

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**DOUGLAS HAER, Complainant,**

vs.

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

Case 408  
No. 52626  
MP-3026

**Decision No. 28525-C**

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Appearances:

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

**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 Milwaukee 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 Local 882, Milwaukee District Council 48, AFSCME, AFL-CIO.

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

On May 29, 1998, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein she concluded that Respondent Local 882 had not failed to fairly represent Complainant and that she therefore did not have jurisdiction to determine whether Respondent Milwaukee County had violated a collective bargaining agreement. Given her conclusions, she dismissed the complaint.

Complainant 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. The parties thereafter filed written argument in support of and opposition to the petition, the last of which was received July 16, 1998.

28525-C

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

**ORDER**

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 14th day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner

Milwaukee County

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

**THE PLEADINGS**

In his complaint, Complainant Hafer alleges that Respondents entered into a settlement agreement which entitled him to an offer of employment as a Laborer for Milwaukee County and to priority for appointment to seasonal County positions. Complainant contends that he never received the benefit of the Settlement Agreement and that Respondent Local 882 thereby failed to fairly represent him in violation of Sec. 111.70(3)(b)1, Stats., and Respondent Milwaukee County thereby violated Sec. 111.70(3)(a)5, Stats.

Respondents deny that they have committed any prohibited practices.

**The Examiner's Decision**

The Examiner dismissed the complaint.

She concluded that there was no persuasive evidence that Respondent Local 882 had engaged in arbitrary, capricious or bad faith conduct toward Complainant. Therefore, she determined that Complainant had failed to meet his burden of proof as to his Sec. 111.70(3)(b)1, Stats., allegation that Respondent Local 882 had failed to fairly represent him.

Having found no breach of the duty of fair representation, the Examiner concluded that she lacked jurisdiction to consider Complainant's allegation that Respondent County had violated Sec. 111.70(3)(a)5, Stats.

**Positions of the Parties on Review**

Complainant contends the Examiner erred when she concluded that Respondent Local 882 had not breached its duty of fair representation toward him. Complainant argues the record demonstrates Local 882's improper failure to file a grievance on Complainant's behalf to gain compliance with the Settlement Agreement. Complainant further argues that Local 882 instead misled him by recommending he file a complaint with the Equal Employment Opportunity Commission (EEOC) and ultimately advised him to file a complaint with the Wisconsin Employment Relations Commission. Given the foregoing, Complainant asks that the Examiner be reversed.

Respondent Local 882 urges affirmance of the Examiner's decision. It asserts the Examiner properly analyzed the very limited evidence presented by Complainant in support of his case and then applied the evidence to the law in an appropriate fashion.

Respondent County also urges affirmance of the Examiner. It argues that Complainant had the right to file a grievance over the County's alleged failure to comply with the Settlement Agreement and failed to do so.

### **DISCUSSION**

We affirm the Examiner.

Complainant asserts in his May 9, 1995 complaint that 1984 and 1991 Settlement Agreements between Respondent Local 882 and Respondent County gave him rights to permanent and seasonal employment opportunities which he never received.

Complainant does not dispute that the contractual grievance procedure is available to employees who wish to raise issues over compliance with the Settlement Agreements. Indeed the record reflects that in May 1994 Complainant filed a grievance (No. 18583) which raised issues regarding compliance with the 1991 Settlement Agreement. Because of the presumed exclusivity of the contractual procedure for resolution of such issues, the Examiner correctly held that she should not exercise the Commission's jurisdiction under Sec. 111.70(3)(a)5, Stats., to evaluate the merits of the Complainant's Settlement Agreements claim against the Respondent County **unless** Complainant could establish that his failure to use the contractual procedure was caused by Respondent Local 882's failure to fairly represent him. *MANKE V. WERC* 66 Wis.2d 524 (1975).

As correctly argued by Respondents and acknowledged by Complainant, Secs. 111.07(14) and 111.70(4)(a), Stats., create a one-year statute of limitations which is applicable to this proceeding. SEE GENERALLY, STATE OF WISCONSIN DEC. NO. 21890-C (WERC, 2/90).

There is no persuasive evidence that during the one-year period prior to the filing of the May 9, 1995 complaint, Respondent Local 882 failed to fairly represent Complainant as to any rights he believed he had under the Settlement Agreements. In fact, the record establishes that Respondent Local 882 did affirmatively represent Complainant's interests during this one-year period. In March 1995, Respondent Local 882 obtained a settlement for Complainant as to a seasonal employment dispute. During this period, Local 882 processed Complainant's grievance (No. 18583) over compliance with a seasonal job opportunity aspect of the 1991 Settlement Agreement. Any advice from Respondent Local 882 that Complainant file a complaint with the EEOC was no more than a reaction to Complainant's assertions that women and minority employees were faring better than white males under the 1984 and 1991 Settlement Agreements.

Complainant did testify that during this one-year period he repeatedly complained to Respondent Local 882 about the Respondent Local's and Respondent County's failure to provide him with the permanent job opportunity he believed he was entitled to under the 1984 and 1991 Settlement Agreements. However, Complainant never exercised his contractual right to file a grievance raising this issue with the County. As correctly argued by the Respondent County, it was the Complainant's option and responsibility to file such a grievance – not Respondent Local 882's. Contrary to Complainant's argument, Respondent Local 882 did not and indeed could not prevent Complainant from filing such a grievance.

Complainant also in effect argues that he did not file a grievance because Respondent Local 882 told him to file a complaint with the Wisconsin Employment Relations Commission. We do not find any such comment by Local 882 officials to be persuasive evidence that the Respondent Local would not have fairly represented Complainant if he had filed a grievance with the Respondent County. When viewed in the context of the entire record, any such comment reflects no more than the Respondent Local advising him that if he was dissatisfied with the manner in which they had thus far represented Complainant's interests, the Wisconsin Employment Relations Commission was the forum in which such issues could be raised.

Given all of the foregoing, we affirm the Examiner's conclusion that Respondent Local 882 did not violate its duty to fairly represent Complainant. In such circumstances, she correctly concluded that it was not appropriate to examine the merits of Complainant's claim against Respondent County. Thus, we affirm her dismissal of the complaint in its entirety.

Dated at Madison, Wisconsin this 14<sup>th</sup> day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

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James R. Meier, Chairperson

A. Henry Hempe /s/

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A. Henry Hempe, Commissioner

Paul A. Hahn /s/

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Paul A. Hahn, Commissioner