STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GORDON F. DeLAUNAIS,

Complainant,

vs.

WISCONSIN STATE EMPLOYEES UNION, COUNCIL 24, AFSCME, AFL-CIO and MARTIN BEIL,

Respondents.

Case 7
No. 53988 PP(S)-256
Decision No. 28735-A

Appearances:

Mr. Gordon F. DeLaunais, 1438 Greenbriar Lane, Mequon, Wisconsin 53092-5072, appearing pro se.
Mr. P. Scott Hassett, Lawton & Cates, S.C., 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On March 27, 1996, Gordon F. DeLaunais, hereafter DeLaunais or Complainant, filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondents Wisconsin State Employees Union, Council 24, AFSCME, AFL-CIO, hereafter Respondent Union, and Martin Beil, hereafter Beil or Respondent Beil, failed to represent Complainant in a grievance regarding a salary increase in 1995, forcing Complainant to seek legal advice at his own expense in violation of Sec. 111.84(3). On May 23, 1996 the Commission appointed Sharon A. Gallagher, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held at Madison, Wisconsin on July 16, 1996. A stenographic transcript of the proceedings was made and received by the Examiner on August 16, 1996. The parties chose to make oral argument at the end of the instant hearing and upon receipt of the transcript herein the record was closed. The Examiner, having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant, Gordon F. DeLaunais is an individual whose address is 1438 Greenbriar Lane, Mequon, Wisconsin 53092-5072. At all times material hereto, DeLaunais has been an employe of the State of Wisconsin Department of Transportation (DOT) and a member of a bargaining unit represented by Respondent Union.

2. Respondent Union, Wisconsin State Employees Union, Council No. 24, AFSCME, AFL-CIO has at all times material herein, been the exclusive representative of a collective bargaining unit consisting of employes of the State of Wisconsin DOT including Complainant and it had a series of labor agreements with the State of Wisconsin covering said bargaining unit. The Union's office is located at 8033 Excelsior Drive, Suite C, Madison, Wisconsin 53717. At all times material herein, Respondent Beil has been the Executive Director of Respondent Union and is therefore an agent of Respondent Union. Respondent Union is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

3. On or about July 19, 1994 Complainant filed a grievance alleging that he was improperly denied a salary grid increase under Article XII of the labor contract; the Union represented Complainant through the grievance process and appealed the grievance to arbitration on January 31, 1995, after the State of Wisconsin DOT had denied the grievance at the third step. By letter dated April 25, 1995, Assistant Director of Respondent Union, Karl Hacker, informed Complainant that the Union would not pursue the grievance to arbitration, as follows:

> . . . I have reviewed, along with other members of the Wisconsin State Employees Union staff, your grievance(s) relating to Article V and XII -- Placement on Grid -- which has been appealed to arbitration.
>
> The contract states as of June 30th you (sic) complete years of service and therefore we will not pursue this grievance to arbitration.
>
> Please be aware that you may appeal this decision not to support your grievance(s) by carefully following the Council 24 appeal procedure, a copy of which is enclosed. . . .

On or about April 27, 1995, Complainant received a handwritten note from his union steward regarding his grievance:

> . . .
>
> C. 24 reps aren't available when I call. Rather than waste time, just begin the appeal procedure. When Marty rejects your

appeal, you'll know whom (sic) to sue. . . .

By letter May 15, 1995, Complainant appealed Respondent Union's refusal to take his grievance to arbitration. In his letter of appeal, Complainant argued in relevant part as follows:

> . . . Your decision is unfounded according to the "agreement between the State of Wisconsin and AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO and its appropriate affiliated Locals dated November 13, 1993 to June 30, 1995."
>
> Article V Seniority. "Seniority . . . shall be determined by the original date of employment with the State of Wisconsin." My seniority date is July 1, 1991.
>
> Article XII Wage Adjustments. Grid implementation effective August 21, 1994, the Employer will implement the grid set forth in appendix 4 as follows:
>
> Paragraph 3 A . . . pay status on the effective date will be set at the grid rate for the employe's class that corresponds to the employe's full years of seniority as of June 30, 1994. I have three full years of seniority as of June 30, 1994 (sic) On July 1, 1994 I had three full years and one day of seniority.
>
> I was informed by my union steward Mark Nordby that the reason the union is not going to pursue this matter, is because the negotiators of the current contract did not mean what they had written in the "agreement". I dispute that notion vigorously. What is the value of the "agreement", when after it is written and signed into law, management says "that isn't what we agreed to" and then officials of the union say "that's right". If the notion that the spoken word takes presedence (sic) over the written word, the whole "agreement" has no value.
>
> I am a union member in good standing. I want my pay adjusted according to the "agreement" as it is written and signed into law. Anything less is nothing more than a breach of contract. . . .

4. By letter dated May 22, 1995, Respondent Beil wrote to Complainant indicating he had received his letter of appeal; that he (Beil) was in the process of requesting Complainant's file to further investigate the matter; and that he (Beil) would contact Complainant in the near future. By letter dated May 24, 1995 Respondent Beil wrote to Complainant as follows:

> I am sorry to inform you that, after careful review, I must uphold the decision not to move forward on this matter.
>
> Contract language, once ratified and passed into law, is set in concrete for the duration of that contract. As in most contracts there are areas that are ambiguous. Unfortunately, this is not one of those areas. At the start of the day on June 30, 1994, you must have had three year's of seniority in state service. In your case you had two years and 364 days of seniority. It was not until the start of the day of July 1, 1994, that you had accumulated three full years of seniority.
>
> There is no fudge factor in this language. If an exception were made for one member, then it would have to be made for all similarly situated members. Where would the fudging stop?
>
> Our mission is to protect the rights of all employees represented by this Union and to the extent possible negotiate the best contract that we can. We will continue to do our utmost to fulfill that mission.
>
> Again, I am sorry that I must concur with the decision transmitted to you via the letter of April 25, 1995, by Assistant Director Hacker and not move to arbitration in this matter. . . .

By letter dated June 25, 1995, Complainant attempted to file a complaint with the Wisconsin Employment Relations Commission regarding his grievance and his treatment by the State of Wisconsin. Complainant took this action without consulting with Respondents. By letter dated June 27, 1995 WERC General Counsel Davis returned Complainant's paperwork and filing fee, indicating that Complainant would have to use proper complaint filing forms, identifying the sections of the statute violated and having the complaint notarized.

5. On July 3, 1995 Complainant properly filed a complaint against the State of Wisconsin only, alleging that "the State of Wisconsin failed to execute Article XII of the Agreement between the State of Wisconsin and AFSCME Council 24 Wisconsin State Employees Union AFL-CIO and its appropriate affiliated locals . . ." in violation of "Section 111.84 Unfair Labor Practices, paragraph (1) (e)." Complainant thus sought to receive the appropriate wage adjustments and all backpay relative to the grid implementation outlined in Article XII of the labor agreement. (Case 400, No. 52855, PP(S)-245) Between July 17, 1995 and September, 1995, the WERC assigned conciliator Amedeo Greco to assist the parties in settling the complaint. By letter dated September 23, 1995, Complainant requested that a hearing be held within forty days and contested the State of Wisconsin's (earlier) filing of a Motion to Dismiss the case.

6. By letter dated October 17, 1995 Examiner McLaughlin (the WERC staff member assigned to hear the case) summarized a conference call he had with legal counsel for the State

of Wisconsin and Complainant regarding the State of Wisconsin's Motion to Dismiss and Complainant's responses thereto. McLaughlin stated the results of the conference call as follows:

> Mr. Wild has agreed to prepare a proposed stipulation of fact. It is his hope that the stipulation can be forwarded to Mr. DeLaunais within not more than three weeks.
>
> If Mr. DeLaunais agrees that the proposed stipulation is accurate, it will become the basis upon which each party will enter argument on the Motion to Dismiss.
>
> My concern that the Union may have an interest in this litigation will be addressed by my serving a copy of the stipulation and the underlying complaint on the Union. In serving these documents on the Union, it is my intent to make it clear that the Union has a right to enter the litigation if it views itself as a party in interest, and that if the Union declines to assert any interest in the litigation any part of the stipulation stating that the Union's position will be taken as an accurate statement of the Union's position.
>
> I stated during the call that I would supply you with at least one example of the cases which prompted my procedural concern. Accordingly I enclose Dec. No. 22320-C (WERC, 7/89) and direct your attention specifically to page 5.

7. On November 6, 1995 Complainant retained Attorney Perry H. Friesler of Davis & Kuelthau, S.C. to represent him before the WERC. By letter dated December 4, 1995, State of Wisconsin Attorney Mark Wild sent Attorney Friesler and Examiner McLaughlin a copy of an arbitration decision which the Union had lost involving facts essentially identical to those regarding Complainant's grievance. That arbitration award issued on November 18, 1995.

8. By letter dated December 20, 1995 Complainant's Attorney Friesler advised Examiner McLaughlin that Complainant would withdraw his complaint. On January 1, 1996 Complainant sent Union Executive Director Beil a letter requesting that the Union reimburse him for legal expenses he incurred because "the union failed to support my grievance to arbitration." Complainant went on in this letter to state:

> I was shocked to discover that the Union took this case to arbitration and did not include me as a grievant. Furthermore, I was not given the courtesy of being advised. The arbitrator's award was dated November 21, 1995, which was six months after I initiated the action with the WERC.

> I was advised by my attorney that while a claim against the State alleging unfair labor practices are now out of the question; there may be a case against the union. I do not want to pursue that option and it can be avoided provided the Union accepts responsibility for my legal expenses up to this date. . . .

On January 9, 1996 the Wisconsin Employment Relations Commission issued its Order Dismissing Complaint in Complainant's case (Case 400) against the State of Wisconsin (Dec. No. 28628). By letter February 24, 1996 Complainant wrote to Respondent Beil requesting that the Union reimburse him for legal expenses in the amount of $210.

9. On November 6, 1995 when Complainant sought the advice of Attorney Friesler, Complainant sought advice regarding the complaint he had filed against the State of Wisconsin because he was confused regarding why the complaint case against the State had been dragging on from June to November, 1995. Complainant also felt he needed to be represented by an attorney. In addition, Complainant conferred with Attorney Friesler regarding the merits and the procedural questions involved in his complaint case against the State of Wisconsin and regarding the merits of the grievance he had filed. After Friesler received the arbitration award issued on November 18, 1995, Friesler advised Complainant that he had no case against the State of Wisconsin. Complainant agreed with Friesler that the complaint against the State should be withdrawn. Complainant stated that during his meetings with Friesler, he also discussed the merits of the underlying grievance and that initially Friesler had told him that he (Friesler) felt that Complainant had a worthy enough case for Friesler to represent him should a hearing be necessary before the WERC in the complaint case against the State.

10. Union Assistant Executive Director Hacker supervises nine AFSCME field representatives who are employed mostly out of their homes; these field representatives work with approximately 54 local unions and employes they represent; the Union representative in charge of Complainant's unit, Jana Neu-Weaver, has approximately 182 local unions with over 4,000 members, to attend to in her job as an AFSCME field representative. Hacker reports directly to Respondent Beil; and Hacker has negotiated all contracts regarding State bargaining units for Council 24 for the past 28 years. Hacker has a procedure whereby his staff representatives must talk to him regarding cases which they wish to take to arbitration, especially discharge and suspension cases, before those cases can be moved to arbitration; that Council 24 has a large case load which in 1995 involved processing more than eleven hundred cases from filing to final resolution or arbitration; and that in 1996 as of the date of the hearing, Respondent Union was processing over 1,000 cases through the grievance procedure. In regard to Complainant's July, 1995 grievance, Hacker spoke with Neu-Weaver regarding the merits of that case; he looked the case over himself and requested that his research assistant check into it as well; and he (Hacker) decided that the case was not a winner. It was at this point, that Hacker wrote his letter to Complainant dated April 24, 1995. In regard to the appeal which Complainant took to Respondent

Beil regarding his grievance, Beil made the final decision not to take Complainant's grievance to arbitration, after Beil, Hacker and their staff took another look at the case. Only in discharge cases can employes hire their own attorneys to pursue their

case to arbitration if the Union decides not to take the case to arbitration itself. However, these employes must file a disclaimer saying that they will not seek any attorney's fees from the Union for their pursuit of their own arbitration case.

11. The November 18, 1995 arbitration award in the LaCrosse cases issued because the AFSCME field representative in LaCrosse, who had had three cases on the same issue as Complainant's grievance, had failed to follow proper procedures and seek Hacker's prior authorization to proceed to arbitration; and the arbitrator had already been selected when Hacker's field representative contacted him regarding these cases. Although Hacker believed those cases (like Complainant's) were losers, Hacker allowed the LaCrosse field representative to go forward through arbitration with those three consolidated cases. The result was that Arbitrator Grenig ruled against the Union in those consolidated cases. After Hacker had spoken to his LaCrosse field representative and allowed her to proceed to arbitration in her cases, he sent a letter dated August 15, 1995 to the State of Wisconsin representative regarding Complainant's grievance, which read in relevant part as follows:

> Upon further investigation and information we are putting the above-referenced case into active status as of this date. Please change your records accordingly and have your representative contact Jana Neu, Field Representative for Council 24. . . .

Hacker did not send a copy of this letter to the Complainant as this is not his normal procedure; and Hacker has no policy or procedure that requires his Field Representatives to send copies of such reactivation letters directly to grievants. The reason Hacker reactivated Complainant's grievance was so that if the cases that the LaCrosse Field Representative had pursued to arbitration were in fact winners, Complainant would reap the benefits of a favorable award. The same provisions of the collective bargaining agreement were involved in the LaCrosse cases as were involved in the Complainant's grievance.

12. The evidence failed to demonstrate that either Respondent Union or Respondent Beil was hostile or biased against Complainant. Beil and the Union's handling of the Complainant's grievance was not shown to be perfunctory and the evidence indicated that Beil and the Union had a rational basis for their decision to refuse to arbitrate Complainant's grievance, based upon objective facts and an understanding they had with the State of Wisconsin as to the meaning and application of the terms of the collective bargaining agreement. Respondents Beil and the Union did not act in an arbitrary, discriminatory or bad faith manner and, at all material times herein, they fairly represented Complainant.

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

CONCLUSION OF LAW

Neither Respondent Union nor Respondent Beil (as an agent of Respondent Union), violated their duty of fair representation with respect to the processing of Complainant's grievance, including their refusal to proceed to arbitration and their failure or refusal to reimburse Complainant for legal fees he incurred, and accordingly they did not violate Sec. 111.84(2), Stats.

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

ORDER 1/

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

Dated at Oshkosh, Wisconsin this 15th day of October, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Sharon A. Gallagher, Examiner

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
> (continued)

1/ (continued)
mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

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

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

In his complaint, Complainant DeLaunais alleged that Respondents Beil and the Union failed to fairly represent him on a grievance regarding his salary grid movement. As a result, he was forced to seek legal advice at his own personal expense after having filed a complaint with the Commission against his employer, the State of Wisconsin; and that he withdrew the complaint because the Union had failed to reveal to him facts which had been available to it. Also in his complaint, Complainant alleged that the actions of the Union violated Sec. 111.84(3), Stats. and he sought reimbursement for his legal expenses, filing fees, and for out-of-pocket expenses, for a total of $310.00.

At the hearing and in his closing argument, Complainant argued that the Union should pay his legal and other fees/expenses because he incurred these fees/expenses because Respondents did not properly copy him on the reactivation letter from Hacker to the State, dated August 15, 1995. Complainant urged that he would not have hired an attorney had he possessed the information that the Union intended to reactivate his grievance. Complainant agreed that the only issue in this case was whether the Union had an obligation to pay his legal and other fees/expenses incurred in connection with the original grievance he had filed in July, 1995.

Complainant also contended that the portions of the Preamble and Bill of Rights contained in Respondent Union's Constitution should be taken into consideration in this case, as Complainant asserted that the Union had failed to live up to the spirit of that document in processing his grievance. The portions of that document which Complainant cited read as follows:

. . .

> Workers organize labor unions primarily to secure better wages and better working conditions.
>
> We hold that they also organize in order to participate in the decisions which affect them at work. One of the fundamental tenets of democratic government is the consent of the governed. Unions are an extension of that idea.
>
> Union members are both workers and citizens.
>
> Collective bargaining is the expression of citizenship in employment. Participation in the political life of the nation is but another aspect of that citizenship.

> In the same way that unions are dedicated to improvement of the terms and conditions of employment, we are equally dedicated to exert ourselves, individually and collectively, to fulfill the promise of American life. Amidst unparalleled abundance, there should be no want. Surrounded by agricultural surpluses of all descriptions, there should be no hunger. With advanced science and medical research, sickness should not go untreated. A country that can shoot rockets to the moon can provide adequate education for all its children.
>
> For unions, the work place and polling place are inseparable, and the exercise of the awesome rights and responsibilities of citizenship are equally required at both.
>
> Unions are under a solemn obligation: to represent members forcefully and effectively in negotiations with management and to conduct internal union affairs according to democratic standards.
>
> . . .

Respondents Beil and the Union argued in their opening statement as well as in their closing argument at the hearing that the Union did everything it could to represent Complainant on his July, 1995 grievance; that the Union properly investigated that grievance; that the Union took that grievance through the third step, but that Respondents refused to take the grievance to the next step (arbitration) based upon the relevant facts of the case. Respondents argued that they could not have anticipated or predicted that the Complainant would hire an attorney in a non-disciplinary case; that it has long been the Union's policy and procedure to deem non-disciplinary grievances to belong to the Union only, and that grievants in those cases have no right to proceed on those grievances if the Union drops them. In addition, Respondents noted that it is not the Union's normal policy to send out copies of letters regarding reactivation of grievances to the grievants; that these are sent to Union field representatives; and that there is no Union policy that requires Union field representatives to send such letters out to grievants involved in cases.

Respondents also observed that Complainant's attorney could not have had any input into Complainant's grievance even if the case had been arbitrated, so that the Union should not be required to reimburse Complainant for legal fees and expenses he incurred solely on his own behalf. Respondents contended that the law surrounding the Union's duty of fair representation allows all unions and their agents a wide range of discretion within which to operate on behalf of grievants; that a union/union agent can be wrong or even negligent in regard to the determination of a grievance without violating the duty of fair representation; and that unless a union or its agents harbor bad faith against a grievant or discriminate against a grievant, a union does not violate the duty of fair representation.

At the close of the hearing, Respondents submitted excerpts from, the treatise, The Developing Labor Law and its 1995 Cumulative Supplement. These excerpts, which detailed the general law regarding the extent and nature of a union's duty to fairly represent members of the bargaining unit in contract negotiations, administration and enforcement matters, can be summarized as follows. Unions act much like a legislative body in representing their members. Unions must represent the interests of employes fairly, impartially and in good faith without evidencing hostility, discrimination and without relying upon irrelevant, arbitrary or invidious considerations. In meeting its duty of fair representation, Unions have been granted a wide discretion or a "wide range of reasonableness" by the courts. Thus, although a union may not arbitrarily ignore a meritorious grievance, or process it in a perfunctory manner, an individual grievant does not have an absolute right to have his/her grievance taken to arbitration. To prove a breach of a union's duty of fair representation regarding its processing of a grievance, a complainant must submit substantial evidence of severe, intentional discrimination, unrelated to legitimate union objectives. Mere errors in judgment and even negligence on the part of the union in processing a grievance are not sufficient to meet this burden of proof.

Therefore, Respondents sought that the complaint should be dismissed in its entirety, as no evidence had been submitted to show that either Respondent Union or Respondent Beil had discriminated against Complainant or acted in bad faith in regard to Complainant's grievance.

Discussion:

The United States Supreme Court has set forth the requirements of the duty of fair representation a union owes to members of bargaining units it represents. 2/ The Wisconsin Supreme Court has followed the requirements laid out by our country's highest court in its own decisions. 3/ Therefore, it is clear that under SELRA, unions must represent the interests of all their members without hostility or discrimination; they must exercise their discretion with good faith and honesty; and they must avoid arbitrary conduct. A union breaches its duty of fair representation when its actions are arbitrary, discriminatory or in bad faith. 4/ In conducting its business, a union is granted a wide range of reasonableness, subject always to complete good faith and honesty of purpose in the exercise of its discretion. 5/ As long as a union exercises its discretion in good faith,

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2/ Vaca v. Sipes, 386 U.S. 171, 177, 64, LRRM 2369, 2371 (1967).

3/ Mahnke v. WERC, 66 Wis.2d 524 (1974).

4/ Vaca v. Sipes, Supra; Coleman v. Outboard Marine Corp., 92 Wis.2d 565 (1979).

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

it is allowed broad discretion in the performance of its representative duties. 6/ A union is not under any absolute duty to pursue even a meritorious grievance and proof that an underlying grievance was meritorious is insufficient, in itself, to establish a violation of the duty of fair representation. 7/ Rather, Complainant has the burden to demonstrate by a clear and satisfactory preponderance of the evidence each element of his/her contentions in these cases.

Applying these principles to the instant case, it is necessary to determine whether Respondent Union and/or Respondent Beil breached their duty of fair representation to Complainant by failing and refusing to reimburse Complainant's legal fees and other expenses incurred regarding Complainant's prior WERC complaint against his employer and/or his grievance regarding his placement on the salary schedule as of July 1, 1994. I note that the undisputed evidence herein revealed that Complainant filed a grievance on July 19, 1994 because his employer, the State of Wisconsin DOT, had denied him a salary grid increase. The Union then investigated the case and represented Complainant and processed his grievance through the third step of the grievance procedure. The uncontradicted evidence also showed that in accord with its normal internal procedures, the final decision whether to take Complainant's grievance to arbitration was made by Union Assistant Director Hacker and his staff who researched the case and found Complainant's case lacked merit. Hacker then advised Complainant of his conclusions by letter dated April 25, 1995. Again, in accord with the Union's normal procedures, Complainant was offered and took an appeal of Hacker's decision to Respondent Beil, Executive Director of the Union. It is clear that Beil followed the Union's normal procedures in considering Complainant's appeal and that Beil denied that appeal on May 24, 1995 in writing, based solely upon the lack of merit of the grievance.

Based upon the above-described evidence, I find that no evidence was proffered to demonstrate that either Respondent harbored any animus against Complainant or that they dealt with him or his grievance in an arbitrary, discriminatory or bad faith manner. Rather, the evidence showed that the Respondents acted in a rational manner based upon their understanding of the mutual intent of the contracting parties regarding the language of Articles V and XII of the applicable labor agreement and the interpretation of that language in the past.

In addition, the evidence showed that on November 6, 1995, Complainant decided, on his own and without consulting the Union, to file a WERC complaint against the State of Wisconsin. Complainant also decided to hire and confer with a private attorney regarding his WERC complaint against the State. Complainant's actions were in no way related to or caused

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

7/ West Allis-West Milwaukee School District, supra.

by the Respondents herein. In this regard, I note that the Respondents were not charged parties in Complainant's prior WERC complaint. Furthermore, Complainant admitted that he consulted a private attorney primarily to determine the status and merits of his WERC complaint against the State.

The fact that Union Representative Hacker reactivated Complainant's grievance after he authorized the arbitration of three cases essentially identical to Complainant's should be lauded not criticized, as Complainant would have benefited from a favorable decision. On this latter point, I find it significant that under the parties' agreed-upon procedures, Complainant's grievance did not have to be litigated in order for him to fully benefit had the Union prevailed in the LaCrosse cases. Respondents' failure to inform Complainant that his case had been reactivated does not rise to the level of a violation of the Respondents' duty of fair representation. In addition, I note that it has not been Respondents' past practice to send such notices directly to grievants, or to require Union Field Representatives to send such notices out to interested parties on the local union level. 8/

As noted above, Complainant had no absolute right to have the Union take his grievance to arbitration. The fact that the three LaCrosse cases were sent to arbitration by mistake, does not require a conclusion that Respondents treated Complainant unfairly or that they thereby discriminated against Complainant by refusing to arbitrate his grievance. Indeed, the decision not to arbitrate Complainant's case was based upon a full investigation and research regarding the merits of his case. The duty of fair representation cannot and should not be interpreted to mean that if a union mistakenly submits one (or more) grievance(s) to arbitration, it will thereafter be bound to take all similar cases to arbitration, regardless of merit.

The last question remaining in this case is whether Respondents have a legal duty (pursuant to their duty of fair representation) to reimburse Complainant for his legal fees and other expenses. I can find no case law to support such a claim. In addition, the facts of this case fail to otherwise show that such a ruling would be justified herein. In this regard, I note that Complainant made his decision to consult with an attorney in early November, 1995, primarily about his WERC complaint in Case 400. At that time, Attorney Friesler must have discussed his fees with Complainant and either received a retainer fee from Complainant or secured Complainant's promise to pay same in the future. At this time, Respondents were unaware that Complainant had retained counsel and they were not parties to Case 400. Thus, at this time, Respondents had given Complainant no

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8/ Even assuming Union Representative Neu was negligent in not sending Complainant a notice of reactivation, such negligence would be insufficient basis for a duty of fair representation violation.

assurances of any indication which could reasonably lead him to believe that Respondents would reimburse him for any legal fees/expenses he would incur involving Case 400, or any other matter.

Indeed, had Complainant inquired, he would have been told that it is expressly against Respondent Union's policies and practices to reimburse members for any legal fees or legal expenses. Furthermore, had Complainant inquired of his attorney or Respondents, he would also have been informed that the services or assistance of Mr. Friesler would not have been accepted by Respondents in the processing of the underlying grievance because this would conflict with Respondent Union's policies and procedures -- that such non-disciplinary grievances "belong" solely to the Union.

Therefore, the evidence herein failed to show that Respondent Beil or Respondent Union breached their duty to fairly represent Complainant in the processing of his grievance, in their decision not to take the grievance to arbitration and in their failure/refusal to reimburse Complainant for his legal fees/expenses, and they did not thereby violate Sec. 111.84, Stats. Therefore, the complaint herein has been denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 15th day of October, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner