STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WILLIAM B. WESTPHAL, Complainant, vs. MARTHA LOVE (PRESIDENT 1055), CAROL STEGALL (SECRETARY 1055), ROSEMARY MCDOWELL (STAFF REPRESENTATIVE), Respondents.	Case 335 No. 47892 MP-2636 Decision No. 27437-A

Appearances:
Podell, Ugent & Cross, S.C., Attorneys at Law, 611 North Broadway, Suite 200, Milwaukee, Wisconsin 53202-5004, by Mr. Alvin R. Ugent, appearing on behalf of the Respondents.
Mr. William B. Westphal, 2657 North Holton Street, Milwaukee, Wisconsin 53212, appearing pro se.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 11, 1992, the Complainant filed a complaint with the Wisconsin Employment Relations Commission (WERC) which alleges that the Respondents had committed prohibited practices by failing to process three grievances to arbitration. On September 10, 1992, Complainant filed an amendment to the complaint which alleges that the Respondents had committed additional prohibited practices by not filing a grievance with respect to an incident which had occurred on December 30, 1991. On October 21, 1992, the WERC appointed Coleen A. Burns, a member of its staff, as Examiner to conduct a hearing on the complaint, as amended, and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Secs. 111.70(4)(a) and 111.07, Stats. Hearing on the complaint, as amended, was held on December 17, 1992, in Milwaukee, Wisconsin. The parties did not file post-hearing written argument and the record was closed on January 5, 1993, upon receipt of the stenographic record of the hearing.

FINDINGS OF FACT

1. Milwaukee District Council 48, AFSCME, AFL-CIO, and its affiliated Local 1055, hereafter collectively referred to as the Union, are labor organizations with principal offices located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

2. At all times material hereto, Respondent Martha Love has been President of Local 1055, Respondent Carol Stegall has been Secretary of Local 1055 and Respondent Rosemary McDowell has been Vice-President of Local 1055, as well as its Chief Steward. At the time of hearing, Love was also President of Milwaukee District Council 48, AFSCME, AFL-CIO.

3. At all times material hereto, William B. Westphal, hereafter Complainant, has resided at 2657 North Holton Street, Milwaukee, Wisconsin 53212, and has been employed by Milwaukee County. Milwaukee County is a municipal employer with principal offices located at the Milwaukee County Courthouse, 901 North 9th Street, Milwaukee, Wisconsin 53233.

4. At all times material hereto, the Complainant has been subject to

the terms and conditions of a 1991-1992 collective bargaining agreement between the County of Milwaukee, hereafter the County or the Employer, and the Union. This collective bargaining agreement contains, inter alia, the following:

2.04 **OVERTIME**

(1) For the purpose of this Section, overtime shall be defined as hours credited in excess of 8 per day or 40 per week.

(2) No overtime shall be paid nor compensatory time allowed except on a straight time basis to any employe whose position is in a pay range above pay range 23 except: when assigned on an overtime basis to intake at the Children's Court Center or to the protective services and runaway program in the Department of Social Services, master degree social workers shall receive time and one-half at the maximum step of pay range 16A. Such overtime may be liquidated upon the request of the employe and with the approval of the department head in accordance with Civil Service Rule VIII, sec. 3(2) and with sec. 2.21(5) of this Agreement.

(3) Employes who work authorized overtime shall have the option of accumulating compensatory time in lieu of cash. Such compensatory time may be liquidated in accordance with sec. 2.21(5) of this Agreement. If such compensatory time is not liquidated in accordance with Civil Service Rule VIII, sec. 3(2), the unliquidated balance shall be compensated in cash.

(4) When overtime is worked, it shall be compensated at a rate 1 1/2 times the rate paid for such work when it is performed during nonovertime hours.

(5) Overtime payment for Park employes will continue to be made in the combination of straight time and one-half the hourly rate in cash. For the purpose of the 2080-hour work year, however, all hours worked shall accrue at straight time. For the purpose of this paragraph, effective in 1981 and each year thereafter, the annual work year shall begin on the first day of the last payroll period in March of each year.

(6) The County agrees to study the utilization of alternative work schedules in County service. Before any such program is implemented, it shall be discussed with the President and Chief Steward of the appropriate affiliated Local. Recommendations made by the Union during the term of this Agreement shall be given due consideration.

(7) Employes assigned to the 24-hour protective services or the runaway program shall be compensated for time spent in disposing of matters by phone from their home during standby period. Time spent in such a manner shall be properly recorded on the appropriate forms provided by the County for such purpose. Protective services and runaway program employes shall be compensated at the appropriate overtime rate.

(8) Employes shall not be required to perform their normal duties during regularly scheduled lunch periods. If an employe's regularly scheduled lunch period is interrupted by a call to duty, such employe shall be compensated on an overtime basis for each 1/10th of an hour while engaged in such activity when such time worked results in more than 8 hours worked that day. The provisions of this paragraph shall not apply to employes scheduled for 8 consecutive hours.

(9) Pharmacist I In Charge, Title Code 525.1 shall be assigned to pay range 23S.

2.05 **OVERTIME ASSIGNMENTS**

(1) Both the County and the Union recognize that overtime arises out of the need to provide services as determined by the County. Overtime will not be used as a means of reducing staff or

eliminating a shift.

(2) In those departments where formal policies exist with respect to overtime assignments, such policies shall not be disturbed.

(3) Except as provided in par. 2 above, overtime assignments shall be rotated in accordance with seniority among those employes in the appropriate classifications who are able to perform the work.

(4) Lists shall be developed in each department showing those employes who wish to perform overtime. Such lists shall be used to fill overtime needs. In the event such lists are insufficient to provide adequate overtime coverage, employes shall be assigned on a rotating basis in the inverse order of seniority among those employes in the classification who are able to perform the work.

(5) In the event it is necessary for involuntary overtime to be performed, no employe shall be required to perform such overtime more than once a month, until all other available employes in the same job classification who are able to perform the work have performed involuntary overtime.

(6) In those departments where no policy exists, the department head shall meet with the Union for the purpose of formulating a policy which is mutually acceptable. Such discussions shall be carried on and any agreement reached shall be formalized in accordance with the procedures set forth in the Memorandum of Understanding titled "Collateral Agreements" dated August 20, 1973. (See Section 6.04)

PART 4

4.01 **RESOLUTION OF DISPUTES** The disputes between the parties arising out of the interpretation, application or enforcement of this Memorandum of Agreement, including employe grievances, shall be resolved in the manner set forth in the ensuing sections.

4.02 **GRIEVANCE PROCEDURE** The County recognizes the right of an employe to file a grievance, and will not discriminate against any employe for having exercised their rights under this section.

(1) **APPLICATION** The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinances and rules which are matters processed under other existing procedures. Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance.

(2) **REPRESENTATIVES** An employe shall be represented at all steps in the procedure by not more than two Union representatives excluding the staff representative. Union representation shall be limited at all steps of the procedure to those persons officially identified as representatives of the Union or its appropriate affiliated Local. The Union shall maintain on file with the Department of Labor Relations a current list of officers and stewards.

(3) **TIME OF HANDLING** Whenever possible, grievances will be handled during the regularly scheduled working hours of the parties involved. The County agrees to provide at least 24-hour written notice of the time and place of the hearing to the grievant and the Union.

(4) **TIME LIMITATIONS** If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended my (sic) mutual consent in writing (extension of grievance time limit form #4894). If any extension is not agreed upon by the parties within the time limits herein provided, or a reply to the grievance is not received within time limits provided herein, the grievance may be appealed directly to the next step of the procedure.

(5) **SETTLEMENT OF GRIEVANCES** Any grievance shall be considered settled at the completion of any step in the procedure if all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.

(6) **FORMS** There are 2 separate forms used in processing a grievance:

(a) Grievance Initiation Form;

(b) Grievance Disposition Form;

All forms are to be prepared in quadruplicate except at the County Institutions, Department of Parks, Recreation and Culture, and Department of Public Works, where 5 copies are to be prepared. Two copies are to be retained by the person originating the form; the remaining copies shall be served upon the other person involved in the procedure at that step, who shall distribute them in such manner as the department head shall direct. The department head shall furnish one copy to the Department of Labor Relations. The forms are available in the Department of Human Resources and in any County department or institution. Each department or institution shall have forms readily available to all employes. A copy of all grievance dispositions shall be forwarded to the appropriate Local President.

(c) Guidelines To Be Followed When Initiating A Written Grievance;

1.The employe alone or with his/her Union Representative shall cite the rule, regulation or contract provisions that was alleged to have been violated at the first step of the grievance procedure.

2. The employe alone or with his/her Union Representative shall in writing provide his/her immediate supervisor designated to hear grievances an explanation as to when, where, what, who, and why the employe believes that his/her contractual rights have allegedly been violated. The written Grievance Initiation Form shall contain the date or time that the employe alleges that his/her contractual rights have been violated.

3.The employe alone or with his/her Union Representative shall detail, in writing, the relief the employe is requesting.

4. If more space is required than is provided for on the Grievance Initiation Form in order to comply with the provisions of this section, the employe shall be permitted to submit written attachments to said form.

5.The Grievance Initiation form shall be prepared by the employe or with his/her Union Representative in a manner that is neat, clear, and discernible.

6.If the employe alone or with his/her Union Representative fails to follow Section 4.02(6)(c)1, 2, 3, 4, or 5, the employe's immediate supervisor designated to hear grievances may return the Grievance Initiation Form to the employe for corrections.

7.The guidelines outlined on 4.02(6)(c)1, 2, 3, 4, 5, and 6 are to clarify the grievance process. These guidelines shall not be used as a bar to the right of an employe to file a grievance. These guidelines are to assist the employe, the Union and management in the resolution of grievances at their lowest level of the grievance procedure. It is understood by the parties that should a dispute arise as to the intent of this section, the Union and the Director of the Department of Labor Relations or his/her designee will meet to discuss the dispute and resolve it to the mutual satisfaction of both parties.

(7) **STEPS IN PROCEDURE**

(a) STEP 1.

1.The employe alone or with his/her representative shall explain the grievance verbally to his/her immediate supervisor designated to respond to employe grievances.

2.The supervisor designed in paragraph 1 shall within 3 working days verbally inform the employe of his/her decision on the grievance presented.

(b) STEP 2.

1.If the grievance is not settled at the first Step, the employe alone or with his/her representative shall prepare the grievance in writing on the Grievance Initiation Form and shall present such form to the immediate supervisor designated in Step 1 to initial as confirmation of his/her verbal response. The employe alone or with his/her Union Representative shall fill out the Grievance Initiation Form pursuant to section 4.02(6)(c)1, 2, 3, 4, 5, 6 and 7 of this Memorandum of Agreement.

2.The employe or his/her Union Representative after receiving confirmation shall forward the grievance to his/her appointing authority or to the person designated by

him/her to receive grievances within fifteen (15) working days of the verbal decision. Failure of the supervisor to provide confirmation shall not impede the timeliness of the appeal.

3.The person designated in Step 2, Par. 2, will schedule a hearing with the person concerned and within fifteen (15) days from date of service of the Grievance Initiation Form, the Hearing Officer shall inform the aggrieved employe and the Union in writing of his/her decision.

4.Those grievances which would become moot if unanswered before the expiration of the established time limits will be answered as soon as possible after the conclusion of the hearing.

5.The second step of the grievance procedure may be waived by mutual consent of the Union and the Director of Labor Relations. If the grievance is not resolved at Step 2 as provided, the Union shall appeal such grievance within forty-five (45) days from the date of the second step grievance disposition to Step 3.

(c) STEP 3.

1.The Director of Labor Relations or his/her designee shall, (sic) attempt to resolve all grievances timely appealed to the third step. The Director of Labor Relations or his/her designee shall respond in writing to the Union within thirty (30) working days from the date of receipt by the Director of Labor Relations of the step 2 appeal.

2.In the event the Director of Labor Relations or his/her designee and the appropriate Union Representative mutually agree to a resolve of the dispute, it shall be reduced to writing and binding upon all parties and shall serve as a bar to further appeal.

3.The Step 3 of the grievance procedure shall be limited to the Director of Labor Relations or his/her designee

and the appropriate Local union representative and one of his/her designees, a Staff Representative and representatives of the appropriate appointing authority involved in each dispute. The number of representatives at any Step 3 hearing may be modified by mutual consent of the parties.

(d) STEP 4

1.If the grievance is not resolved at the third step as provided, the Union may appeal such grievance to the permanent arbitrator. Such appeal shall be in writing with notification to the Director of Labor Relations, or his/her designee, within 45 days of the third step hearing decision.

2.The Union shall, in writing, notify the Director of Labor Relations or his/her designee within forty-eight (48) hours prior to the arbitration hearing of the names of the employes the Union wishes to have released for the arbitration hearing. The release of said employes shall be subject to review by the Director of Labor Relations or his/her designee and shall be subject to mutual agreement of both the Union and the Director of Labor Relations. The release of employes shall not be unreasonably denied.

. . .

(9) **INTERPRETATION OF THE MEMORANDUM OF AGREEMENT** Any disputes arising between the parties out of the interpretation of the provisions of this Memorandum of Agreement shall be discussed by the Union and the Director of Labor Relations. If such dispute cannot be resolved between the parties in this manner, either party shall have the right to refer the dispute to the permanent arbitrator, who shall proceed in the manner prescribed in subsection (8) above. The parties may stipulate to the issues submitted to the permanent arbitrator or shall present to the permanent arbitrator, either in writing or orally, their respective positions with regard to the issue in dispute. The permanent arbitrator shall be limited in his/her deliberations to the issues so defined. The decision of the permanent arbitrator shall be filed with the Union and the Director of Labor Relations.

5. On May 18, 1990, Patricia Jakus, the County's Med Tech Manager, issued a written memorandum to Specimen Depository Personnel on the subject of "Policy on Overtime 'No Shows'", which stated as follows:

1.Lab Assistant/Phlebotomists or Lab Clerks in the Specimen Depository may volunteer for available overtime shifts according to the contract.

2.Failure to show up will result in NO VOLUNTEERING FOR OVERTIME FOR THREE MONTH.

Two cancellations within one month will result in NO VOLUNTEERING FOR OVERTIME FOR THREE MONTHS.

3.The absence will be so noted on the time sheet.

4.Assignments are subject to change according to section needs on that day.

On June 13, 1990, Jakus issued a written memorandum to Martha Love, in her capacity as President of District Council 48, on the subject of "Policy on

Overtime No Shows," which stated as follows:

> Attached is a policy which will be effective immediately concerning Specimen Depository employees who volunteer for overtime and do not honor the committment. (sic) Not only does this disrupt the laboratory trying to handle the volume of patient work, it denies less senior people an opportunity to exercise their rights.
>
> The policy is based on a similar one put into effect by the Nursing office this year for "sitter" no shows. If you have any questions, please call me.

On December 18, 1990, Toni Mirasola, a County supervisory employe, issued a written memorandum to Specimen Depository Personnel regarding "Sign-up for Standby," which stated as follows:

> As you know, Judy Hawkins has authorized us to have standby for 2nd and 3rd shift, seven days a week. This has allowed us to get staff in quickly to cover for an employee who is ill, or for some other serious reason is unable to come to work as scheduled. An added benefit of standby is that you can plan for the possibility of being called in, instead of being mandatorily called in.
>
> In the past, we have been able to fill our standby list voluntarily. I would like this practice to continue. However, I have noticed that many of the slots for 2nd and 3rd shift are not signed up for. We must have these filled.
>
> The standby lists for 2nd and 3rd will close on Friday, December 21 at 9:00 a.m. Please volunteer by that time. Once the lists are closed, the remaining slots for standby will be filled from the mandatory overtime list. Those already signed up for standby will be passed up, as will those who are scheduled for vacations. It is my hope that all slots will be filled voluntarily so that we will not have to resort to mandating standby.
>
> I anticipate and appreciate your understanding and cooperation in this matter.
>
> Thank you!

On December 21, 1990, Marie Strube, Specimen Depository Supervisor, issued a written memorandum to Specimen Depository Personnel on the subject of "Standby Call Schedule," which stated as follows:

> Here is a posting for the second and third shift <u>standby assignment</u> for the next ten day period. The next list will be available for volunteering over the weekend.
>
> There are a few points to keep in mind. We must have your current telephone number on file or you must furnish an alternate number where you can be reached. You must respond to a call and be able to be here within a reasonable period of time. We will try to give you as much advance notice as possible when having to use this list.
>
> Remember, if the supervisor on duty at the time feels that there is enough coverage on the shift, it may not be necessary to call someone in.
>
> If there are any further questions, please contact me, Toni Mirasola, or Judy Hawkins, if Toni or I are not available.

At all times material hereto, the Complainant was subject to the overtime policies contained in the memorandum set forth above.

6. Between December of 1990 and May 16, 1992, the Complainant was a Lab Phlebotomist for the County. Complainant's work site was located at Froedtert Hospital, which is approximately one mile from the County Hospital. On January 2, 1991, the Complainant completed a Grievance Initiation Form, which was designated as Grievance Reference No. 25153, which alleged that the County had violated Section 2.04 of the collective bargaining agreement when "my department was not told that an overtime list was posted and I was not allowed to work overtime even though I have enough seniority to have worked the overtime. When I found out that an overtime list did exist I was told that the list was closed and would remain closed." On January 2, 1991, the Complainant became aware that an employe had called in sick. The Complainant telephoned his supervisor to volunteer for the overtime and was told that he could not have the overtime because the overtime was being filled from the mandatory overtime list. On January 3, 1991, the Complainant completed a Grievance Initiation Form, which was designated as Grievance Reference No. 25154, which alleged that the County had violated Section 2.04 of the collective bargaining agreement because "although I was willing to work overtime on the second shift on January 2, 1991 I was not asked to volunteer. The lab assistant supervisor went directly to the standby list and gave the overtime to someone with less seniority."

7. The Complainant volunteered for and was scheduled for overtime on January 26 and 27, 1991. On January 26, 1991, prior to the start of his scheduled overtime shift, the Complainant notified the County that he was ill and would not be able to work on January 26, 1991. At that time, the Complainant also advised the County that he might not be able to work on January 27, 1991. On January 27, 1991, the Complainant telephoned the County to confirm that he was ill and would not be able to work the overtime shift scheduled for January 27, 1991. The Complainant did not work the overtime on either January 26 or January 27, 1991. On February 18, 1991, Clarence Lever, Jr., a County supervisor, issued a written memorandum to the Complainant on the subject of "Overtime and Standby," which stated as follows: "Mr. Westphal you have been taken off standby for February 20, 1991. You will be able to sign up for Overtime and Standby again April 28, 1991. At that time your 90 days will be completed." On February 5, 1991, the Complainant completed a Grievance Initiation Form, which was designated as Grievance Reference No. 26117, which stated "I was very ill and had to call in sick for an overtime assignment. I was suspended for three months from the voluntary overtime list. The suspension is unfair and extreme."

8. Grievance Initiation Forms are kept in each of the County's Departments, including the County's Personnel Department, and are available from the Departments and Union Officers upon request of an employes. Each of the three Grievance Initiation Forms had been completed by the Complainant and had requested that the Complainant be made whole for the alleged contract violation. After Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 were filed with the County, they were processed through Step Two of the grievance procedure by the Union. On February 6, 1991, Ray P. Medina, Associate Hospital Administrator--Ambulatory Services, issued the County's Second Step response to Grievance Reference No. 25153, on a Grievance Disposition Form which stated:

> COMPLAINT: The grievant contends that on 1/2/91, he was denied the opportunity to work overtime because he did not see an overtime list posted in the department. He further stipulates that the list was posted at MCMC and not at Froedtert where he is stationed. An employee with lessor (sic) seniority was given the overtime even though the grievant volunteered to perform it. He was also

informed that the overtime list was closed by the Clinical Laboratory Supervisor.

The Clinical Laboratory Supervisor, being new in the position at the time of this incident, inquired whether there was a written overtime policy in the department. She indicates that she received inconsistent information regarding the existence of a policy. She also indicates that the grievant did request the overtime; however, the list was closed and she felt it would not have been appropriate to reopen it. Also, upon further investigation I have learned that the departmental practice has been to post the overtime list on the fourth floor of MCMC only, and as a result of the confusion expressed in this grievance, management is evaluating some constructive changes to this practice.

RELIEF REQUESTED: To be paid for the following date in which the grievant feels he was inappropriately denied overtime: January 3, 1991 (second shift).

Note:It is the supervisor's understanding that the grievant only contested one of the overtime assignments listed above when she heard the Step I grievance.

DECISION: GRIEVANCE DENIED.

On March 19, 1991, Medina issued a Second Step response to Grievance Reference No. 26117 on a Grievance Disposition Form which stated as follows:

COMPLAINT: On January 26 and 27, the grievant was scheduled to work overtime on the second shift. As a result of being ill (flu), he called in sick and did not perform the overtime. The grievant was subsequently suspended for three (3) months from volunteering for overtime. He believes the suspension is unfair and extreme.

RELIEF REQUESTED: The grievant requests that the suspension be rescinded effective February 6, 1991 and he be made whole for any and all overtime opportunities he has been denied as a result of the suspension.

DISCUSSION: Management, for the record, submitted copies of the overtime policy regarding overtime 'no-shows' dated May 18, 1990 and shared with the Specimen Depository Personnel (attached). This policy was shared with DC48 union representatives in writing on June 13, 1990 (attached). Point #2 of the policy specifically states that, 'Two cancellations within one month will result in NO VOLUNTEERING FOR OVERTIME FOR THREE MONTHS'. The grievant contends that the absences/cancellations (2) were related to one episode of illness and management supports the language in the policy.

DECISION: Based on the facts in this instance, the grievance is denied.

The record does not contain a Grievance Disposition Form which references Grievance Reference No. 25154.

9. Upon receipt of the County's Second Step grievance response, the Local 1055 Grievance Committee meets with the affected grievant, as well as with the Union Steward involved in processing the grievance, to discuss the County's Second Step response; to ask if the grievant is satisfied by the Second Step response; and, if the grievant is not satisfied, to ask what the grievant would like done about the grievance. Pursuant to this procedure, the Local 1055 Grievance Committee met with the Complainant on April 17, 1991 to

discuss the three grievances. At the time of this meeting, the labor contract had strict time lines and grievances denied at the Second Step were automatically appealed to the Third Step. At all times material hereto, Gertie Purifoy has been a Staff Representative for District Council 48, AFSCME, AFL-CIO and has been responsible for servicing Local 1055. Pursuant to the Union's normal procedures, Purifoy attended the April 17, 1991 meeting of the Local 1055 Grievance Committee. Pursuant to the Union's normal procedures, Purifoy appealed Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the Third Step of the contractual grievance procedure. Pursuant to the Union's normal procedures, Purifoy met with the County's Third Step grievance representatives to argue the merits of the three grievances. This Third Step meeting occurred on May 13, 1991. At the time of this meeting, Purifoy was in possession of Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117, as well as the County's Second Step responses to the grievances. On May 21, 1991, Purifoy received the County's Third Step response to the Complainant's three grievances, which response was to sustain the Second Step grievance responses, denying all of the grievances. Under the terms of the collective bargaining agreement, it is the Union, and not the grievant, who has the authority to decide whether or not a grievance will be appealed to the contractual grievance arbitration procedure. Under the permanent umpire grievance arbitration procedure provided for in the collective bargaining agreement, Staff Representative Purifoy receives two arbitration hearing dates per month, which dates are shared with all of the Locals that Purifoy services, i.e., Local 1055, Local 526, Local 1654 and Local 1656. Given these limitations, it is not possible for Local 1055 to arbitrate all of the grievances which have been denied by the County. Pursuant to its normal procedure, upon receipt of the County's Third Step Response to Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117, the Local 1055 Grievance Committee met to decide whether or not to appeal Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual arbitration procedure. The record does not establish the date of this meeting. Pursuant to the Union's normal procedure, Purifoy attended this meeting of the Local 1055 Grievance Committee and was asked to make a recommendation as to whether or not Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 should be appealed to the contractual grievance arbitration procedure. Purifoy recommended that the three grievances not be appealed to the contractual arbitration procedure. At the time that Purifoy made this recommendation, she understood that Sec. 2.05(2) of the collective bargaining agreement allowed individual Departments to follow existing overtime policies. In her investigation of the grievances, Purifoy understood that the County had denied the three grievances on the basis that the conduct of the County had complied with the overtime policies existing in the Complainant's Department. After consulting with Local 1055 Secretary Stegall and Union President Love, Purifoy was satisfied that the overtime policies relied upon by the County had been received by the Union Stewards and had been disseminated to employes in the Complainant's Department. It was Purifoy's understanding that, under existing overtime policy, overtime lists involving the Complainant's Department are posted at the County Hospital and that the Complainant had the same right and opportunity to sign the overtime list as any other employe. Purifoy did not consider Grievance Reference No. 25153 to be meritorious because the Complainant had not signed the overtime list and, pursuant to the existing overtime policy, the County had assigned the disputed overtime to the person on the overtime list who had the most seniority. Purifoy did not consider Grievance Reference No. 25154 to be meritorious because Purifoy understood that the County had complied with the Complainant's Department's existing overtime policies when it used the standby procedure, rather than accept the Complainant's offer to voluntarily work the overtime. Purifoy understood that the Complainant's Department's existing overtime policies permitted employes to volunteer for overtime, but that if the employe failed to appear for two overtime dates in a one month period, than the employe received a three month suspension from working overtime. Purifoy did

not consider Grievance Reference No. 26117 to have merit because the Complainant failed to appear for two overtime dates, i.e., January 26, 1991 and January 27, 1991. Based upon her understanding of the relevant contract language and her understanding of the Complainant's Department's overtime policies, Purifoy concluded that the Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 were not sufficiently meritorious to warrant the use of one of the limited arbitration dates allocated to Local 1055. The Local 1055 Grievance Committee concurred with the Purifoy's conclusion and decided not to appeal Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual grievance arbitration procedure.

10. The Union's normal procedure is for the Secretary of Local 1055 to send affected grievants a written notification of, and an invitation to, meetings of the Local 1055 Grievance Committee. The Complainant did receive such notice of the April 17, 1991 Grievance Committee meeting. Due to the vacation of the Secretary, the Complainant did not receive written notification of the Local 1055 Grievance Committee meeting which followed the Union's receipt of the County's Third Step response. It is not evident that Complainant received any other notice of this meeting. The Complainant did not attend the meeting in which the Local 1055 Grievance Committee decided not to appeal Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual grievance arbitration procedure. The Complainant recalls that, during the meeting with the Local 1055 Grievance Committee which occurred on April 17, 1991, he was told by Rosemary McDowell that the three grievances would go to arbitration. Purifoy recalls that, at the April 17, 1991 meeting, the Complainant was told by two individuals, Chief Steward Rosemary McDowell and the Chairperson of the Grievance Committee, Bernie Freckmann, that the grievance would be processed to the Third Step. Between the filing of the three grievances and May of 1991, the Complainant asked Union Steward Marion Tatum how his grievance arbitration was going and she told the Complainant to wait, that it could take a year or more, that the Union was handling the matter, and that everything would be fine. During this same time period, the Complainant had a conversation with Carol Stegall in which she told the complainant that the grievances would go to arbitration if the County ruled against the Complainant. On May 16, 1992, Complainant started a new job in the County's Department of Social Services. At that time, it occurred to him that he had not been contacted by the Union Steward concerning his grievances. Complainant asked the Department of Social Services Steward, Patricia Gryder, about his grievances. Gryder told the Complainant that, when she contacted a representative of Local 1055, she was told that the grievances had been withdrawn shortly after they had been submitted. It is not evident that the Complainant knew, or had a reasonable basis to know, of the Union's decision not to appeal his three grievances to arbitration prior to May 16, 1992. On August 11, 1992, Complainant filed a complaint with the Wisconsin Employment Relations Commission alleging that Martha Love, Carol Stegall, and Rosemary McDowell, in their capacity as representatives of Local 1055, had committed prohibited practices when they failed to appeal Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual grievance arbitration procedure.

11. On December 30, 1991, at approximately 12:30 p.m., two of the Complainant's supervisors, Steve Herrick and Tony Mirasola, told the Complainant to gather dirty needle boxes and throw them in a bag, or to go home without pay. It is the County's procedure to place the dirty needle boxes in a red or orange bag and to have biohazardous personnel dispose of the bags. On December 30, 1991, the Complainant's primary job duties were to draw blood, order tests, and provide test results over the telephone. The needles that he used to draw blood were placed in the dirty needle box. Prior to December 30, 1991, the Complainant had not previously been asked to gather the dirty needle boxes and had not been trained to gather the dirty needles boxes. Considering

such work to be hazardous, the Complainant refused to gather the dirty needle boxes and went home without pay. The Complainant recalls that, when he told Martha Love about the incident, Love told the Complainant that he was lucky that he was not fired. The Complainant did not discuss this matter with any other Union representative and did not file a grievance in this matter. The Complainant did not ask Love, or any other Union Representative, to file a grievance on the December 30, 1991 incident. The Complainant believes that a grievance must be filed by the Union and that he could not file a grievance by himself. Love has known the Complainant for a number of years. Prior to becoming a Phlebotomist, the Complainant worked as a Patient Transporter in surgery and, in that capacity, worked with Love, who is a Nursing Assistant in the Post-Anesthesia Care Unit. Love recalls that she had a discussion with the Complainant in which he expressed anxiety about having to dump the dirty needle boxes, but denies that she ever told the Complainant that he was lucky that he did not get fired. The discussion between Love and the Complainant occurred in a hall, after the Complainant had made several telephone calls to Love. Love had attempted to return the Complainant's telephone calls, but had been unsuccessful in these attempts. Love told the Complainant that it was their job to prepare the dirty needle boxes for pick-up by the biohazardous personnel. Love denies that the Complainant ever indicated that he wanted to file a grievance at the time that they discussed the dirty needle boxes. On September 10, 1992, Complainant filed an amendment to the complaint alleging that he was cheated out of three hours of pay because Martha Love maintained that no grievance should be filed on the incident which occurred on December 30, 1991.

12. The Union's decision to not appeal Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual grievance arbitration was based upon the conclusion that the three grievances were not sufficiently meritorious to warrant the use of one of the arbitration dates allocated to Local 1055 and did not involve any arbitrary, discriminatory or bad faith conduct on the part of Respondent Martha Love, Respondent Carol Stegall, Respondent Rosemary McDowell, or any other agent of the Union.

13. Neither Respondent Martha Love, nor any other representative of the Union, refused to file a grievance on the events of December 30, 1991 in which the Complainant refused to gather the dirty needle boxes. Respondent Martha Love has not been shown to have engaged in any arbitrary, discriminatory or bad faith conduct when she discussed the events of December 30, 1991 with the Complainant.

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

CONCLUSIONS OF LAW

1. At all times material hereto, William B. Westphal has been a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

2. At all times material hereto, Milwaukee District Council 48, and its affiliated Local 1055, have been labor organizations within the meaning of Sec. 111.70(1)(h), Stats.

3. At all times material hereto, Martha Love, Carol Stegall and Rosemary McDowell have been agents of Milwaukee District Council 48, AFSCME, AFL-CIO, and/or its affiliated Local 1055.

4. The Wisconsin Employment Relations Commission has jurisdiction to

hear and decide the merits of the complaint filed on August 11, 1992, and the amended complaint filed on September 10, 1992.

5. Milwaukee District Council 48, AFSCME, AFL-CIO, its affiliated Local 1055, and its agents, Martha Love, Carol Stegall, and Rosemary McDowell, have not been shown to have violated the Union's duty of fair representation by failing to appeal William B. Westphal's Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual grievance arbitration procedure and, accordingly, have not violated Sec. 111.70(3)(b)1, Stats.

6. Respondent Martha Love has not been shown to have violated the Union's duty of fair representation by her conduct during the discussion with William Westphal which involved the December 30, 1991 incident in which Westphal was told by his supervisors to gather the dirty needle boxes and throw them in a bag, or to go home without pay, and accordingly, has not violated Sec. 111.70(3)(b)1, Stats.

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, as amended, be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 1st day of March, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner

1/ Footnote 1/ found on page 16

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Sec. 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In the complaint initiating these proceedings, the Complainant alleges that Martha Love, Carol Stegall and Rosemary McDowell, representatives of Local 1055, Milwaukee District Council 48, AFSCME, AFL-CIO, committed prohibited practices by refusing to appeal Complainant's Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual grievance arbitration procedure. In an amendment to the complaint, Complainant alleges that Martha Love committed prohibited practices by refusing to file a grievance involving a December 30, 1991 incident in which Complainant's supervisors sent the Complainant home without pay for refusing to gather and place dirty needle boxes in a bag.

Respondents deny that they have committed any prohibited practices. Respondents argue that the Wisconsin Employment Relations Commission lacks jurisdiction to hear the merits of the complaint because it was not timely filed and Milwaukee County was not named as a respondent.

Discussion

Jurisdiction

The complaint, as originally filed, alleges that Respondents committed prohibited practices by failing to appeal three of Complainant's grievances, i.e., Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117, to the contractual grievance arbitration procedure. Complainant did not identify the portion(s) of the Wisconsin Statutes alleged to have been violated by the Respondents' conduct. At hearing, however, the Complainant confirmed that he was alleging that Respondents' conduct had violated their duty of fair representation. It follows, therefore, that the underlying statutory claim is that Respondents have violated Sec. 111.70(3)(b)1, Stats., which makes it a prohibited practice for a municipal employe, individually or in concert with others, "to coerce or intimidate a municipal employe in the enjoyment of his legal rights, including those guaranteed in sub. (2)."

Sec. 111.07(14), Stats., which is made applicable to these proceedings by Sec. 111.70(4)(a), Stats., provides:

> The right of any person to proceed under this section shall not exceed beyond one year from the date of the specific act or unfair labor practice alleged.

The statute of limitations begins to run once a complainant knows, or has a reasonable basis to know, of the act alleged to be in violation of the statute. 2/ The Complainant, contrary to the Respondents, argues that he did not learn of the Union's decision to not appeal Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to arbitration until after May 16, 1992.

The decision to not appeal Grievance Reference No. 25153, Grievance

2/ State of Wisconsin, Dec. No. 26676-B (WERC, 4/91); Menomonie County, Dec. No. 22872-A (Honeyman, 9/85), aff'd in pertinent part, Dec. No. 22872-C (WERC, 3/86). See also: Johnson vs. WERC, et al., Milw Cty CirCt, No. 90-CV-016842 (6/91).

Reference No. 25154 and Grievance Reference No. 26117 to the contractual grievance arbitration procedure was made during a meeting of the Local 1055 Grievance Committee. While the record does not establish the exact date upon which this meeting occurred, it is evident that this meeting occurred after May 21, 1991, the date upon which the Union received the County's Third Step response denying the three grievances. The Complainant was not present at this meeting of the Local 1055 Grievance Committee.

The Local 1055 Grievance Committee has a procedure by which written notification of the Grievance Committee meetings are provided to employes who have filed grievances which may be affected by the meeting. As Union Representative Purifoy acknowledged at hearing, this written notification procedure was not followed with respect to the meeting in which the Local 1055 Grievance Committee decided to not appeal Complainant's three grievances to arbitration. 3/ According to Purifoy, however, the Union Steward had notified Complainant of this Local 1055 Grievance Committee meeting. The Examiner does not consider Purifoy's hearsay testimony to be sufficient to rebut the Complainant's testimony that he did not receive any notice of the meeting.

The record does not warrant the finding that the Complainant knew, or should have known, of the Local 1055 Grievance Committee meeting in which the Union decided to not appeal his three grievances to arbitration. Thus, it cannot be reasonably concluded that the Complainant's failure to attend this Local 1055 Grievance Committee meeting acts to estop or waive his claim that he was not aware of the Union's decision not to appeal the three grievances to arbitration prior to May of 1992.

The Union's witnesses do not claim, and the record does not demonstrate, that, following this meeting, the Union provided the Complainant with written notification of the decision to not appeal the three grievances to arbitration. Union Representative Purifoy, however, recalls that she had a telephone conversation with the Complainant in which she advised the Complainant of "the third step disposition." 4/ The Complainant denies that he had any telephone conversation with Purifoy. 5/ Assuming arguendo, that Purifoy's recollection of events is accurate, the Examiner considers her testimony concerning the telephone conversation to be ambiguous. That is, the Examiner does not know whether Purifoy meant that she told the Complainant about the County's Third Step disposition of the grievances, or whether she meant that she told the Complainant about the Union's disposition of the grievances. Assuming arguendo, that Purifoy intended the latter meaning, the testimony is not dispositive of the timeliness claim because the record fails to establish the date of the alleged conversation.

At hearing, Union Representative Purifoy stated that even though the Complainant did not appear at the meeting in which the Local 1055 Grievance Committee had decided to not appeal the three grievances to arbitration, the Complainant would have received a copy of the County's Third Step response indicating that the County had denied the three grievances. 6/ Assuming arguendo, that the Complainant had received a copy of the County's Third Step response more than one year prior to the filing of the instant complaint, it is not evident that the County's Third Step response provided the Complainant with a reasonable basis to know that the Union had decided to not appeal the grievances to arbitration.

3/ T. at 74.

4/ T. at 74.

5/ T. at 75.

6/ T. at 57.

Complainant was present at the Local 1055 Grievance Committee Meeting of April 17, 1991, in which the Local 1055 Grievance Committee discussed the County's Second Step response denying the grievances. According to Complainant, at this meeting, Union Representative McDowell advised the Complainant that his three grievances would be processed to arbitration. McDowell did not testify at hearing. Union Representative Purifoy, who was present at the April 17, 1991 meeting, denies that the Complainant was told that his three grievances would be processed to arbitration. According to Purifoy, McDowell and the Chairman of the Grievance Committee, Bernie Freckmann, told the Complainant that the three grievances would be processed to the Third Step of the grievance procedure. Given the evidence that the Union's decision to appeal, or to not appeal, grievances to arbitration is made after receipt of the County's Third Step response, the Examiner is persuaded that Purifoy's version of the events of April 17, 1991 is more credible than the Complainant's version of the events. As Purifoy stated at hearing, it is likely that the Complainant confused the Third Step of the grievance procedure with the arbitration step.

The Complainant recalls that he had a conversation with Union Representative Carol Stegall in which Stegall advised him that the grievances would go to arbitration if the County ruled against the Complainant. 7/ Complainant also recalls that, on several occasions, he asked Union Steward Marion Tatum about his grievances and how the arbitration was going. According to the Complainant, Tatum responded that "it would be a year or more, and the union was to handle that and everything was going to be fine." 8/ Neither Stegall, or Tatum, testified at hearing. The record fails to establish the date of the alleged conversations with Stegall and Tatum. However, given Complainant's testimony that he did not hear from the Union concerning his grievances after May of 1991, 9/ it is reasonable to conclude that the conversations with Stegall and Tatum occurred between the filing of the grievances and May of 1991.

Unlike the Complainant's testimony concerning the meeting of April 17, 1991, the Complainant's testimony concerning the conversations with Stegall and Tatum was not contradicted by the testimony of any other witness. Moreover, unlike Complainant's testimony concerning the meeting of April 17, 1991, there is no reasonable basis to conclude that the Complainant may have misconstrued the comments which he attributed to Stegall and Tatum. Accordingly, the Examiner has credited Complainant's testimony with respect to his conversations with Stegall and Tatum. Assuming arguendo, that the Complainant did receive the County's Third Step response denying the grievances in May of 1991, as did the Union, the Complainant's conversations with Stegall and Tatum provided the Complainant with a reasonable basis to assume that the grievances had been processed to arbitration and that the process would take at least a year.

The complaint filed on August 11, 1992, alleges that Respondents' violated their duty of fair representation by failing to appeal Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual grievance arbitration procedure. The Complainant maintains that he did not learn of the Union's decision to not appeal the three grievances to arbitration until after May 16, 1992, when the Steward in the Department of Social Services contacted representatives of Local 1055 to ask about the status of his grievances. 10/ The record does not demonstrate

7/ T. at 14.

8/ T. at. 15.

9/ T. at 77.

10/ Purifoy acknowledges that representatives of Local 594 did contact her and that she did tell

otherwise.

For the reasons discussed above, the Examiner is not persuaded that the Complainant knew, or had a reasonable basis to know, of the Union's decision to not appeal Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual grievance arbitration procedure more than one calendar year prior to the filing of the complaint on August 11, 1992. Accordingly, the undersigned rejects the Respondents' assertion that the complaint is not timely.

On September 10, 1992, Complainant filed an amendment to the complaint alleging that the Union, by its agent Respondent Love, had violated its duty of fair representation by not filing a grievance on an incident which occurred on December 30, 1991. Where, as here, an amendment to a complaint raises a new cause of action, the statute of limitations runs from the date of the amendment. 11/ It must be concluded, therefore, that Complainant's amendment to the Complaint was timely filed.

At hearing, the Respondents argued that the Complaint should be dismissed because the Complainant had not also named Milwaukee County as a respondent. Given the nature of the breach of the duty of fair representation claims raised in the complaint and the amended complaint, the Complainant is not required to name Milwaukee County as a respondent in this matter. Despite Respondents' argument to the contrary, the Commission does have jurisdiction to determine the merits of the complaint and the amended complaint.

Merits

In Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369, (1967) and Mahnke v. WERC, 66 Wis.2d 524 (1974), the courts set forth the requirements of the duty of fair representation a union owes its members. A union must represent the interests of all its members without hostility or discrimination, exercise its discretion with good faith and honesty, and eschew arbitrary conduct. The Union breaches its duty of fair representation only when its actions are arbitrary, discriminatory or in bad faith. 12/ The Union is allowed a wide range of reasonableness, subject always to complete good faith and honesty of purpose in the exercise of its discretion. 13/ As long as the Union exercises its discretion in good faith, it is granted broad discretion in the performance of its representative duties. 14/ A complainant has the burden to demonstrate, by a clear and satisfactory preponderance of the evidence, each element of its contention. 15/ Mahnke, supra, 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.

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these representatives that Local 1055 had decided not to appeal the three grievances to arbitration. (T. at 74-75.)

11/ City of Stevens Point, et al., Dec. No. 26525-A (Jones, 2/92); CESA #4, et al., Dec. No. 13100-E (Yaffe, 12/77), aff'd, Dec. No. 13100-G (WERC, 5/79).

12/ Coleman v. Outboard Marine Corp., 92 Wis.2d 565 (1979).

13/ Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953).

14/ West Allis-West Milwaukee School District, Dec. No. 20922-D (Schiavoni, 10/84; Bloomer Jt. School District, Dec. No. 16228-A (Rothstein, 8/80).

15/ West Allis-West Milwaukee School District, Ibid.

Complaint

The record demonstrates that Complainant's Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 were filed and processed through the Third Step of the contractual grievance procedure in the same manner as any other grievance affecting a member of Local 1055. Complainant does not allege, and the record does not demonstrate, that the Respondents violated their duty of fair representation by their conduct in processing the three grievances through the Third Step of the contractual grievance procedure. Rather, Complainant alleges that the Respondents violated their duty of fair representation when Respondents failed to appeal Complainant's Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual arbitration procedure.

Under the terms of the collective bargaining agreement, it was the Union, and not the Complainant, who had the right to appeal Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual grievance arbitration procedure. Following the Union's receipt of the County's Third Step response denying Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117, the Local 1055 Grievance Committee met to decide whether or not the Union would appeal the grievances to the contractual arbitration procedure. Prior to making this decision, the Local 1055 Grievance Committee asked Union Representative Gertie Purifoy for a recommendation as to whether or not the three grievances should be appealed to the contractual grievance arbitration procedure. Purifoy recommended that Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 not be appealed to arbitration. The Local 1055 Grievance Committee agreed with Purifoy's recommendation and decided to not appeal Complainant's Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual arbitration procedure.

In a proceeding of this type, the Commission does not make a determination as to whether Complainant's Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 are, or are not, meritorious. The Commission has previously recognized that, in duty of fair representation cases involving a union's decision not to pursue a grievance, that fact that the grievance may be meritorious is not determinative of whether a violation of law has occurred and that a union has a great deal of discretion in deciding whether or not a grievance should be pursued through arbitration. 16/ It is only if the union's action in not pursuing even a meritorious grievance is arbitrary, discriminatory or in bad faith that there is a violation of law. 17/

By meeting to decide whether or not the Complainant's grievances should be appealed to the contractual grievance arbitration procedure and by asking Purifoy for a recommendation as to whether or not the grievances should be appealed to the contractual grievance arbitration procedure, the Local 1055 Grievance Committee followed its normal procedures. To be sure, it was not normal procedure to fail to notify the Complainant of the fact that the Local 1055 Grievance Committee would be meeting to discuss the County's Third Step response and to determine whether or not to appeal Complainant's grievances to arbitration. The record, however, supports the conclusion that this failure to notify the Complainant was due to the vacation of the secretary responsible for providing such notification. There is no evidence that the Union's failure to

16/ City of Greenfield, et al., Dec. No. 24776-C (WERC, 2/89).

17/ Id.

notify the Complainant of the Local 1055 Grievance Committee meeting was motivated by bad faith, hostility, or intent to discriminate against the Complainant.

While the Complainant was not provided with the opportunity to attend the meeting in which the Union decided to not appeal Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to arbitration, the Complainant was provided with the opportunity to discuss the three grievances, and the County's Second Step response thereto, with the Local 1055 Grievance Committee on April 17, 1991. As the testimony of Purifoy establishes, the County's Third Step response sustained the County's Second Step response. 18/ Given the fact that the County's Second Step response was the subject of the April 17, 1991 meeting, it is reasonable to conclude that, at the time that the Local 1055 Grievance Committee made the decision to not appeal Complainant's grievances to arbitration, the Committee was aware of Complainant's position with respect to the three grievances, as well as Complainant's position with respect to the County's response to these three grievances. The fact that the Complainant was not provided with an opportunity to be present at the meeting in which the Local 1055 Grievance Committee decided to not appeal Complainant's grievances to hearing does not warrant a finding that the decision was arbitrary, discriminatory or in bad faith.

Purifoy, the AFSCME Staff Representative responsible for servicing Local 1055, was present at the April 17, 1991 meeting of the Local 1055 Grievance Committee meeting in which the Complainant was provided with the opportunity to discuss Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117, as well as the County's Second Step response thereto. Prior to making the recommendation to not appeal the three grievances to arbitration, Purifoy had been given copies of the three grievances and the County's Second Step response thereto, and had met with the County's Third Step grievance representatives to argue the merits of the three grievances. Based upon her discussions with the Union Stewards who serviced the Complainant's Department, Purifoy concluded that there was merit to the County's assertion that the overtime which was the subject of Grievance Reference No. 25153 and Grievance Reference No. 25154 had been assigned in a manner which was consistent with the overtime policies which existed in the Complainant's Department. Purifoy also concluded that, contrary to the assertion of the Complainant, the County was correct when they concluded that the call-in on January 26, 1991, and the call-in on January 27, 1991, involved two separate failures to work voluntary overtime and, therefore, Complainant's ninety-day suspension from overtime and standby opportunities, which was the subject of Grievance No. 26117, was consistent with Complainant's Department's overtime policies. Based upon her understanding that the Complainant's Department's overtime policies were incorporated into the collective bargaining agreement by the language of Sec. 2.05(2), Purifoy concluded that the County had complied with its contractual obligations and that Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 were not sufficiently meritorious to warrant the use of one of limited arbitration dates allocated to Local 1055. The record contains sufficient detail so as to enable the Examiner to determine that both Purifoy and the Local 1055 Grievance Committee made a considered decision by review of relevant factors when they concluded that the Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 were not sufficiently meritorious to warrant an appeal to arbitration.

In summary, the Examiner is satisfied that Union's decision to not appeal Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual grievance arbitration procedure was based solely upon the Union's determination that the grievances did not have

18/ T. at 54.

sufficient merit to warrant an appeal to arbitration. The evidence does not establish that this decision was made in a perfunctory manner. Nor is there evidence of animosity, slighting or disregard in assessing the merits of the grievances. The record does not warrant the conclusion that the Union's decision not to appeal Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual grievance arbitration procedure involved any bad faith, discriminatory or arbitrary conduct by Respondents Martha Love, Carol Stegall or Rosemary McDowell, or any other agent of the Union.

While it is apparent that the Complainant is upset by the fact that he did not learn of the Union's disposition of the three grievances until May of 1992, the Commission has previously found that the failure of a union to notify a grievant of the disposition of his grievance does not provide an adequate basis for finding a breach of the duty of fair representation. 19/ Contrary to the assertion of Complainant, the record does not establish that the Union violated its duty of fair representation when it failed to appeal Complainant's Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual grievance arbitration procedure.

Amendment to the Complaint

On December 30, 1991, two of the Complainant's supervisors, Steve Herrick and Toni Mirasola, told the Complainant to gather dirty needle boxes, throw them in a bag, or go home without pay. Having never performed this duty before, and considering the work to be hazardous, the Complainant went home without pay. On September 10, 1992, the Complainant filed an amendment to his complaint alleging that Union President Martha Love refused to file a grievance contesting the order to gather the dirty needle boxes and the loss of pay that resulted from the Complainant's decision to go home, rather than to gather the dirty needle boxes.

According to the Complainant, when he discussed this incident with Union President Martha Love, Love told the Complainant that he was lucky that he was not fired. Love, who remembers discussing the incident with the Complainant, denies that she ever told the Complainant that he was lucky that he did not get fired. Love recalls that the Complainant had left several telephone messages, which she was unsuccessful in returning. According to Love, she met the Complainant in the hall and he expressed concern over having been told to gather the dirty needle boxes. Love recalls that she told the Complainant that it was their job to prepare the dirty needle boxes for pick-up by biohazardous personnel. Love maintains that the Complainant never indicated that he wanted to file a grievance.

As discussed above, the Complainant disputes Love's assertion that she did not tell the Complainant that he was lucky that he was not fired. However, the other portions of Love's testimony are not in dispute and, thus, are entitled to be credited herein.

As Complainant acknowledged at hearing, following the conversation with Love, he did not discuss the matter with any other Union Representative. The Complainant argues that further contact with the Union would have been futile because the Union President had told him that she did not want him to file a grievance.

Assuming arguendo, that Love did tell the Grievant that he was lucky that he was not fired, such a statement would not establish a violation of the Union's duty of fair representation. As Respondent argues, a Union

19/ UW - Milwaukee (Housing Department), sub nom Guthrie V. WERC, Dec. No. 111457-F (1977).

Representative is entitled to give an opinion on employe conduct.

It is not evident that either Complainant's right to file a grievance, or the merits of such a grievance, was the topic of discussion between Love and the Complainant. Rather, Love was responding to Complainant's anxiety about having been told to gather and dispose of the dirty needle boxes by offering her opinion that such duties were a part of the Complainant's job. Given the context of the conversation, even if Love had told the Grievant that he was lucky that he was not fired, it would not be reasonable to construe such a statement to mean that Love was refusing to file a grievance on the matter, or that the other Union Representatives would refuse to file a grievance on the matter if requested to do so by the Complainant.

Contrary to the argument of the Complainant, the record does not establish that Respondent Love, or any other Respondent, refused to file a grievance on the incident of December 30, 1991. Nor is it evident that Respondent Love, or any other Union Representative, engaged in any conduct which caused the Union to breach its duty of fair representation toward the Complainant with respect to the events of December 30, 1991.

Conclusion

It has not been shown that Respondents, or any other Union Representative, breached the Union's duty of fair representation toward Complainant by failing to appeal Grievance Reference No. 25153, Grievance Reference No. 25154 and Grievance Reference No. 26117 to the contractual grievance arbitration procedure. Nor has it been shown that Respondent Love, or any other Union Representative, breached the Union's duty of fair representation toward the Complainant by conduct relating to Complainant's discussions with Love concerning the events of December 30, 1991. Accordingly, the complaint, as amended, has been dismissed.

Dated at Madison, Wisconsin this 1st day of March, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner