

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CRAIG MARCHANT, Complainant,

vs.

**DEPARTMENT OF EMPLOYMENT RELATIONS
(UW HOSPITAL AND CLINICS) and COUNCIL 24,
WSEU LOCAL 1942, AFSCME, AFL-CIO**, Respondents.

Case 435
No. 54931
PP(S)-269

Decision No. 29093-A

Appearances:

Ms. Helen Marks Dicks, 124 West Broadway, Suite 100, Monona, Wisconsin 53716-3902, on behalf of Complainant.

Mr. P. Scott Hassett, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, on behalf of Council 24 and Local 1942.

Mr. David J. Vergeront, Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, on behalf of UW Hospital and Clinics.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DISMISSING COMPLAINT**

On February 28, 1997, Complainant Craig Marchant filed a complaint against the Department of Employment Relations (UW Hospital and Clinics) and Council 24 and its affiliate Local 1942, alleging that by its unilateral actions taken in December, 1996 and early 1997, the Respondent Employer violated the statute as well as the labor agreement by changing the manner in which payroll checks were distributed at the Hospital and that by its failure to pursue litigation and/or settle Complainant's grievance to his satisfaction regarding paycheck distribution, the Respondent Unions failed to properly represent Complainant.

On March 10, 1997, Complainant amended his complaint to specifically allege that the Union had refused to fairly represent him since October 29, 1996 and that he had suffered financial loss due to the Union's failure to timely pursue his grievance. On May 2, 1997, Complainant again

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amended his complaint to specifically mention Council 24 and the American Federation of State, County and Municipal Employees as Respondents and to allege that Union officer Martin Beil specifically violated state law as well as the Union's constitution by refusing to submit bargaining demands to Respondent Employer and by altering delegate-approved bargaining demands or submitting demands that were not approved by the delegates on the bargaining team in contract negotiations with Respondent Employer.

On May 2, 1997, Respondent Union answered the complaint denying Complainant's allegations and on May 16, 1997, Respondent Union answered the Complainant's first amended complaint and filed a Motion to Dismiss regarding Respondent Union and/or Beil's alleged actions concerning negotiations, urging that these allegations were outside the original complaint, unrelated to any actions therein, and that Complainant had failed to exhaust internal Union remedies regarding alleged violation of the Union's constitution and that hearing these allegations along with Complainant's original complaint allegations would be highly inappropriate.

On May 15, 1997, Respondent Employer filed its answer to Complainant's original complaint, and on May 19, 1997, Respondent filed its answer to Complainant's amended and second amended complaints, including in each of these documents its affirmative defenses which included Respondent Employer's request that the case be deferred to arbitration and that Complainant be required to exhaust his administrative remedies available under the collective bargaining agreement.

On May 2, 1997, the Commission appointed Sharon A. Gallagher, a member of its staff, to act as Examiner in this case. Hearing was scheduled for June 4, 1997, at which the parties agreed to defer the underlying allegations of the original complaint to arbitration on an expedited basis. On June 9, 1997, Complainant was notified by Respondent Union that the payroll check distribution grievance was scheduled for umpired arbitration on June 25, 1997 before Arbitrator Jay Grenig. In lieu of umpire arbitration, however the Respondents resolved all issues relating to paycheck distribution at UW Hospital and Clinics by voluntary settlement agreement which included Respondent Employer's issuance of an August 7, 1997 memo sent to all employees of UW Hospital and Clinics reaffirming Respondent Union's position on paycheck distribution.

Thereafter, Complainant insisted upon resumption of the hearing in this matter and hearings were held on February 10, 1998 and April 13, 1998 at Madison, Wisconsin before Examiner Gallagher. At the hearing on February 2 and April 13, 1998, Respondents renewed their motion to dismiss this matter and Respondent Union made an expanded motion to dismiss allegations regarding it at the hearing on April 13, 1998. The Examiner granted Respondents' motions to dismiss upon the completion of Complainant's case in chief on April 13, 1998. A stenographic transcript of the proceedings was made, the last of which was received by April 21, 1998. Briefs and reply briefs herein were received by June 12, 1998. The Examiner, having considered the evidence and arguments of the parties including their briefs regarding the motions to dismiss and

Respondents' right to attorney's fees and costs, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Craig Marchant (Marchant or Complainant) is an individual who has been employed by UW Hospital and Clinics (UWH) since approximately 1987 and he has been employed for the past seven years in the Reprocessing Central Supply Department. At all times relevant hereto, Complainant worked from 4:30 p.m. to 1:00 a.m. Marchant is therefore an employee within the meaning of Sec. 111.81(d), Stats. Complainant's address is 101 West Third Street, Waunakee, Wisconsin 53597.

2. The State of Wisconsin, Department of Employment Relations and University of Wisconsin Hospital and Clinics, are employers within the meaning of Sec. 111.81(7)(d) and (8), Stats.

3. Council 24, Wisconsin State Employees Union, Local 1942, AFSCME, AFL-CIO (Union), has at all times material herein been the exclusive representative of a collective bargaining unit consisting of employees of UWH including Complainant and it has had a series of labor agreements with the State of Wisconsin (DER) covering said bargaining unit. The Union's office is located at 8033 Excelsior Drive, Suite "C", Madison, Wisconsin 53717-1903, and its Executive Director is Martin Beil. At all times material herein, Executive Director Beil and Assistant Executive Director Karl Hacker have been agents of Respondent Union. Diana Miller has at all times material herein been an employee of Respondent Union responsible for the enforcement of the labor agreement between the Union and UWH. The Union is therefore a labor organization within the meaning of Sec. 111.81(12), Stats.

4. By law, the Department of Employment Relations (DER) is responsible for the negotiation and enforcement of collective bargaining agreements under the State Employment Labor Relations Act (SELRA) between entities such as UWH and the Union. Mr. Jon Litscher is Secretary of DER, whose offices are located at 137 East Wilson Street, Madison, Wisconsin 53707. Renae Bugge, was at all times material herein the Director of Employee Relations and Communications for the UWH and Neal Spranger was at all times material herein Employee Relations Specialist for UWH. At all times relevant, Brian Tennant was Payroll Manager at UWH and Gordon Derzon was Superintendent of UWH. All of these individuals at all times relevant hereto were agents of the Respondent Employer.

5. The relevant collective bargaining agreement provisions from the 1995-97 contract are quoted below (emphasis in the original, denotes language added to the contract in 1995):

...

Section 9: Distribution of Pay Checks

11/9/1 The Employer agrees to continue its present departmental practices relating to the distribution of pay checks. Pay checks will be distributed in a confidential manner. All pay checks that are mailed will be mailed first class. When a regular payday falls on a holiday (including bank holidays) the Employer will distribute and date pay checks the day before the holiday.

...

ARTICLE IV

Section 8: Processing Grievances

...

4/8/2 Designated grievance representatives will also be permitted a reasonable amount of time without loss of pay to process grievances through Step Three (including consultations) in their jurisdictional areas during their regularly scheduled hours of employment. Only one designated grievance representative will be permitted to process any one grievance without loss of pay as above. Further, in a group grievance, only one grievant, appearing without loss of pay, shall be the spokesperson for the group. (Group grievances are defined as, and limited to, those grievances which cover more than one employee, and which involve like circumstances and facts for the grievants involved). Group grievances must be so designated at the First step of the grievance procedure and set forth a list of all employees covered by the grievance.

4/8/3 The grievance meeting as provided in the Pre-Filing Step and Steps One and Two above shall be held during the grievant's regularly scheduled hours of employment unless mutually agreed otherwise. The Employer shall designate the time and location for Pre-Filing, First and Second step grievance hearings. The grievant's attendance at said hearings, including reasonable travel time to and from the hearing, shall be in pay status.

...

4/8/4A (BC, ASU, T, SPS) The Pre-Filing Step and Step One of the grievance procedure will be held on the grievant's and the grievant's representative's work time if the work time is on the same or overlapping shift.

It is understood that the grievance time limits may have to be extended to accommodate this provision and that work schedules need not be changed.

...

MEMORANDUM OF UNDERSTANDING NO. 12

1995-1997 AGREEMENT

MEMORANDUM

Date: May 23, 1995

To: All WSEU Represented Employees

From: Martin Beil, Executive Director
AFSCME Council 24, WSEU

Jon E. Litscher, Secretary
Department of Employment Relations

Subject: **Direct Deposit of Payroll Checks**

During the course of discussions during the 1995-97 labor contract negotiations with the Wisconsin State Employees Union, problems with paycheck distribution were identified by both WSEU and Employer representatives. Items of concern identified by the parties include: security against lost or stolen checks, the considerable increase in the cost of postage and handling in recent years, paychecks which are lost in the mail cause significant delays in availability of employee funds, the time and expense of canceling and reissuing checks to replace those that were originally lost (including re-mailing the replacement checks), and the need to maintain detailed records of reissues for reconciliation purposes.

It is recognized by the parties that it is in the best interest of both to minimize unnecessary delays and expenses related to the distribution of payroll checks. Therefore, both WSEU and DER strongly encourage all state employees to set up direct deposit of payroll checks with their financial institution(s).

Direct deposit would virtually eliminate problems that are currently being experienced by both the employees and the agency payroll offices.

6. On July 1, 1996, UWH became a public authority, no longer a department of the University of Wisconsin. At the same time, it became clear that payroll would no longer be done by the University of Wisconsin on campus, but that it would be done by UWH at a location offsite and off-campus. Also on July 1, 1996, Council 24 chartered a new local which would cover all UWH employees, local union number 1942 and Local union number 171 which had previously been the local which represented Complainant was combined with other groups to form Local 1942. Sometime in the Fall of 1996, Council 24, essentially as a part of the reorganization of UWH and the creation of Local 1942, removed union stewards who had been members of Local 171. Council 24 then appointed stewards to represent employees such as Complainant in the grievance process for a time. Thereafter, Council 24 appointed a board which selected stewards to represent employees in grievances. Also during this period of time, Council 24 began attempts to train new stewards in the grievance process and its assigned union representative, Diana Miller attended grievance steps as a steward on behalf of employees where needed.

In the spring of 1996 employer representative Brian Tennant (Payroll Manager at UWH) raised the distribution of paychecks at a Labor Management Committee meeting where managers and local labor officials were present. At this meeting, Tennant asked if union officials would encourage employees to direct deposit their paychecks and if UWH could issue informative letters to employees regarding direct deposit. At this time, the Union did not agree to change any practice regarding the distribution of paychecks but it agreed to essentially allow UWH to issue its informational letter and noted that nothing in the collective bargaining agreement addressed direct deposit. On March 19, 1996, Brian Tennant sent the following letter to all UWH employees which read, in relevant part, as follows:

The transition to a public authority will result in significant changes in the UWHC payroll department. We are working with the university to assume many additional responsibilities that they currently perform on our behalf. We must accomplish this transition to an independent payroll department by the end of 1996. In addition, the payroll department will be moved to an offsite location in the summer of 1996.

The many changes in the payroll department necessitate that staff obtain training for the new responsibilities assumed from campus. Staff will also require training on our new payroll system, PeopleSoft payroll. This training will need to occur while we continue to pay employees in the existing campus payroll system. As a result, we need to identify and streamline certain department activities to create the available time for staff training.

We have identified check distribution as a candidate for process improvement. Approximately 50% of hospital employees currently receive a paper payroll check. As a result, payroll staff spend significant time distributing checks at the walk-up service window in D6/235.

We would like to recommend bank "direct deposit." The advantages of direct deposit to a UWHC employee are:

1. Eliminates the need to make a special trip to payroll to collect your payroll check.
2. Eliminates the need to make a special trip to your bank to deposit your payroll check.
3. Employees will continue to receive earnings statements detailing pay and leave activity.
4. Most banks ensure that direct deposit funds are available at 12:00 AM (midnight) on pay day.
5. Starting in 1997 with PeopleSoft payroll, you can distribute your paycheck to multiple accounts.
6. Some banks offer free checking for customers who direct deposit their payroll check. Also, some banks have offered to open a depository account to hold funds for those who do not wish to have a checking account.

Finally, as many of you know, the University's current payroll check direct deposit system is a paper based system whereby actual paper checks are mailed to the employees' financial institution just prior to payday. This paper based system has several drawbacks. Mail delivery can affect the timely arrival, the paper-based system requires a significant amount of manual labor, and it uses a precious resource - paper. *Starting on April 1, the university will utilize electronic transfer (ACH) to transmit paychecks to employees' banks.* Over the last few months, they have conducted successful test runs of the electronic transfer process with area banks.

...

7. On April 5, 1996, Tennant sent the following facts to Local 1942 Union official Steve Preller which included Tennant's concerns regarding a direct deposit letter he intended to send to UWH employees and acknowledged Preller's input into this letter (not quoted here) which apparently issued to employees on a later date, as follows:

...

Top ten reasons why you should consider Direct Deposit

1. Your hard earned money is available instantly, no waiting for checks to clear.
2. Funds deposited even if you are sick, out of town, or on vacation.

3. Funds can be deposited in checking or savings accounts, anywhere in the United States.
4. No lost checks.
5. Some banks offer free checking for customers who direct deposit their payroll check.
6. Employees who do not have (or wish to have) checking accounts can arrange to have their paycheck deposited into a debit account. The funds are then available through ATMs and point-of-sale transactions.
7. Conserves a precious resource - paper.
8. Employees will continue to receive earnings statements detailing pay and leave activity.
9. Starting in 1997 with PeopleSoft payroll, you can distribute your paycheck to multiple accounts, even in multiple financial institutions.
10. Join the fun! Nearly two thirds of your fellow hospital employees already use direct deposit.

Please complete the attached authorization form for direct deposit and return to the payroll office in D6/235. Also, please remember to attach a voided check or deposit ticket with your completed form. We will forward your direct deposit authorization form to campus payroll. Your direct deposit will be activated in two to three weeks after receipt of your authorization form.

Thank you for your consideration. Please call the payroll office at 2-4559 if you have any questions. (emphasis in original).

Prior to the end of December, 1996, Complainant regularly had his paycheck hand-delivered to him by his supervisor at approximately 6:30 p.m. on working time on the Wednesday prior to payday. Also, prior to January 1, 1997, most UWH employees had three options by which to receive their paychecks: having their checks delivered to them at the Hospital, or picking up their checks from the Human Resources Department at the Hospital; having their checks mailed to their home address; having their checks directly deposited to their bank account. In 1994 and 1996, Complainant had filed grievances regarding the delivery of paychecks. Those cases were settled by UWH in Complainant's favor, resulting in his continuing (until December of 1996), to have his paycheck delivered to him at approximately 6:30 p.m. by his supervisor on the Wednesday before payday.

8. On August 26, 1996, Payroll Manager Tennant sent Local 1942 Union official Wilkinson the following letter regarding paycheck distribution:

...

I am writing to communicate my decision concerning check distribution to PM shift employees in Radiology, Central Services, and Environmental Services. The payroll department will continue to provide check distribution to PM shift employees with the following conditions:

- * The payroll department will honor this distribution practice for the remainder of the current 1995-97 contract for the specific departments currently receiving the service. Departments can come to the payroll office to pickup checks and earnings statements after 3:00 PM on Wednesday one day prior to pay day.
- * As you suggested in last week's union/management meeting, paychecks will be distributed at the end of the employee's shift. This will ensure that the employee does not have the opportunity to negotiate the paycheck prior to the pay date printed on the paycheck.
- * The payroll department will provide checks for all employees in the affected cost centers, regardless of work shift. The department contact will be responsible for distributing the checks to each department employee.

...

9. In late October, 1996, Complainant requested a meeting with Council 24 Representative Diana Miller regarding paycheck distribution concerns. Miller and Complainant met at the Hospital on October 29, 1996 and Miller indicated that she felt it might be fruitful for Complainant to appear before a Labor-Management Committee meeting to discuss the paycheck distribution issue. Thereafter, Complainant received the various memos/letters from UWH, quoted herein.

10. On December 2, 1996, Brian Tennant sent the following memo to all UWH employees:

The Payroll Department will relocate to the Public Service Commission building on Whitney Way on January 10, 1997. The upcoming move is just one of the payroll changes which will affect you as an employee. Since the creation of the Hospital Authority, the payroll department has continued to distribute hospital employee paychecks produced by UW-Madison. On January 2, 1997, hospital employees will

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receive their first paycheck produced by the hospital on its newly implemented PeopleSoft payroll system. In preparation for these changes, we have reviewed paycheck distribution procedures for those employees who do not have direct deposit. I am writing to let you know the steps we will be taking to ensure that you continue to receive your paycheck in a timely and secure manner.

For those employees who do not have direct deposit, checks will be mailed directly to your home address and will arrive in your mailbox on the scheduled pay date. Mail delivery will provide you with timely, secure, and confidential distribution of your check.

If you prefer to have your earnings deposited directly into your bank account on the scheduled pay day, we encourage you to stop by D6/235 and sign up for direct deposit. The earnings statement detailing your hours worked, deductions, leave balances, etc. will be delivered to you via inter-hospital mail.

We have discussed these changes with your union representatives and agreed to notify you of the changes with this letter. If you have concerns about how these changes will affect you, want more information about direct deposit, or if the mailing address where you want the check directed is other than that to which this letter was mailed, **please notify me by returning the attached survey response.** This will give us the information needed to ensure that you continue to receive your check in a timely manner.

Thank you for your cooperation as Hospital Authority continues to assume services previously performed by the University of Wisconsin-Madison. (emphasis in original).

...

To: Brian Tennant

Payroll Services D6/235

My concerns or changes are as follows:

1. My correct mailing address is:

address _____

city/state/zip code _____

2. I am concerned about this paycheck distribution change. My concern is:

3. I am interested in direct deposit. (Please stop by the payroll department in D6/235)

Signed: _____

Print name _____

Job title _____

Work unit _____

Day phone _____

...

11. On December 13, 1996, Superintendent of UWH, Gordon Derzon, sent the following memorandum to all UWH employees regarding the implementation of the new payroll and benefits systems:

...

As you know, one of the new responsibilities of the UWHC Authority is to administer the hospital's payroll and benefits system. During the six months since creation of the Authority, the University has continued to process our payroll, allowing time for us to develop and implement our new computerized system, PeopleSoft. The new system will begin operation with the January 2, 1997, paycheck for all employees. We believe it will enhance our payroll services, and I'd like to take this opportunity to highlight key aspects of the new system and what you should expect as we begin using it.

Check Distribution

- * Pay stubs for employees who use direct deposit to their banks will be distributed through interdepartmental mail.
- * **Paychecks for employees who do not use direct deposit will be mailed directly to the employee's home.** If you have moved recently, be sure that the Human Services Department has your current mailing address.

...

Questions and Assistance

Implementing a new system for nearly 5,000 employees is an enormous effort, and we recognize that a few problems may occur. **Please verify the accuracy of all payroll deductions and address any questions to our payroll and benefits staff:**

- * Payroll and benefits representatives will be available to meet with you in room D6/225 from 7 a.m. to 5 p.m. on January 2-3 and January 16-17 to address questions concerning your paychecks.
- * After January 17, please direct benefits questions to benefits counselors at 265-8891 and payroll questions to payroll staff at 262-4559.

The implementation of our new payroll and benefits system has been a cooperative effort of the Departments of Human Resources, Information Systems, and Payroll. Staff in these departments have expended tremendous energy to design and implement a state-of-the-art system. We believe the system provides an efficient and effective method of processing payroll and benefits deductions, while offering excellent service to employees. Thank you for your cooperation as we begin to use this new system. (emphasis in original).

...

12. On the first paycheck of January, 1997, Complainant experienced a difficulty with delivery of his paycheck. At this time, UWH sent Marchant's paycheck to his mother's address in Wyocena, Wisconsin and Marchant had to drive to his mother's house to get his check. Marchant admitted that he had given the UWH his mother's address early on in his employment as an official address. Later, Complainant asked Bugge and Tennant about this. They told Complainant it must have been a mistake; that UWH never got Complainant's request that his check be sent to his home.

13. Sometime prior to January 16, 1997, Complainant spoke with UWH Manager Neal Spranger who told Complainant that he (Complainant) could receive his paycheck at the Human Resources Department on Wednesday afternoon prior to the close of that office and the commencement of Complainant's shift. On January 16, 1997, Marchant had a pre-file step grievance meeting with Union steward Deb Lucas, Neal Spranger and Renae Bugge of UWH. Prior to this meeting, Marchant's supervisor, Ron Gallitz, had written a note to Union steward Lucas indicating that Marchant would not be allowed to attend the pre-file meeting. Becoming aware of this, Marchant went to the office of Renae Bugge and Neal Spranger and spoke with them. Marchant was able to convince Bugge and Spranger that he should be allowed to attend the pre-file meeting and it occurred on schedule (January 16, 1997). At this meeting, Marchant discussed paycheck distribution and its history. Bugge stated (in a joking manner) that if there were more than 100 people who wanted their checks at the Hospital the bosses would put a stop to such

check distribution and no one would get their checks at the Hospital. Bugge also stated that employees with individual needs would get their paychecks on Wednesday night.

14. On January 21, 1997, Marchant was invited to, and attended, a Labor-Management Committee meeting at UWH in order to discuss paycheck distribution as he and Diana Miller had discussed previously. However, when Marchant arrived at this meeting he was told by Miller and Renae Bugge that he would not be allowed to speak at the meeting and that he could not sit at the table with the members of the Labor-Management Committee. Marchant was also told that the reason he would not be allowed to speak at this meeting was because a pre-file step had already occurred on his grievance regarding paycheck distribution. However, at this meeting, Union Representative Wilkinson stated his objection to the fact that paychecks were not being distributed as they had been in the past at the Hospital. Wilkinson also specifically objected to UWH's December 13, 1996 letter to employees which had described only two options for the receipt of paychecks: direct deposit and mailing to the employee's home. On January 31, 1997, Marchant's paycheck distribution grievance was officially filed.

15. On February 11, 1998, at a regular Union meeting, Union Representative Karl Hacker and Diana Miller were present. At this meeting, Hacker stated that the Union had already filed an unfair labor practice regarding UWH's change in the distribution of paychecks. On February 12, 1998, the Union sent Marchant the following letter:

...

I have received your letter regarding the grievances that you filed. The following is in answer to the questions that you have raised in your letter to me.

- * Payroll check distribution grievance #97-2163 will not be scheduled for a 2nd step grievance meeting. A pre-filing step was held on 1-16-97 with you, Deb Lucas, Renae Bugge and Neal Spranger present. The payroll check distribution issue was not resolved at the pre-filing step according to Deb Lucas. This issue has also been reviewed by our legal counsel with a recommendation to pursue the matter further by filing an unfair labor practice claim with the WERC. I have instructed the Employer to hold this grievance pending the outcome of the ULP.
- * Discrimination grievance #97-2165 will be scheduled for a pre-filing meeting. Deb Lucas has transferred to another shift and this grievance will be reassigned. Please submit to me all documentation to substantiate your claim of discrimination under Subchapter II (State Fair-Employment Act), Chapter 111, Wis. Stats. which deal with a discrimination-free environment assured for all protected purposes and or Wisconsin Statutes s. 111.84 (State Employment Labor Relations Act). This grievance will be scheduled for a

pre-filing meeting after the documentation to substantiate your claim of discrimination has been received by me.

- * Discrimination grievance #97-2167 will be scheduled for a pre-filing meeting after you have submitted the necessary documentation to substantiate your claim of discrimination to me.

Please submit the necessary documentation to me no later than Wednesday, February 19, 1997 or sooner if possible.

...

16. Two weeks later, on February 28, 1998, Marchant filed the instant complaint regarding UWH's unilateral change in the method of payroll check distribution. Since January 1, 1997, employees have been allowed to pick up their paychecks at the Human Resources office and some employees have continued to have their paychecks delivered to them at their worksites on their worktime.

17. At the June 4, 1997 hearing herein, the parties agreed to defer this case to expedited arbitration and a hearing was scheduled for June 25, 1997. All issues in dispute between the Respondents were resolved prior to that expedited hearing by the issuance of the following August 7, 1997 memo to UWH employees which read as follows:

...

Dear University of Wisconsin Hospital and Clinics Board Employee,

I'm writing to review with you the Hospital's paycheck distribution practices and ask for your feedback on the check distribution since the Hospital assumed the payroll distribution in January of this year. In December of 1996 I wrote to you shortly before Payroll moved to our new offices on Whitney Way. At that time, I described the paycheck distribution procedures to be used after our move.

You are currently receiving your paycheck through one of these ways:

- * Direct Deposit
- * First class mail delivery to your home
- * Picking it up at the Hospital

I would welcome your input on how well the paycheck distribution process is working for you. Your feedback will give us the information needed to evaluate how well these services are meeting your needs. Please indicate any questions,

comments, or desire to change the way your check is distributed on the form below
1/ and return to me by August 15, 1997.

We remain committed to providing the highest possible level of payroll service to
each of you. Thank you for taking the time to respond.

...

1/ The form referred to was the same as that quoted in Finding No. 10, above.

On October 29, 1997, Complainant advised that the above memo was insufficient to settle the instant case and hearing was reconvened by agreement of the parties, on February 10 and April 13, 1998.

18. The evidence failed to demonstrate that either Respondent Union or its agents Beil, Hacker and Miller were hostile or biased against Complainant. Miller and Respondent Union's handling of Complainant's grievance was not shown to be perfunctory and the evidence indicated that the Union intended to file a prohibited practice regarding the paycheck distribution matter brought to its attention by Complainant. Neither Hacker nor Miller acted in an arbitrary, discriminatory or bad faith manner and at all material times herein they fairly represented Complainant. No evidence was offered to show that any of Respondent Union's agents had made any discriminatory, arbitrary or threatening statements to or about Complainant. The Union's denial of Complainant's requests for Respondent Union to pay for copies, mileage, attorney's fees, child support and time spent picking up his payroll check in January, 1997 at his mother's home did not constitute a violation of the Union's duty of fair representation. As Complainant provided no evidence to support its allegation that a violation of the duty of fair representation occurred, Complainant's claims are frivolous.

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

CONCLUSIONS OF LAW

1. Even assuming all of Complainant's evidence is true, Complainant failed to present a *prima facie* case showing that Respondent Union or its agents had violated their duty of fair representation with respect to the processing of Complainant's grievance pursuant to Sec. 111.84(2), Stats.

2. Complainant's allegations were not debatable did not amount to a colorable claim of a violation of Sec. 111.84(2)(a) and (c), Stats.

3. The Commission will not exercise its jurisdiction to review the merits of Respondent UWH's alleged breach of the collective bargaining agreement and unilateral change of its paycheck distribution practices in violation of Sec. 111.84(1)(d) and (e), Stats.

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

ORDER OF DISMISSAL

It is ordered that the complaint be, and is, hereby dismissed in its entirety.

It is further ordered that Complainant pay Respondents' (UWH and Council 24) reasonable attorneys' fees and costs for bringing this frivolous suit not to exceed \$1,500 for each Respondent.

Dated at Oshkosh, Wisconsin this 13th day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

UNIVERSITY OF WISCONSIN (HOSPITAL AND CLINICS)

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT**

POSITIONS OF THE PARTIES

Complainant's Brief on the Merits

Complainant argued that filing an unfair labor practice was the only course open to Marchant on February 28, 1997, as the time to file and process his grievance had already lapsed. Further, the Complainant urged that the Union failed to investigate the merits of Marchant's grievance and therefore the Union's decision not to pursue it was arbitrary and in bad faith. In this regard, Complainant noted that in October and December, Complainant had conversations with Union representatives Miller and Hacker regarding his concerns on paycheck distribution. Yet, in Complainant's view, Miller failed to interview Marchant on his position regarding paycheck distribution to meet the requirements of a full and fair investigation prior to the January 21, 1997 labor-management committee meeting. Complainant speculated that Miller must have been unhappy that Marchant initiated the grievance and that this was the reason why she failed to properly investigate the case. As none of the grievance steps were followed in this case, Complainant believed there was no active grievance or appeal thereof at the time that Marchant filed his prohibited practice complaint.

In the Complainant's view, the failure to investigate a grievance necessarily means that the Union's decisions regarding that grievance must be arbitrary and capricious. In Complainant's opinion, the settlement reached with Respondent UW Hospital regarding Marchant's grievance was a complete concession to the Employer which, Complainant urged, necessarily demonstrated that the level of representation which Marchant received was insufficient. In addition, Complainant speculated that the Respondents agreed to defer the case to arbitration in order to settle the underlying grievance which resulted in making the complaint case herein moot.

The Complainant urged that because the Union had prevailed on grievances in the past regarding the very subject of the complaint case herein, Respondent Union acted in bad faith in failing to pursue Marchant's grievance. Complainant contended that Respondent Union acted in bad faith by making promises to Marchant which it did not keep or follow through on. Complainant reiterated that there was no route available to get his (Marchant's) case to arbitration by the time the complaint was filed, as the time periods under the contract had lapsed. In addition, Complainant believed that because Marchant was excluded from settlement negotiations, this constituted bad faith within the meaning of Chapter 111. Complainant stated that the Respondents excluded Marchant from the settlement process in order "...not to solve Marchant's grievance in a manner acceptable to him, but rather (it was) a joint attempt by the Employer and the Union to moot out the case." Thus, because the Respondent's settlement of Marchant's grievance was not in

Marchant's interests, but benefited the Employer, the Complainant urged that a violation of the duty of fair representation must have occurred.

Complainant's Brief on Fees and Costs

In regard to the issue whether Complainant's allegations made in this case were frivolous and therefore whether attorney's fees and costs should be granted to Respondents, Complainant argued as follows. Complainant noted that the issue had arisen in the past regarding paycheck distribution, and the grievants had won each case. Complainant argued that the Union blocked Marchant's efforts to proceed with his grievance; that the Union missed the time limits for the grievance; and that the Union failed to obtain the remedy which Marchant had requested in this case. Complainant urged that Marchant had been injured by the inconvenience of having to pick up his paycheck on his own time and by the fact that the Respondent Employer's treatment of his pay in January had "made him violate his child support obligation". Thus, it was clear to Complainant that the case was clear-cut and that it could not be found that Marchant's allegations were frivolous, requiring the payment of attorney's fees and costs.

Complainant urged that the WERC lacks jurisdiction to impose attorney's fees and/or costs under Section 814.025, Stats. In addition, Complainant contended that Chapter 111 of the Wisconsin Statutes fails to grant the Commission any specific statutory authority to impose such fees and costs. Furthermore, the Complainant argued that WERC case law cited by Respondent is inapposite to this case and that Respondents have misconstrued the precedents involved. In this regard, the Complainant asserted that the WERC has never imposed attorney's fees and costs against a Complainant for bringing a frivolous claim.

Even if the WERC could impose attorney's fees and costs, Complainant pointed out, the Respondents provided no evidence that Complainant had filed its suit to harass or maliciously injure Respondents or that it had done so in bad faith; that Respondents failed to provide any evidence that the Complainant or his attorney knew or should have known that the action was without a reasonable basis in law and could not be supported by good faith argument. The Complainant urged that the Examiner never found in her oral ruling regarding the motions to dismiss that there was no basis in law for the case, only that the case was "trivial". The Complainant argued that merely failing to prevail on the merits of a case does not make the case frivolous and it urged that a violation of Chapter 111 was proven by Complainant.

Complainant asserted that there is a legal presumption that actions are not frivolous and that the parties requesting attorney's fees and costs have to overcome this presumption, citing *KELLY V. CLARK*, 192 Wis. 2d 633 (Ct.App., 1995). Finally, the Complainant claimed that no formal motion to dismiss had been made by the Respondents, and that the Examiner made her ruling on her own motion from the bench without the required findings on frivolousness. Therefore, Complainant urged that the Examiner to reverse her decision and find that fees and costs should not be paid by

Respondents

Respondent UWH

Respondent UWH chose not to file a brief in this matter, relying instead upon the briefs filed by Respondent Union.

Respondent Union's Brief on the Merits

The Union noted that for a violation of the duty of fair representation to occur, a union's conduct toward a member must be arbitrary, discriminatory or in bad faith. Nonetheless, the Union pointed out that a union has great discretion in processing its members' claims and grievances and that mere negligence is insufficient to establish a violation of the duty of fair representation.

The Union analyzed the Complainant's allegations as follows. The Union noted that the Complainant had argued that Respondent Union failed to listen to his concerns and to follow through thereon; that Complainant was upset that he had not been allowed to speak at a labor-management committee meeting on January 21, 1997; that Complainant felt excluded from settlement negotiations regarding his paycheck distribution grievance; and that the Union appeared to have settled Complainant's grievance in bad faith for the sole purpose of "mooting" out Complainant's allegations in the instant case; and that despite the settlement agreement, Complainant was still forced to suffer the inconvenience of having to pick up his paycheck outside of his working hours.

In regard to the allegations that the Union failed to listen to or follow through on Complainant's concerns and failed to allow him to speak at a labor-management committee meeting, the Union noted that it was the Union that contacted and met with Complainant regarding his grievance and that the Union invited Complainant to the labor-management committee meeting to put forth his concerns. The fact that Complainant had already filed his grievance and that he was not a member of the labor-management committee necessitated his being denied the opportunity to speak to the labor-management committee. However, the Union noted that both Union representatives Diana Miller and Pat Wilkinson aired their opinions regarding paycheck distribution which were, Complainant admitted, in line with his objections to the Employer's conduct in this area.

In regard to the allegation that Complainant was excluded from settlement negotiations, the Union asserted that Complainant's attorney was notified of the settlement agreement and given an opportunity to voice her objections. Complainant's attorney cited only the fact that Marchant would not be able to receive his paycheck as he had in the past, as her sole objection to the settlement agreement; Complainant's attorney never asserted that the settlement agreement process had been done in bad faith. In any event, the fact that the Union decided to settle the underlying

Commission's precedents, and thus should not be a basis for finding in favor of Complainant on the merits of this case.

In regard to the Complainant's assertion that the Union settled the underlying grievance in bad faith for the purpose only to moot out Complainant's complaint case herein, the Union argued that Complainant failed to submit any evidence to support this claim. Indeed, the Union noted that the fact that the Union had not processed Marchant's concerns and requests fast enough for his liking would not form a basis for finding a violation of the duty of fair representation. Indeed, the Union urged, the fact that Marchant had had no trouble in filing and pursuing grievances in the past based upon this record should demonstrate that a finding in favor of the Union on the merits herein was justified.

Finally, the Union argued that Complainant's being forced to pick up his paycheck one day early on his off time was not truly inconvenient to him. Even if it were to constitute true inconvenience, Complainant could have had his check direct-deposited or sent to his home on payday. In all of the circumstances, Respondent Union asserted that the Examiner was correct in granting Respondents' motion to dismiss the instant case.

Respondent Union's Brief on Fees and Costs

In regard to fees and costs, the Union argued that the WERC has authority to award attorney's fees and costs based upon the Wisconsin Statutes as well as Commission precedent. The Union noted that where claims are not debatable, the Commission has found them frivolous, and awarded the opposing party fees and costs. TOMAH SCHOOL DISTRICT, DEC. NO. 28708-B (WERC, 5/91), slip. op. at p. 9. In addition, the Union noted that Chapter 814.025(3)(b), Stats. defines a frivolous claim as one which the party knew or should have known was "without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law." In this context, and given the lack of evidence of any violation in this case, the Union contended that the Complainant should be held liable for Respondents' attorneys fees and costs.

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. *VACA V. SIPES*, 386 U.S. 171, 177, 64 LRRM 2369, 2371 (1967). The Wisconsin Supreme Court has followed the requirements laid out by our country's highest court in its decisions. *MAHNKE V. WERC*, 66 Wis. 2D 524 (1974). Therefore, it is clear that under SELRA, unions must represent the interests of all their members without hostility or discrimination; that they must exercise their discretion with good faith and honesty; and that they must avoid arbitrary conduct. A union breaches its duty of fair representation when its actions are arbitrary, discriminatory, or in bad faith. See e.g., *VACA V.*

SIPES, SUPRA; WISCONSIN PROFESSIONAL POLICE ASSOCIATION, DEC. NO. 28075-A (Jones, 4/98); COLEMAN V. OUTBOARD MARINE CORP., 92 Wis. 2D 565 (1979).

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However, 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. FORD MOTOR CO. V. HOFFMAN, 345 U.S. 330, 31 LRRM 2548 (1953). 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. WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT, DEC. NO. 20922-D (Schiavoni, 10/84), AFF'D BY OPERATION OF LAW, DEC. NO. 20922-E (WERC, 10/84). Rather, a complainant has the burden to demonstrate by a clear and satisfactory preponderance of the evidence each element of his or her contention that a violation of the duty of fair representation has occurred. The fact that a union refuses to take a case to arbitration, or that it settles a case against a grievant's wishes will not prove a violation of the union's duty of fair representation under the case law. See, WISCONSIN EDUCATION ASSOCIATION COUNCIL, DEC. NO. 28543-A (McGilligan, 9/97).

As Examiner Nielsen aptly observed in BLACKHAWK VTAE, DEC. NOS. 28448-B, 28449-B (Nielsen, 7/97):

Fair representation is not perfect representation, nor is it a guarantee that every individual member will be satisfied with each act or decision taken by the labor organization.

Indeed, it has been held that even where a union is negligent in processing a grievance, such negligence is insufficient to support an allegation that the union thereby violated its duty of fair representation.

It is clear on this record that sometime in 1996, UWH was statutorily created as a public authority, separate from the University of Wisconsin and that Chapter 111.80, Stats. was amended to create a new bargaining unit at UWH for all employees represented by Council 24. In line with this, Respondent Union created a new local union and removed the stewards who had represented the prior local, replacing them at first with stewards appointed by Council 24. Thereafter, the Respondent Union created a committee of local union members who appointed local stewards at UWH. 2/ Given these significant changes in both the employer as a separate entity and the local

2/ Complainant presented no evidence herein to cast doubt on Council 24's motivations in taking these actions.

union and its bargaining unit, it is not surprising that some confusion as well as a lack of proper ongoing training of stewards might have occurred initially when these significant changes occurred.

In regard to paycheck distribution at UWH in 1996, employer representatives spoke to the local union members regarding the interest the employer had in encouraging employees to direct deposit their paychecks. As a result, UWH gained permission from the Union to issue memos regarding direct deposit as a means of payroll distribution. Those memos were dated March 19, April 5, August 26, December 2 and December 13, 1996. These memos essentially indicated that paycheck distribution would be accomplished through the three options that had been pursued and used in the past for the period of the 1995-97 contract. It is also clear that after the significant change in the employer's status as a separate entity occurred, UWH planned to go to off-site paycheck preparation, by placing the payroll department of UWH at the Public Service Commission building on Whitney Way in Madison, Wisconsin, effective January 10, 1997. This meant that paycheck preparation would not be done by the University of Wisconsin on campus.

It is significant that in the memos dated December 2 and December 13, 1996, UWH urged employees to make sure that their addresses were current for purposes of mailing their paychecks in January, 1997 pursuant to these changes in payroll preparation and distribution. Although Marchant prepared a change of address form, it appears that this form was not received by UWH in a proper fashion. Marchant admitted that only one of his paychecks went astray in early 1997, that he had listed his mother's address on a prior address form with UWH, and that he resubmitted a second change of address form to UWH for future reference. It is also clear that UWH apparently neglected to deduct \$175 from Marchant's paycheck as a child support payment on the first paycheck of 1997 and that Marchant had to travel several hundred miles to pay this amount and get a receipt from the Clerk of Courts in the county involved. 3/

3/ Marchant submitted no evidence to show that the failure of UWH to deduct a child support payment from his first paycheck of 1997 or UWH's use of an old mailing address Marchant had given UWH previously was done intentionally or in retaliation for his union activity or in order to restrain or coerce him in his union activities.

The facts of this case regarding the alleged violation of the duty of fair representation demonstrated that Marchant became concerned about the possibility of a change in paycheck distribution at the end of October, 1996. At this time, he requested a meeting with Diana Miller of the Union regarding this matter. At this meeting with Miller, Marchant did not ask to file a grievance and as no change in paycheck distribution had occurred, as of October 29, 1996, such a grievance would not have been timely.

Having experienced difficulty receiving his first paycheck of 1997, Marchant filed a pre-file step grievance on January 16, 1997. It should be noted that effective January 1, 1995, the collective bargaining agreement had been changed in the grievance article to include a new pre-file step which had not previously been used by the parties. Although it is not clear whether

Marchant's supervisor, Ron Gallitz, had received any grievances between January 1, 1995 and January 16, 1997, he apparently incorrectly indicated that Marchant would not be allowed to attend the pre-file step of his (Marchant's) grievance. Dissatisfied with Gallitz' position on this point, Marchant then spoke to Renae Bugge and Neal Spranger and received their assurance that he would be allowed to attend the pre-file meeting of his grievance, which occurred on schedule on January 16, 1997.

Evidence showed that at the January 16, 1997 meeting, Marchant was given every opportunity to express his opinions and views regarding his grievance. In any event, Marchant failed to demonstrate that he was injured in any way by Gallitz' initial refusal to allow him to attend the pre-file meeting on his grievance.

On January 21, 1997, Marchant was invited to a labor-management committee meeting at UWH by Diana Miller in order to discuss the paycheck distribution. The evidence showed that Marchant was not allowed to speak or sit at the table with committee members. The fact that Marchant was not a member of the committee, and that he had filed a pre-file step on his paycheck distribution grievance reasonably explain why Marchant was not allowed to speak at this meeting or sit at the table with the committee members. In any event, it is clear that Union representative Pat Wilkinson made the points that Marchant would have made (perhaps not in Marchant's words, or at the length which Marchant would have spoken) when Wilkinson specifically objected to the fact that UWH failed (in its December 13, 1996) memo to describe all three paycheck distribution options that were effective through 1996 and when Wilkinson asserted that the Local Union believed that paychecks should be distributed according to past practice.

It should be noted that Marchant was accommodated in the receipt of his paycheck, prior to January 16, 1997, by UWH manager Neal Spranger who allowed Marchant to pick up his paychecks at the Human Resources Department on the Wednesday before payday before the close of the Human Services office and the commencement of Marchant's third shift duties.

Marchant has argued that the Union failed to follow through on his case. In this regard, I note that the evidence showed that Marchant attempted to reach Diana Miller approximately two or three times prior to January 16, 1997; that he wrote her three notes; and that after January 16, 1997 Marchant called Ms. Miller approximately twice. The evidence failed to show that Ms. Miller or Karl Hacker returned any of Marchant's calls during this time period. Although this evidence tends to show Ms. Miller and Mr. Hacker were less than diligent in returning Marchant's calls, it is insufficient to constitute a violation of the duty of fair representation.

On February 11, 1998, at a regular union meeting, Union representative Hacker stated that the union had already filed an unfair labor practice regarding UW Hospital's change in the distribution of paychecks. This statement is clearly wrong. Assuming as we must that Hacker made this statement, it is nonetheless insufficient to demonstrate a violation of the duty of fair

representation, as it amounts to mere negligence on Hacker's part to have spoken inaccurately. In any event, on February 12, 1998, the Union formally clarified its position regarding Marchant's various grievances. Specifically, regarding the paycheck distribution grievance, the Union advised Marchant in its February 12th letter that the grievance had been reviewed by the Union's legal counsel with a recommendation to pursue a ULP with the WERC and hold the grievance pending the outcome of the ULP. I note that no difficulty regarding timeliness or procedure was discussed in Respondent Union's letter. Thus, the error that Hacker had made on February 11th was corrected by the Union in this letter.

After receiving the Union's February 12 letter, Marchant, apparently disbelieving the Union's statements in its letter, called the WERC several times and was told that no unfair labor practice had been filed by Council 24 on the issue involved in this case. Marchant admitted herein that he is aware that the Union would have one year in which to file an unfair labor practice regarding paycheck distribution and that he did not call the Union to inquire regarding the status of the unfair labor practice prior to filing the instant complaint. These circumstances tend to show that Marchant was attempting to trump the Union by his actions, there being no need, by his own admission, to rush to file an unfair labor practice against UWH.

Complainant has argued here that the Union failed to investigate the merits of his grievance, making its decision not to pursue the grievance arbitrary. However, Marchant admitted that on October 29, 1996, both Hacker and Miller met with him about his concerns regarding paycheck distribution at UWH and that he was able to voice his concerns at that meeting. In addition, sometime between December and early January, 1997, Marchant stated he spoke to Diana Miller twice regarding the paycheck distribution matter. Thus, Marchant's assertion that Miller failed to interview him properly prior to the January 21, 1997 labor-management meeting, is simply not true.

Marchant next argues that he had no choice but to file an unfair labor practice because this was the only course left open to him, as his grievance had lapsed by February, 1997. On this point, Marchant indicated that none of the grievance steps had been followed and that therefore no active grievance, or appeal therefrom, could have existed. These assertions are belied by the Union's February 12, 1997 letter which clearly states that the grievance would be held in pending status awaiting the outcome of the unfair labor practice which legal counsel had recommended. Thus, Marchant's claim that no further recourse was open to him in February, 1997, regarding the paycheck distribution matter was clearly false.

Marchant argued that because Respondent Union made a "one hundred percent concession" to UWH in settling the underlying grievance this demonstrates the Union's failure to fairly represent him. This allegation gets at the crux of Marchant's complaint: he wanted the Union to grieve his paycheck distribution claim and gain a settlement or order that his UWH supervisor would have to continue to hand-deliver Marchant's paycheck to him on Wednesday at 6:30 p.m. at his work site. To Marchant, any outcome short of this amounted to a violation of the Union's duty

of fair representation. It should be noted that case law indicates that a grievant is never assured of a specific outcome for his grievance. Nor is a union required to take a grievance to arbitration to meet its duty of fair representation.

The fact that Complainant did not receive the settlement that he sought in his grievance – that his supervisor deliver his paycheck to him on his worksite on the Wednesday before payday at approximately 6:30 p.m. – does not require a conclusion that the Union breached its duty of fair representation herein. Rather, I note that the August 7, 1997 memo to employees which issued as a result of Respondent's settlement of Marchant's grievance, confirms the fact that employees will continue to have three methods for paycheck distribution: direct deposit, first-class mail delivery to their homes and the ability to pick up their paycheck at the Hospital. 4/ Based upon the settlement,

4/ This memo also sought employee input into how paycheck distribution is working for each employee, and asked each employee to assure (by inclusion of a designation form) that they have properly listed their address and their desired method of paycheck distribution with the employer.

and given the substantial change UWH made in payroll processing in early 1997, I cannot conclude that the settlement constituted a complete concession to UWH or that the Respondent Union's entering into the settlement constituted a violation of the duty of fair representation.

Complainant speculated in its brief that the Respondents deferred the instant case to arbitration in order to moot the complaint case. I can find no evidence on this record to support Marchant's claim on this point. The fact that the Union may have previously prevailed on grievances regarding paycheck distribution prior to the underlying grievance, does not necessarily mean that the Union should have taken Marchant's grievance to arbitration for a final determination. In this regard, I note that between the prior grievances and the grievance which Marchant filed, great changes had occurred at UWH, including its creation as a separate entity, the change in the bargaining unit for UWH employees, as well as the payroll department's move off the UW campus to a state-owned facility.

Marchant has asserted that he has been injured by the Union's representation of him in that he has been inconvenienced by having to pick up his paycheck on his own time at the Human Resources office prior to the start of his shift; that UWH failed to properly deduct child support obligation from Marchant's January 1, 1997 paycheck, to his detriment; that Marchant incurred mileage charges, copying costs and attorney's fees all because the union failed to fairly represent him. Had Marchant read the Union's February 12 letter and understood it, he would not have proceeded to file the instant complaint case, incur attorney's fees and copying charges as well as some of the mileage fees he has claimed are due him. Thus, in my view, Marchant's "injuries" are

of his own making, are based upon his own voluntary decisions and are not due to any arbitrary, capricious or discriminatory treatment of him by the Union.

In his May 2, 1997 and May 29, 1997 amendments to his complaint, Marchant sought WERC orders that the Union rescind certain bargaining demands, that the Union had violated its constitution, that a new election should be run, that the Union be ordered to reimburse Complainant's union dues, and that the Union be ordered to submit new and appropriate bargaining demands. There is absolutely no basis in case law or in the statute for any of these remedies. Therefore, these requests for remedies by Complainant have been denied in their entirety.

Complainant offered no evidence of any statements made by Union representatives Hacker and Miller or any other union representatives which would tend to indicate that the Union harbored any animus or hostility toward Marchant. Rather, the evidence showed that Respondent Union acted rationally based upon its understanding of the paycheck distribution issue in light of the changes made in the contract as well as the reorganization of UWH and the local union. The fact that Complainant decided, on his own, and without consulting the Union, to file a WERC complaint against the Union and the State of Wisconsin and that he decided to hire and confer with a private attorney regarding his complaint case, without consulting the Union first, should not ultimately be the Union's responsibility. The Union did not know Marchant had retained an attorney until after the fact. I note that there was no evidence offered to show that the Union ever gave Marchant any assurances or indication which could have reasonably lead him to believe that Respondent Union would reimburse him for any legal fees, costs or expenses he might incur involving his grievance or the instant case. I do not believe the duty of fair representation can or should be interpreted to mean that if a union mistakenly or for some rational reason either settles a grievance, or submits it to arbitration, it will thereafter be bound to take all cases to a similar settlement or to arbitration regardless of their merit.

Attorney's Fees and Costs

In conjunction with their motions to dismiss, Respondents have requested attorney's fees and costs based upon the fact that Complainant's allegations were frivolous. I have concluded that Complainant should pay Respondent's attorney's fees and costs, having found Complainant's claims against the Union to be frivolous, devoid of merit and not debatable. See, STATE OF WISCONSIN, DEC. NO. 27971-A (Buffett, 5/94); ELCHO SCHOOL DISTRICT, DEC. NO. 27904-A (Burns, 8/94).

In his concurrence in MADISON SCHOOL DISTRICT, Dec. No. 16471-D (WERC, 5/81), Commissioner Torosian stated what has become current Commission policy on the subject of attorney's fees as follows:

While I concur with the majority that attorney's fees are not justified in the instant case, I disagree with the iron-clad policy enunciated by the majority of denying attorney's fees in all future cases. I agree that, for some of the policy reasons stated in the UNITED CONTRACTORS case, the Commission should be reluctant to grant attorney fees. However, I feel the Commission should retain the flexibility, and therefore adopt a policy, which would enable it to grant attorney fees in exceptional cases where an extraordinary remedy is justified. In this regard I would adopt the reasoning of the National Labor Relations Board stated in HACK'S, INC., 88 LRRM 1049, wherein the National Labor Relations Board stated its intention "...to refrain from assessing litigation expenses against a respondent, notwithstanding that the respondent may be found to have engaged in 'clearly aggravated and pervasive misconduct' or in the 'flagrant repetition of conduct previously found unlawful' where the defenses raised by that respondent are 'debatable' rather than 'frivolous'."

In my opinion limiting the granting of attorneys fees to such cases would best balance some of the policy considerations cited in UNITED CONTRACTORS and the interest of the Commission in discouraging frivolous litigation and to protect the integrity of our process.

...

In my view, this is an exceptional case which demonstrates that Complainant had absolutely no basis upon which to demonstrate that the Union had violated its duty of fair representation, and therefore Complainant could not proceed on the merits against UWH. Contrary to Complainant's contention, the Commission has evinced a willingness in a proper case to award attorney's fees and costs against a Complainant. TOMAH SCHOOL DISTRICT, supra. I see no reason not to extend the Commission's general rules regarding the granting of attorney's fees and costs to Respondents for the following reasons. There is no question that the allegations of Complainant are not debatable: absolutely no evidence of Union animus or hostility toward Marchant was produced in this case. Clearly, Marchant could not prove a violation of the duty of fair representation against the Union in these circumstances, as Marchant failed to submit evidence of arbitrary, capricious, discriminatory or bad faith conduct by the Union toward him.

I note that Complainant had been a union steward and was admittedly aware of the statute of limitations applicable to cases such as this one arising under Chapter 111. In my view, Complainant or his counsel knew or should have known that without evidence of animus or hostility to show arbitrary, capricious or discriminatory conduct on the part of the Union or its agents toward Marchant, Complainant could not prove a violation of the duty of fair representation. See JUNEAU COUNTY V. COURTHOUSE EMPLOYEES, LOCAL 1312, AFSCME, AFL-CIO ET AL.

216 Wis. 2D 283 (Ct.App. 1/98). Under all the circumstances of this case, an order of attorney's fees and costs of up to \$15,000 to be paid to each Respondent by Complainant is warranted and has been ordered herein. 5/

5/ Approximately one and one-half days of hearing occurred herein for which Respondents had to prepare. I therefore find that attorney's fees and costs not to exceed \$1,500 to Respondent Union and \$1,500 to Respondent UWH are reasonable.

Dated at Oshkosh, Wisconsin this 13th day of August, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

