STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENNETH B. HILL,

Complainant,

vs.

MILWAUKEE COUNTY and AFL-CIO DISTRICT COUNCIL 48, LOCAL 1055,

Respondents.

Case 419
No. 53937 MP-3153
Decision No. 28754-B

Appearances:

Mr. Kenneth B. Hill, 7360 West Old Loomis Road, Greendale, Wisconsin 53129 pro se.

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

Podell, Ugent, Haney & Delery, S.C., Attorneys at Law, 611 North Broadway Street, Suite 200, Milwaukee, Wisconsin 53202-5004, by Mr. Frank L. Lettera, appearing on behalf of the Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER AND ORDER DENYING MOTION TO REOPEN THE RECORD AND TO AMEND THE COMPLAINT

On March 14, 1996, Kenneth B. Hill, hereinafter Complainant, filed a complaint with the Wisconsin Employment Relations Commission alleging that Milwaukee County, hereinafter County, withheld certain wages in violation of the collective bargaining agreement and that AFL-CIO District Council 48, Local 1055, hereinafter Union, failed to represent him by failing to process his grievance over same "to the third step of arbitration with the Labor Relations Department." On June 7, 1996, the Commission appointed Dennis P. McGilligan, 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 Secs. 111.70(4)(a) and 111.07, Stats. On the same date, hearing in the matter was scheduled for Wednesday, July 31, 1996, in Milwaukee, Wisconsin. On June 14, 1996, Respondent Milwaukee County filed an Answer to the complaint and a Motion to Dismiss the complaint. On July 1, 1996, the Examiner issued an Order Denying Motion to Dismiss. A hearing was conducted by the undersigned on July 31, 1996, in the Milwaukee County Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin. The hearing was transcribed, and the parties completed

their initial briefing schedule on October 9, 1996.

During the period in which the parties were filing written argument on Complainant's original complaint, Complainant filed a Motion received October 9, 1996, to Reopen the Record and to Amend the Complaint. The parties were given additional opportunity to file written arguments on the Motion. That briefing schedule was completed on December 4, 1996.

The Examiner, having considered the evidence and argument of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Kenneth B. Hill, herein referred to as the Complainant, is at all times material herein a municipal employe within the meaning of Sec. 111.70(1)(i), Stats., and is employed by Milwaukee County (House of Corrections) as a Correctional Officer (Boiler).

2. Respondent Milwaukee District Council 48, AFSCME, AFL-CIO, Local 1055, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

3. At all times material to this proceeding, Respondent Milwaukee District Council 48, AFSCME, AFL-CIO, Local 1055, has been the exclusive bargaining representative of certain employes including the grievant in the employ of Milwaukee County (House of Corrections).

4. Respondent Milwaukee County (House of Corrections) is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its offices located at House of Corrections, ACC Administration, Milwaukee, Wisconsin.

5. Respondents Milwaukee District Council 48, AFSCME, AFL-CIO, Local 1055 and Milwaukee County (House of Corrections) have been parties to a series of collective bargaining agreements, of which the agreement in effect during the period involved herein extended from 1994 to 1996. This agreement provides the following provision relevant to this matter:

PART 4

. . .

4.02 **GRIEVANCE PROCEDURE**

. . .

(7) **STEPS IN THE PROCEDURE**

(a) STEP 1

1. The employe alone or with his/her representative shall explain the grievance verbally to his/her immediate supervisor designated to respond to employe grievances.
2. The supervisor designated in paragraph 1 shall within 3 working days verbally inform the employe of his/her decision on the grievance presented.

(b) STEP 2

1. If the grievance is not settled at the first step, the employe alone or with his/her representative shall prepare the grievance in writing on the Grievance Initiation Form and shall present such form to the immediate supervisor designated in Step 1 to initial as confirmation of his/her verbal response. The employe alone or with his/her Union Representative shall fill out the Grievance Initiation Form pursuant to section 4.02(6)(c)1,2,3,4,5,6 and 7 of this Memorandum of Agreement.
2. The employe or his/her Union Representative after receiving confirmation shall forward the grievance to his/her appointing authority or to the person designated by him/her to receive grievances within fifteen (15) working days of the verbal decision. Failure of the supervisor to provide confirmation shall not impede the timeliness of the appeal.
3. The person designated in Step 2, Par. 2, will schedule a hearing with the person concerned and within fifteen (15) days from date of service of the Grievance Initiation Form, the Hearing Officer shall inform the aggrieved employe and the Union in writing of his/her decision.
4. Those grievances which would become moot if unanswered before the expiration of the established time limits will be answered as soon as possible after the conclusion of the hearing.
5. The second step of the grievance procedure may be waived by mutual consent of the Union and the Director of Labor Relations. If the grievance is not resolved at Step 2 as provided, the Union shall appeal such grievance within forty-five (45) days from the date of the second step grievance disposition to Step

3.

(c) STEP 3

1. The Director of Labor Relations or his/her designee shall, (sic) attempt to resolve all grievances timely appealed to the third step. The Director of Labor Relations or his/her designee shall respond in writing to the Union within thirty (30) working days from the date of receipt by the Director of Labor Relations of the step 2 appeal.
2. In the event the Director of Labor Relations or his/her designee and the appropriate Union Representative mutually agree to a resolve of the dispute, it shall be reduced to writing and binding upon all parties and shall serve as a bar to further appeal.
3. The Step 3 of the grievance procedure shall be limited to the Director of Labor Relations or his/her designee and the appropriate Local union representative and one of his/her designees, a Staff Representative and representatives of the appropriate appointing authority involved in each dispute. The number of representatives at any Step 3 hearing may be modified by mutual consent of the parties.

(d) STEP 4

1. If the grievance is not resolved at the third step as provided, the Union may appeal such grievance to the permanent arbitrator. Such appeal shall be in writing with notification to the Director of Labor Relations, or his/her designee, within 45 days of the third step hearing decision.

. . .

6. In the Spring of 1995, the Complainant became aware through the Union newsletter that Milwaukee County (House of Corrections) was not paying back-to-back pay properly. He then approached his Union Steward, Kristine Colla, of Local 1055, regarding a possible wage dispute that he had with the County over back-to-back pay.

7. Kristine Colla, hereinafter Colla, spoke to Complainant's immediate supervisor, Anthony Grabowski, about the matter according to Step 1 of the grievance procedure but was unable to resolve the dispute. Thereafter, the grievance was reduced to writing by Colla, and signed by the Complainant.

8. On June 8, 1995, a meeting was held pursuant to Step 2 of the grievance procedure. Present were Colla, Kenneth J. Goegeline (the hearing examiner), Grabowski, Rose McDowell (Chief Steward) and the Complainant. At the meeting the Union presented arguments on behalf of the Complainant regarding the back-to-back overtime grievance he filed noted above. The Union and the Complainant also offered to settle the grievance "for 1,000 back hours at half-time pay." The 1,000 hours was an arbitrary number selected "because a good arbitrator would ask for a dollar if he's looking for 25 cents," and because the Complainant did not provide the Union with enough information "to come up with a solid dollar figure." The County did not refute any of the facts presented by the Union but did indicate that the Complainant had not requested back-to-back pay until the instant grievance.

9. By letter dated July 17, 1995, Gerty Purifoy, Staff Representative, requested on behalf of the Union that Complainant's back-to-back pay grievance be processed to hearing before the County's Department of Labor Relations pursuant to Step 3 of the grievance process.

10. On July 26, 1995, a Grievance Disposition Form was issued by Goegeline. The decision in the Disposition Form was to uphold the grievance. An award of $1,500 was rendered to the Complainant. Goegeline also found:

> . . . While sustaining the grievant's claim in the grievance, work schedules and time sheets presented at the hearing were incomplete and unclear in identifying the dollar amount for requested relief. The hearing officer awards one thousand five hundred dollars, subject to normal withholding, to be paid to the grievant via separate check upon acceptance of this disposition as final and total relief in this grievance.

11. At this point in time, Colla discussed the proposed settlement with the Complainant. She recommended that he accept it because it was "a fair amount of money," and because it was way more than the "approximately two or three hundred dollars" she thought he would get. Colla testified that the Complainant accepted the settlement offer. Colla next contacted Chief Steward McDowell informing her that there had been a settlement of the Complainant's claim.

12. Complainant testified that the day after he received the Grievance Disposition Form he spoke to Chief Steward McDowell about the proposed settlement informing her that he was not happy about the amount of relief offered, and that he "would like to think about it and discuss it with my family." Complainant stated the next day he spoke with Colla and informed her that he was not happy with the proposed settlement amount of $1,500, and wanted "$5,000 to put this conflict behind us."

13. Colla testified that within 48 hours of the settlement Complainant had a change of heart and told her that he thought he should have received more money from the County. However, by this time the matter had been settled. As noted in Finding of Fact 8, Union Staff Representative Purifoy had moved the grievance to the third step as requested by Chief Steward McDowell. She did this because the Union had not yet received the second step disposition from the House of Corrections, and needed to move the grievance to the third step within the forty-five (45) day time line provided for in Step 2 of the grievance procedure. On the day before the third step hearing (July 26, 1995), Purifoy learned of the second step disposition from Goegeline who faxed her a copy of the Grievance Disposition Form. On the day of the third step hearing (July 27, 1995), Purifoy explained that there had been a settlement of the grievance after Step 2. Purifoy was clear in her understanding that an agreement had been reached after Step 2 through conversations that she had with McDowell and Colla. It was then recorded at said meeting that the grievance had been settled and that the $1,500 settlement had been accepted by the Complainant. On August 8, 1995, Purifoy signed off on said agreement. She signed off on the agreement because in her official capacity she was the authorized person to sign off on any agreements that had been reached at the third step.

14. Thereafter, the Complainant informed McDowell that he had not settled for the $1,500 figure, and that if the County was going to stand firm on that amount he wanted the matter arbitrated. After hearing nothing for about two weeks, the Complainant contacted Bernie Freckmann, Vice President of Local 1055, regarding the matter. The Complainant then received a notice to report on September 20, 1995, at 10:00 a.m. to discuss his grievance with the Union's Grievance Committee.

15. The Complainant met with the Union Grievance Committee on September 20, 1995, to discuss his grievance. He told the Committee that one of his co-workers in the Power House, Jeff Thompson, who started working at the House of Corrections in August, 1994, replacing the Complainant on the rotating shift, submitted to the House of Corrections' Payroll Department the dates and times from his schedule that he had not received proper back-to-back compensation. Freckmann asked the Complainant to inform him of the outcome of Thompson's request for back-to-back pay; said the Committee would try to resolve his grievance with the County; and informed him that he would be contacted if a solution could be reached. The Complainant again asked the Committee if the relief offered by the County did not change, he would like to go to arbitration.

16. Around the middle of October, 1995, the Complainant contacted Freckmann to inform him that Thompson's request had been honored by the Payroll Department, and that back-to-back pay of about $500 had been issued by check. The Complainant then expressed his desire to have the Union put his grievance before the Department of Labor Relations for an arbitration hearing. Freckmann said a meeting would be set up between him and the Union to discuss his grievance.

17. Around November 20, 1995, the Complainant met with the Union Grievance

Committee. The Complainant presented documentation regarding Thompson's receipt of back-to-back pay paid him in the amount of $493.72. The Committee asked the Complainant to submit dates and times involving his back-to-back pay from the time sheets he had involving his pay shortage in the same way Thompson did and talk to Goegeline about reaching a compromise regarding his grievance. The Union also stated at this time that it had been informed that if the Complainant did not accept the relief settlement from the July 26, 1995 Disposition Form by the next day, this would be the last time this offer would be extended to him.

18. On November 27, 1995, the Complainant submitted a speed letter to Kathy Rudolf in the Payroll Department at the House of Corrections. The Complainant stated that after reviewing his time sheets from pay periods 1 through 26 of 1994, he found that he was not paid back-to-back overtime premiums for the dates and times included in the letter. The Complainant also requested copies of all his time sheets since his date of hire for the purpose of further review for non-payment of back-to-back overtime premiums. The Complainant never received a response to this letter.

19. The Complainant next spoke with Goegeline about the matter on or about December 10, 1995. Goegeline informed the Complainant that $1,500 was the final offer from the County, and that if he did not accept the offer by the next day, the offer would no longer be extended. The Complainant responded that he did not accept the offer, and that he would turn the matter over to the Wisconsin Employment Relations Commission (WERC) if the Union and the County did not offer a fair settlement for back-to-back pay due him.

20. After the above conversation, the Complainant contacted Freckmann and informed him of what had happened up to that point. The Complainant asked Freckmann to advance the grievance to arbitration. Freckmann responded that the time frame had passed to arbitrate the dispute. The Complainant informed Freckmann that if his grievance was not advanced to arbitration he would contact the WERC since he felt he "was being misrepresented by the Union." Freckmann responded by stating that he would not be threatened and refused to discuss the issue with the Complainant from that point on.

21. On December 14, 1995, the Complainant wrote a letter to Martha Love, Union President, requesting that his grievance be moved to arbitration. After receiving a copy of this letter, Colla contacted Love and asked her to allow the Complainant to appear before the Executive Board "to plead his case so the Board could understand what it was he was looking for." Normally, a letter would have been required for such an appearance, but Colla asked Love to waive this requirement "based on my word" and to allow the Complainant to come before the Executive Board. After the second step, Colla normally "is out of the loop," but as this matter dragged on "it began to create some hard feelings," and Colla wanted to give the Complainant an opportunity to present his case.

22. Colla notified the Complainant of the date (on or about the Monday after Christmas) they were to appear before the Executive Board. She did this verbally about a week before the

meeting. Colla felt it was important for the Complainant to be able to present his case to the Board because perhaps:

> . . . we could clear up whatever misunderstandings were still in existence, whether it was relative to the back-to-back policy, whether it was relative to the entire grievance procedure, because he felt that we had deliberately allowed this to fall to the wayside and then said, "There's a time restraint." And that was not the case at all.

On the meeting date, the Complainant without contacting the Executive Board or Colla failed to show up. Without the Complainant present, Colla presented Complainant's grievance to the Board.

23. After the meeting, Colla and the Complainant had a heated discussion about the dispute, and about Complainant not showing up at the meeting. Complainant told Colla that he had other plans, and she "should have notified him about it." A second meeting was arranged by Colla for the Complainant to appear before the Executive Board, one which he did attend. At said meeting, which occurred on or about January 17, 1996, Union representatives explained to the Complainant that if his grievance was not resolved at any of the lower steps that it was up to the Grievance Committee to determine whether or not the grievance would proceed to arbitration. The Complainant was also informed that the grievance had been resolved, and that the Union withdrew the grievance without prejudice based upon his verbal acceptance of the settlement. Therefore, he was told, the Union would not arbitrate the dispute. The Complainant was further told to accept the settlement or it would be withdrawn by the County. The Complainant responded by telling the Committee that he had "never seen or was offered any type of statement or document or check asking me to accept the relief offered," and that from that point on he would try to resolve the dispute through the WERC.

24. On January 29, 1996, the Complainant contacted Superintendent Richard Cox of the House of Corrections regarding his grievance. Cox told the Complainant that he would look into the matter and get back to him. By memo dated February 6, 1996, Cox informed the Complainant, in material part, as follows:

> Concerning your request for information dated 11/27/95, you should be receiving a written response from Mr. Goegeline shortly.
>
> You had indicated there may be others entitled to "back-to-back" pay and they were not receiving it because of improperly completed time sheets. A communication will be put in the next newsletter advising all staff regarding how to question/resolve pay issues including back-to-back overtime.

> Regarding the larger issue of your previously filed grievance, there is a settlement to which the Union has agreed. Although you may not like the terms of that grievance settlement, the House of Correction Administration must consider the matter settled.
>
> You have indicated you intend to pursue other remedies available to you to resolve the situation. That certainly is your right.
>
> If you pursue the matter, we will continue to comply with reasonable requests. As I have indicated earlier in the memo, you should be receiving a response to your 11/27/95 speed memo in the near future.

25. On or about February 8, 1996, the Complainant received a $1,500 relief check along with his payroll check. On February 13, 1996, the Complainant returned the check to the County stating that he would not accept the settlement in that amount and that he would pursue the matter to the WERC.

26. The Complainant did not receive the rest of his time sheets, or a response to his November 27, 1995 speed letter, and no memo appeared in the House of Corrections' newsletter explaining the back-to-back pay policy, all as promised in Superintendent Cox's letter noted above.

27. Milwaukee District Council 48, AFSCME, AFL-CIO, Local 1055 and its aforesaid agents' and representatives' handling of Complainant's grievance regarding back-to-back pay was not arbitrary, discriminatory or in bad faith; and, the Union at all times material herein fairly represented Complainant.

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

CONCLUSIONS OF LAW

1. Respondent Milwaukee District Council 48, AFSCME, AFL-CIO, Local 1055, and its agents and representatives, met their obligation to fairly represent Complainant herein; and, therefore, said Respondent did not commit prohibited practices within the meaning of Sec. 111.70(3)(b)1, Stats.

2. Having concluded that Milwaukee District Council 48, AFSCME, AFL-CIO, Local 1055 did not violate its duty of fair representation to Complainant, there is no jurisdiction to determine the allegations that Respondent Milwaukee County violated Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act by its actions relative to the back-to-back pay issue, and Complainant's grievance.

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

ORDER 1/

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

Section 111.07(5), Stats.

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

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed in its entirety.

IT IS ALSO ORDERED that the Complainant's Motion to Reopen the Record and to Amend the Complaint is hereby denied.

Dated at Madison, Wisconsin, this 30th day of January, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Examiner

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the commission
(footnote continued on Page 11)

1/ (footnote continued from Page 10)

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).

MILWAUKEE COUNTY (HOUSE OF CORRECTIONS)

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
AND ORDER DENYING MOTION TO REOPEN THE RECORD
AND TO AMEND THE COMPLAINT

On March 14, 1996, Kenneth B. Hill filed the complaint initiating these proceedings. Therein Hill, hereinafter Complainant, alleged the Union failed in its duty to fairly represent him by failing to process his grievance to arbitration and/or by failing to obtain a satisfactory settlement of his grievance over back-to-back pay. The Union and its agents denied committing any prohibited practices by their actions in the instant case. The County also denied committing any prohibited practices by its actions herein. During the course of the parties' briefing schedule following the hearing, the Complainant filed a Motion to Reopen the Record and to Amend the Complaint which both the Union and the County opposed. The parties completed their briefing schedule on all the matters in dispute on December 4, 1996.

COMPLAINANT'S POSITION

Complainant argues that the Union failed to represent him properly by refusing to take his back-to-back pay grievance to arbitration. In support thereof, Complainant first maintains that he, not the Union, understands "the policy of back-to-back pay" citing the settlement accepted by Officer Thompson for said pay from the County as evidence of same and support for the proposition that the Union should have supported his efforts to go to arbitration and/or to obtain a larger settlement. Complainant secondly rejects the Union's defense to his complaint that there are only a limited number of arbitration dates available per month and his claim did not warrant going to arbitration noting that he as a "party" to the grievance did not consider it settled within the meaning of Part 4, Section 4.02, item #5 of the collective bargaining agreement; and, in any event, the Union's lack of resources is not an adequate defense for failing to process his grievance to arbitration. Complainant thirdly argues that the Union was aware of his decision not to accept the proposed settlement well within the time lines necessary not to sign off on the settlement at the third step. Complainant also states that he notified Colla prior to the December 14, 1995 Union Executive Board meeting that he would be unable to attend. Complainant also rejects the Union's attack on the credibility of his testimony stating:

> The unions (sic) rebuttal also questions my credibility in how the grievance was handled, by asking me at the hearing, if I had ever seen the grievance initiation form, and I gave a no answer. I was trying to state that I had not received my copy from the union. I was well aware I had a grievance concerning the back to back pay issue

> and have enough credibility to send the issues to be resolved, to the proper agency, the WERC.

Finally, Complainant requests that the Examiner allow a Motion to Reopen the Record and to Amend the Complaint because the new dispute involves the same exact issues as the instant case and because the new information provided demonstrates "the unions (sic) and Milw. Co. total disregard for the authority of the WERC, as . . . these practices continue."

With respect to his claims against the County, Complainant requests the Examiner to rule in his favor because of the County's "ethically questionable tactics used during my attempt to resolve the back to back pay issue" necessitating his need to bring the issue before the Commission. Complainant claims his case can be distinguished from the cases relied upon by the County in support of its position based on the following improper actions by the County: one, he was not allowed access to his past time sheets despite numerous requests for same; two, the Payroll Department instructed him improperly with respect to filling out his time sheets for claiming back-to-back pay; three, "Kathy Rudolf was instructed not to inform, correct, or pay the earned premium to myself," despite knowing I was filling out the time sheets improperly; and four, the Payroll Department changed his time sheets so as to avoid paying him the premium pay.

RESPONDENT UNION'S POSITION

The Union argues that it represented the Complainant fairly during his grievance. In this regard the Union maintains that the Complainant did not understand the grievance procedure; that he lacks credibility with respect to his recollection of how his grievance was handled; that he accepted the settlement of his grievance that resulted from Step 2 of the grievance procedure and then changed his mind within 48 hours of his acceptance of the settlement and wanted more in the way of compensation; that the Union acted properly in reliance on the Complainant's acceptance of the settlement to sign off on the agreement; that when the Union learned of the Complainant's dissatisfaction with the results of his grievance that it attempted beyond the call of duty to respond to his concerns and give him an opportunity to air his complaints; and that the Union's decision-making process for deciding which case to take to arbitration was fair and in the Complainant's situation his "case would not have been one of the cases to go to arbitration because it had already been resolved at Step 2." Finally, the Union points out that the Complainant as a grievant is not involved in the process of deciding which grievances to take to arbitration and that his case would not have ranked very high in the prioritization process. Based on its arguments and the facts, the Union requests that the complaint be dismissed.

The Union opposes Complainant's Motion to Reopen the Record and to Amend the Complaint because "By agreement of all the parties, the scope of the hearing was limited to the issue of whether or not the Respondent Union breached its duty of fair representation." The Union adds that in his Motion Complainant "discusses extraneous and irrelevant matters that are outside the purview of the stipulated issue of the case-in-chief."

RESPONDENT COUNTY'S POSITION

The County initially argues that the Complainant does not have an independent basis to proceed directly against it. The only way the Complainant can bring an action to enforce the contract relative to the interests of the County, according to the County, is where the Union has the sole power to invoke the higher stages of the grievance procedure and where the employe has been prevented from exhausting his contractual remedies by the Union's wrongful refusal to process the grievance. Even then, the County opines, Complainant's ability to proceed is limited by the express terms of the labor agreement.

Citing Vaca v. Sipes, 386 U.S. 171 (1967), the County argues that a wrongful refusal occurs only when the Union breaches its duty of fair representation and that:

> A breach of the statutory duty of fair representation occurs when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. (Mahnke v. WERC, 66 Wis.2d 524, 531 (1975))

The County argues that the Complainant has neither shown nor claimed that the actions of the Union on his behalf were arbitrary, discriminatory or in bad faith. To the contrary, the County claims any disparate treatment involved was to the Complainant's advantage. In addition, the County argues that the Complainant's assertion that he should have gotten more back pay than a colleague is irrelevant. Citing a Court of Appeals decision, Gray v. Marinette County, et al., 200 Wis.2d 426 (1966), the County asserts the mere existence of differences between the two employes does not make them invalid. Finally, the County contends the only real claim articulated by the Complainant was his opinion that the Union was somehow negligent. The County points out that negligence is not one of the Mahnke factors.

In conclusion, the County argues that the Complainant's complaint deals only with substantive issues surrounding his already adjusted grievance and does not allege the Union failed to fairly represent him. The County notes:

> He complains only that his insistence of going to final and binding arbitration and the ultimate result of the grievance process were not exactly as he demanded. He has no right or reasonable expectation of same.

The County adds:

> Here, the union reasonably believed the grievance to have been adjusted and settled with finality. It reasonably dealt with the grievant. Just as reasonably, the union determined that this was not a case upon which it chose to squander one of its limited number of arbitration dates and other scarce union resources, especially given the nature of the case and its having been previously resolved.

Based on the foregoing, and the record as a whole, the County requests that the complaint be dismissed, and the Examiner "order such other and further relief as may be deemed appropriate, including but not limited to costs and fees, including actual attorney fees."

The County also opposes both aspects of Complainant's Motion. Regarding reopening the record, the County claims that none of the information the Complainant seeks to present meets the test for adding newly discovered evidence, or that it speaks to the representation issue or that it was unavailable at the time of hearing, or that it was newly discovered, or that it is at all relevant to the limited scope of the proceedings. The County also objects to the request to allow Complainant to amend his complaint based on the Commission's one-year statute of limitations and the fact that he should have been aware of the facts he now wants to complain of at the time he originally lodged his complaint. Finally, the County objects to the Complainant's inclusion of "matters outside the record of the hearing" in his Motion, and moves to strike same.

DISCUSSION

The primary issue presented herein is whether the Union violated its duty to fairly represent Complainant. The duty of fair representation obligates a Union to represent the interests of its members without hostility or discrimination, to exercise its discretion with good faith and honesty, and to eschew arbitrary conduct. 2/ The Union's duty to fairly represent its members is only breached when the Union's actions are arbitrary, discriminatory, or taken in bad faith. 3/

The thrust of Complainant's case is that the Association violated the duty of fair representation when it failed to process his grievance to arbitration. However, Gerty Purifoy, Staff Representative for the Union, testified that Complainant's case would not have been one of the

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2/ Vaca v. Sipes, 386 U.S. 171, 177, 64 LRRM 2369, 2371 (1967); Mahnke v. WERC, 66 Wis.2d 524 (1974).

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

cases taken to arbitration because it had already been resolved at Step 2. 4/ Purifoy also testified that in making decisions about which cases would advance to arbitration, that the Union had to balance the needs of the entire Union membership and not just those of one individual. 5/ Purifoy added that part of this balancing act includes consideration of the relative merits of an individual's case versus those of other grievants who might appear before the Grievance Committee. 6/ Even the Complainant admitted that he had no knowledge of the other grievances that the Grievance Committee might be considering, and that it was possible that his grievance might not have ranked that high in this prioritization process. 7/

The Complainant argues, contrary to the above, that he did not agree to settle the grievance, and that he informed the Union of this on a timely basis so that the Union should have been aware of same when it signed off on the settlement at Step 3 of the grievance procedure. Assuming arguendo that the Complainant never agreed to settle the grievance, and that he informed his Union Steward within 48 hours of his receipt of the Grievance Disposition Form of his rejection of the proposed settlement contained therein, the Complainant's case still must fail. In this regard, the Examiner notes that Union Staff Representative Gerty Purifoy informed the County at the third step meeting, and within one day of the issuance of the aforesaid Grievance Disposition Form, of the settlement of Complainant's grievance acting in reliance on information that she had that the grievance had been settled. The Complainant's grievance was then settled at the third step. As noted previously, the Union had moved the grievance to the third step in order to comply with grievance procedure time lines. Although there is a gap of about two weeks from the date of issuance of the Grievance Disposition Form containing the proposed grievance settlement to the date of the third step written sign-off wherein at least Union Steward Colla failed to inform Purifoy that the Complainant had changed his mind and/or never agreed to the proposed settlement which is unexplained, the Complainant offered no persuasive evidence that said failure was arbitrary, discriminatory or done in bad faith. The County argues that the only real claim articulated by the Complainant which might be relevant herein "was his opinion that the union was somehow negligent." However, as pointed out by the County, "negligence is not one of the Mahnke factors."

4/ Tr. 116.

5/ Tr. 115.

6/ Tr. 115-116.

7/ Tr. 62-64.

Complainant asserts that he should have gotten a lot more back pay than a colleague and because he didn't the Union acted improperly. However, as pointed out by the County the Court of Appeals recently stated citing Humphrey vs. Moore, 375 U.S. 335 (1964):

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty or purpose in the exercise of its discretion. Gray v. Marinette County, et al., 200 Wis.2d 426 (1996).

Here, the Complainant offered no persuasive evidence that the Union handled his grievance any different than it would any other grievant similarly situated, or that its recommendation to accept the proposed settlement, or any other action with respect to said settlement was arbitrary, discriminatory or in bad faith.

Complainant also complains that when he appealed to the Union to process his grievance to arbitration after the Step 3 resolution of same the Union acted improperly in refusing to arbitrate his dispute. However, the record indicates that various Union representatives and staff persons went out of their way to provide the Complainant with advice, counsel and representation including several meetings with the Union Grievance Committee, one of which the Complainant simply did not show up for. The Union responded to Complainant's continuing concerns in a responsive manner above and beyond that normally accorded bargaining unit employes in the grievance process. Beyond the fact that the Union settled the dispute with the County at the third step based on the assumption the Complainant had agreed to settle his grievance, the Examiner finds it reasonable to conclude that the record is clear the Complainant and Union simply disagreed over the relative merits of his grievance.

Finally, the Complainant argues that the fact the Union has limited resources and/or can only take two grievances to arbitration each month is no defense for its failure to take his grievance to arbitration. However, as noted above, the Complainant offered no persuasive evidence or testimony that the Union's actions were arbitrary, discriminatory or in bad faith. In addition, the record is clear that the Union and the County have an agreement limiting the number of arbitration dates per year 8/ and that the Union has an objective process for deciding which cases proceed to

8/ Tr. 101-102.

arbitration. 9/ As noted above, there is no persuasive evidence that the grievant's case is one that the Union would have decided to take to arbitration even if it had not been resolved at an earlier step of the grievance procedure. 10/

It is true that one Union official, Bernie Freckmann, at one point long after the grievance had been settled, refused to talk to the Complainant any more over what he perceived was a "threat" to take the matter to the WERC if the grievance was not settled to the Complainant's satisfaction. 11/ However, Freckmann also helped the Complainant to get a hearing before the Union Grievance Committee to state his case earlier in the process, 12/ and along with other Union representatives did his best to try to explain to the Complainant back-to-back pay and what he felt the Complainant was entitled to. 13/ In addition, the record indicates that neither the Union nor any of its decision-makers or agents including Freckmann bore any hostility or discriminatory motive against Complainant at any time material herein. In fact, the Union provided Complainant with more representation than it gave other grievants similarly situated.

Based on all of the foregoing, and the record as a whole, the Examiner finds it reasonable to conclude that the Union's actions toward Complainant herein were not arbitrary, discriminatory or taken in bad faith. Having concluded that the Union did not breach its duty of fair representation toward the Complainant, the Examiner has no authority to consider any breach of contract claims against the County. 14/

Complainant's Motions

Likewise, the Examiner denies the Complainant's Motion to Reopen the Record and to Amend the Complaint for the reasons discussed below.

The Examiner first notes that the Complainant's request to reopen the evidentiary hearing and to amend his complaint in order to recover back-to-back pay (although he admits that he received back-to-back pay after bringing the matter to the attention of the County) was the subject

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9/ Tr. 102-103.

10/ See Tr. 62-64 and 115-116.

11/ Tr. 31.

12/ Tr. 119.

13/ Tr. 120.

14/ Mahnke v. WERC, 66 Wis.2d 524 (1975) at 532.

of his original complaint. The Complainant also wants to hold both the Union and the County "accountable" for their actions relating to same.

Wis. Adm. Code Section ERC 10.19 provides that a "hearing may be reopened on good cause shown." The standards for reopening a hearing are set forth in School District of Marinette, Dec. No. 19542-A (Crowley, 5/83), and require the movant to show:

> (a) That the evidence is newly discovered after the hearing, (b) that there was no negligence in seeking to discover such evidence, (c) that the newly discovered evidence is material to that issue, (d) that the newly discovered evidence is not cumulative, (e) that it is reasonably possible that the newly discovered evidence will affect the disposition of the proceeding and (f) that the newly discovered evidence is not being introduced solely for the purpose of impeaching witnesses.

After considering the Complainant's Motion in light of the above standards, the Examiner denies the Motion because the newly discovered evidence is not material to the instant dispute and because it is not reasonably possible that this evidence will affect the outcome of this proceeding. The Examiner reaches these conclusions for the following reasons. One, while there are similarities between Complainant's original complaint and his new claims (both concern back-to-back pay) there are significant differences between same. For example, Complainant originally complained that he was denied the proper amount of back-to-back pay, and that the Union failed to properly represent him and failed to process his grievance over same to arbitration. In his new claim, Complainant admits that he was eventually paid at least some of the back-to-back pay owed him after his complaints on the matter, but still wants to file a grievance "to put in place consequences for the tactics being used by the payroll department for changing time sheets without notification to employees which has caused pay shortages, because unless the employee would catch this shortage it might never be paid." The Examiner is not persuaded that the basic facts or causes of action are the same in the Complainant's different claims. Thus, while the Complainant obviously contends otherwise in complaining anew about the County's behavior toward him, the Examiner finds that the disputes are separate and distinct, and conduct related to one dispute is not necessarily applicable to the other.

The Complainant also complains that the Union continues to misrepresent him this time by failing to file a first step grievance on his behalf over his latest claims against the County. However, the Examiner has already found that the Complainant did not prove that the Union violated its duty of fair representation with respect to his initial grievance/complaint over back-to-back pay. By agreement of the parties, the scope of the initial hearing was limited to said issue. There is no indication that the Complainant has made every effort to exhaust the contractual

grievance arbitration procedures and/or the Union's internal appeal process with respect to his new claims before coming to the Commission with his claims. Nor is there any persuasive evidence that the Complainant initiated a grievance on his own over the County's actions which is his right under the parties' contractual grievance arbitration procedure. 15/ Based on same, and absent any persuasive evidence that the Union's actions relating to Complainant's new claims violated its duty to fairly represent him, the Examiner finds that the information for which the Complainant requests to reopen the hearing is not the kind of evidence which will affect the outcome of this proceeding.

The Complainant also requests to amend his complaint to include allegations relating to the new evidence.

Section 111.07(2)(a), Stats., provides in pertinent part:

> . . . any such complaint may be amended in the discretion of the Commission at any time prior to the issuance of a final order based thereon."

ERC 22.02(5)(a) provides:

> (5) AMENDMENT. (a) Who may amend. Any complainant may amend the complaint upon motion, prior to the hearing by the commission; during the hearing by the commission if it is conducting the hearing; or by the commission member or examiner authorized by the commission to conduct the hearing; and at any time prior to the issuance of an order based thereon by the commission, or commission member or examiner authorized to issue and make findings and orders.

Given the foregoing statutory provision and administrative rule, it is clear that the right to amend is very broad and explicitly encompasses post-hearing amendments (i.e., prior to issuance of a final order). And, although there is no "relatedness" test by which an amendment should be judged, it has been held that amendments can be denied where the requested amendment is unsupported by any rationale and requires waiver by Respondent of further hearing 16/ or where the

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15/ See Finding of Fact 5.

16/ State of Wisconsin, Dec. No. 20711-A (Honeyman, 1/84); White Lake Schools, Dec. No. 12623-B (Schurke, 9/74).

amendment constitutes an abuse of process 17/ or prejudices Respondent. 18/ Here, for whatever reason, the Complainant waited until the very end of the briefing period to file his request to amend his complaint. In balancing the Complainant's right to amend with Respondents' right to a timely decision, 19/ the Examiner finds that due to the lateness of the Complainant's filing of his request to amend (after all rebuttal briefs, except Complainant's had been filed with respect to the original complaint) it would be an abuse of the process to permit same. Therefore, I have denied the Motion to Amend the Complaint as well.

Having concluded that the Respondent Union (and its agents) did not breach its duty of fair representation toward Complainant, and that there is no authority to consider the Complainant's claims against Respondent County, the Examiner has dismissed the complaint in its entirety. The Examiner has also found no basis to grant the Complainant's aforesaid Motion and, therefore, has denied same.

Dated at Madison, Wisconsin, this 30th day of January, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Examiner

17/ Racine Schools, Dec. No. 15915-B (Hoornstra, 12/77).

18/ Wautoma Schools, Dec. No. 15220-A (Malamud, 7/77).

19/ Section 111.07(4), Stats.