STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THOMAS WOOD, Complainant, vs. KENOSHA UNIFIED SCHOOL DISTRICT and UNION LOCAL 168 DONALD DECKER (PRESIDENT), Respondents.	Case 136 No. 50788 MP-2877 Decision No. 27915-A

Appearances:

Mr. Thomas Wood, 902 38th Street, Kenosha, WI 53140, appearing pro se.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Clifford B. Buelow, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202-6613, appearing on behalf of the Kenosha Unified School District.

Hanson, Gasiorkiewicz & Weber, S.C., Attorneys at Law, by Mr. Robert K. Weber, 514 Wisconsin Avenue, P. O. Box 1875, Racine, WI 53401, appearing on behalf of Union Local 168, Service Employees International Union and Donald Decker (President).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

On December 2, 1993, Complainant Thomas Wood filed a complaint with the Wisconsin Employment Relations Commission alleging that the Kenosha Unified School District and Union Local 168, Service Employees International Union and Donald Decker, its President, had committed prohibited practices in violation of the Municipal Employment Relations Act, respectively, by the District's attempting to withhold $6,453 in benefits effective from July 1, 1992 in violation of the parties' collective bargaining agreement and by the Union's settling his grievance in violation of the duty of fair representation owed to Complainant. On January 18, 1994, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on February 16, 1994, in Kenosha, Wisconsin. After the presentation of the Complainant's case, the Respondents made a Motion to Dismiss the complaint. The parties made oral arguments with respect to said Motion, and after considering the evidence and the arguments of the parties, the Examiner granted the Motion to Dismiss. The hearing was transcribed, and the Examiner received the transcript on March 3, 1994. The Examiner issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Thomas Wood, hereinafter referred to as the Complainant, is an individual whose address is 902 38th Street, Kenosha, Wisconsin 53140.

2. Kenosha Unified School District, hereinafter referred to as the District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its offices are located at 3600 52nd Street, Kenosha, Wisconsin 53144.

3. Union Local 168, Service Employees International Union and Donald Decker, its President, hereinafter referred to as the Union, is the collective bargaining representative of a bargaining unit described as follows:

> Custodial Employes, Mechanics, Maintenance Workers, Truck Drivers, Warehouse Employes, Therapy Aides, Food Service Employes and Head Custodial Engineers.

The Union's offices are located at 7702 16th Avenue, Kenosha, Wisconsin 53143.

4. At all times material herein, the Complainant was employed by the District and was a member of the bargaining unit represented by the Union.

5. The District and the Union were parties to a collective bargaining agreement which by its terms was in effect from July 1, 1989 through June 30, 1992. This agreement contained the following provision:

> 12.03 Any employe whose injury is job related and covered under the Worker's Compensation Act shall receive his or her regular Board check and the benefits of this agreement without loss of sick leave for a period of twelve months from the date of injury, provided that the employe reimburse the Board for the amount received from Worker's Compensation.

6. The District and the Union negotiated a successor agreement to the agreement which expired on June 30, 1992. The parties did not reach a tentative agreement until on or about February 23, 1993, and the tentative agreement was initialed by the Union on March 8, 1993, and the District on March 9, 1993. The agreement was retroactive and covered the period from July 1, 1992 to June 30, 1994. The agreement contained a grievance procedure culminating in final and binding arbitration. The agreement modified Section 12.03 of the prior agreement and states as follows:

> 12.03 Whenever an employee is absent from work as a result of personal injury occurring on the school premises and not due to the employee's negligence, the employee will be paid his/her full salary less weekly indemnity under the Workers' Compensation Act for the period of his/her disability up to thirty (30) work days and no part of such absence will be charged to his/her accumulated sick leave.

7. On February 19, 1992, the Complainant was injured at work and received benefits under Section 12.03 of the 1989-92 contract. After July 1, 1992, the Complainant continued to be on workers' compensation and received benefits under Section 12.03 until the 1992-94 contract was ratified. When the successor contract became effective the District applied Section 12.03 of the 1992-94 contract to the Complainant retroactive to July 1, 1992. Because the grievant had received benefits not provided under the new contract, the District calculated that it had paid the Complainant $5,730.13 from July 1, 1992, which it was entitled to recoup under the 1992-94 contract. By subtracting vacation, sick pay, holiday pay, work days and retroactive pay under the 1992-94 contract, the Complainant owed the District $1,238.29 as well

as $3,338.34 for health insurance from July 1, 1992. The District forgave the $3,338.34 for the health insurance.

8. The Complainant filed a grievance apparently asserting that as his injury occurred under the 1989-92 contract that he was entitled to pay and benefits for a year and that he did not owe the District any monies and should receive monies instead. The grievance was combined with other grievances alleging a violation of Section 12.03 and processed through Steps 1 and 2. At Step 2, it was agreed that the attorneys for the District and Union would get together to try to resolve the grievances. The attorneys met and a settlement of all the grievances was reached. The settlement provided in part as follows:

SETTLEMENT AGREEMENT

> SEIU LOCAL 168 ("Union") and KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 ("District") agree to settle the grievances of Thomas Wood, Paul Wamboldt, Gordon St. Martin, Dave Bruneau, Dennis Goff and Ronald Becker as follows:
>
> 1. The grievances will be withdrawn by the Union with prejudice.
>
> 2. The District will waive the amounts previously claimed due from Messrs. Woods and St. Martin. Woods and St. Martin shall be considered whole and entitled to no other backpay, fringe benefits or any other consideration.

In short, the Union resolved the grievance on the basis that the District would forgive the amounts it sought as overpayment to Complainant by waiving its right to recoup the $1,238.29.

9. The Union is affiliated with the Service Employees International Union whose constitution and bylaws provide in Article XVI, Section 8 as follows:

> Section 8. Subject to the provisions of applicable statutes, every Local Union or member or officer thereof or officer of the International Union against whom charges have been preferred and disciplinary action taken as a result thereof or who claims to be aggrieved as a result of adverse rulings or decision rendered, agrees, as a condition of membership or affiliation and the continuation of membership or affiliation, to exhaust all remedies provided for in the Constitution and Bylaws of the International Union and the Local Union and further agrees not to file or prosecute any action in any court, tribunal or other agency until those remedies have been exhausted.

The Union Local 168 has a constitution and bylaws which also provides in Article VIII, Section 6, as follows:

> **Section 6.** Subject to the provisions of applicable

> statutes, every member or officer of this Local Union against whom charges have been preferred and disciplinary action taken agrees, as a condition of membership or affiliation and the continuation of membership or affiliation, to exhaust all remedies provided for in the Constitution and Bylaws of the International Union and in this Constitution, and further agrees not to file or prosecute any action in any court, tribunal, or other agency until those remedies have been exhausted.

The Complainant did not exhaust the Union's internal grievance procedures.

10. The evidence failed to demonstrate that the Union's handling of the Complainant's grievance was perfunctory; rather the evidence indicates that the Union had a rational basis for its decision to settle Complainant's grievance. The evidence failed to prove that the Union acted in an arbitrary, discriminatory or bad faith manner, and on the contrary, the evidence establishes that it fairly represented the Complainant.

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

CONCLUSIONS OF LAW

1. The Union did not violate its duty of fair representation with respect to the processing, handling and settlement of the Complainant's grievance, and accordingly the Union did not violate Secs. 111.70(3)(b)4 or 1, Stats.

2. The Complainant has failed to exhaust the internal Union appeals procedure because it could have redressed his grievance, and accordingly the Complainant is precluded from maintaining this action by his failure to exhaust said procedures.

3. Inasmuch as the Union did not violate its duty of fair representation to the Complainant, there is no jurisdiction to determine the allegations that the District violation Sec. 111.70(3)(a)5, 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/

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

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time.

(Footnote continued on Page 6.)

IT IS ORDERED that the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 8th day of April, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

1/ (Footnote continued from Page 5.)

> 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DISMISSING COMPLAINT

In his complaint initiating these proceedings, the Complainant alleged that the Union had committed a prohibited practice by violating its duty of fair representation to him, and the District violated the parties' collective bargaining agreement by the Union's and District's settlement of the Complainant's grievance contrary to the terms of the contract. The Union answered the complaint denying it had committed any prohibited practice and that it settled the grievance under the July 1, 1992 contract whereby the District forgave certain amounts owed to the District. The District also answered denying that it committed any prohibited practice and asserting that the complaint failed to state a claim entitling Complainant to relief. At the hearing in this matter, the Respondents moved to dismiss the complaint after the Complainant had presented his case.

District's Arguments

The District contends that the Complainant had to show that he complied with the Union's internal grievance procedure and it is clear that he did not do so and the matter should be dismissed for that reason alone. The District asserts that the Complainant had the burden of proving that the Union violated its duty to fairly represent him. The District maintains that under the law, the Union has a right to be wrong, but it cannot act arbitrarily, capriciously or in bad faith. The District argues that there is no evidence in the record that the Union acted arbitrarily, capriciously or in bad faith or that what it did was wrong. It submits that the Union had to make a judgment call based on what it could accomplish in an arbitration hearing and there is no telling what an arbitrator will do. The District, noting the testimony of the Union's witnesses, pointed out that the parties had a disagreement as to what the contract provided, but they had to live with the document as it was written. The District points out the contract was resolved in mediation rather than in face-to-face negotiations. The District refers to the effective dates that were specified and that there was no specific date other than the start date for revised Section 12.03 of the contract. The District claims that the Union was aggressive in filing some of the grievances and the District thought there was no basis for them but the Union represented the Complainant aggressively and beyond the legal minimum in this area. It maintains that the Union's offer to pay $1,000 was not because the Union felt guilty of anything but was an attempt to help a member going through hard times. The District opines that it is preposterous to assume that the Union acted arbitrarily, capriciously or in bad faith and there is absolutely no basis to conclude the Union failed to adequately represent the Complainant.

The District argues that there was no violation of the contract. It notes that everything was up for negotiation and the parties can agree to concessions and give backs. The District insists that the only exception is that a retiree who elects benefits under the contract would get those but the retiree would no longer be an employe or covered by the contract but as long as you are an employe and a member of the bargaining unit, you are covered by the contract and every part of the contract can be changed. It concludes that even if the Union unfairly represented the Complainant, there is no contract violation. It further submits there was no unfair representation and the complaint must be dismissed.

Union's Position

The Union joined in the District's Motion without further comment.

Complainant's Response

The Complainant, citing Dayton Press, Inc., 71 LA 134 (Barone, 1978), claimed the Union stated he could win his grievance. The Complainant states that when you are negotiating, everything can be opened for bargaining, and when you go retroactive to the date the contract expired, you can start to implement it. The Complainant maintains that if he had been injured on July 2, 1992, he would agree as to how he was treated. The Complainant notes that he was injured under the old contract and his injury continued under the new contract and he asserts that this would fall under a grandfather clause and if you are injured under the old contract, you continue to get benefits under the old contract.

The Complainant believes that the Union settled his grievance to benefit the majority of the grievants and a majority were injured after July 1, 1992, as only two were injured before that date. The Complainant asserts that the District would not have settled the two separately from the others. The Complainant alleges that the Union told him he had a very good grievance, but they were not sure how the others would work out. The Complainant claims he had a vested interest in the 1989-92 contract, and the Union should not have settled his grievance under the 1992-94 contract and the Union settled it in violation of the 1989-92 contract. The Complainant submits that he was injured under the 1989-92 contract and to settle it, the parties had to change the interpretation of the 1989-92 contract and this they could not do without a meeting to re-vote on the language of the contract.

District's Response

The District submits that the Complainant's arguments demonstrate on their face that he has no case against the Union. It alleges that what he is saying is that he was trade bait but that happens all the time and it is part of the give and take of negotiations and, in a legal sense, does not show the failure to fairly represent him. It insists that whether there is any merit to his grievance, everyone who was an employe on July 1, 1992, had his or her wages and fringes up for negotiations, and the Complainant was not an untouchable. The District claims that his fringes were up for negotiations and were changed, i.e. his benefits under Section 12.03 were changed and there is no violation of the

contract and no merit to the grievance. It submits that this question need not be decided unless the Union is shown to have failed to fairly represent him and the record is grossly insufficient for such a finding.

Discussion

In Vaca v. Sipes, 386 U.S. 171, 177, 64 LRRM 2369, 2371 (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, to exercise its discretion with good faith and honesty, and to eschew arbitrary conduct. The union breaches its duty of fair representation only when its actions are arbitrary, discriminatory or in bad faith. 2/ 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. 3/ As long as the Union exercises its discretion in good faith, it is granted broad discretion in the performance of its representative duties. 4/ The mere fact that a grievance may be meritorious is not determinative of the unfair representation 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/ Applying these principles to the instant case, it must be concluded that the Complainant has failed in his burden of establishing that the Union acted in an arbitrary, discriminatory or bad faith manner in settling his grievance. The Complainant's arguments simply relate to the merits of the grievance, but whether he is right or wrong is not the issue but rather the Union's conduct. The Complainant asserts that he was injured under the 1989-92 contract and even though the contract language changed, he was still entitled to 1989-92 benefits under that contract although it expired on June 30, 1992, and the new language applied after July 1, 1992. The Complainant claimed that he was entitled to benefits under a grandfather clause but there was no evidence of a grandfather clause.

2/ Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Coleman v. Outboard Marine Corp., 92 Wis. 2d 565 (1979).

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

4/ West Allis - West Milwaukee School District, Dec. No. 20922-D (Schiavoni, 10/84) aff'd by operation of law, Dec. No. 20922-E (WERC, 10/84); Bloomer Jt. School District, Dec. No. 16228-A (Rothstein, 8/80), aff'd by operation of law, Dec. No. 16228-B (WERC, 8/80).

5/ City of Greenfield, et al., Dec. No. 24776-C (WERC, 2/89); Stanley v. General Foods Corp., 88 LRRM 2862 (5th Cir., 1975).

6/ West Allis - West Milwaukee School District, Dec. No. 20922-D (Schiavoni, 10/84).

The Complainant was paid a retroactive wage under the new contract and it seems dubious that he could claim benefits under both contracts but suffer no reductions when the contract clearly provides for same. If this scenario went before an arbitrator, no one can predict with certainty how the arbitrator would rule. The Union might have prevailed or it might have lost. It settled the grievance such that the risk of losing in arbitration would not result in the Complainant's having to pay the amounts demanded by the District. It is not enough to claim that the Union should have taken the case because it is a good case, it must be shown that the Union acted arbitrarily, discriminatorily or in bad faith. The record fails to prove any of these elements. The Union considered the plain language of the 1992-94 contract and the fact that Section 12.03 was retroactive to July, 1992. 7/ It was felt that the grievant came under the 1992-94 contract language. 8/ It is generally recognized that arbitrators will apply the plain language of the contract. The Union had to make a judgment call, i.e. fight the District on this language and perhaps lose or settle the case whereby the Complainant was relieved of paying some $1,238. The evidence indicates that there were bona fide reasons for the Union's conduct. No evidence was presented that they acted in bad faith or that their decision to resolve the grievance was arbitrary. Reasonable minds can disagree over the merits of the grievance but resolving it where the Complainant got a benefit as opposed to a complete loss is certainly not arbitrary conduct. The evidence establishes that the Union had a rational basis for its decision. The record also failed to demonstrate that the Union had any discriminatory motives or engaged in discriminatory conduct in resolving the grievance. The evidence failed to establish that the Union acted in bad faith, or was arbitrary or discriminatory in settling the Complainant's grievance and consequently, the Union did not breach its duty of fair representation to the Complainant.

It was argued that the Complainant failed to exhaust the internal Union grievance procedures prior to filing the instant complaint. In Clayton v. Auto Workers, 451 U.S. 679, 107 LRRM 2385 (1981), the U.S. Supreme Court held that exhaustion of the internal grievance procedures are not required unless the procedures are capable of reactivating the employe's grievance or of redressing it. It may be true that the grievant could not reactivate his grievance against the District because it would be held untimely; however, as he was only seeking a monetary remedy, had he been successful under the internal Union procedures, he could have recovered the money sought from the Union making him whole and redressing his grievance. Inasmuch as the Complainant failed to exhaust the internal Union grievance procedures, he is barred from proceeding with his complaint.

Having concluded that the Union did not breach its duty of fair representation toward the Complainant, the Examiner has no authority to consider any breach of contract claims against the District. 9/

Therefore, the Motion to Dismiss the complaint has been granted.

7/ Tr. 48-49.

8/ Tr. 24, 49.

9/ Mahnke vs. WERC, 66 Wis.2d 524 (1975) at 532.

Dated at Madison, Wisconsin, this 8th day of April, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner