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-C

Appearances:

Mr. Kenneth B. Hill, 7360 West Old Loomis Road, Greendale, Wisconsin 53129, on his own behalf.

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 Respondent 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 Respondent Local 1055.

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

On January 30, 1997, Examiner Dennis P. McGilligan issued Findings of Fact, Conclusions of Law and Order in the above matter wherein he concluded that Respondent Milwaukee District Council 48, Local 1055 had met its obligation to fairly represent Complainant and thus had not violated Sec. 111.70(3)(b)1, Stats. Given this conclusion, the Examiner further determined that he should not exercise jurisdiction to determine whether Respondent Milwaukee County had violated a collective bargaining agreement and thereby committed prohibited practices within the meaning of Secs. 111.70(3)(a)5, Stats. He therefore dismissed the complaint.

On February 19, 1997, Complainant filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument, the last of which was received April 8, 1997.

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

ORDER

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 22nd day of January, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A.Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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

The Examiner's Decision

In his decision, the Examiner reasoned as follows:

> 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/
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> The thrust of Complainants' 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 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 the 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/
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> 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

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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).

4/ Tr. 116.

5/ Tr. 115.

6/ Tr. 115-116.

7/ Tr. 62-64.

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."

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 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 take 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

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8/ Tr. 101-102.

9/ Tr. 102-103.

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

11/ Tr. 31.

12/ Tr. 119.

13/ Tr. 120.

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 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

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

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:

> (1)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

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15/ See Finding of Fact 5.

rationale and requires waiver by Respondent of further hearing 16/ or where the 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 Respondent's 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 field 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.

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

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

18/ Wautoma Schools, Dec. No. 16220-A (Malamud, 7/77).

19/ Section 111.07(4), Stats.

On review, Complainant asks that we reverse both the Examiner's dismissal of the complaint and his denial of Complainant's motion to reopen the record and amend the complaint. We have reviewed the record and find that it fully supports the Examiner's dismissal of the complaint and denial of Complainant's motion to reopen/amend. Thus, we affirm in all respects.

Dated at Madison, Wisconsin this 22nd day of January, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/

James R. Meier, Chairperson

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

Paul A. Hahn /s/

Paul A. Hahn, Commissioner

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