

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GARY L. OLDS,

Complainant,

vs.

LOCAL 309, AFSCME, AFL-CIO, and
CITY OF STEVENS POINT,

Respondents.

Case 99

No. 53890 MP-3147

Decision No. 28708-B

Appearances:

Mr. Gary L. Olds, an individual residing at 2501 Nebel Street, Lot 704, Stevens Point, Wisconsin 54481, on behalf of himself.

Shneidman, Myers, Dowling & Blumenfield, Attorneys at Law, 217 South Hamilton Street, P.O. Box 2155, Madison, Wisconsin 53701-2155, by Mr. Aaron N.

Halstead, on behalf of Local 309, AFSCME, AFL-CIO.

Mr. Louis J. Molepske, City Attorney, 1515 Strong's Avenue, Stevens Point, Wisconsin 54481, on behalf of the City of Stevens Point.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On February 27, 1996, Gary L. Olds, an individual residing in Stevens Point, Wisconsin, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission wherein he alleged that the City of Stevens Point, Wisconsin had violated his rights under a collective bargaining agreement between the City of Stevens Point and Local 309, AFSCME, AFL-CIO, in violation of Sec. 111.70(3)(a)5, Stats., and that thereafter, Local 309, AFSCME, AFL-CIO, failed in its duty to fairly represent him in violation of Sec. 111.70(3)(b)1, Stats. Thereafter, the Commission appointed David E. Shaw, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter.

On April 29, 1996, Local 309, AFSCME, AFL-CIO filed a motion to dismiss the complaint on the basis that the complaint was not sworn to before a person authorized to administer oaths or acknowledgments, contrary to the requirements of ERC 2.01, Wisconsin Administrative Code. On May 6, 1996, Complainant responded objecting to the motion and

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asking to correct the error. On May 6, 1996, the City of Stevens Point joined in Local 309's motion to dismiss and also moved to dismiss the complaint on the basis that it fails to allege a cause of action under either Sec. 111.70(3)(a)5 or 111.70(3)(b)1, Stats. On May 10, 1996, Local 309 responded, joining in the City's motion to dismiss. On May 21, 1996, the Examiner issued orders denying the motions to dismiss the complaint and requiring Complainant to comply with ERC. 12.02(1), Wisconsin Administrative Code. On May 31, 1996, Complainant refiled his complaint signed and sealed by a notary public.

A hearing was held before the Examiner on June 6, 1996 at Stevens Point, Wisconsin. At hearing, the Complainant amended his complaint to add a new allegation. A stenographic transcript was made of the hearing and the post-hearing briefing schedule was completed by July 8, 1996. Having considered the evidence and the arguments of the parties, the Examiner now makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Gary L. Olds, hereinafter the "Complainant", or "Olds", is an individual person residing at 2501 Nebel Street, Lot 704, Stevens Point, Wisconsin. At all times material herein, Olds has been employed as a Loader Operator in the Respondent City's Department of Public Works. On February 27, 1996, Olds filed a complaint of prohibited practices with the Commission against the Respondent City of Stevens Point and the Respondent Stevens Point City Employees Local 309, AFSCME, AFL-CIO, which was not sworn to before a person authorized to administer oaths or acknowledgements. On May 31, 1996, in response to an order issued by the Examiner in this matter, Olds refiled his complaint of prohibited practices which included a signed and attached cover page on which it was indicated that it had been subscribed and sworn to before a notary public on May 30, 1996.

2. Stevens Point City Employees Local 309, AFSCME, AFL-CIO, hereinafter the "Local" or "Local 309", is a labor organization and is affiliated with Wisconsin Council 40, AFSCME, AFL-CIO, hereinafter Council 40, a labor organization having its main offices located at 8033 Excelsior Drive, Suite "B", Madison, Wisconsin. At all times material herein, Stephen Louis has been the President of Local 309 and Tom Jisko, Cliff Bembenek, Todd Euster, Jim Flatoff, Joel Starr, Larry Stanczyk, Ken Rozek and Bruce Peplinski have been stewards for Local 309. For approximately three years and up until January of 1996, Complainant was the Secretary of Local 309. At all times material herein, Jeff Wickland has been the Staff Representative from Council 40 assigned to represent Local 309 in contract administration and negotiations. At all times material herein, Robert Lyons has been the Executive Director of Council 40.

Local 309 represents three separate bargaining units and is the recognized exclusive collective bargaining representative for all regular full-time and regular part-time employees of the Respondent's Department of Public Works and Department of Parks, Recreation and Forestry, except the Director of Public Works, Street Supervisor, Director of Parks, Recreation and Forestry,

Assistant Street Supervisor, Park Supervisor, Recreation Facilities Supervisor, clerical and administrative aides, summer, seasonal and temporary employees.

3. The Respondent City of Stevens Point, hereinafter the City, is a municipal employer and has its main offices located at 1515 Strongs Avenue, Stevens Point, Wisconsin. The City maintains and operates a Department of Public Works and, at all times material herein, Jon Van Alstine has been the Department's Director, Howard Krieski has been the Superintendent of Streets and Bruce Schiefelbein has been the Fleet Maintenance Supervisor. At all times material herein, Marge Molski has been the City's Personnel Manager and Louis Molepske has been the City Attorney.

4. The City and Local 309 are parties to a collective bargaining agreement covering the period of January 1, 1995 through December 31, 1996, which sets forth the wages, hours and conditions of employment of the employees in the bargaining units represented by Local 309. Said Agreement includes the following provisions set forth, in relevant part, below:

SECTION 2 - MANAGEMENT RIGHTS

- A. The City possesses the sole right to operate City government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:
1. To direct all operations of the City;
 2. To establish reasonable work rules and schedules of work;
 3. To hire, promote, transfer, schedule and assign employees;
 4. To suspend, demote, discharge and take other disciplinary action against employees for just cause;
 5. To lay off employees because of lack of work or any other legitimate reasons;
 6. To maintain efficiency of City government operations;
 7. To comply with State and Federal law;

8. To introduce new or improved methods or facilities;
9. To change existing methods or facilities;
10. To determine the kinds and amounts of services to be performed as pertains to City government operation, and the number and kinds of classifications to perform such services;
11. To contract out for goods and services; however, it will be the policy of the City to first consider the impact on the employment security of its employees as the result of any such action and to notify and confer with the Union prior to taking action;
12. To determine the methods and means by which City operations are to be conducted;
13. To take whatever action is necessary to carry out the functions of the City in situations of emergency.

Any unreasonable exercise or application of these management rights by the City shall be appealable by the Union or an employee through the grievance and arbitration procedure.

It is further agreed by the City that the management rights shall not be used for purposes of undermining the Union or discriminating against any of its members, and the Union agrees that this Clause shall not be used to harass the City.

...

SECTION 7 - GRIEVANCE PROCEDURE

A grievance shall mean a dispute concerning the interpretation, application, or violation of this agreement and shall be handled as follows:

- A. Subject Matter. Only one subject matter shall be covered in any one grievance. However, this shall not prohibit one arbitration board from hearing successive grievances so long as each grievance hearing is completed before the next one

begins.

- B. Time Limitations. The time limitations specified in this procedure may be extended by mutual consent of the parties.
- C. 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.
- D. Steps in Procedure.

Step 1. The employee, alone or with a Union steward, a member of the grievance committee or with or without the Union representative shall orally explain his/her grievance to his/her immediate supervisor as soon as possible, but in no event later than fifteen (15) working days after he/she knew or should have known of the cause giving rise to the grievance. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later, except in cases involving immediate danger to the employee's health and safety. The immediate supervisor shall, within ten (10) working days, orally inform the employee and the steward, member of the grievance committee, or Union representatives, where applicable, of his/her decision.

Step 2. If the grievance is not settled at the first step, the grievance shall be reduced to writing and filed with the department head within ten (10) working days. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date of the incident or violation took place, the specific section of the Agreement alleged to have been violated, if any, and the signature of the grievant and the date. The department head shall meet with the employee, steward or grievance committee with or without the Union representative at a mutually agreeable time and render his/her decision in writing within five (5) working days after said meeting.

Step 3. If the grievance is not settled at the second step, it

may be presented to the Personnel Committee in writing, within ten (10) working days after receipt of the written decision of the department head. The meeting to discuss the grievance shall be held at a mutually agreeable time. Following this meeting, the Personnel Committee shall respond within ten (10) working days in writing.

E. Arbitration.

1. Time Limit. If a satisfactory settlement is not reached in Step 3, the Union must notify the Personnel Committee in writing within thirty (30) calendar days that they intend to process the grievance to arbitration.
2. Arbitration Board. Any grievance which cannot be settled through the above procedures may be submitted to an arbitration board comprised of three (3) persons, to be selected. . .

. . .

3. Arbitration Hearing. The Arbitration Board selected or appointed shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the Arbitration Board shall render a written decision to both the City and the Union which shall be final and binding upon both parties.

. . .

5. On Friday, July 28, 1995, the City's Fleet Maintenance Supervisor, Bruce Schiefelbein was in charge of Streets while Superintendent of Streets Howard Krieski was on vacation. The Loader Operator who normally worked on streets, and is senior to Olds, was off that day and Olds complained to Schiefelbein that there was no Loader Operator assigned to streets. There was Loader work to be done on both the streets and in the pit, although the streets work was to be for only 2-3 hours. Olds had been working in the pit that week. The Loader work on the streets turned out to be longer than 2-3 hours and was performed by Ron Berna, a Loader Operator who is less senior than Olds. The following week, Olds, accompanied by a Local 309 Steward,

verbally complained to Krieski about a less senior Loader Operator having been assigned to Streets instead of him. Krieski responded with the following memorandum:

TO: Tom Jisko, Union Steward
Gary Olds, Union Secretary

FROM: Howard Krieski

DATE: August 1, 1995

On July 28, 1995 Gary Olds was assigned to work in the pit instead of the streets during my absence. City understands that Gary is 2nd on streets and this work assignment was made in error during my absence.

At the time he issued the above response to Olds, Krieski had not discussed the matter with Schiefelbein nor seen Schiefelbein's notes regarding what had occurred that day.

Olds filed a written grievance dated August 11, 1995 which read, in relevant part, as follows:

Statement of Grievance:

(Circumstances of Facts): (Briefly, what happened) Howie Krieski assigned Ron Berna to streets instead of Gary Olds. Gary Olds more senior employee.

(The contention-what did management do wrong?) (Article or Section of contract which was violated if any) Section 5, Paragraph A.

Settled in negotiations talks by John, Bruce & Marge.

(The Request for Settlement or corrective action desired):

Never, ever, ever, ever, ever to happen again.

On or about September 7, 1995, Berna was again assigned to perform Loader work on the streets, rather than Olds, and Olds verbally complained to Krieski in that regard.

Krieski responded as follows to Olds' verbal grievance:

TO: Gary Olds, Steve Louis, Jeff Wickland

FROM: Howie Krieski

Date: September 7, 1995

Gary Olds

Grievance - Step 1 - Assignment of Ron Berna to streets instead of Gary Olds.

No violation of contract. Section 2 - Management Rights (A) (3)

6. On August 11, 1995, Olds left work at approximately 11:30 a.m. because of a headache. As Olds was leaving, Krieski asked him if he had informed the timekeeper that he was going home sick and Olds responded that he had not, but that he had marked it on his time card. The timekeeper that day was Local 309 President Steve Louis. At the end of that day, Krieski asked Louis for the time cards and in checking them, Krieski noted that Olds' time card showed eight hours worked and did not indicate Olds had taken sick leave. The following Monday, August 14, 1995, Krieski informed Olds that he was being given an oral warning for not telling the timekeeper and not marking on his time card that he left work early due to illness. Olds told Krieski that he had a bad headache that day, and just forgot. Krieski issued Olds the following warning:

CUMULATIVE WARNING SLIP

Employee's Name Gary Olds Dept. Street Dept.

Date of Violation 8/11/95 Time 11:30 a.m.

Place City Garage

Description of Violation Went home sick at 11:30 a.m. Marked 8 hrs. on time card.

Supervisor's remarks: Asked Gary if he had told the timekeeper he was going home sick. He said no he marked it on time card. I checked his card and it showed 8 hrs.

Has Employee Form of	<u>When Warned and By Whom</u>			
Been Warned	<u>Warning</u>	<u>1st Warning</u>	<u>2nd Warning</u>	<u>3rd Warning</u>
Previously?	Oral	X		

Written

 Yes X No

Previous Discipline None

Corrective Action to be Taken Talked to Gary and told him from now on to tell the timekeeper when leaving and mark it on his card.

Further violations may result in additional discipline, up to and including discharge.

Howie Krieski	8/14/95
Supervisor's Signature	Date

APPROVED BY	Date
Supervisor's Supervisor	

Employee's remarks: Gary says he had a bad headach (sic) and must have forgot. I asked him if he wanted to read the report and he said there is no sense in talking to me and walked out.

Employee's Signature:	Date
Gary refused to sign.	

A copy of all written warnings will be placed in the employee's personnel file and a copy sent to the union steward.

That same day, Olds subsequently went to Krieski's office and asked to see another employe's time cards who had been late for work in the past. Krieski told Olds that the employe had come to Krieski about it and that they had worked it out so that the employe could make up the time. Krieski placed a note in Olds' personnel file memorializing their discussion and did not inform Olds of the note, but did subsequently give a copy of the note to one of the Local's stewards. That steward showed the note to Olds and the two of them then went to Krieski to discuss the matter. Olds also complained that Krieski was telling everybody about his having not filled out his time card properly on August 11th and about the note he had placed in Olds' personnel file on August 14th.

By the following memorandum of September 7, 1995, Krieski responded to Olds' complaint that Krieski had breached his duty of confidentiality:

TO: Gary Olds, Steve Louis, Jeff Wickland

FROM: Howie Krieski

Date: September 7, 1995

Gary Olds
Grievance - Step 1 - Confidentially

The Union President, Steve Louis (who was also acting as timekeeper that day) and the two union stewards were told by me that you were receiving an "oral written discipline" for not marking your timecard appropriately.

The Cumulative Warning Slip the City uses in disciplinary action calls for the Union to be notified.

No breach of confidentiality. No contract violation.

Also by the following memorandum of September 7, 1995, Krieski responded to Olds' grievance regarding the August 14th note he had placed in Olds' personnel file:

TO: Gary Olds, Steve Louis, Jeff Wickland

FROM: Howie Krieski

Date: September 7, 1995

Gary Olds
Grievance - Step 1 - Time Cards

Time cards are a part of the payroll records, and as such are open record. Resolve Grievance by removing letter from Gary's file.

7. On September 5, 1995, Olds broke a taillight on the Loader he was operating and was told by Krieski to fill out an accident report. Olds filled out the report and turned it in and also filled out a post-trip work slip indicating the taillight needed to be repaired. Krieski then learned from Schiefelbein that an accident report was not required in the circumstances where only City property was involved, but was taken care of by reporting the matter on the post-trip slip. Krieski then told Schiefelbein to throw away Olds' accident report. Olds subsequently went in with a steward to complain to Krieski about his being harassed by management with regard to his being assigned to the pit instead of the streets, his being disciplined for filling out his time card incorrectly on August 11th and for being required to fill out an accident report for breaking a taillight on the Loader on September 5th. Krieski apologized to Olds for having him fill out an accident report, but

Olds refused to accept the apology because Krieski did not agree that it violated the collective bargaining agreement.

8. By the following memorandum of September 13, 1995, Krieski responded to Olds' complaint that he was required to fill out an accident report on September 5th with regard to breaking a taillight on the Loader:

TO: Gary Olds, Steve Louis, Jeff Wickland

FROM: Howie Krieski

Date: September 13, 1995

Gary Olds
Grievance - Step 1 - Accident Reports.

No violation of contract.

9. By the following memorandum of October 2, 1995, Krieski responded to Olds' grievance regarding being harassed by management:

TO: Gary Olds, Steve Louis, Jeff Wickland

FROM: Howie Krieski

Date: October 2, 1995

Gary Olds
Grievance - Step 1 - Claim of Harassment

No violation of contract.

10. Olds was not satisfied with Krieski's September 13 and October 2 responses to his grievance regarding harassment and on October 9, 1995, filed a written grievance which read, in relevant part, as follows:

Statement of Grievance:

(Circumstances of Facts): (Briefly, what happened) I broke a taillight on Loader #831. I was told by maintenance supervisor I have to make out an accident report. I made one out as requested.

(The contention-what did management do wrong?) (Article or Section of contract which was violated if any) I went in for Step 1 grievance on harassment. I explained the harassment charges. They sent a letter back saying that there was no violation of contract on accident report. Management said they were in the wrong in the first place. I went into the meeting on harassment charges and they sent a letter back on the accident report.

(The Request for Settlement or corrective action desired):

Written apology and placed in my file and management file that I was written up for no aparent (sic) reason.

Signed Gary Olds

11. By the following memorandum of October 31, 1995, Krieski responded at Step 2 of the contractual grievance procedure to Olds' grievance regarding the less senior Loader/Operator, Berna, being assigned to "streets" instead of Olds:

TO: Gary Olds, Steve Louis, Jeff Wickland

FROM: Howie Krieski

Date: October 31, 1995

Gary Olds Grievance

Step 2 - Assignment of Ron Berna to streets instead of Gary Olds.

No violation of contract. Section 2 - Management Rights (A)(3).

By the following memorandum of October 31, 1995, Krieski also responded at Step 2 to Olds' grievance regarding harassment as to being disciplined for incorrectly filling out his time card on August 11, 1995:

TO: Gary Olds, Steve Louis, Jeff Wickland

FROM: Howie Krieski

Date: October 31, 1995

Gary Olds Grievance

Step 2 - Harassment - Time Card

No violation of contract.

By the following memorandum of October 31, 1995, Krieski responded at Step 2 to Olds'

grievance regarding harassment as to being required to fill out an accident report on September 5, 1995:

TO: Gary Olds, Steve Louis, Jeff Wickland

FROM: Howie Krieski

Date: October 31, 1995

Gary Olds Grievance

Step 2 - Harassment - Accident Report

No violation of contract. Management asked employee to fill out accident report. Unaware that form used had been changed. Management apologized for requesting the form be filled out.

12. Olds was not satisfied with Krieski's October 31, 1995 responses to his grievances and filed a written grievance on November 9, 1995, which read, in relevant part, as follows:

Statement of Grievance:

(Circumstances of Facts): (Briefly, what happened) Management has been harassing me.

(The contention-what did management do wrong?) (Article or Section of contract which was violated if any) Making a mistake on timecard and getting a oral and written discipline. When other employe came in late or leave early and no action is taken against them. I have to make out state accident reports, but no other employe has to for such a minor accident. Management threw away the report without my knowledge and then said there is no violation of contract. There are numerous other harassment situations that have occurred, but I don't have enough room on this sheet.

(The Request for Settlement or corrective action desired):

Written apology and placed in my file and management files so to be treated like a human being.

Signed Gary Olds

13. When a grievance has been filed by a member of one of the bargaining units represented by Local 309 and has not been resolved in the steps of the grievance procedure, it is

reviewed and considered by the Local's Stewards Committee for purposes of recommending whether the Local should take the grievance to arbitration. The Stewards Committee consists of the stewards from the three bargaining units represented by Local 309 and its President. The Stewards Committee's recommendation then goes to the Local's Executive Board for review. The Executive Board consists of seven members, including the Local's president, and is responsible for conducting the Local's business between membership meetings and for reviewing the decisions of the Stewards Committee and making recommendations to the membership. After reviewing the Stewards Committee's recommendations on whether to process a grievance to arbitration, the Executive Board makes its own recommendation which is then placed before the membership for a vote. There are approximately 117 members in the Local and in order to take a vote, at least ten members must be present.

14. On or about October 15, 1995, the Local's Stewards Committee met for the purpose of considering Olds' request that his pending grievances be taken to final and binding arbitration. Present at the meeting was Louis and the stewards from the bargaining units represented by Local, including stewards from departments and bargaining units other than the one in which Olds works. Olds was not asked to attend that meeting, however, the stewards who represented Olds in the grievances were present and provided information that they had concerning the grievances. At the meeting, the Stewards Committee reviewed Olds' grievances and decided to recommend that the grievances not be taken to arbitration. With regard to Olds' Loader grievance, the Stewards Committee based its decision on Olds' having still been assigned to operate a Loader, his having not lost any pay or hours, his having been working in the pit all that week, their understanding that the street on which the work was done had to be finished that day (a Friday), and because Berna was experienced in working with the hot mix crew on preparing the street for seal coat, whereas Olds was not. Based upon those considerations, the Stewards Committee concluded that management was justified in assigning Berna, rather than Olds, to the streets work and recommended that Olds' grievance in that regard not be appealed to arbitration.

With regard to Olds' grievance regarding his having been given an oral warning for not marking his time card appropriately on August 11, 1995, the Stewards Committee's understanding was that Olds admitted he wrote eight hours as worked on his time card for that day and the Committee considered an oral warning to be insignificant, as it would not lead to more serious discipline unless the employee repeated the same mistake over and over, and they felt it was unlikely that Olds would repeat his mistake. The Committee recommended his time card grievance not be appealed to arbitration.

With regard to Olds' grievance regarding being harassed by having to fill out an accident report when he broke a taillight on the Loader, the Stewards Committee felt that Olds had already received the apology he sought from Krieski, and recommended the grievance not be taken to arbitration.

The Stewards Committee's recommendations with regards to Olds' grievances were

subsequently considered by the Local's Executive Board. The Executive Board concurred with the Stewards Committee's recommendations not to pursue Olds' grievances further.

15. By the following memorandum of November 20, 1995, to Louis, Olds responded to the recommendations of the Local's Stewards Committee and Executive Board regarding his grievances:

To: President of Local 309

I am asking that the 309 Union ask Management to take an extension on my three grievance because Local 309 voted to reject my grievances on October 15th 1995 at a steward meeting that I did not get asked to attend. I didn't get to explain my grievances and the committee decided to reject them, so I would like to meet with the Ex-Board of Local 309 for the first step of this protest as soon as possible, so I can take my case to Wisconsin Council 40 Ex-Board. I would like to know your decision on having a Ex-Board meeting so I can plan my calendar and have my paper work ready. I would like at least 3 days notice not at the last minute.

As you will see at the bottom of this page who I will be mailing this letter to Mr. Bob Lyons and Jeff Wickland.

cc:

Bob Lyons
Jeff Wickland
Steve Louis
Tom Jisko

16. At approximately 6:30 a.m. on the morning of December 5, 1995, Louis verbally notified Olds that the Local's Executive Board would meet at 7:00 p.m. on December 7th. Olds asked Louis to put this in writing and Louis gave Olds the following handwritten memorandum later that same morning:

Gary, 12-5-95 8:55 a.m.

Your request for an Executive Board meeting, has been granted.

The meeting will be held at the Northside Bar on Thursday, Dec. 7th at 7:00 p.m.

Your request for a 3 day notice however was not possible. You were informed of the meeting at 6:30 a.m. on Tuesday, Dec. 5th, This was verbally done by me.

You, at that time requested my response in writing, and this also fulfills your request.

Pres Local 309
Stephen J. Louis /s/

The Local's Executive Board met the evening of December 7, 1995, at which time Olds presented additional information regarding his grievances that he had not provided previously. The Executive Board considered Olds' grievances in light of the new information, but did not alter its recommendation that they not be taken to arbitration. Olds was not officially notified of the Executive Board's decision.

On December 21, 1995, at a meeting of the Local's membership, with approximately 25 to 30 members present, the membership voted to drop Olds' grievances. Notices of said meeting had been posted in the same place and manner as in the past. Olds was not present at that meeting.

17. On December 27, 1995, Olds sent Louis, Wickland and Council 40 Executive Director Robert Lyons the following memorandum:

To: President Local 309 Steve Louis, Jeff Wickland, Council 40
Ex-Board, Bob Lyons

From: Gary Olds

Date: December 27, 1995

On 11-20-95 I sent Steve Louis and Bob Lyons a letter on my 1st Step Protest. The Ex-Board of Local 309 has had one meeting regarding these grievances. The Grievances were ok to go on and nothing has been done since that time. I am now filing Step 2 of the Protest to Wisconsin Council 40 Ex-Board. I hope that Local 309 has kept the extension going on my 3 Grievance till Council 40 Ex-Board hears my case. I hope that Local 309 follows threw on this extension. I have retained a Attorney on this matter. This letter will be sent along with the original Protest.

Dues Paying Member

Gary Olds

18. By the following letter of December 28, 1995, Louis notified the City of the decision of the Local's membership to drop Olds' grievances:

December 28, 1995

Marge Molski, Personnel Manager
City of Stevens Point
1515 Strong's Avenue
Stevens Point, WI 54481

Dear Marge:

On December 21, 1995, the membership of Local 309 directed me to contact you about its decision to drop three (3) grievances. The grievances involve Gary Olds and are dated August 11, 1995 (assignment), October 9, 1995 (harassment-accident report), and November 9, 1995 (harassment-time card). The Union's decision to drop these grievances is done without prejudice or precedence.

Sincerely,

Stephen J. Louis /s/
Stephen J. Louis
President, Local 309

cc: Gary Olds, Secretary, Local 309
Kevin Ruehl, Secretary-elect, Local 309

19. By the following memorandum of December 28, 1995, Olds requested that Council 40's Executive Board review his protest of the Local's actions with regard to his grievances:

To: Wisconsin Council 40

From: Gary Olds

Date: December 28, 1995

I would like the Ex-Board of the Committee that handles Protest and Grievances to go over my Protest which is against Local

309. I (Gary Olds) feel that Local 309 has been using misconduct on my Grievances against Management and misrepresenting AFSCME members. My Grievances are in good faith. Management admitted to being wrong on paper, but Union Officers decided to be friends with the Boss. The Union has been harassing me just like Management has been doing. I would like Council 40 to go over my case and get this matter solved. I would also like the harassment as a dues paying union member from the President and other Union members to stop.

C/C Council 40
Steve Louis
Ex-Board 309
John O'Dell
Kenny Larsen
Jeff Wickland
Ann Arndt

Dues Paying Member
Gary Olds

20. By the following letter of January 8, 1996, Lyons responded to Olds' request of December 28, 1995 that Council 40's Executive Board review his protest against the Local:

January 8, 1996

Mr. Gary Olds, Secretary
Local 309, AFSCME, AFL-CIO
2501 Nebel Street, Lot 704
Stevens Point, WI 54481

RE: Your Letters of December 27 and 28, 1995

Dear Brother Olds,

This will serve as a follow-up to your December 27 and 28, 1995 letters regarding the disposition of three (3) grievances that you have filed against the city of Stevens Point, and our January 3, 1996 phone conversation concerning this matter.

In your December 27 letter, you state that you are filing "Step 2 of

the Protest" with the Council 40 Executive Board. Your December 28 letter to Council 40 asks the Executive Board to "go over my Protest which is against Local 309". As I noted in our telephone conversation, the Council 40 Executive Board does not review Local Union decisions regarding the disposition of grievances. As I further noted in our phone conversation, the Policy and Procedure Committee of the Council Executive Board does serve as the Council Trial Body in cases where the decision of a Local Union Trial Body is appealed to the Council level, pursuant to the Judicial Procedure set forth in the International Union Constitution. It is my understanding, however, that no charges have been filed at the Local Union level in this matter, and, therefore, there is no Local Union Trial Body decision to appeal.

I sincerely hope that you and the Local 309 Executive Board are able to come to a mutually satisfactory agreement regarding the disposition of your grievances. Absent such an agreement, I have attached a copy of Article X, Judicial Procedure, of the International Union Constitution for your reference should you choose to file formal charges in this matter. I am also herewith forwarding copies of the Judicial Procedure to the President, Vice-President, and Treasurer of Local 309 for their information. Please note, however, that unless formal charges are filed, a trial is held at the Local Union level, and the decision of the Local Union Trial Body is properly appealed, the Council 40 Executive Board does not have a role to play in your dispute with Local 309.

I trust this has been responsive to the points you raised in your recent letters. Please feel free to contact me, however, if you have any additional questions in this regard.

In Solidarity,

Bob /s/
ROBERT W. LYONS
Executive Director

RWL/mmb

Attachments

cc: (with attachments)
Stephen Louis, President, Local 309
Joel Starr, Vice-President, Local 309
John O'Dell, Treasurer, Local 309
Council 40 Executive Board Members
Bob Chybowski, Associate Director
Jeff Wickland, Staff Representative

21. Olds presented no evidence that he has at any time filed charges at the Local level against any of the Local's members or officers with regard to their handling of his grievances.

22. On or about February 13, 1996, Olds asked Schiefelbein for information regarding mileage for going to drug and alcohol testing. Schiefelbein placed the information in an envelope and wrote Olds' name on the envelope and pinned it on management's bulletin board. When Olds came to work the evening of February 14, 1996, he found the envelope Schiefelbein had pinned on the board with the word "asshole" written in black ink under his name. Management had previously posted notices on or near the bulletin board which, in bold-faced type, stated as follows:

ATTENTION

**IT HAS BEEN BROUGHT TO
MY ATTENTION THAT
SOMEONE MAY BE
TAMPERING WITH CITY
EQUIPMENT. IF THAT IS THE
CASE AND YOU ARE
CAUGHT, STRICT
DISCIPLINARY ACTION WILL
BE TAKEN**

...

**ALL PERSONNEL
IT HAS BEEN BROUGHT TO
MY ATTENTION THAT THE
USE OF VERBAL AND
WRITTEN PROFANITY HAS**

**INCREASED. AS CITY
EMPLOYEES THIS
PRACTICE NEEDS TO BE
CURTAILED.**

Thanks. Howie.

. . .

REMINDER

**ANYONE CAUGHT
DEFACING OR
REMOVING ANYTHING
FROM THIS BULLETIN
BOARD WILL FACE
DISCIPLINARY
ACTION.**

Olds requested to have a meeting with Krieski and Schiefelbein the next morning, and a meeting was held at approximately 9:10 a.m. on February 15, 1996 in Krieski's office with Krieski, Schiefelbein, Olds and Kenneth Rozek, a Local 309 Steward, present. Olds asked who had placed the envelope with his name on it on the bulletin board. When Schiefelbein acknowledged that he had, Olds accused Schiefelbein of calling him a name. Olds insisted that the City find out who had written "asshole" on the envelope and punish that person. Olds held management responsible since it was the City's bulletin board and Schiefelbein had placed the envelope on the board.

Krieski made copies of all of the time cards for February 14th and took them to Lieutenant Eggleston, the head of detectives in the City's Police Department, to compare with the handwriting on the envelope.

On February 15th, 1996, Olds also filed a grievance regarding the envelope with his name and "asshole" written on it, which grievance stated, in relevant part, as follows:

Statement of Grievance:

(Circumstances of Facts): (Briefly, what happened) I came into

work the night of Feb 14 and a envelope addressed to Gary Olds Asshole that Bruce Schiefelbein put up.

(The contention-what did management do wrong?) (Article or Section of contract which was violated if any) Putting a envelope on there city bulletin board with my name & asshole on it.

(The Request for Settlement or corrective action desired): Give me name if Bruce didn't do it who did.

Signed Gary Olds

Also on February 15, 1996, Krieski sent Louis the following letter notifying him of the action the City was taking regarding the matter of the "profanity" written on the envelope:

February 15, 1996

Steve Louis
Union President Local 309

SUBJECT: Profanity written on envelope addressed to Gary Olds

Dear Mr. Louis,

This letter is to inform you of the preliminary action that is being taken regarding the profanity written below Gary Olds name on the envelope after it was posted on the City bulletin board by Bruce Schiefelbein on February 14, 1996.

After being apprized of the situation on Thursday, February 15, 1996 at approximately 7:15 A.M. by Gary Olds and Ken Rozek, I informed Jon VanAlstine. Jon VanAlstine and I then met with an Officer at the Stevens Point Police Department on Thursday, February 15, 1996 at 8:30 A.M. This matter is now under investigation by the Police Department.

Sincerely,

Howie Krieski /s/
Howie Krieski
Superintendent of Streets

cc: Gary Olds
Bruce Peplinski

Ken Rozek
Jon VanAlstine/Director of Public Works

23. Lieutenant Eggleston spent approximately forty-five minutes comparing the writing on the copies of the time cards with the writing ("asshole") on the envelope addressed to Olds. From that review, Eggleston concluded there were similarities between the handwriting on the envelope and the handwriting of five individuals whose time cards he had compared with the writing on the envelope. Eggleston also concluded that because the writing sample of one word was inadequate for comparison purposes and the area where the bulletin board was located was unsecured and accessible to the public, he could not be certain who had written the word on the envelope and, therefore, he was not able or willing to make a judgement as to who had written it. Eggleston did not take any fingerprints from the envelope and it was his understanding that he was only being asked for his opinion and that he was not conducting a criminal investigation.

24. On February 26, 1996, Krieski responded in writing to Olds' grievance regarding the derogatory remark written on the envelope addressed to him, stating that there was "No violation of contract". Olds returned the response to Krieski with the notation "No Step 1". Olds, along with Louis and Stewards Ken Rozek and Bruce Peplinski, met with Krieski and Schiefelbein in Krieski's office to discuss the matter. Olds asked what was being done to find the guilty party and indicated that he was not satisfied and that he still held Schiefelbein accountable for writing the derogatory remark on the envelope.

25. On March 4, 1996, Local Stewards Rozek and Peplinski talked to City Attorney Louis Molepske and the City's Personnel Manager, Marge Molski, about obtaining the names of the individuals Lieutenant Eggleston had felt had similarities in their handwriting with that writing on the envelope addressed to Olds. They were told that the names could not be released because Eggleston was not an expert and could not guarantee that the guilty party is one of those individuals.

On March 6, 1996, Schiefelbein sent a memorandum to Molski complaining about Olds' accusing him of calling Olds a name and asking that action be taken against Olds if he did not discontinue his accusations.

26. On March 12, 1996, Olds filed his written grievance regarding the remark on the envelope. On that same date, Krieski responded in writing at Step 2 as follows:

To: Gary Olds

From: Howard Krieski

Date: March 11, 1996

Grievance - Profanity written on envelope - Step 2

Step 1 answer was given to grievant on February 26, 1996. Grievant had 10 working days to reduce the grievance to writing and file with Department Head. Step 2 was received by Department Head March 12, 1996.

Grievance Step 2 is untimely and there is no violation of contract.

On March 25, 1996, Krieski issued the same written response at Step 2, but added an explanation that Molski had typed the wrong date on the March 12th response and that Olds' Step 2 grievance was due on March 11th, but was not received until March 12th and was untimely.

27. On March 21, 1996, a meeting of the Local's membership was held. During said meeting the membership voted on Olds' grievance regarding the derogatory remark written on the envelope and voted to drop the grievance on the basis that it did not involve a grievable issue. The Local advised Molski of its decision by the following memorandum of March 29, 1996:

LOCAL UNION 309 MEMO

TO: Marge Molski

FROM: Kevin Ruehl

DATE: March 29, 1996

SUBJECT: Grievance: profanity on envelope dated 2/15/96

During the union meeting held on March 21, 1996, the union made the following decisions regarding the above mentioned grievance:

-The union disagrees with the City on the time lines issue.

-The union body has also directed me to inform you that they decided this was not a grievable issue.

-The union: Local 309 has decided to drop this grievance without prejudice or precedence.

Kevin Ruehl /s/

Ken Rozek /s/

cc: Howie Krieski
Gary Olds
Ken Rozek

The Local took no further action on Olds' grievance regarding that matter.

28. At some time in 1995 a dispute developed between Olds and the Local's other officers which to some extent involved Olds' refusal to turn over tapes of the Local's meetings Olds had made as its Secretary and the Local's failure to reimburse Olds for the cost of those tapes. The dispute resulted in the Local's filing charges against Olds with AFSCME International and asking that Olds be disciplined by the International.

29. The Local represented Olds in his grievances at all steps of the grievance procedure that precede arbitration. The grievance procedure in the Collective Bargaining Agreement between Local 309 and the City was not exhausted with respect to Olds' grievances in that they were not processed to arbitration. With regard to the Local's decisions not to take Olds' grievances to arbitration, those decisions were made in a fashion consistent with the Local's usual procedures. The decisions of the Local's Stewards Committee and its Executive Board to recommend that Olds' grievances not be taken to arbitration were based upon due consideration of the information those bodies had available to them at the time, including the additional information Olds provided on December 7, 1995, their views as to what was required, or permitted or covered under the Collective Bargaining Agreement between the Local and the City, as pertained to the individual grievances, the City's responses to Olds' complaints contained in his grievances and the remedies he sought. The Local's decision not to proceed to arbitration on Olds' grievances were not arbitrary, were made in good faith and the personal animosity that may exist between Olds and some of the Local's officers, did not play a part in those decisions. Olds was advised by Council 40 as to the procedures he was required to follow in order to appeal the Local's decisions not to proceed to arbitration on his grievances and Olds failed to follow those procedures.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The complaint filed by Gary L. Olds on May 31, 1996, in response to the Examiner's Order of May 21, 1996, adequately comports with the requirements of ERC 12.02(1) of the Wisconsin Administrative Code.

2. Respondent Local 309, AFSCME, AFL-CIO, its officers and agents, did not violate their duty to fairly represent Gary L. Olds with respect to the grievances set forth in the Findings of Fact, and, therefore, did not violate Sec. 111.70(3)(b)1, of the Municipal Employment Relations

Act.

3. Complainant having failed to establish that Respondent Local 309 violated its duty to fairly represent him in his grievances, it would be inappropriate to address the violation of contract claims against the Respondent City of Stevens Point.

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

ORDER 1/

The instant complaint of Gary L. Olds alleging prohibited practices by Respondents Local 309, AFSCME, AFL-CIO and the City of Stevens Point, Wisconsin is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 24th day of January, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

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- 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. 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).

LOCAL 309, AFSCME, AFL-CIO
CITY OF STEVENS POINT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant filed a complaint with the Commission alleging that Respondents Local 309, AFSCME, AFL-CIO and the City of Stevens Point had committed prohibited practices in violation of the Municipal Employment Relations Act. Local 309 subsequently moved to dismiss the complaint on the basis that the original was not signed and sworn to before a person authorized to administer oaths or acknowledgements as required by ERC 2.01, Wis. Adm. Code. The City moved to dismiss the complaint on the basis that it failed to allege a cause of action under either Sec. 111.70(3)(a)5, Stats. or 111.70(3)(b)1, Stats. The Respondents joined in each other's motion and Complainant opposed both motions. On May 21, 1996, the Examiner issued an order denying the motions to dismiss the complaint and requiring Complainant to comply with the requirements of ERC. 12.02(1) Wis. Adm. Code. 2/ On May 31, 1996, Complainant refiled his complaint using the Commission's form as the cover page, which he signed before a notary public, as indicated by the notary's signed statement and seal. The cover page was attached to the page providing the Complainant's statements in response to the questions on the Commission's form, as well as the supporting allegations and documents filed with the complaint.

At hearing on June 6, 1996, the City renewed the motion to dismiss the complaint for lack of verification. Also at hearing, Complainant amended his complaint to add a new allegation against Respondents.

POSITIONS OF THE PARTIES

Complainant

The Examiner has taken the liberty of summarizing the Complainant's arguments stated in his post-hearing brief and putting them in the context of the allegations in his complaint so that they may be more easily understood.

With regard to his loader assignment grievance, Olds has alleged that when he grieved the July 28th, 1995 assignment of Berna to Streets, rather than himself, as the more senior Loader Operator, the City responded that he was right and that he should have been assigned that work. When it happened again on September 7, and he grieved it, Krieski responded that there was no

2/ ERC 2.01 Wis. Adm. Code pertains to complaints filed under the Wisconsin Employment Peace Act and is substantively identical to ERC 12.02(1) Wis. Adm. Code pertaining to complaints filed under the Municipal Employment Relations Act in this regard.

violation of contract and the Local has refused to proceed on his grievance even though it is valid. Olds notes that at the hearing the City questioned the date on the grievance, i.e., whether it is "8/11/95" or is "9/11/95". Olds asserts that even if he did make a mistake as to the date, the City admittedly made an error as to the date of its response to his grievance regarding the derogatory remark written on the envelope addressed to him and the Local did not even question that error. Regardless of the date on the grievance, it is clear that the City's response was at least 38 days late. Olds also asserts that the City keeps changing his job. Olds claims to have posted for a Loader Operator position, but now the City claims that the job is that of a "Loader/Lead Person".

With regard to his grievance regarding harassment, Olds asserts that the grievance was concerning a number of incidents that he felt constituted harassment and that the City inappropriately broke the grievance down into separate issues and responded as though there were separate grievances on the different incidents. With respect to his being required to fill out an accident report, Olds asserts that the policy for years has been that under those circumstances, employees were not required to fill out an accident report, but instead filled out a work slip. Now the City claims it has a policy that employees file accident reports for any accidents, however, it did not submit any evidence in that regard, and management has not informed employees of such a change in policy. Olds asserts that the Local should have stood behind him on his grievance because the City has not in fact changed its policy. Further, the accident report incident should not have been singled out of his harassment grievance, but should have been considered along with the discipline he received for filling out an inaccurate time slip. In that latter regard, Olds has alleged that other employees who came in late or made errors on their time cards were permitted to make up the time or correct their time cards, but were not disciplined as he was. Further, when he went to Krieski to obtain information regarding how other employees had been treated, Krieski put a note in his personnel file referencing the request. Krieski also showed that note to others, as well as informed other employees of the discipline. Olds alleged that all of management's actions in this regard were part of his harassment grievance and should not have been separated out and responded to individually.

With regard to the derogatory remark written on the envelope addressed to him, Olds asserts that the notices were posted on the City's bulletin board threatening discipline for anyone caught defacing or removing items from the bulletin board long before the incident in question took place. On February 14, 1996, Schiefelbein placed the envelope on the bulletin board with his name and the word "asshole" written on it. Olds contends that Schiefelbein had to have placed the letter on the board on February 14th because Olds was working from 11:00 p.m. to 7:00 a.m. at the time, so the letter had to be there when he finished work at 7:00 a.m. on February 15th. If the letter had been placed on the board before 3:00 p.m., all of the employees and Krieski should have seen the envelope on the board with just his name on it, but the City produced no witnesses in that respect. Schiefelbein testified he placed the envelope on the bulletin board after 3:00 p.m., and there is no evidence to the contrary. While anyone has access to the building during the day, after 3:00 p.m. the building is locked. Thus, one of two things occurred; Schiefelbein put up the envelope, with the remark on it, after 3:00 p.m. or the City has a security problem that should be investigated. Olds

also asserts that, contrary to the City's claim that the matter was under investigation, the police officer testified that there had not been an investigation and there was not going to be an investigation. Olds also asserts that Schiefelbein's letter complaining about Olds' allegations that he wrote the word on the envelope was inappropriate, and that if Schiefelbein had a problem with his conduct, he should have grieved Olds' allegation. The letter is just another example of Schiefelbein's harassment against Olds.

In closing, Olds notes that the stewards involved in his grievances did not appear at the hearing and asserts that the Local intentionally did not invite them in order to avoid testimony that would have been detrimental to its case. Olds also asserts that, contrary to Louis' testimony, that Louis did go to the International to have him dismissed from his employment, and also complained to the International about Olds' having filed this action with the Commission. Olds also disputes O'Dell's testimony that he (Olds) stated at a meeting of the Central Labor Council that he filed this complaint in order to cause the Local to spend more money. Olds asserts that O'Dell, as the Local's Treasurer, failed to reimburse him for the tapes he purchased to record the Local's meetings for the prior three years. Olds also takes issue with the City's closing argument at hearing wherein the City's counsel made a statement to the effect that Olds' mentality is reflected in his statement that the Union should fight harder for its members whether they are right or wrong. Olds asserts that comment refers to his lack of education and is insulting and amounts to another example of harassment. Finally, with regard to the request of the Local and the City for attorney's fees, Olds asks that those requests be denied, since he does not have that kind of money and he is already paying union dues and per capita fees to the Local which are going towards paying for its attorney's fees.

Respondent Local

The Local asserts that it was difficult to deduce from the complaint and the documents accompanying the complaint what it was that Olds was complaining about, other than it involved a work assignment, an oral warning he received for failing to properly complete his time card and the disposition of the grievance he filed in October of 1995 regarding an accident report he was required to complete. The Local asserts that the hearing did nothing to enlighten it as to what prohibited practices it was alleged to have committed, but that it was clear from the hearing that the complaint was filed without any basis in fact or law, was frivolous, and was instituted for the sole purpose of harassing the Local by forcing it to expend resources in defending against this complaint.

With regard to the work assignment grievance, the Local asserts that the evidence indicated that on either August 11 or September 11, 1995, Olds filed a grievance in which he complained that Krieski had assigned a less senior employee to work on the Loader on the "streets" while Olds had been assigned to the "pit". The grievance indicated that a similar incident had occurred previously and that a resolution had been reached between management and the union, however, Olds offered no testimony to show what that resolution had been. Olds' testimony showed that at the time in

question, he held the position of Loader Operator or Lead Person/Loader Operator and on the day complained of was assigned to work on the Loader and that he suffered no loss of pay as a result of the assignment. Louis testified that the Local's Steward Committee and Executive Board recommended against pursuing the Loader assignment grievance because Olds had been assigned to the Loader on the day in question and had suffered no loss of pay. There was no testimony offered in rebuttal on that point.

With regard to the timecard grievance, the Local asserts that the evidence indicates that Olds left work on August 11, 1995 telling Krieski that he was sick and wanted to leave, whereupon Krieski asked Olds whether he had advised the timekeeper that he was leaving. Olds responded that he had written it on his timecard. Krieski later discovered, upon a routine review of the timecards, that Olds had recorded eight hours of work for that day, rather than four. The Local asserts that since Olds made his statement to Krieski within seconds of having completed his timecard, there was a fair inference that he had "not been candid" with Krieski. Olds was given an oral warning for that incident; which he grieved. The Local voted not to pursue the grievance on the bases that there was no violation of the contract shown, it considered the discipline given to be minor and it did not believe Olds would repeat the misbehavior. Olds failed to demonstrate that those stated reasons for not pursuing the grievance were false or inappropriate.

The Local asserts that the most ridiculous of Olds' grievances, and the one that most indicates why attorney's fees and costs ought to be awarded against him, concerns the accident report he was required to complete. Having broken a taillight on the Loader on September 5, 1995, Olds was asked by Krieski to complete a two-page "Automobile Accident or Loss Report". Olds did so and then filed a grievance on October 9, 1995. In that grievance, Olds indicated that he sought as relief, "written apology and placed in my file and management's (sic) file. That I was written up for no apparent reason." The grievance was denied on the basis of "no violation of contract" and subsequently, upon learning that the City had changed its policy regarding the form to be completed in that situation, Krieski apologized for requiring Olds to fill out the form, however, he indicated that he still did not consider it to be a violation of the contract. The Local saw no reason to take the grievance to arbitration since Olds had received the relief he sought, and he had not been disciplined in connection with that incident.

The Local asserts that its Stewards Committee met on October 15, 1995, and considered Olds' grievances and voted to recommend that they not be pursued to arbitration for the reasons stated above. That recommendation was accepted by the Local's Executive Board and subsequently endorsed by a vote of the membership. Olds requested that the decision be reconsidered and that request was granted. The Executive Board met on December 7, 1995 at which time Olds offered additional information regarding his grievances. The Executive Board reconsidered the grievances and voted not to change its recommendation to pursue the grievances. The membership of the Local voted at the December 21, 1995 meeting not to pursue the grievances to arbitration.

The Local cites the testimony of O'Dell as explaining Olds' real motive for bringing his

complaint against the Local, i.e., he wanted to impose the economic burden upon the Local of having to pay an attorney to defend itself against his claims. O'Dell's testimony was based on his having been present at the February 14, 1996 meeting of the Central Labor Council at which Olds had made comments while "off the record" that he had filed the instant charges against the Local which he knew were frivolous, but that he wanted the Union to have to pay its lawyers to travel to Stevens Point to represent him in this matter. O'Dell's testimony was un rebutted. Further, on cross-examination Olds prefaced one of his questions by saying "Now, on the night that I made this statement. . ." thereby reflecting he did not dispute having made the statement. Further, Olds offered no evidence of a motive for O'Dell to lie.

The Local asserts that assuming that Olds is alleging a breach of the duty of fair representation under Section 111.70(3)(b)1, Stats., there are no facts to support the claim. The Local cites Gray v. Marinette County, 200 Wis. 2d 426, (Ct. of App., 1996) as controlling law in this case. In Gray, the circuit court had dismissed the plaintiff's breach of the duty of fair representation claim against the local union on summary judgement. Affirming, the Court of Appeals held:

"We conclude that, as a matter of law, the material facts concerning Gray's grievance do not constitute facts that meet the standard articulated in Mahnke. Specifically, the facts do not indicate that the Union's conduct toward Gray was arbitrary, discriminatory, or in bad faith." At 200 Wis. 2d 446.

Olds has similarly failed to meet his burden of proof. The Local's president explained clearly the factors that were discussed before the Local reached its decisions not to pursue the grievances. Olds offered absolutely no testimony to demonstrate that the Local had any motive other than as explained by Louis. Thus, the complaint should be dismissed.

The Local also requests that it be awarded attorney's fees and other costs it has incurred in defending against Olds' charges. It asserts that the Commission has held that attorney's fees and costs should be awarded where a party's position is asserted and/or continued "in bad faith, or based on legal arguments which are insubstantial and without justification." Citing, Madison Metropolitan School District, Dec. No. 14038-B (WERC, 4/77) and Madison Teachers Inc., Dec. No. 16471-A (WERC, 12/78). The Local alleged in its answer to the amended complaint that Olds commenced and continued this proceeding in bad faith and solely for the purpose of harassment and vexation and it now asserts that a lack of any evidence to support Olds' claims confirms the propriety of its request for attorney's fees and costs. Regardless of whether Olds was represented by legal counsel, he had a duty to ascertain the relevant legal standard he must meet and he had a corresponding duty to determine what facts would be sufficient to satisfy that standard. The Local asserts that it is apparent from the testimony that Olds either failed to make those basic inquiries, or did so and then proceeded to disregard what he learned. Therefore, this is a proper case in which to impose the costs of litigation on a party and the Local requests that the Examiner do so.

Respondent City

The City asserts that Olds has failed to provide any evidence that the City has violated Section 111.70(3)(a)5, Stats., and requests that the complaint against the City be dismissed.

With regard to the Loader assignment grievance, Olds claimed that he should have been placed on the "streets" on July 28, 1995 instead of continuing to work in the pit. Although a grievance was filed, the matter was settled to everyone's satisfaction, including Olds'. Schiefelbein's uncontroverted testimony indicates that Olds was asked if he wanted to work in the pit or work on the hot mix for the two to three hours on July 28th and that Olds indicated he wished to continue in the pit. Krieski testified he wrote to Olds indicating that it was an error not to have assigned him to the "streets", however, at the time Krieski was not aware that Schiefelbein had already discussed the matter with Olds, and that there had been agreement that Olds would continue in the pit. That testimony is uncontroverted. The Local's President, Louis, testified that a determination was made that the grievance should not be appealed, and the matter was therefore dropped. There is no testimony in the record to show that there was a conspiracy between the Local and the City to deprive Olds of any rights he may have had under law or the bargaining agreement.

The complaint also alleges that on September 7, 1995, a less senior employe was again assigned to "streets" instead of Olds. Krieski testified that on that day, due to time limitations, he assigned Berna on the hot mixing instead of Olds. Berna had six years of experience on that job and knowledge of the operation, while Olds did not. The City asserts that Krieski had the right under Section 2, Management Rights, of the Agreement between the Local and the City, because of the time limitations, to assign Berna to the operation for the limited period of one day. It is uncontroverted that the City denied the second step grievance on the basis of its management rights. No further action was taken by either the City or the Local and the matter was dropped. Again, there is no evidence of a conspiracy or other arrangement between the City and the Local to violate Olds' rights.

The City asserts that with regard to Olds' grievance regarding the accident report, the undisputed testimony reflects that in the past the Street Department had a policy of always requiring that accident reports be completed for any type of accident. Unbeknownst to Krieski, Schiefelbein changed that policy by allowing minor damage to City vehicles to be reported on the employee's pre- or post-trip slips. Krieski testified that he was not aware of the policy change and requested that Olds complete the accident form. Krieski also testified that upon being informed of the change by Schiefelbein, he verbally apologized to Olds in the presence of Schiefelbein and Olds' union representative, Tom Jisko, and further advised Olds that he did not need to fill out the report. Olds indicated that he would not accept Krieski's apology.

With regard to Olds' grievance regarding being disciplined for incorrectly filling out his time slip, the City asserts that on the day in question Olds told Krieski that he was going home sick, and Krieski asked him if he had told the timekeeper. Olds answered to the effect that he had not,

but that he had marked his sick time on his time card. In going through the time cards, Krieski subsequently noticed that Olds had indicated on his time card that he had worked the full eight-hour day that day instead of noting sick leave. In accord with the Collective Bargaining Agreement, Krieski notified the Local that Olds would be receiving an oral warning for not marking his time card correctly. The City asserts that management categorically denied Olds' allegation that there were other employees who had done similar things, and had not been disciplined for it. Olds was unable to produce any actual examples similar to his own, and the testimony indicated that other employees who had incorrectly marked their time cards were given warning slips and also docked in pay.

The City notes that Olds was permitted to orally amend his complaint at hearing to add the allegation regarding the derogatory remark, "asshole", placed on the letter addressed to him. Olds was unable at hearing to verify who had written the remark. The City notes that it had placed notices on the bulletin board to the effect that employees would be punished for defacing materials or for otherwise making disparaging remarks. The officer from the City's Police Department, who looked into the matter for the City, indicated the Department was unable to reach any positive conclusions concerning the matter because the bulletin board was located in an area that is accessible to anyone, including the general public. Schiefelbein testified that contrary to Olds' allegations, he did not place the remark on the envelope, and had no knowledge as to who did so.

In conclusion, the City asserts that Olds presented no evidence to indicate there was a violation of Section 111.70(3)(a)5, Stats., nor a violation of Section 111.70(3)(b)1, Stats. Olds' own testimony corroborates that of the City's and Local's witnesses as it relates to the facts. The City also asserts that Olds' mentality in this matter is reflected by his statement that the Union should fight harder for its members, regardless of whether they are right or wrong. The City also cites the testimony of O'Dell that Olds was aware that there was no substantial case against either the Local or the City and that Olds simply wished to pursue the matter in order to cause the Local the expense. Further, Olds testified on cross-examination that his real complaint was against his union, and not against the City. The City concludes that given the absence of any evidence which, when viewed in the most favorable light to the Complainant, would substantiate his complaint, the complaint should be dismissed and that due to the frivolous nature of the claims and the abuse of the system, costs should be awarded in the form of attorney's fees to the City.

DISCUSSION

The Complainant, Olds, has essentially alleged that the Respondent City violated his rights under the Collective Bargaining Agreement between the City and the Respondent Local in several instances and that the Respondent Local thereafter refused to process his grievances to arbitration in violation of its duty to fairly represent him.

The applicable law in this case is set forth in the Wisconsin Supreme Court's decision in

Mahnke v. WERC. 3/ Relying on the U.S. Supreme Court's decision in Vaca v. Sipes, 4/ the Wisconsin Court held that: (1) Where the contract grievance procedure has not been exhausted, in order for the complaining employee to bring suit against the employer for a breach of contract claim the union must be showed to have breached its duty of fair representation in refusing to process the grievance; (2) such a breach of the duty of fair representation "occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith;" (3) "a union has considerable latitude in deciding whether to pursue a grievance through arbitration," however, in exercising its discretion "a union must, in good faith and in a nonarbitrary manner, make decisions as to particular grievances." 5/

Here it has been alleged and admitted that the contractual grievance procedure was not exhausted. Therefore, to proceed against the City with his contract violation claims Olds must first prove that Local 309 breached its duty of fair representation in the manner it processed his grievances and/or by refusing to appeal the grievances to arbitration. To do so, Olds must show by a clear and satisfactory preponderance of the evidence that the Local's conduct toward him was arbitrary, discriminatory or in bad faith.

Olds' complaint, as amended at hearing, alleges that Local 309 violated its duty to fairly represent him by refusing to process four of his grievances to arbitration: (1) Loader assignment grievance; (2) oral warning/timecard grievance; (3) accident report grievance; and (4) derogatory remark grievance. Olds objected to the City's separately addressing his complaints against management and responding to them in the fashion set forth above, as he considered his complaints as being instances of his being harassed by management. According to Olds, it was the "harassment" he was grieving and he felt management was not properly responding to his complaint in that regard and that the Local was improperly permitting management to do so. Olds asserts that the incident of the derogatory remark being written on the envelope addressed to him is yet another example of the harassment.

It is noted that Olds filed a separate grievance that charged a violation of contract for assigning Berna, rather than him, to "Streets", (8/11/95). Although the City responded separately to Olds' complaints regarding being disciplined for improperly filling out his time card, as well as what he felt was a breach of confidentiality in that situation, and his being asked to fill out an accident report, the City's October 31st responses acknowledged that Olds had alleged they were instances of harassment. There was nothing for the Local to really object to as far as the City's manner of responding. Responding to the alleged incidents separately made practical sense from the standpoint of discussing the specifics of each incident, and whether management had acted

3/ 66 Wis. 2d 524 (1975).

4/ 386 U.S. 171, 190 (1967).

5/ 66 Wis. 28 at 531-32.

improperly in each cited situation. While Olds may have disagreed with that approach, there is no evidence that the separate responses somehow impeded the processing of his complaints and grievances or otherwise worked to his detriment. The fact that the Local did not object to that approach certainly does not rise to the level of being arbitrary or discriminatory, nor does it demonstrate bad faith on its part.

The record also indicates that Olds was accompanied by one or more stewards whenever he met with management to discuss his complaints or to present his grievances. Olds testified that one of the stewards showed him the letter Krieski placed in his personnel file regarding his request to see other employees' timecards, and that the steward accompanied him to discuss it with Krieski. As a result of that meeting, Krieski removed the letter. Similarly, with regard to Olds' grievance regarding the derogatory remark written on the envelope in February of 1996, a steward, Rozek, accompanied Olds to the meeting with Schiefelbein and Krieski on February 15th, the morning after Olds discovered the envelope. On March 9, 1996, two stewards, Rozek and Peplinski, met with the City's Attorney and the City's Personnel Manager to request, albeit unsuccessfully, the names of the individuals who had been identified as having handwriting similar to that found on the envelope. Thus, there has been no showing that Olds was denied representation during the processing of his grievances.

With regard to the Local's decisions not to take Olds' grievances to arbitration, it is within a union's role as the exclusive collective bargaining representative to assess the evidence and make a good faith determination as to whether to process a grievance to arbitration and a union is given considerable latitude in making that decision. Mahnke, 66 Wis. 2d at 531-532. Further, the fact that a grievance has merit is not determinative of whether a violation has occurred. It is only if the union's decision not to arbitrate the grievance is arbitrary, discriminatory or made in bad faith, that the union will be found to have violated its duty of fair representation. 6/ Relying on the U.S. Supreme Court's decision in Vaca, supra, the Wisconsin Supreme Court in Mahnke pointed out a union's responsibility in making a decision on whether to arbitrate a grievance:

Vaca also requires the union to make decisions as to the merits of each grievance. It is submitted that such decision should take into account at least the monetary value of his claim, the effect of the breach on the employee and the likelihood of success in arbitration. Absent a good faith determination, a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation.

6/ Mahnke, 66 Wis. 2d at 531-532, citing Humphrey v. Moore, 375 U.S. 335, 349 (1964) and Moore v. Sunbeam Corp., 459 Fed. 2d 811, 820 (7th Cir., 1972). Also see City of Greenfield and District Council 48, AFSCME, Dec. No. 24476-C (WERC, 1989).

This is not to suggest that every grievance must go to arbitration, but at least that the union must in good faith weigh the relevant factors before making such determination.

66 Wis. 2d at 534.

The Court required that the union's exercise of discretion be put on the record in sufficient detail to enable the Commission and reviewing courts to determine whether the union had considered the relevant factors in reaching its decision. Mahnke, 66 Wis. 2d at 535.

The evidence in the record indicates that the Local's normal procedure for deciding whether a grievance will be processed to arbitration is to first have its Stewards Committee consider the matter and make a recommendation to the Local's Executive Board, which in turn considers the matter and makes a recommendation to the Local's membership, which then votes on the Executive Board's recommendation. The uncontroverted testimony of the Local's President, Louis, was that those procedures were followed with regard to the grievances Olds has placed in the record in this case. Louis also specifically testified as to the factors that the Stewards Committee considered in deciding to recommend against taking Olds' grievances to arbitration. With regard to Olds' grievance that a less senior Loader operator was assigned to "streets" work, Louis testified that the Stewards Committee considered the fact that Olds had not lost any pay or hours, that Olds was assigned to operate a Loader and that management was justified in assigning the less senior employee to the streets work as he possessed experience and skills, which Olds did not possess, that allowed him to help the "hot mix crew" that day and which were necessary to ensure that the work was completed on time. With regard to Olds' grievance that he was being harassed by having to fill out an accident report for breaking a taillight on the Loader, Louis testified that the Stewards Committee felt that Olds had already received the remedy he had requested, i.e., a written apology from management. As to Olds' grievance that he was being harassed by management by being disciplined for incorrectly filling out his time card, Louis testified that the steward who handled the grievance told the Committee that Olds admitted he had written down eight hours worked on his time card for that day, and that the Committee felt the oral warning Olds received was justified and was not very significant and that it was unlikely Olds would improperly fill out his time card again. It is also noted that while Olds alleged he was treated differently than others who had incorrectly filled out their time cards, Olds testified on cross-examination that he did not bring any such examples to the Local.

It is also significant that when Olds asked to meet with the Local's Executive Board for the purpose of explaining his grievances after he learned it was being recommended that they be dropped, he was given that opportunity by Louis and the Executive Board. Olds met with the Executive Board on December 7, 1995 and explained why he felt the Local should take his grievances to arbitration and presented information which he had not previously shared with the stewards involved. Louis testified that the Executive Board agreed to reconsider its recommendations in light of the information Olds presented and that, after having done so, it decided not to change its recommendations. While Louis admitted he did not inform Olds of that

decision, that is not sufficient by itself, to find a violation.

With regard to Olds' grievance regarding the derogatory remark on his envelope, the evidence indicates that the Local's decision to drop the grievance was based on the view of its members that the grievance did not involve a grievable matter. It is not clear from Olds' grievance, nor from the facts alleged and the facts in the record, how Olds felt the labor agreement was violated in that incident.

Based upon the evidence in the record, it is concluded that Olds' grievances/complaints were processed in a routine manner by the Local, that he was represented by the Local stewards at the various steps in the grievance procedure and was not, in any manner, denied representation by the Local other than its decision not to process the grievances to arbitration. From the record evidence, it is further concluded that the Local's decisions not to process the grievances to arbitration were made in accord with the Local's procedures, were based upon an assessment of the facts as were known, the merits of the grievances, the remedies requested, and the actions taken by management in response, and that the decisions were within the limits of its discretion. Therefore, Olds has not shown by a clear and satisfactory preponderance of the evidence that the Local's decisions were arbitrary, discriminatory, or made in bad faith. Therefore, the prohibited practices alleged against the Local have been dismissed.

As stated previously, where, as here, the contractual grievance procedure has not been exhausted, an individual employee may not bring suit against the employer for a breach of contract claim unless it has first been established that the union violated its duty to fairly represent the employee in refusing to process the employee's grievance. Mahnke, 66 Wis. 2d at 532. As it has been concluded that the Local did not violate its duty to fairly represent Olds with regard to these grievances, the breach of contract claims against the City are not addressed and are dismissed.

Costs and Attorney's Fees

Both the Local and the City have requested that Olds be required to pay their costs and attorneys fees on the basis that the instant complaint was frivolous and that Olds knew or should have known that he could not prove his claims. The Examiner would agree that the case the Complainant presented can at best be described as incomplete. Part of that may be attributed to his not being an attorney and his lack of experience in presenting a case, e.g., it appears he was relying upon the Local to have all of its officers and stewards present so that he could question them. The witnesses that testified in addition to Olds shared an inability to remember exact dates, and it was with some difficulty that their testimony as to when events occurred was matched to the documentary evidence so that the chronological order of events could be determined. The Examiner is loathe to conclude that Olds knew from the start that he did not have a case when it may be more likely that he did not know what he needed to prove his case or how to go about doing it. While the Examiner does not consider a prohibited practice complaint hearing before the Commission to be an appropriate forum for every gripe or complaint an individual may have

against an employer or union, he also does not consider it appropriate to hold an individual to the same standard as an attorney with regard to assessing the merits of one's case.

Both the Local and the City also cite the testimony of O'Dell, the Local's former treasurer and treasurer of the Central Labor Council, that he heard Olds tell the members present at a meeting of the Central Labor Council in February of 1996 that he was filing this complaint against the Local, even though he knew the charges were frivolous, so the Local would have to pay its lawyers to represent it in this matter. The Local also asserts that Olds left O'Dell's testimony unrebutted and acquiesced in O'Dell's testimony by the manner in which he prefaced a question to O'Dell on cross-examination. The transcript of the hearing is as follows as to Olds' questions and O'Dell's answers with regard to that meeting:

BY MR. OLDS:

Q. Mr. O'Dell, that was in February, right, you said, I made that comment?

A. That's correct.

Q. What else was said then about this suing deal or whatever your statement?

A. I don't remember. I mean, you were there. You can tell me.

Q. Did you give out -- you are the treasurer -- the treasurer of the Central Labor Council?

A. That is right.

Q. Did you give a report on your -- treasury report?

A. You mean the Central Labor?

Q. Yes.

A. I presume I did. I can't remember.

(Transcript, pp. 118-119).

The Examiner finds nothing in the phrasing of Olds' questions to O'Dell that would indicate that he conceded he had made the statement to which O'Dell testified. It is also apparent from their

exchanges that Olds and O'Dell bear some animosity toward one another. Further, O'Dell's testimony indicated an inability to remember much of anything about what was said or done at that meeting beyond the statement he attributed to Olds. It is also not accurate to state that O'Dell's testimony is un rebutted. Olds testified on cross-examination in response to the Local's counsel's questions regarding the February meeting of the Central Labor Council:

Q. Did you attend on the 14th of February of this year here in Stevens Point a Central Leadership Conference at the Northside Bar?

A. No.

Q. Central Labor Council meeting at the Northside Bar?

A. Yep.

Q. And that was in the evening?

A. Yep.

Q. Did you make any statements at that point to others who were in attendance about what your reasons were for having brought this prohibited practice complaint for which we are all assembled here today?

A. Not all of it.

Q. Pardon?

A. Not all of it, just some things about it. I didn't make a statement of what it was.

Q. Okay. What did you discuss? What do you recall having discussed at that meeting regarding the prohibited practices complaint?

A. That I was filing charges against the Union.

Q. Did you say anything about what your motivation was for having done that?

A. Nope.

(Transcript, pp. 31-32).

Both Olds and O'Dell played it "cute" in responding on cross-examination and the Examiner finds little in the testimony of either about the February 14th meeting upon which he feels he can comfortably rely. Given O'Dell's selective memory about the meeting and his animosity towards Olds, as well as it being unlikely that Olds would make such a self-damaging statement, O'Dell's testimony regarding the meeting is not credited.

Lastly, it is noted that Olds was involved in a dispute with the Local's leadership and was facing charges the Local had filed against him with the International Union at the same period in time that his grievances were dropped by the Local. It would not be unreasonable for one to be suspicious of the Local leadership's motive in deciding to recommend against processing his grievances to arbitration, and Olds displays an obvious tendency to be suspicious of actions that affect him. The Examiner would also note that while Olds' attitude that his union should support him whether he is right or wrong is not shared by the courts or this Examiner, it is also not universally viewed as being unrealistic or unreasonable.

The Commission has held that the award of costs and attorney's fees is only appropriate where the opposing party's position in the litigation is such that it demonstrates the "extraordinary bad faith" or "frivolous" standard, and that the test is to be strictly applied. 7/ While Olds may be overly suspicious, quick to take offense, and perhaps unreasonable in his expectations of what his union can do or should do to right what he perceives to be unfair treatment or harassment, and has ineptly presented his case, that does not constitute the extraordinary "bad faith" necessary to justify the award of costs and attorney's fees. Therefore, the requests of the Local and the City in that regard have been denied.

Dated at Madison, Wisconsin, this 24th day of January, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

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