STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANNA K. ABEL, Complainant, vs. LADYSMITH-HAWKINS SCHOOL DISTRICT and NORTHWEST UNITED EDUCATORS, Respondents.	Case 29 No. 48993 MP-2710 Decision No. 27614-C

Appearances:

Weld, Riley, Prenn & Ricci, Attorneys at Law, by Mr. Stephen L. Weld, 715 South Barstow Street, Suite 111, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Ladysmith-Hawkins School District.

Mr. Michael J. Burke, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of Northwest United Educators.

Ms. Anna K. Abel, 600 East Sabin Avenue, Ladysmith, Wisconsin 54848, appearing on her own behalf.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 3, 1994, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order in the above matter wherein she concluded that Respondent Northwest United Educators had not breached its duty of fair representation to Complainant Anna Abel and thus had not committed a prohibited practice within the meaning of Sec. 111.70(3)(b), Stats. Based on her conclusion that Respondent Northwest United Educators had not breached its duty of fair representation, she concluded she did not have jurisdiction over the merits of Complainant Abel's contention that Respondent Ladysmith-Hawkins School District had violated a collective bargaining agreement and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats. Given her conclusions, the Examiner dismissed the complaint.

Complainant Abel timely 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. Complainant Abel and the Respondent District filed written argument in support of and in opposition to the petition, the last of which was received April 6, 1994.

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

ORDER 1/

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.

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of June, 1994.

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

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.

Continued

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> (a) Proceedings for review shall be instituted by serving a petition therefore 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 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.
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> (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.
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> . . .
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> (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.

LADYSMITH-HAWKINS SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
ORDER AFFIRMING EXAMINER'S FINDINGS
OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

Complainant Abel's position in this litigation was accurately summarized in the Examiner's decision as follows:

. . .

> In 1990 and 1991, Anna Abel worked as a custodian for 21 consecutive days and, thus, is entitled to seniority in the custodial department. Whittenberger obtained his position by virtue of establishing seniority by working 21 consecutive days in the custodial department in 1991. Since the Complainant obtained her seniority rights in the custodial department prior to Whittenberger, she should have been given the position that Whittenberger was given.
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> The language of Article 9(H), which entitles Anna Abel to seniority in the custodial department, does not distinguish between summer employes when it refers to substitute or temporary employes. This fact, is verified by the testimony of NUE Executive Director Manson. The Union's assertion that the language of Article 9(H) applies only to members of the public who are not parties to the master contract is ludicrous.
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> The summer paint crew in 1990, who were all members of the bargaining unit, were requested to sign acknowledgments that they would not become members of the custodial department by virtue of working 21 consecutive days. In addition, District exhibits have the Union waiving the 21 day provision contained within Article 9(H) of the master agreement. The Union's conduct belies its assertion that the parties have always agreed that summer custodial work was not subject to the provisions of Article 9(H).
>
> Complainant has become a thorn in the side of the District and the Union. Complainant has repeatedly applied for custodial positions and has attempted to assert her rights through a variety of mechanisms, including complaints with the State of Wisconsin and the Equal Employment Opportunities Commission and correspon-dence and telephone communications with the various representatives of NUE and the District. The initial complaint against the Union and the School District alleged that the hiring of Whittenberger involved sexual discrimination.
>
> Complainant properly presented her grievances to the School District and the NUE. The grievances were

not submitted to arbitration based upon Manson's opinion that Complainant's grievance was unwinnable. The Union's decision to not submit Complainant's grievance to arbitration was arbitrary, capricious and lacking in good faith and breached the Union's obligation of fair representation.

The Union should be ordered to cease and desist from substituting Mr. Manson's interpretation of the master agreement for that of a qualified arbitrator. The Union should also be jointly and severally responsible with the District for monetary damages sustained by Anna Abel as a result of ignoring her contractual rights. The Union should be required to acknowledge and publish a revised seniority list placing Anna Abel in the custodial department with seniority as of her 21st day of employment in June, 1990.

The District violated Section 111.70(3)(a)5, Stats., with respect to conditions of employment when it failed to recognize that Anna Abel has seniority rights to the December, 1992 custodial position. While the District violated the terms of the master contract in not recognizing her seniority rights in the custodial department in 1991, she is precluded from complaining of earlier breaches under SEc. 111.07(14), Stats., which provides for a one year limitation on claims.

Complainant requests damages resulting from the District's failure to recognize her seniority entitlement to the custodial vacancy applied for in December of 1992. Such damages against the District would include immediate placement in the custodial department, back pay, lost benefits, and a declaration of seniority in the custodial department as of June, 1990.

. . .

In her decision, the Examiner accurately set forth as follows the applicable law by which Complainant's duty of fair representation claim would be measured:

. . .

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 represent-ation only when its actions are arbitrary, discrimin-atory or in bad faith. 3/ 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. 4/ The fact that a grievance may be meritorious is not determinative of the unfair repre-sentation claim and a violation of the Union's duty of fair representation occurs only if the Union's decision not to pursue a grievance is arbitrary, discriminatory or in bad faith. 5/

A complainant has the burden to demonstrate, by a clear and satisfactory preponderance of the evidence, each element of its contention. 6/ 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. (footnotes omitted)

. . .

Measuring the conduct of Respondent Northwest United Educators against the foregoing standard, the Examiner concluded that no breach of the duty of fair representation occurred. She held in part:

. . .

By a letter dated April 15, 1993, Manson advised the Complainant that the NUE Board of Directors voted to uphold the decision of the Grievance Committee and stated, inter alia, that "NUE declines to process your grievance to arbitration based on its belief that NUE has met its duty of fair representation to you by thoroughly investigating your grievance and reaching the conclusion, and advising you of that conclusion, that your grievance is virtually unwinnable."

It is not evident that either the decision of the Ladysmith-Hawkins ESP Grievance Committee, or the decision of the NUE Board of Directors, was based upon any factor other than Manson's opinion that the grievance was not winnable in arbitration. As NUE argues, a determination of the likelihood of success in the arbitration of a grievance is well within the range of discretion which a union is granted when it seeks to fairly represent its bargaining unit members. 7/ Given Manson's status as NUE Executive Director and Chief Spokesperson in the contract negotiations between the District and the Ladysmith-Hawkins ESP since the ESP's inception in 1980, it was not an abuse of discretion for NUE representatives to defer to Manson's opinion concerning the merits of the grievance.

Manson's conclusion that the District had not violated the contract was based upon Manson's belief that (1) the District had given the Complainant the consideration which she was contractually entitled to as a Food Service employe and (2) that Complainant's custodial work did not provide the Complainant with any seniority rights within the Custodial Department. Given the focus of Complainant's arguments, Complainant apparently does not take issue with Manson's conclusion

that the District had given the Complainant the consideration which was due to her as a Food Service Department employe. Nor does the record establish that this conclusion was arbitrary, discriminatory or made in bad faith.

. . .

It is not evident that any bargaining unit member has obtained a custodial position by virtue of perform-ing summer custodial work. Moreover, as demonstrated by Manson's letter of June 21, 1990, other bargaining unit members had been advised that the performance of more than twenty days of summer work did not provide rights in the custodial department. By concluding that custodial "summer work" did not provide the Complainant with seniority rights in the custodial department, Manson acted in good faith and not in an arbitrary or discriminatory manner.

In determining whether or not the Union violated its duty of fair representation toward the Complainant, it is neither necessary, nor appropriate, to determine whether or not Manson correctly concluded that Complainant had performed "summer work" in 1990 and 1991. 9/ Rather, the issue to be determined is whether or not Complainant has demonstrated that Manson's conclusion is arbitrary, discriminatory or in bad faith.

Complainant acknowledges that the District hires summer custodians to perform cleaning tasks which are not normally performed during the school year. 10/ Complainant further acknowledges that, when she was a "temporary" employe in 1990 and a "substitute" employe in 1991, she performed tasks normally performed by the summer custodians. 11/

The custodial work relied upon by the Complainant was performed in July and August of 1990 and in May and June of 1991. It is not evident that Whittenberger performed any of his "substitute" custodial work during the summer months. Complainant has not demonstrated that Manson acted in bad faith, or was arbitrary or discriminatory, when he concluded that the Complainant, unlike Whittenberger, had performed custodial "summer work."

It is evident that the Complainant has filed several grievances, as well as complaints with various State and Federal agencies concerning the conduct of the District and NUE. Additionally, the Complainant has complained to the Union about the adequacy of its repre-sentation. The record, however, does not demonstrate that the Union's decision to not appeal Complainant's December, 1992, grievance to arbitration was motivated, in any part, by hostility toward the Complainant.

> On several occasions NUE provided the Complainant with the opportunity to present her views with respect to the merits of her grievance. On several occasions, Manson responded, in great detail, to the claims of the Complainant. NUE's determination that the grievance was not winnable in arbitration was not made in a perfunc-tory manner. Rather, the Examiner is satisfied that NUE and its agent, Manson, made a considered decision by a review of relevant factors. (footnotes omitted)

. . .

DISCUSSION:

On review, Complainant Abel continues to contend that Respondent Northwest United Educators (NUE) incorrectly evaluated her contractual claim to the disputed custodial position. However, as concluded by the Examiner, the question of law raised by her complaint is not whether Respondent NUE correctly evaluated the merits of the contractual claim. Rather, the question is whether Respondent NUE's decision not to pursue Complainant's grievance to arbitration was based on arbitrary or bad faith considerations. Like the Examiner, we conclude it was not. The record establishes that Respondent NUE made a detailed good faith evaluation of Complainant's grievance and met its duty of fair repre-sentation when concluding the grievance was not sufficiently meritorious to take to arbitration.

Because we have affirmed the Examiner as to the duty of fair represent-ation, we also affirm the Examiner's conclusion that it is inappropriate to reach the merits of Complainant contractual claim against Respondent District. We reject Respondent District's claim for attorneys fees because Complainant's position in this litigation does not meet the requisite extraordinary bad faith or frivolous standard. 2/

Given the foregoing, we have affirmed the Examiner's dismissal of the complaint.

Dated at Madison, Wisconsin this 3rd day of June, 1994.

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

2/ See, Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90).