STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DOUGLAS HAFER, Complainant,

vs.

MILWAUKEE COUNTY and LOCAL 882, MILWAUKEE DISTRICT COUNCIL 48, AFSCME, AFL-CIO, Respondents.

Case 408
No. 52626
MP-3026

Decision No. 28525-B

Appearances:

Castellani, Sheedy & Associates, by **Attorney Michael T. Sheedy**, 829 North Marshall Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainant Douglas Hafer.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Office of the Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of the County.

Podell, Ugent, Haney & Delery, S.C., by **Attorney Carolyn H. Delery**, 611 North Broadway Street, Suite 200, Milwaukee, Wisconsin 53202-5004, appearing on behalf of the Respondent Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 9, 1995, Douglas Hafer, hereafter Complainant, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that Milwaukee County and Local 882, Milwaukee District Council 48, AFSCME, AFL-CIO had committed prohibited practices in violation of the Municipal Employment Relations Act. Hearing was held in Milwaukee, Wisconsin, on December 11, 1997. The hearing was transcribed. The record was closed on March 3, 1998, upon receipt of the transcript and post-hearing written argument.

No. 28525-B

FINDINGS OF FACT

1. Milwaukee County, hereafter County or Employer, is a municipal employer and has its principal offices located at the Milwaukee County Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin 53233.

3. Local 882, Milwaukee District Council 48, AFSCME, AFL-CIO, hereafter Union, is a labor organization and has its principal offices located at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

3. Douglas Hafer, a resident of Milwaukee, Wisconsin, worked for Milwaukee County as a seasonal employe from 1974 until May of 1995, when Hafer voluntarily quit his seasonal employment with the County. During his employment with the County, Hafer was represented for purposes of collective bargaining by Local 882, Milwaukee District Council 48, AFSCME, AFL-CIO. The County has not offered a permanent appointment to Hafer. At all times material hereto, the County and the Union have been parties to a collective bargaining agreement which contains a grievance procedure which culminates in final and binding arbitration. An individual grievant may file and process a grievance through the Third Step of the grievance procedure. After the Third Step disposition of the grievance, the grievance is owned by the Union. The Union, but not the individual grievant, has the right to process a grievance to arbitration. The initial grievance is required to be filed within ninety days of the date of the infraction, or of the date upon which the infraction was known to have occurred. The Union has filed a grievance when requested to do so by the Complainant.

4. Prior to March 19, 1984, Group Grievances 03708, 04127, et al., were filed with the County. These grievances claimed that the County was illegally using Emergency Appointees, i.e., those not on the eligibility list, while Temporary Appointees, i.e., those on the eligibility list but without a regular appointment, were available to work and that the County was terminating Temporary Appointees prior to their securing unemployment compensation rights and replacing the terminated Temporary Appointees with Emergency Appointees. On March 19, 1984, these grievances were settled by the Union and the County pursuant to the following "Agreement":

> Milwaukee County and Milwaukee District Council 48, AFSCME, AFL-CIO (hereinafter referred to as the "Union") enter into the following terms of Agreement:
>
> 1. Temporary Appointments will be made from the existing eligible list in order of civil service exam score;
>
> 2. Upon being called for appointment, the Temporary Appointee will be able to select the job location and assignment from those then available subject to approval of the relevant supervisor whose approval shall not be unreasonably

withheld.

3. Milwaukee County shall not make any Emergency Appointments at any time when employees on the appropriate eligible list are available for Temporary Appointment.

4. In no case shall Emergency Appointees displace Temporary Appointees.

5. In the event the work of a Temporary Appointee is no longer to be performed by anyone, the Temporary Appointee shall bump the least senior Emergency Appointee in the department if any, provided, however that such Temporary Appointee shall maintain his job status.

6. In the Department of Parks, Recreation and Culture, the existing Laborers eligibility list shall be totally depleted by appointing each consenting eligible to a Regular Appointment prior to utilizing any new eligible list.

7. The Union withdraws with prejudice Group Grievances 03798, 04127, et al.

The Laborers' eligibility list referenced in Paragraph Six, SUPRA, is the 1977 eligibility list. The 1977 eligibility list contained more than one hundred names. Hafer, one of the grievants whose grievance was settled by the March 19, 1984 "Agreement," was nineteenth from the bottom on the 1977 eligibility list. In October, 1991, the County and the Union entered into the following Collateral Agreement:

Collateral Agreement between
Milwaukee County and
AFSCME District Council 48 and its
Affiliated Local 882

This constitutes a Collateral Agreement between Milwaukee County and Milwaukee District Council 48 and its affiliated Local 882.

It is not the intent of the Department of Parks, Recreation and Culture to supplant Park Maintenance Workers with seasonal Park Worker III's while Park Maintenance Workers are on layoff status.

Milwaukee County agrees that effective upon execution of this agreement Milwaukee County shall not lay off Park Maintenance Workers for the duration of 1991 and all of 1992. This provision expires at midnight on December 31, 1992.

Within 3 days following the execution of this agreement, Milwaukee County Parks Department will recall those employes who were laid off from the Parks Department on October 4, 1991.

A. The parties agree to the following governing principles:

1. The parties agree that this Collateral constitutes a mutually satisfactory resolve to the parties' dispute regarding the Parks Reorganization.

2. Local 882 and District Council 48 agree to alter their proposal to settle the Parks Reorganization matter by withdrawing the proceedings before the Wisconsin Employment Relations Commission.

3. Immediately upon this agreement going into effect, the Union shall drop all grievances challenging the Parks reorganization and counsel for the respective parties shall immediately petition the Milwaukee County Circuit Court to dissolve the injunction issued by Judge McCormick.

4. Except as otherwise set forth herein, the Union recognizes the subject Parks Department abolishments/creates and reclassifications.

5. The parties stipulate to the bargaining unit status of the new classifications as set forth in the attached stipulations.

B. The changes in titles or reclassifications do not serve to deprive employees of contractual benefit entitlements, practices or policies, including those set forth in collateral agreements, arbitration awards, settlement agreements and practices. Contractual benefits (other than the operation of equipment) which formerly inured to employees in the Parks Department shall inure to the employees to which they were intended. Except as otherwise specifically set forth in this collateral, this collateral supersedes all provisions of the and (sic) practices concerning the operation of equipment by Parks Department employees with regard to the assignment and operation of equipment by Parks Department employees.

1. Seasonal Classifications and Rates*

Park Worker I	$4.60	
Park Worker II	$5.75	
Park Worker III		$6.90
Park Office Assistant I	PR 6	
Seasonal Horticulturist	PR 15P	
Horticulturist II (Seasonal)		PR 18
Golf Starter I		$6.10

Golf Starter II	$6.65
Lifeguard	$5.72-$6.12-$6.52
Asst. Head Lifeguard	$6.99-$7.31

**These rates shall be increased in accordance with the negotiated across-the-board wage increase for 1992.*

C. The parties agree to specific terms as set forth below:

1. Existing E.O. I's and II's who are assigned to the Parks Department shall have their titles changed to that of Park Maintenance Worker II and III respectively, or Forestry Worker II and III respectively. Such individuals shall be red-circled in PR 17A (I's) or 21 (II's) and permitted to, if applicable, advance to the top step of the pay range. These individuals shall, in addition to any transfer rights they may have in their new classification, retain all transfer rights and layoff rights they would have had, had they remained Equipment Operators I or II. In accordance with established practices, red-circled Park Maintenance Workers or Forestry Workers shall have preference for job assignments and overtime assignments on the type of equipment which has historically been rated as E.O. equipment, provided such overtime would not require liquidating accrued time or on an approved leave and scheduled off days.

2. Horticulturist shall operate the following pieces of equipment: pie wagon, step-up, pick-up truck, fork-lift, and bob cat.

3. *(Union is still awaiting County's proposal for progression within Office Assistant I, II and III career ladders.)*

4. The position description for Assistant Head Lifeguard and Lifeguard shall be amended to provide: that work assignments which are incidental to the performance of their duties in and around the assigned pool shall be confined to the location in and around the pool to which the Lifeguard or Assistant Head Lifeguard is assigned.

5. Forestry Workers and Park Maintenance Workers shall receive Forestry Worker/Park Maintenance Worker III pay for <u>all</u> time assigned to operate the type of equipment presently rated for Equipment Operator II.

6. Employees on the layoff/recall list for Laborer who were laid off from the Parks Department shall be placed on the layoff/recall list for Park Maintenance Worker I for three (3) years and one (1) day from date of their layoff from the Laborer position in the Parks.

7. The placement of new equipment which is unique to that already being utilized within the categories of Park Maintenance Worker and Forestry Worker I, II and III, and Park Worker shall be discussed with the Union. If no agreement on the placement of this equipment is achieved between the parties, the Union may take the issues before the permanent umpire for consideration.

8. The 1977 Laborers list shall continue to be used to fill vacancies in permanent positions of Laborer and shall be given priority for Seasonal Park Worker III positions.

9. The Parties will discuss the manner in which seasonal employees will be hired for the 1992 season. However, whatever the procedure, those seasonal workers whose performance was deemed satisfactory and who seek reemployment for the 1992 season will be considered for hire as such employees have been considered for reemployment in the past.

10. Milwaukee County shall deduct the appropriate amount of fairshare or dues deduction which would have been collected for the pay period April 28, 1991 through May 11, 1991 from the pay checks of any employees who were in the Local 882 bargaining unit in the Parks Department (in accordance with the stipulations referenced in A, 5 of this Collateral) during that pay period and who are still employed by Milwaukee County. Such amount shall be deducted from the first payroll following the finalization of this Collateral and shall thereafter be immediately forwarded to the Union.

5. From January 1, 1990 through November 30, 1995, the County did not hire any permanent Laborers or Park Maintenance Workers into the Department of Parks, Recreation & Culture. Individuals hired into the Department of Parks, Recreation & Culture from January 1, 1990 through November 30, 1995, were not hired because they were on the Laborers' 1977 eligibility list, but rather, were hired through normal civil service procedures. In 1993, Grievance No. 32846 was filed with the County claiming that Hafer was improperly terminated from his 1993 seasonal employment. This grievance was processed by the Union and denied by the County at the Second Step in December of 1993 and at the Third Step on January 26, 1994. On March 9, 1994, the Union appealed this grievance to arbitration. On March 8, 1995, Principal Assistant County Corporation Counsel Mary Grimes sent the following to Union Attorney Nola Hitchcock Cross:

Re: Hafer, Doug, Umpire Appeal #1383
Grievance Reference No. 32846

Dear Attorney Cross:

The following represents the non-precedential settlement of the above grievance:

> For the 1995 season, the Parks Department will offer Mr. Hafer a seasonal Park Worker III slot which is currently identified as at least an 800 hour position. It is understood that this slot will not be in the East Region or in Landscape Services.

In May of 1994, Grievance Reference No. 18583 was filed with the County. In this grievance, the Union claimed that, since Hafer was on the 1977 civil service list, Hafer was entitled to be called first in 1994 for the longest hours given to seasonal employes in any district and that by not so calling Hafer, the County had violated Management Rights, Sec. 1.05 of the contract and the 1991 Collateral Agreement. Union Representatives and County Representatives met at the Second Step of the grievance procedure on July 28, 1994, and the County issued its Second Step denial of the grievance on August 3, 1994. In this denial, William Tietjen, a manager in the Parks Department, stated that the issue raised in the grievance was previously addressed in Grievance 32846 and that, consistent with the December 3, 1993 denial of Grievance 32846, the County did not believe that Paragraph 8 entitled Park Worker III incumbents on the 1977 Laborers' eligibility list to be the first individuals hired as Park Worker III or the last to be seasonally terminated. On September 26, 1994, a Third Step meeting on the grievance was scheduled for October 19, 1994. On August 28, 1996, the Union and the County entered into a settlement of Grievance No. 34751, which had been processed to arbitration by the Union. In this settlement, the Union and the County agreed, inter alia, to the following: two named individuals would be offered appointments to the next available positions of Park Maintenance Worker I in order of their hours worked; four named individuals would be interviewed before any other parties are interviewed for consideration for hire; and the 1977 Laborers' eligible list would be abolished effective August 28, 1996.

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

CONCLUSIONS OF LAW

1. Milwaukee County is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

2. Local 882, Milwaukee District Council 48, AFSCME, AFL-CIO is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

3. Complainant's allegation that the County has breached a settlement agreement presents a claim which is a grievance under the collective bargaining agreement which has been negotiated by the County and the Union.

4. Complainant has not proven, by a clear and satisfactory preponderance of the evidence, that Local 882, Milwaukee District Council 48, AFSCME, AFL-CIO, and its agents

and assigns, have not met their obligation to fairly represent the Complainant and, therefore, Local 882, Milwaukee District Council 48, AFSCME, AFL-CIO, has not violated Sec. 111.70(3)(b)1, Stats.

5. Having concluded that Local 882, Milwaukee District Council 48, AFSCME, AFL-CIO, has not violated Sec. 111.70(3)(b)1, Stats., the Examiner does not have jurisdiction to determine the merits of Complainant's allegation that Milwaukee County has violated 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

The complaint against Local 882, Milwaukee District Council 48, AFSCME, AFL-CIO, and Milwaukee County is dismissed in its entirety.

Dated at Madison, Wisconsin, this 29th day of May, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Respondent Union has violated its statutory duty of fair representation in violation of Sec. 111.70(3)(b)1, Stats., and that Milwaukee County has violated a settlement agreement in violation of Sec. 111.70(3)(a)5, Stats. Respondents deny that they have committed the prohibited practices alleged by the Complainant. Respondent County further alleges that the complaint was not timely filed and that the Commission lacks jurisdiction to determine the breach of contract claim against the County.

POSITIONS OF THE PARTIES

Complainant

The Complainant initiated a group grievance which resulted in a March 19, 1984 settlement agreement between the County and the Union. Under the specific terms of this settlement agreement, employes on the 1977 eligibility list, such as the Complainant, were to be given priority in terms of appointment to seasonal and permanent positions. In 1991, the County and Union reaffirmed this settlement in a Collateral Agreement.

For years the County abided by the settlement agreement and hired off the 1977 eligibility list, with the exception of minority hiring. By August 18, 1993, the County affirmed that only a few white males remained on the 1977 list. Believing that the agreement was being ignored and/or violated, Complainant went to the Union, which turned a deaf ear.

In March, 1994, the Complainant contacted the County and was told only one available job was open at Lake Park at 520 hours. Other slots were available, but the Complainant was not informed of this other work. After learning that individuals not on the 1977 list had been hired, Complainant went to his Union and talked to Acting President Butch Skare, who referred the Complainant to the EEOC and several other places. Eventually the Complainant was referred to the WERC, told his Union representative that he had to go against them, and was told well, then you have to go ahead, do it.

Complainant waited patiently for his turn. It was only after he learned that the settlement agreement was being ignored and/or violated that Complainant went to the Union, which turned a deaf ear. The Union did nothing other than to tell him to file in this forum.

The complaint was initiated within the statute of limitations period because this breach of contract is continuing in nature. Arguments such that the 1977 eligibility list was abolished post facto, or that there have been changes in classification, are nothing short of an admission of breach

of contract.

The County has denied the Complainant employment rights guaranteed under the grievance settlement agreement of 1984. Under VACA V. SIPES, the Union has failed to properly represent the Complainant in his quest for his guaranteed employment rights.

Complainant is aggrieved as a result of the Union's failure to represent him and the County's refusal to abide by the settlement agreement. Abolishing the list after the fact does not affect Complainant's rights. Complainant is entitled to be remedied for the Union's and the County's prohibited practices.

Respondent Milwaukee County

The collective bargaining agreement between the County and the Union contains an exclusive dispute resolution mechanism, i.e., a grievance procedure which culminates in final and binding arbitration. Under Wisconsin law, the Complainant cannot proceed with a breach of contract claim against the County, unless he establishes that the Union breached its duty of fair representation in failing to pursue a grievance through the contractual grievance procedure.

Under the contractual grievance procedure, Complainant may file a grievance and process a grievance through at least the first two steps, with or without the Union. As the Complainant's testimony establishes, he was never denied access to the grievance procedure.

Complainant has not indicated that the subject matter of this complaint was ever pursued through the grievance procedure. Complainant has not shown that the Union failed in its responsibility to process a grievance, or even that Complainant asked the Union to act on his behalf. Complainant should not be allowed to pursue his breach of contract claim against the County.

Complainant states that the County's obligation to hire him dates back to 1977 or 1984 and that, in 1992, he knew that others were hired before him. Complainant offered no explanation for waiting more than three years before initiating the instant action. Complainant's complaint is not timely because it was not filed within the time limits set forth in Sec. 111.70(14), Stats., the applicable statute of limitations.

The agreements relied upon by the Complainant all go to putative hiring obligations which the County had to seasonal employes. In May, 1995, Complainant voluntarily left his seasonal employment with the County. From that point on, Complainant was no longer covered by the terms of the labor contract between the County and the Union, or the benefits flowing therefrom. By voluntarily terminating his seasonal employment with the County, he extinguished any obligation Milwaukee County might have had to him.

Complainant has failed to show that he was bypassed for any job he should otherwise have been entitled to. Moreover, any putative rights the Complainant may claim were extinguished by virtue of the settlement agreement of August of 1996.

Complainant's testimony concerning Union representatives Joe Manson and Butch Skare can only be characterized as inadmissible hearsay testimony. Given the County's inability to cross-examine absent witnesses, statements attributed to Manson or Skare cannot be applied adversely to the County.

Other than Complainant's opinion, the record is devoid of any evidence that he had any entitlement to a position other than Laborer. Complainant's opinion on this point is defeated by the evidence of the mutual understandings of the Union and the County and the fact that the other jobs required the filing of applications and testing. The County has not hired a Laborer since at least 1990.

The County has stood by its obligations. The complaint is unfounded and should be dismissed.

Respondent Union

Approximately 176 candidates were listed on the 1977 Laborers' eligibility list. The Complainant scored 75.50 and was placed nineteenth from the bottom. Sometime between 1977 and 1984, seasonal laborers' filed a group grievance involving the illegal use of Emergency Appointees. A settlement agreement on this grievance was signed on March 19, 1984. In October of 1991, the Union and the County entered into a Collateral Agreement to resolve a dispute regarding the Parks Reorganization.

The Complainant relies upon his uncorroborated hearsay testimony to demonstrate that he approached the Union "hundreds of times" and was assured by Union officials that he would receive a regular appointment. The Complainant claims that he filed a number of grievances, but does not recall when the grievances were filed, or the subject matter of the grievances. Complainant claims that he never received copies of these grievances, but did not contact the Union to request that copies of these grievances be produced for hearing.

The record demonstrates that Grievance No. 32846 was filed in 1993 and Grievance No. 18538 was filed in 1994. Each grievance involved timely notice for seasonal employment and was based upon the argument that persons on the 1977 Laborers' eligibility list had priority for seasonal work. The 1993 grievance was processed through the contractual grievance procedure by the Union and settled on March 8, 1995. The 1994 grievance was not scheduled for arbitration because the Complainant terminated his employment with the County and was no longer a Union member.

Complainant's argument that the 1984 settlement agreement entitled him to any job within the County is ludicrous. The agreement applied only to the Parks Department and the Laborers' eligibility list only qualifies an individual to hold the position of Laborer. Moreover, as Complainant's testimony demonstrates, he knew that he was required to apply and test for other

classifications.

Complainant's own exhibit verifies that no individuals were appointed to a Laborers' position since 1990. Nor were there any appointments to Park Workers I, II, or III. It is not evident that individuals not on the 1977 eligibility list were appointed to Laborer positions. There is no evidence that the County has violated any agreement.

The Union's duty to fairly represent its members is only breached when the Union's actions are arbitrary, discriminatory, or taken in bad faith. Complainant has the burden to prove that the Union was arbitrary, discriminatory or acted in bad faith.

No evidence was provided to prove that Complainant's representation by the Union was arbitrary, discriminatory, or in bad faith. The complaint should be dismissed.

DISCUSSION

The Complainant claims that the County breached a settlement agreement in violation of Sec. 111.70(3)(a)5, Stats., by not offering the Complainant a permanent appointment and by not providing the Complainant with preferential hiring for seasonal work. By "preferential hiring," the Complainant means that he is entitled to be called first for seasonal work in the Parks Department and to work the most seasonal hours.

Complainant's allegation that the County has breached a settlement agreement presents a claim which is a grievance under the parties' collective bargaining agreement. The parties' contractual grievance procedure culminates in final and binding arbitration.

The Commission will not assert jurisdiction over Complainant's Sec. 111.70(3)(a)5 claim against the County unless the Complainant first proves that the contractual grievance procedure could not be exhausted because the Union breached its duty of fair representation toward the Complainant by refusing to process a grievance on the breach of contract claim. CITY OF STEVENS POINT, DEC. NO. 28708-B (SHAW, 1/97). To prove a breach of the Union's duty of fair representation, the Complainant must show that the Union's conduct toward him was arbitrary, discriminatory or in bad faith. MAHNKE, 66 WIS.2D AT 531-532, CITING HUMPHREY V. MOORE, 375 U.S. 335, 349 (1964) and MOORE V. SUNBEAM, 459 FED.2D 811, 820 (7TH CIR., 1972). In the absence of a showing of arbitrary, discriminatory, or bad faith conduct, a union is not obligated to carry grievances through all steps of the grievance procedure; the failure of a union to notify a grievant about the disposition of his grievance is an inadequate basis for finding a breach of the duty of fair representation; Complainant has the burden to come forward and demonstrate, by a clear and satisfactory preponderance of the evidence, each element of his contention; and absent such proof, the Commission refuses to draw inferences of perfunctory or bad faith grievance handling. MARINETTE COUNTY, DEC. NO. 19127-C (HOULIHAN, 11/82).

Section 111.07(14), Stats., which is incorporated by reference in Sec. 111.70 prohibited practice 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.

Thus, to prevail upon the claim that the Union breached its duty of fair representation, Complainant must prove that the alleged unlawful conduct occurred within the one-year statute of limitations period.

Complainant argues that the Union breached its duty of fair representation in violation of Sec. 111.70(3)(b)1, Stats., by refusing to file, or by failing to process, grievances on Complainant's claim that the County violated a settlement agreement by not offering the Complainant a permanent appointment and by not providing the Complainant with preferential hiring for seasonal work.

Permanent Employment

According to Complainant, the County first breached the settlement agreement when the County offered permanent appointments to minorities and females who were on the 1977 Laborers' eligibility list, but did not offer permanent appointments to white males who were placed higher on this eligibility list. Complainant, who claims that no females or minorities remained on the 1977 Laborers' eligibility list after August 18, 1993, recalls that he spoke to the Union about this hiring of minorities and females, understood the reasons for this hiring, and did not contest this hiring because, in "hundreds" of conversations with the Union, Complainant had been assured by the Union that, in time, he would receive a permanent position with the County.

With one exception, Complainant could not recall the specifics of any of these "hundreds" of conversations with the Union. The one exception being his testimony that, at the time that the October, 1991 Collateral Agreement was presented to the Union membership for ratification, Union representatives promised that individuals on the 1977 Laborers' eligibility list would receive permanent employment with the County.

Neither Complainant's testimony, nor any other record evidence, demonstrates that, within the one-year statute of limitations period applicable to this complaint, the Union refused to file a grievance on a claim that the County breached the settlement agreement when the County offered permanent appointments to minorities and females who were on the 1977 Laborers' eligibility list. Nor does the record demonstrate that, within the one-year statute of limitations period applicable to this complaint, the Union violated its duty of fair representation in the manner in which it processed such a grievance.

Complainant recalls that he had a conversation with acting Union President Butch Skare in which the Complainant complained about the fact that the County was hiring people who were not on the 1977 Laborers' eligibility list, including younger, white males. Complainant recalls that Skare told him to go to the "EEOC and several other places." While Complainant recalled

that he filed a Complaint with the ERD on August 23, 1994, he did not recall the date of the conversation in which Skare allegedly told the Complainant to go to the "EEOC and several other places."

Complainant does not claim, and the record does not establish, that, at the time of this conversation, the Complainant requested Skare to file a grievance on his complaint, or that the Complainant requested Skare to take any other action on his behalf. Nor is it evident that this conversation with Skare occurred within the applicable statute of limitations period.

According to Complainant, when the EEOC told the Complainant that the EEOC could not help the Complainant, the Complainant approached Skare at the Union's 1994 Christmas party and told Skare that the Complainant would have to go against the Union by filing a prohibited practice claim with the WERC. The Complainant recalls that Skare replied "go ahead." Complainant does not claim, and the record does not establish, that Complainant requested any assistance from the Union at the time of this conversation with Skare.

Complainant claims that, in 1992, the County began hiring individuals into permanent positions who were not on the 1977 Laborers' eligibility list in violation of the settlement agreement; that he filed numerous grievances on this hiring; and that he never heard anything about these grievances. According to Complainant, he did not have copies of these grievances because the Union ignored his requests for copies of these grievances.

Complainant was entitled to subpoena Union documents and witnesses for hearing, but did not do so. Neither Complainant's testimony, nor any other record evidence, demonstrates that, within the one-year statute of limitations period applicable to this complaint, the Union refused to file a grievance on Complainant's claim that the County breached the settlement agreement when the County offered permanent appointments to individuals who were not on the 1977 Laborers' eligibility list and did not offer a permanent appointment to the Complainant. Nor does the record demonstrate that the Union violated its duty of fair representation in the manner in which it processed such a grievance.

In summary, Complainant has not proven that Complainant could not exhaust the contractual grievance procedure with respect to the claim that the County violated a settlement agreement by not offering the Complainant a permanent appointment because the Union breached its duty of fair representation to the Complainant. Accordingly, the Examiner does not have jurisdiction to determine the merits of Complainant's claim that the County violated Sec. 111.70(3)(a)5, Stats., when it failed to offer the Complainant a permanent appointment.

Seasonal Employment

The record fails to demonstrate that, prior to the filing of Grievance No. 32846, the Complainant filed, or requested the Union to file, any grievance on the claim that the Complainant

was entitled to preferential hiring for seasonal employment. Grievance No. 32846 was filed in 1993 and was processed by the Union through the first three steps of the contractual

grievance procedure. On January 26, 1994, the County issued its Third Step denial of Grievance No. 32846 and on March 9, 1994, the Union submitted this grievance to arbitration. On March 8, 1995, the County and the Union settled Grievance No. 32846 on a non-precedential basis by agreeing to offer certain seasonal employment opportunities to Complainant for the 1995 season.

The Complainant acknowledges that, in April of 1995, he received a telephone call from William Tietjen, a manager in the Parks Department, in which Tietjen advised the Complainant that he could begin work in April of 1995. The Complainant denies that he understood that this offer was made pursuant to a grievance settlement. Assuming arguendo, that the Union did fail to notify the Complainant of the disposition of Grievance No. 32846, such a failure would not be sufficient to establish that the Union has violated its duty of fair representation.

No Union witnesses were called to explain the Union's rationale in settling Grievance No. 32846. The terms of the grievance settlement do not demonstrate that the Union engaged in arbitrary, discriminatory, or bad faith conduct. Complainant has failed to demonstrate that the Union violated its duty of fair representation in the manner in which the Union processed Grievance No. 32846.

It is not evident that, following the filing of Grievance No. 32846, the Complainant filed, or requested the Union to file, any grievance on the claim that the Complainant was entitled to preferential hiring for seasonal employment, until Grievance No. 18538 was filed in May of 1994. Grievance No. 18538 was processed by the Union to the Third Step of the contractual grievance procedure. The record fails to establish what, if anything, occurred after the Union had processed Grievance No. 18538 to the Third Step. As stated above, absent proof of arbitrary, discriminatory, or bad faith conduct, the Commission refuses to draw inferences of perfunctory or bad faith grievance handling.

In summary, Complainant has not proven that Complainant could not exhaust the contractual grievance procedure with respect to the claim that the County violated a settlement agreement by not providing Complainant with preferential hiring for seasonal work because the Union breached its duty of fair representation to the Complainant. Accordingly, the Examiner does not have jurisdiction to determine the merits of Complainant's claim that the County violated Sec. 111.70(3)(a)5, Stats., by failing to provide Complainant with preferential hiring for seasonal work.

Grievance Settlement Agreement of August 28, 1998

On August 28, 1998, the County and the Union resolved Grievance No. 34751. This grievance settlement provided employment opportunities to certain individuals. This settlement also stated that "The 1977 Laborer eligible list is abolished." No Union witnesses were called to explain the Union's rationale in entering into this settlement.

Complainant voluntarily quit his seasonal employment with the County in May of 1995. The record fails to demonstrate that the Complainant was named as a grievant in Grievance No. 34751, or that this grievance was filed at a time in which the grievant was employed by the County. Nor is it otherwise evident that the Complainant and the individuals who received employment opportunities under the settlement of August 28, 1996, were similarly situated. The record does not demonstrate that the Union, or any of its decision-makers, bore any hostility toward the Complainant at any time prior to the time that the Union entered into the settlement agreement of August 28, 1998.

The County and the Union are entitled to enter into agreements which modify, or even nullify, previous agreements. The County and the Union are also entitled to enter into agreements which affect individuals and classes of employes differently. The existence of such differences does not render agreements invalid, nor does it demonstrate that the Union has acted in an arbitrary, discriminatory, or bad faith manner.

The terms of the settlement of August 28, 1996 do not establish that the Union has engaged in arbitrary, discriminatory, or bad faith conduct towards the Complainant. Nor does the record otherwise establish that the Union violated its duty of fair representation to the Complainant by entering into the grievance settlement of August 28, 1996.

CONCLUSION

Complainant has not proven, by a clear and satisfactory preponderance of the evidence, that, within the applicable statute of limitations period, the Union violated its duty of fair representation to the Complainant. Absent such proof, the Examiner is without jurisdiction to consider Complainant's Sec. 111.70(3)(a)5 claims against the County. Accordingly, the complaint against the Union and the County has been dismissed.

Dated at Madison, Wisconsin, this 29th day of May, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

CAB/mb
28525-B.WP1