STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JESUS BARBARY and MARK J. BENZING,	:	
Complainants,	:	Case 50
vs.	:	No. 46915 MP-2559
	:	Decision No. 27140-D
WISCONSIN EDUCATION ASSOCIATION COUNCIL and BLACKHAWK TECHNICAL COLLEGE,	:	
Respondents.	:	

Appearances:

Mr. Jesus Barbary, P. O. Box 485, Beloit, Wisconsin 53512-0485, and Mr. Mark J. Benzing, 2022 Dewey Avenue, Beloit, Wisconsin 53511, appearing pro se.

Mr. Bruce Meredith, Staff Counsel and Ms. Mary A. Pitassi, Associate Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P. O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Wisconsin Education Association Council.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Jon E. Anderson, 131 West Wilson Street, P. O. Box 1110, Madison, Wisconsin 53701-1110, appearing on behalf of Blackhawk Technical College.

ORDER

On July 17, 1992, Examiner Lionel L. Crowley issued Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above matter, wherein he concluded that Wisconsin Education Association Council had not committed any prohibited practices within the meaning of the Municipal Employment Relations Act, and wherein he further concluded that it was not appropriate to exercise Commission jurisdiction over the complaint as it relates to Blackhawk Technical College. Therefore, the Examiner dismissed the complaint in its entirety. Complainants Barbary and Benzing thereafter filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats.

During the period in which the parties were filing written argument, the Commission received a request from Complainant Barbary that his complaint be dismissed. The remaining parties thereafter engaged in ultimately unsuccessful settlement efforts. The matter became ripe for Commission consideration on December 10, 1992, when the Commission was advised that the settlement efforts had proven unsuccessful.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

1. The decision of Examiner Crowley as it relates to Complainant Jesus Barbary is set aside and the complaint filed by Jesus Barbary is hereby dismissed.

1/ Footnote found on pages 2 and 3.

2. The Examiner's Findings of Fact, Conclusions of Law and Order as they relate to Complainant Benzing are hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 8th day of February, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph

(footnote continued on Page 3)

1/ (footnote continued from Page 2)

commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be

reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING ORDER

Complainants are custodians employed by Blackhawk Technical College and represented for the purposes of collective bargaining by Wisconsin Education Association Council (WEAC or Union). The complaint focuses on the manner in which WEAC responded to Complainants' concerns regarding their respective workloads vis-a-vis other custodians. More specifically, Complainants contended that WEAC breached its duty of fair representation by failing to file a grievance as to the workload issue and by the manner in which WEAC participated in a union-management work study committee convened to make recommendations as to Complainants' concerns. Complainants' concern about WEAC's representation also focused upon the fact that when Complainant Barbary first questioned the equitable distribution of work during a staff meeting, a fellow custodian, who also was a local Union officer, stated that Barbary's work habits were responsible for any difficulties Barbary had performing the allotted work responsibilities.

In his decision, the Examiner concluded that WEAC had not violated its duty of fair representation with respect to the Complainants by the manner in which it participated in the work study committee, by the decision not to file a grievance on behalf of the Complainants, or through the statement made by a Union official regarding Complainant Barbary's work habits. On review, Complainant Benzing takes issue with the manner in which the Examiner analyzed and resolved the duty of fair representation issue. Respondents WEAC and Blackhawk Technical College assert that the Examiner properly analyzed the issues before him. We turn to a consideration of those issues and the manner in which the Examiner responded to them.

Looking first at the work study committee and the remarks of the Union official, the Examiner made the following Findings of Fact:

> 6. On September 12, 1990, Complainant Barbary made a written request to the College that a time study be conducted on his work area. The request was made to Jeff Amundson, the Facility Manager and the Complainants' supervisor. At the time of this request, Complainant Barbary was assigned on the third shift as custodian for the Industrial Occupations building and Complainant Benzing was assigned on the third shift as custodian for the Business Occupation building. Jeff Amundson responded in writing to this request on September 13, 1990 indicating that he felt there was no need to do a time study and gave the reasons for his decision.
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> 7. On February 1, 1991, the College held a meeting with the custodial staff with Jeff Amundson present along with his supervisor, Bob Borremans, the Assistant Director/Administrative Services, as well as Connie Hilst, the local union president. The purpose of this meeting was to make the custodians aware of certain happenings and to inform them to keep their eyes open. The happenings were that phone cords were getting cut, items were missing, like staplers, and things were being moved around. At the time of this meeting, the College's representatives asked if there were any concerns that anyone wanted to bring up. Complainant Barbary stated that he was having problems with his area, it being larger than the rest of the areas assigned to custodians and he didn't have time to do all of his duties and he wanted a work time study. Bob Borremans replied that there was no need for a time study.
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> 8. In attendance at this same meeting on February 1, 1991 was custodian Al Stiegman, who at that time was also vice-president of the local union. After Complainant Barbary stated he was having problems, Stiegman made a statement to the effect that if Barbary would come in on time and not leave early, he would have time to finish his work. Barbary took strong exception to this statement, stating he came in on time and did not leave early. Barbary then submitted a request to the union's Executive Committee to have Stiegman removed from his office as Vice-President for the defamatory statement. Union President Hilst informed Barbary on April 8, 1991, that the Executive Committee would hear Barbary's rebuttal to Stiegman's remarks at a meeting on April 18, 1991. The Committee met and considered the matter but Stiegman was not removed from office. Stiegman however lost his office in an election held that same day.
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> 9. After the February 1, 1991 meeting, local union president Connie Hilst requested the College do a study of the custodial work areas. On February 12, 1991, Bob Borremans responded to this request indicating that the College would agree to the formation of a committee established by the parties to examine the Complainants' work areas. The committee would consist of two members appointed by Hilst and two by Borremans. The committee was to make a recommendation to Borremans who retained the right to make the final decision on work assignments.
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> 10. On February 21, 1991, Connie Hilst named custodians Joyce Randall, who had previously worked one of the areas to be studied, and Everett Montayne, the Chief Steward, and Borremans named Jeff Amundson and Alan Ferguson, the College's Personnel Director. The committee met on March 8, and again on March 28, 1991. In between the two meetings, Everett Montayne went to Barbary's area and counted the number

of rooms and voiced a concern about the time to vacuum them at the second meeting. Amundson showed Montayne the vacuuming schedule he had assigned to Barbary which provided that rooms were to be vacuumed every other day and Montayne's concerns were satisfied. The committee unanimously made the recommendation that the work areas assigned remain the same. These results were sent to the Complainants by Connie Hilst on April 19, 1991.

In his Memorandum, the Examiner analyzed the work study committee issues in the context of the duty of fair representation owed Complainants. He held:

> The Complainants also argued that the Union along with the College coerced the Complainants in the exercise of their rights by establishing a study committee which was not neutral thereby denying them fair representation. What rights? The Complainants have not shown that they had any right to a job study under the contract or under Sec. 111.70, Stats. The claim of rights has been plucked from thin air. The Complainants have made a giant leap to a conclusion without establishing any premise to support this conclusion. First, there is no provision in the agreement which provides for a study of one's job let alone a study committee. 9/ Furthermore, Complainant Barbary had requested a time study on his area on September 12, 1990 which was denied by the College. 10/ In his request, there was no

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9/ Ex. 8.

10/ Ex. 9.

> reference to any contractual provision and no grievance was ever filed over it. 11/ The verbal request made by Complainant Barbary on February 1, 1991 was again denied by his supervisors at the College. 12/ Complainant Barbary made no claim of a contractual right to such a study and never grieved it. Despite Barbary's requests and corresponding denials by the College, the Union requested the College to study the Complainant's work areas. The Union had just negotiated the first contract with the College and had not dealt with any of these issues in bargaining and the chief spokesman could not come up with any language in the contract to justify a grievance. 13/ The College could have said no to such a study as it had done to Complainant Barbary or have done their own study, but instead, it proposed a study committee with equal representation from both Union and management. 14/ The Union obtained something that was not in the contract and was for the benefit of the Complainants.
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> Complainants make a valid argument that once the committee was established, the union representatives were required to act in good faith. There was no evidence of any coercion or collusion to deny Complainants any rights they could assert and no evidence was presented that the committee was a sham. On the contrary, the committee met on two occasions and the chief steward investigated on his own and the other committee member appointed by the union was familiar with the work area. 15/ The record fails to demonstrate that the Union and/or committee members acted in any manner other than in good faith with honesty of purpose. Complainants assert that the committee was not neutral as the Union named two custodians who might have their duties increased and were employes of the College. The Complainants again are jumping to conclusions without establishing any premises to support these conclusions. The College's offer to set up the committee was that the Union name two members. The Union acted responsibly in naming employes who were familiar with custodial duties at the College. The Complainants have failed to prove any bias on the part of these members and they have failed to show any right of their own or of the Union to name outsiders to the committee. In short, Complainants had no right to a study committee and certainly had no right to state who would be on the committee. The Complainants asserted that the union members had a conflict of interest because they are employes. The evidence presented failed to show that either union member would be adversely affected by any decision the committee made nor was there any evidence shown that indicated that merely because they were employes was there a conflict or that the committee was biased. The evidence indicates that the union members of the committee acted in good faith and there is no evidence that any conduct on the part of the union was arbitrary, discriminatory or in bad faith.
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11/ Ex. 9.

12/ Tr. 29, 31 and 32.

13/ Tr. 155.

14/ Ex. 10.

15/ Exs. 15, 16; Tr. 76, 86, 92.

The Complainants simply disagree with the committee's result. They feel that they are being treated unfairly as the have the largest square footage areas to clean and this is disparate treatment. As the Union correctly pointed out, fairness is not the test here, but it is whether the College's assignments can be said to be unreasonable. The evidence does not demonstrate that the assignments are unreasonable. It must be noted that the Complainants only asked that a study be done. It was only through the Union's efforts that a committee was formed to study their jobs. The committee studied their jobs and found no evidence of disparate treatment and the evidence fails to prove otherwise. The committee's decision was not pretextual. The Complainants do not like the result of the study committee so have resorted to claims of unfair representation and bias. The evidence indicates that the Union did its best to get a study done and appointed persons that would give the committee results credibility and these individuals were not shown to be biased or to have acted in bad faith. The evidence indicates that a proper and honest study was done and the Complainants can ask for nothing more. Even if Complainants had selected who they wanted for the study committee, the final result might have been the same. Additionally, the College retained the sole right to make the final decision with respect to job assignments so despite the committee's recommendations, the College may have made no changes in assignments. It is concluded that the Union has acted properly and it has not been shown that it engaged in any conduct which was arbitrary, discriminatory or in bad faith. Hence, the Union did not breach its duty of fair representation to Complainants.

As to the impact of the statement of the Union official on February 1, 1991, the Examiner further held:

> The Complainants assert that the statement made by Allen Stiegman on February 1, 1991, demonstrates a breach of the Union's duty of fair representation. The evidence established that Stiegman was attending the February 1, 1991 meeting because he was a custodian and was not acting as a Union representative in this meeting, and the mere fact that he held office in the Union does not mean that his statement is attributed to the Union. It is concluded that Stiegman made the statement simply as an employe and not in his official capacity. Even if Stiegman's statement is attributed to the Union, it does not establish a violation of the duty of fair representation. Stiegman's statement did not prevent the formation of the committee to study the Complainants' jobs and Stiegman had no input in the selection of committee members, the committee's deliberations or its results. The mere existence of bad feelings is not sufficient to support a claim of unfair representation by the Union representative. 6/ Even where animosity existed between a steward and employe, any deficiencies in the steward's handling of a grievance could be remedied by the steward's union superiors. 7/ Here, the Union president requested a time study, which the College agreed to, all of which took place after Stiegman's statement. 8/

6/ 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 (4th Cir., 1976).

7/ National Rural Letter Carriers Ass'n., 271 NLRB No. 165 (1984).

8/ Ex. 10.

> The committee had no connection with Stiegman thereafter. Complainants must show some causal connection between the statement and the outcome of the committee. Complainants have asserted that Stiegman's statement influenced the outcome of the committee presumably by influencing the two members appointed by the Union president. There was absolutely no evidence that the two appointees were affected in any way by Stiegman's statement and Complainants have failed to meet their burden of proving by a clear and satisfactory preponderance of the evidence that Stiegman's statement influenced the committee in any way and was the basis of unfair representation on the part of the Union.

We have considered the record and Complainant Benzing's assertions that the Examiner wrongly analyzed the foregoing issues. From our analysis and consideration, we conclude that the Examiner correctly and exhaustively considered the facts and law and concluded that the Union had not breached its duty of fair representation. We have, therefore, affirmed the Examiner's decision in this regard.

As to the WEAC decision not to file a grievance over the work allocation issue, the Examiner made the following Finding of Fact:

11. Complainants sent a memo to Everett Montayne, Chief Steward, dated May 21, 1991 asking that a grievance be filed because the study was not done in good faith, and was not conducted by neutral parties such that Article 2 of the collective bargaining agreement was violated. On May 28, 1991, the Union's grievance committee met for approximately one hour and reviewed the request along with the agreement and then decided that there was no basis to file a winning grievance. Connie Hilst informed the Complainants of this result by a memo dated June 4, 1991. Article 5 of the collective bargaining agreement allows employes to file grievances and process them up to the arbitration stage but neither Complainant filed a grievance on this matter.

In his Memorandum, the Examiner analyzed the question of whether the Union's failure to file a grievance breached the duty of fair representation as follows:

> A review of the evidence with respect to the grievance shows that the chief steward took it to the grievance committee who deliberated for an hour looking for a reason to file a grievance and couldn't find any. 17/ This evidence establishes that the Union did not process the grievance in a perfunctory manner. There was no evidence of animosity, there was no slighting or disregard in assessing the merits of the grievance, nor was there any other indication of bad faith or arbitrary conduct.

17/ Tr. 87, 90, 94.

Having considered Complainant Benzing's argument in the context of the record before us, we again conclude that the Examiner properly analyzed this aspect of the complaint and have therefore affirmed him in that regard, as well.

In closing, we note that in his written argument, Complainant Benzing has asserted that he did not fully understand the nature of the hearing before Examiner Crowley and thus was unprepared to proceed and thereby prejudiced in his ability to present his case. We do not find this assertion persuasive. The transcript of the May 11, 1992 proceedings does not contain any request by Complainant Benzing for a postponement or a continuance of the hearing. Nor was any such request ever made in written form to the Examiner. Further, Complainant Benzing was given every opportunity during the hearing to call witnesses and to present written exhibits and took full advantage of those opportunities.

Given all of the foregoing, we have affirmed the Examiner's Findings of Fact, Conclusions of Law and Order.

Dated at Madison, Wisconsin this 8th day of February, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner