will receive confirmation of the UNION decision on your case from the Madison office of Council 24.

You need not take further action now. We will keep you informed of the progress concerning your case. If you have any questions or comments please contact me or your Local UNION steward.

16. In December of 1990, Cody advised Schmit that he was withdrawing as steward in the case and designating Lanny Ross in his place. Jahns objected to this designation and chose his own steward, John Brandenberg.

17. In January of 1991, he wrote Schmit the following letter:

After our local meeting, you told me you misunderstood the intent of the certified letter I sent to you regarding my civil rights as they pertain to my grievance. The letter clearly states"rights which I may possess in addition to the grievance/arbitration procedures provided in the collective bargaining agreement" I fail to see how this could in any way be interpeted (sic) as me asking the union to represent me in a civil matter, as you stated to me on that night.

This letter was originally mailed September 10, 1990. Here it is almost four months later and I have not yet received a written response from the union! The most common response I get from people when I tell them about this is "What do you pay Union dues for?"

I am in the process of contacting John Brandenberg to take over as the Steward to replace Cody. Please answer the following for me.

1. Will the steward need to be present at the arbitration hearing.

2. Which type of arbitration is the Union pursuing, umpire, expedited, or full, and why? I do not feel this should be handled thru (sic) expedited arbitration because of the precendential (sic) nature of the grievance. i.e. right to free speech.

3. Briefly explain the three types of arbitration.

4. Manual Code 9121.06 Chapter Pers 24 Code of Ethics. Pers 24.01(1)(b) Nothing in this chapter shall deny the rights of an employee under the constitutions of the United States of America and of this state, the Wisconsin Statutes or any other laws of this state, or under any labor agreement negotiated pursuant to Wisconsin Statutes. This is dated Sept, 1975. Is this current? Code of Ethics dated February, 1983, the above statement 24.02(1)(b) is entirely absent. Does this mean we, as employees of the

State of Wisconsin, no longer have constitutional rights while under the employ of the State? Furthermore, what is the Union's position regarding the constitutional rights of employees of the state?

Thank you for your cooperation and I will inform you of the new steward designation.

18. On January 9, 1991, Schmit answered Jahns with the following letter:

I received your letter of 1/2/91.

Shortly after the Local meeting held in December 90, I received a call from L-1218 President Cody. He informed me that to alleviate the personal differences you have with him as your steward, he is assigning Lanny Ross to you case.

Just for your information, the Steward selection is done by the Local Union.

As for the type of Arbitration forum your case will be heard in, AFSCME and the Employer decide what type of arbitration to use. The final decision has not been decided yet. When the decision is made, you will be informed. All three types of arbitration are described in the contract.

Your grievance was filled (sic) because Management administered to you a two day suspension for alleged work rule violations. The issue that will be arbitrated is this: Was the disciplinary action against the grievant for just cause? If not, what is the appropriate remedy? All argument will be related to rights of management under Article III and the work rules they impose.

The Arbitration process deals only with contract language. Neither the Union, Management or the Arbitrator have the right to demand, impose or rule on issues that are non-contractual in arbitration.

I am moving expeditiously with this case and I will be in touch with your new steward Lanny Ross. Lanny will be working with you on the investigation and he will also be at the arbitration hearing. I will keep you informed as things develop.

19. In February of 1991, Jahns spoke with the Department's District Director regarding the Department's Code of Ethics. During this conversation, Jahns asked if the District Director would be willing to get together to solve his grievance before it went any further in the arbitration process. Jahns informed Lanny Ross of these discussions. He indicated that he and Brandenburg planned to meet with two Department representatives, Dale Urso and _____ Jacobs, regarding the grievance.

20. Jahns, on March 13, 1991, directly proposed a settlement of his grievance to Urso. After waiting a few weeks, he asked Urso about the status of his settlement proposal. He was advised by Urso that Urso approved of it and had passed it on to higher management in Madison. When Jahns called the Madison management, whomever he spoke with informed him that the settlement proposal had been passed on sometime ago to the Union but the Department had not received a reply from the Union.

21. On or around May 12, Schmit called Jahns and advised him that the Union would not allow Jahns to settle the grievance because they had not been contacted or asked to participate in the settlement discussions. Jahns claimed that the Deputy Secretary of the Department informed him that Schmit had been notified of the meeting. Schmit denied this. Jahns pointed out that he had notified Ross about 19 days prior to the meeting that the meeting was going to take place and that his steward, Brandenburg, was present with him at the meeting. Schmit told Jahns the Union would not agree to a settlement without Schmit's involvement.

22. Jahns then contacted Gary Lonzo, the President of Council 24, and advised him of the situation. Lonzo agreed to look into it. After three or four weeks Jahns received a copy of a settlement which the Union was proposing. He agreed to this settlement and would not testify as to the terms and conditions of said settlement because it contained a nondisclosure clause.

23. In June of 1991, Karl Hacker, Respondent Union's Assistant Director, became aware, through Schmit, that meetings were occurring without upper level Union involvement. Hacker called Jim Federhart, the Department's Employment Relations Specialist, to complain. The end result of the discussions was the settlement referred to in Finding of Fact 22 above. Hacker negotiated the settlement on the Union's behalf with representatives from the Department.

24. It may be inferred that Cody believed Jahns would secure a postponement of said hearing when Cody last spoke to Jahns on July 30. Moreover, while it is true that Cody sought to persuade Jahns that an attorney was unnecessary, there is no evidence that he conditioned his representation of Jahns on Jahns' not having an attorney present at the pre-disciplinary hearing. Rather it appears that Cody was simply reluctant to come in to represent Jahns during his vacation and wanted Jahns to reschedule the meeting.

25. Although it does appear that the grievance was settled largely as a result of Jahn's initiative, the Union's actions in processing said grievance, including its failure to accept a certified letter from the grievant, or to inform Jahns regarding civil rights which he may possess outside the scope of the collective bargaining agreement, were not arbitrary or capricious nor is there any showing that the Union acted in bad faith.

26. The Complainant filed the instant complaint on September 13, 1991. Said Complaint contained the following as its first allegation:

> 1. Council 24, Local 1218, did not have a representative at the pre-disciplinary hearing held at the Department of Natural Resources headquarters in Rhinelander the morning of 31 July, 1990.

27. The first allegation set forth in the complaint described in Finding of Fact 24 occurred more than one year prior to the filing of the complaint.

28. Respondent filed an answer with the Commission on February 17, 1992, which Complainant had not received as of the date of the hearing, February 19, 1992.

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

CONCLUSIONS OF LAW

1. As to the first allegation in the complaint which occurred more than one year prior to the filing of the complaint on September 13, 1991, it is not appropriate to toll the application of the one year statute of limitation established in Sec. 111.84(4) and 111.07(14), Stats.; and the Commission is without jurisdiction to proceed on said allegation.

2. Respondent AFSCME, Council 24 and its agents, William Schmit and Leonard Cody, did not violate the Union's duty of fair representation in their failure to pick-up certified letters of Complainant Jahns, to give him legal information regarding any civil rights he may enjoy, or in their processing of his grievance to settlement; and accordingly, did not commit an unfair labor practice in violation of Sec. 111.84(2)(a).

ORDER 1/

It is ordered that the complaint be and hereby is dismissed in its entirety.

Dated at Madison, Wisconsin this 14th day of May, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Mary Jo Schiavoni, 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

(Footnote 1/ continued on page 12)

1/ Continued

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.

WISCONSIN STATE EMPLOYEES UNION, COUNCIL 24

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant Jahns filed the instant complaint alleging that Respondent AFSCME Council 24 and its agents Schmit and Cody breached the Union's duty of fair representation by failing to have a union representative at Jahns's pre-disciplinary hearing, by failing and refusing to pick up certified correspondence from him, by denying him a response from Respondent Union's legal counsel as to his civil rights as they may be limited by contractual obligations of Respondent Union, and by acting arbitrarily and perfunctorily in the processing of his grievance. He has requested one thousand dollars for legal fees, personal time, pain and suffering incurred as a result of the alleged discriminatory practices of Respondent Union and its agents Cody and Schmit.

Complainant's Position:

Complainant asserts that all allegations in his complaint should be deemed true and that a default judgment should be entered in his favor because Respondents failed to file a timely answer prior to the hearing in the instant matter.

Jahns argues that the Respondent has not fairly represented him during the entire grievance process. He points to the Union's failure to make any effort to delay the pre-disciplinary hearing which was scheduled and held too quickly for Jahns to prepare. Stressing that he repeatedly informed Cody that he desired Cody's presence at the pre-disciplinary hearing, he claims that the Union made no effort to delay said hearing. Jahns maintains that the Union's behavior during the whole period of time from his receipt of the notice of a pre-disciplinary hearing up to and including the securing of a settlement in this matter was discriminatory.

Respondent's Position:

Respondents argues that the Commission must apply the law as set forth in Vaca v. Sipes, 386 U.S. 171 (1967), the landmark U.S. Supreme Court case which establishes that unless the Union's conduct is arbitrary, capricious or in bad faith, there is no breach of the union's duty of fair representation. It notes that the Commission is bound to apply this standard as set forth in Mahnke v. WERC, 66 Wis.2d 524 (1975). The Union stresses that processing a grievance to arbitration in a slow fashion is not actionable in a duty of fair representation case. Moreover, no violation exists where the Union presents a settlement package as a fait accompli without the grievant's involvement. The Respondents maintain that, by-and-large, Complainant got exactly what he wanted. According to the Union, Jahns wanted to have an attorney present at the pre-disciplinary hearing, and an attorney was there. The Union filed a grievance on his behalf and timely processed said grievance to the arbitration step. It claims that Jahns wanted a different steward; and, a different steward was provided. Moreover, the Respondents assert that the grievance was ultimately resolved to the grievant's satisfaction. Under no circumstances can the Respondents' behavior be considered arbitrary, capricious, or discriminatory.

The Union avers that there is no basis for awarding attorneys fees under UW-Milwaukee (Housing Dept.) sub nom. Guthrie v. WERC, Dec. No. 11457-H, (WERC, 1/86) because no racial discrimination exists in the instant case and because Jahns did not incur any attorney's fees as a result of any breach on

Respondents' part. The Union disputes any contention that its failure to file an answer prior to the hearing harmed Jahns or created a basis for relief.

The Repondents also maintain that the first allegation of the complaint should be dismissed as time-barred by the statute of limitations.

PROCEDURE:

Both procedural issues, namely the effect of Respondent's failure to file a timely answer and whether the Complainant's first allegation is time-barred by the applicable statute of limitation will be addressed before proceeding to the merits.

Respondents filed an answer on February 17, 1992, which the Complainant did not receive as of the date of the hearing. At the hearing, the Complainant moved to have the allegations against Respondents deemed to be admitted and to have a default judgment entered against the Respondents. Complainant did not, however, introduce any evidence demonstrating that he had been prejudiced by Respondents' failure to file a timely answer nor did he request to postpone said hearing because of Respondents' failure. ERB 22.03(6) notwithstanding, the Commission has consistently refused to find that failure to file a timely answer in a prohibited practice case constitutes a waiver of hearing as to the material facts alleged in a complaint. 2/ Furthermore, ERB 5.01 expressly permits an examiner to waive any requirements of the Rules unless a party can show prejudice would result from this action. 3/ Complainant has not demonstrated that he was prejudiced by the late-filing of Respondents' answer and accordingly this Examiner has not found that the failure on the part of the Respondents to file a timely answer constitutes admissions of the allegations contained in the complaint and a waiver on Respondents part to a hearing as to the material facts alleged in the complaint.

Respondents argue that the first allegation set forth in the complaint is time-barred by the applicable statute of limitations. The Examiner agrees. The Commission rejected an argument from a complainant that she was entitled to wait until her contractual remedy was exhausted before the statute of limitations began to toll. 4/ In that case, the Commission reiterated the general rule that ordinarily, a complaint naming only the union as respondent and alleging only a Sec. 111.70(3)(b)1, Stats., would have to be filed within one year after the union's wrongful act or omission to be timely under the applicable statutory limitation on time of complaint filing. The justification for tolling the statutory limitation against a duty of fair representation claim when it is accompanied by a breach of contract violation claim against an employer does not exist where the complaint concerns the quality of the union's grievance procedure representation rather than the merits of the grievance itself. To toll the statute, the Commission said "However, to do so, the employe would necessarily have to name the employer as a party respondent. Otherwise, the merits of the grievant's contract claim against the employer

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2/ Richland County (Sheriff's Department), Dec. No. 26352-A (Schiavoni 7/90); Brown Deer School District, Dec. No. 25884-A (McLaughlin, 6/89); School District of Walworth, Dec. No. 16550-A (Davis, 9/78); and City of Milwaukee, Dec. No. 8017 (WERC, 5/67).

3/ Richland County, supra; Oneida County, Dec. No. 25229-A (Gratz, 7/88); State of Wisconsin (DOA), Dec. No. 15759-B (WERC, 3/80).

4/ WSEU, Council 24, Dec. No. 21980-C (WERC, 2/90.

becomes immaterial to the determination of the issues presented in the complaint, making exhaustion of grievance remedy unnecessary and hence, no justification for tolling the statue of limitation." 5/

In the instant case, no companion breach of contract claim against the employer was filed. Moreover, Jahns is complaining of specific conduct of Respondents; namely, their failure to have a union representative present at the July 31, 1990, pre-disciplinary hearing. Complainant concedes that his claim is not premised upon the ultimate outcome of his grievance but upon the Union's conduct in failing to appear and represent him. Thus the rationale set forth in WSEU, Council 24, 6/ should apply. Because the wrongful omission as alleged by Jahns, i.e., the failure to send a union representative to the pre-disciplinary hearing, occurred more than one year from the filing of the instant complaint, the Commission is without jurisdiction to proceed on this allegation.

Merits:

Having found that the Commission is without jurisdiction to consider Complainant's initial allegation on the merits because it was not timely filed within one-year of the occurrence or omission complained, the undersigned does, however, assert the Commission's jurisdiction to consider the merits of Complainant's second allegation.

Respondents are correct in asserting that Mahnke v. Wisconsin Employment Relations Commission, supra, sets forth the guidelines for analyzing the conduct of a union toward its members in a duty of fair representation case. To prevail, a Complainant must demonstrate that the Union acted arbitrarily, capricious, discriminatory, or in bad faith. Mahnke requires that a union's exercise of discretion be put on the record in sufficient detail so as to enable the Commission and reviewing courts to determine whether the union has made a considered decision by review of relevant factors. As long as a union exercises its discretion in good faith, it is granted broad discretion in the performance of its representative duties. 7/

The Commission, in applying the Mahnke standard, has, in previous cases, decided that absent a showing of arbitrary, discriminatory, or bad faith conduct the Union is not obligated to process grievances through all steps of the grievance procedure, 8/ that the failure of a union to notify a grievant as to the disposition of his grievance, is an inadequate basis for finding a breach of duty, 9/ that mere negligence in the processing of a grievance including the late filing of arbitral briefs is insufficient to constitute a

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5/ WSEU, Council 24, supra, at p.10; International Union of Operating Engineers, Local 950, Dec. No. 21050-C (WERC, 7/84) and Dec. No. 21050-F (WERC, 11/84) aff'd Case No. 655-705, (Cir.Ct. Milw. 8/85).

6/ WSEU, Council 24, Ibid.

7/ West Allis-West Milwaukee School District, Dec. No. 20922-D (Schiavoni, 10/84); Bloomer Jt. School District, Dec. No. 16288-A (8/80).

8/ West-Allis-West Milwaukee School District, supra. City of Appleton, Dec. No. 17541 (1/80).

9/ UW - Milwaukee (Housing Department), sub.nom Guthrie v. WERC, Dec. No. 11457-F (1977).

violation, 10/ and that it is not for the Commission to judge the wisdom of union policies absent proof of perfunctory or bad faith grievance handling. 11/ Moreover, it is the burden of the Complainant to come forward and demonstrate, by a clear and satisfactory preponderance of the evidence, each element of its contention; and absent such proof the Commission will not draw inferences of perfunctory or bad faith grievance handling. 12/

Federal court cases which deal with the duty of fair representation are also instructive. In one case, a Texas court found that the union did not breach its duty of fair representation when it substituted business representatives at the arbitration hearing, did not notify the grievant or let him be present at employer-union meetings held prior to submission of the grievance to arbitration, and failed to interview key witnesses in preparation for arbitration. 13/ In another, there was no violation even if the evidence supported the employe's contentions concerning (1) the union's failure to introduce certain witnesses and to cross-examine others; (2) the employe's need to "prod" the union into representing him; and (3) the union business agent's advice that the employe get notarized statements from three other employes despite his lack of experience in securing such statements. The court concluded that such allegations amounted at most to a claim of negligence which was insufficient to establish a breach of the duty of fair representation. 14/

The Third Circuit Court found no violation despite contentions that the union failed to present certain witnesses and to investigate the possibility of calling others, failed to brief the employe before grievance hearings and to rebut employer evidence, and failed to notify the employe of the membership of the grievance panel. 15/

Finally a district court in Minnesota refused to find a breach although the employe claimed that the Union was ill-prepared for the arbitration hearing, failed to present the employe's evidence of mitigating circumstances, opposed employe attempts to record the hearing and to submit written testimony, and failed to intercede on the employe's behalf, where no issue of material fact existed to support such contentions. In that case, the grievant, like Jahns in the instant case, claimed that the union representative displayed hostility toward him personally and by refusing to discuss the case or to review the evidence with the grievant's private counsel. The court found these claims to be meritless and held that any antagonism displayed by union officials was of the grievant's own creation. It said that the mere existence of bad feelings is not sufficient to support a claim of unfair representation

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10/ Wisconsin Council 40, Dec. No. 22051-A (McLaughlin, 3/85).

11/ UW - Milwaukee, Ibid.

12/ West Allis-West Milwaukee School District, Ibid.; Marinette County, Dec. No. 19127-C (Houlihan, 11/82), aff'd, Dec. No. 19127-D (WERC, 12/82).

13/ McFarland v. Teamsters, Local 745, 110 LRRM 3022, 3017-28 (U.S. N. Tex, 3/82).

14/ Taylor v. Belger Cartage, 119 LRRM 2430, 2432 (C.A.8, 5/85), see also Castelle v. Douglas Aircraft Co., 118 LRRM 2717-2718, C.A. 9, 2/85.

15/ Findlay v. Jones Motor Freight, 106 LRRM 2420, 2422-23 (C.A.3, 1/81; see also Castelle v. Douglas Aircraft Co., 118 LRRM 2717-1718 (C.A.9, 5/85).

by the union representative. 16/

When Jahns' claim is weighed in light of the above cases, it is evident that he has failed to meet his burden of proof. At best, he has demonstrated that the Union for whatever reason dealt with him cautiously. The Union was diligent in the filing and the timely processing of the instant grievance. Differences that Jahns may have had with Cody and Schmit in the preparation and presentation of the grievance at the earlier steps are insufficient to establish a breach of the duty given the wide latitude afforded the Union. Nor does the Union refusal to pick-up a certified letter which Jahns ultimately sent Schmit by regular mail constitute conduct which would meet such a standard. Moreover, the Union's initial refusal to acquiesce in a grievance settlement to which it believed it was not privy or a party, given the noninvolvement of Hacker or Schmit at that stage of the grievance procedure, is not sufficient to establish such a violation either. The entirety of the Union's behavior even coupled with the Union's presentation of an ultimate settlement agreement negotiated by the Union as a fait accompli is not outside the discretion afforded to the Union in grievance handling and would not constitute arbitrary, discriminatory, or bad faith conduct.

While it is true that Jahns took the "initiative" in prodding the Union at most steps of the grievance procedure, as he was anxious to have the matter favorably resolved, at no time has he proved that the Union treated his grievance perfunctorily. His grievance was moved to the arbitration step at the time it was ultimately resolved.

Even assuming for the sake of argument that a violation was found, Jahns is not entitled to attorneys' fees. He consistently informed Cody that he desired to have an attorney present in addition to Union representation at the pre-disciplinary hearing. He has not produced any evidence of legal expenditures other than those relating to the pre-disciplinary hearing. He has failed to establish racial discrimination as a reason for the Union's alleged adverse treatment. Therefore, even were a violation found in this matter there is no basis for awarding the remedy which Complainant seeks.

Dated at Madison, Wisconsin this 14th day of May, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Mary Jo Schiavoni, Examiner

16/ Schleper v. Ford Motor Co., 107 LRRM 2500, 2502 (D. Minn, 6/80); see also Hardee v. Allstate Services, Inc., 537 F. 2d 1255, 92 LRRM 3342 (C.A.4, 1976).