STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JERRY C. WAGNER, Complainant,

vs.

WISCONSIN STATE EMPLOYEES UNION, AFSCME COUNCIL 24, AFL-CIO, Respondent.

Case 445
No. 55359
PP(S)-278

Decision No. 29177-A

Appearances:

Mr. Jerry C. Wagner, appearing on behalf of himself.

Murray & Cross, by **Ms. Nola J. Hitchcock Cross**, and **Mr. Gordon R. Shea**, on behalf of the Union.

FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER

Amedeo Greco, Hearing Examiner: Complainant Jerry C. Wagner ("Wagner"), filed an unfair labor practices complaint with the Wisconsin Employment Relations Commission ("Commission") on July 11, 1997, alleging that Wisconsin State Employees Union, AFSCME, Council 24 ("Council 24"), had committed an unfair labor practice by refusing to arbitrate his grievance and by thereby breaching its duty to fairly represent him.

On August 27, 1997, the Commission appointed the undersigned to issue and make Findings of Fact, Conclusions of Law and Order as provided for in Section 111.07(5) Stats. Council 24, then represented by Attorney P. Scott Hassett, filed its answer and a motion to dismiss on October 15, 1997, at which time it also asked for an award of attorney's fees. Wagner by letter dated October 21, 1997, objected to Attorney Hassett's participation on the ground that Attorney Hassett was in the same law firm as Wagner's former private attorney, the late Richard Graylow, and that Hassett therefore had a conflict of interest dictating his

recusal. Hassett by letter dated October 27, 1997, unilaterally withdrew from this case and was replaced by attorney Nola J. Hitchcock Cross. Hearing was held in Madison, Wisconsin, on April 7, 1998. Both parties subsequently filed briefs and Wagner filed a reply brief that was received by November 3, 1998.

Having considered the arguments and the record, I make and file the following Findings of Fact, Conclusion of Law, and Order.

FINDINGS OF FACT

1. Wagner, whose address is P.O. Box 263, Amery, Wisconsin 54001, was employed by the State of Wisconsin as a Conservation Warden from 1973 to December 10, 1993, when he was terminated.

2. Council 24, a labor organization, maintains its principal office at 8033 Excelsior Drive, Suite "C", Madison, Wisconsin 53717. At all times material herein, Martin Beil has served as Council 24's Executive Director, Karl Hacker has served as Council 24's Assistant Director, and Richard H. Rettke has served as a Council 24 Field Staff Representative. Throughout that time, they have acted on Council 24's behalf and they have served as its agents.

3. At all times material herein, Council 24 has represented for collective bargaining purposes a bargaining unit that includes Conservation Wardens employed by the State of Wisconsin ("State"). Council 24 and the State have been parties to a series of collective bargaining agreements that provide for a grievance procedure and for final and binding arbitration.

4. Prior to his termination, Wagner received a formal written reprimand in October, 1990, for not properly investigating a jet-ski accident; a one-day unpaid suspension in February, 1992, for not following orders; and a three-day suspension in February, 1993, for improperly removing a trap tag from an arrestee.

5. Wagner on his own time participated in a non-job related rifle shoot conducted by the Wisconsin Conservation Warden Association in May, 1993, at which time some of his rifle cartridges misfired. Wagner on May 19, 1993, wrote a letter of complaint to cartridge manufacturer Olin-Winchester which, in turn, replied in a June 15, 1993, letter that offered Wagner replacement rifle cartridges.

6. Unsatisfied, Wagner in a July 20, 1993, letter that was typed on plain stationery informed an Olin-Winchester customer service representative:

. . .

> This letter is in response to your correspondence of June 15, 1993, regarding two misfired cartridges I returned to you for inspection.
>
> Though I accept your explanation for why the shells didn't fire when snapped a second or third time, I resent your apparent assumption that a "weak blow" from my revolver caused the initial problem.
>
> As a classified police combat competitive shooter – and law enforcement officer – I maintain my gun in optimum condition at all times.
>
> If I am on the firing line in a competition match and experience a misfire, I – as well as any other competitor in that situation – will attempt a refire as quickly as possible before the time expires, so I don't lose the ten points it represents.
>
> In my case and your shells, it was 20 points and the match.
>
> Of greater concern to me is the consequence of having two subsequent misfires in a single cylinder when involved in a serious, potentially life-threatening law enforcement citation.
>
> In either case, I would not be in a position to say, "Oops, I better take this misfire out for Winchester."
>
> Your condescending letter and a token box of shells disappointed me and was not the type of response I expected from a company such as yours.
>
> Though I am a long-time user of Winchester shells, this incident and the tone of your letter have raised serious doubts in my mind as to whether I should continue my client relationship with your company.
>
> In addition, I feel compelled to communicate these misgivings to my comrades in law enforcement as well as other competitive shooters via association contact and letters to special interest publications.

> I would reconsider this action should you be concerned enough about this problem to donate several cases of wad-cutters or other ammunition to the Wisconsin Conservation Wardens Association for its annual competitive shoot.
>
> I am anxiously awaiting your reply.

Wagner signed his name "Jerry C. Wagner Wisconsin Conservation Warden" and sent a copy of it to Olin-Winchester's president.

7. Olin-Winchester subsequently complained to Wagner's superiors about his July 20, 1993 letter and an investigation thereafter was conducted by the State regarding Wagner's letter.

8. Donald L. Semman, Deputy Secretary of Wisconsin's Department of Natural Resources, by letter dated December 2, 1993, informed Wagner:

. . .

> This letter is to advise you that you are terminated in your position as a Conservation Warden 3 with the Department of Natural Resources effective at the end of the business day on December 10, 1993.
>
> This disciplinary action is based on the following incidents and your behavior which violated the Department's Work Rules (Manual Code 9121.06(1)(e) – Failure to provide accurate and complete information whenever such information is requested by an authorized individual.) and the Department's Code of Ethics (Manual Code 9121.1(6) – Refrain from any acts or relations which will violate their public trust and reflect discredit on themselves or the Department.).
>
> By virtue of experiencing two (2) misfires at a competitive shoot, you proceeded to contact Olin-Winchester regarding their pistol ammunition. (See attached correspondence which is incorporated herein by reference) In your July 20, 1993 letter, you expressed dissatisfaction with their test results and their offer to provide you with a "token" box of replacement shells. In addition, you stated that you would communicate your "misgivings" regarding Olin-Winchester's ammunition to your "comrades in law enforcement as well as other competitive shooters via association contact and letters to special interest publications". However, you were willing to reconsider your actions if they would donate several cases of wad-cutters or other ammunition to the Wisconsin Conservation Wardens Association for its annual competitive shoot. You signed the letter as Jerry C. Wagner, Wisconsin Conservation Warden.

At your pre-disciplinary hearing, you stated that on July 22, 1993 you had shown Warden Supervisor Dave Zeug the July 20, 1993 letter to Olin-Winchester and that said letter had not been mailed prior to Zeug's review. When asked directly by Attorney Richard Henneger if the postmark on the envelop to Olin-Winchester would show a date of July 22, 1993 or later, you responded in the affirmative. Attached is a copy of the outside of the envelope showing a postmark of July 21, 1993.

In deciding on your discipline, I considered your written reprimand dated October 29, 1990, your one (1) day suspension pursuant to Bruce Braun's letter dated February 12, 1992, and your three (3) day suspension pursuant to Bruce Braun's letter dated February 12, 1993.

You are also reminded of the availability of the Department's Employee Assistance Program (EAP) to assist you in resolving any personal problems. This program is voluntary and strictly confidential. You may contact Jeff Carroll, EAP Director in Madison, at (608) 266-2133 or any DNR Employee Assistance Coordinator.

Your classification is included in the Security and Public Safety Bargaining Unit which is covered by a Collective Bargaining Agreement between the State of Wisconsin and the Wisconsin State Employees Union. If you believe this action was not based on just cause, you may appeal through that agreement's grievance procedure.

. . .

9. Wagner applied for unemployment compensation benefits after his discharge and a hearing was held on February 15, 1994, before Administrative Law Judge Charles Schaefer. Wagner during said hearing was asked whether he had already mailed his aforementioned July 20, 1993, letter to Olin-Winchester before he showed it to his supervisors and he replied: "At that point – yeah, it's – it's clear now that – that it was mailed." Wagner testified in this proceeding that he was confused about this question because, in his words, there were "two letters that went to Olin-Winchester", i.e. his original letter that was sent to a customer service representative and a copy of that letter that was sent to that company's president. Wagner added here that his testimony there was "not correct from the standpoint I was confused." Up to the time of the instant proceeding, Wagner never told any Council 24 representatives that he was confused at his unemployment compensation hearing or that his testimony there was incorrect.

10. Administrative Law Judge Schaefer ruled on February 18, 1994, that the State had properly terminated Wagner pursuant to Sec. 108.04(5), Stats., and that he therefore was not entitled to any unemployment compensation benefits. In doing so, he found on p. 2 of his decision:

> The manufacturer complained to the employer about this letter. In response, the employer conducted an investigation during which time the employe stated that he had shown two of his supervisors the letter before mailing it on July 22, 1993. Those supervisors had not raised objection to its being sent. Later, the employer obtained the envelope in which the employe's letter to the manufacturer had been sent. It was postmarked July 21, 1993, the day before he should have shown the letter to his supervisors. He was discharged both for having failed to provide accurate information to the employer and also for having engaged in an act which violated public trust and reflected discredit on himself or the employer.
>
> Manufacturers often do make a gift of product in response to product complaints. Such gifts are presumably to neutralize by means of generosity, the original dissatisfaction. That neutralization would potentially prevent complaints about the product to other individuals. However, it is up to the manufacturer to initiate this process. The employer characterized the employe's letter as an act of extortion. This is not an unreasonable characterization of the letter. Additionally, it is noted that what the employe was seeking for his association would have cost several hundred dollars on a retail basis.
>
> It is true that the employe did show his immediate supervisor and the employer's district supervisor a copy of the letter. Neither of them told him that the letter was improper. However, he showed them the letter only after it had been sent. It therefore was not done with supervisory approval. His supervisors explained that they had not paid sufficient attention to the letter to see that portion of the letter referred to above. The appeal tribunal does not find that claim totally convincing. Both supervisors may well have been improperly unconcerned about the nature of the letter. However, since the employe did not rely on that approval in sending the letter, it cannot be found that the employer condoned his actions and the absence of objection from the supervisors did not otherwise justify the letter.
>
> Under these circumstances, the employe's actions in writing to an ammunition manufacturer to state that he will broadcast complaints regarding its product unless the manufacturer supplies product of significant value to a warden association was clearly improper activity which reflected discredit on both himself and the employer. As such, it evinced a wilful, intentional and substantial disregard of the employer's interests and of the standards of conduct which the employer had a right to expect of him.

11. Wagner unsuccessfully grieved his termination through the various steps of the contractual grievance procedure and he asked Council 24 to appeal it to arbitration. Council 24 Field Staff Representative Rettke, who had earlier told Wagner that he had a good case, informed Wagner by letter dated March 31, 1994, that Council 24 would arbitrate his discharge. Wagner also was told by Attorney Graylow that he had a good case.

12. Council 24 subsequently tried to settle Wagner's case with the State by entering into a proposed Settlement Agreement with the State that provided:

. . .

SETTLEMENT AGREEMENT

Whereas the Grievant, Jerry Wagner, and the Wisconsin State Employees Union have filed grievances alleging violations of the Agreement between the parties as described on the third-step grievances, has processed the grievances through the contractual grievance procedure, and appealed them to arbitration, the parties hereby agree that the above-referenced cases have been settled in all respects on the following basis:

1. The Union and the Grievant agree to withdraw the appeal to arbitration of the Employer's Case Numbers 012409, 012299, 012300, 012301 and 011441.

2. The Grievant and the Union also agree that this settlement forever releases and discharges the State of Wisconsin, DNR, and their present and past agents, from any liabilities, damages and causes of action related to the Grievant's employment with and separation from DNR.

3. The Grievant agrees that he will not pursue or accept employment with DNR in the future.

4. DNR agrees to remove the discharge notice and any other reference to the discharge from the Grievant's personnel file.

5. DNR will pay to Mr. Wagner a lump sum of $7,500.00 dollars subject to all normal and customary deductions. Such payment will be made with all reasonable expendiency from the date this agreement is signed by the parties.

6. The agreement by the parties to this settlement shall not be construed or represented by any of the parties as an admission of liability or wrongdoing on any of their parts. The parties agree that this settlement is expressly and solely intended to avoid the expense, delay and distraction that the preparation and litigation of these matters would entail for all of them.

7. The parties agree that they will not publicize the terms of this settlement beyond a statement that the parties have amicably settled the dispute on terms satisfactory to all the parties.

8. The parties recognize and agree that the facts, conditions and circumstances of this case are unique, and as such shall not, singly or in any combination, constitute a precedent for any other cases.

The Grievant has read the provisions of this Settlement Agreement and by signing, represents that he/she understands all its terms and has had full opportunity to consult with his/her representatives for advice.

• • •

13. Council 24 Field Representative Rettke by letter dated September 15, 1995, provided Wagner with a copy of said Settlement Agreement and asked whether it was acceptable to him.

14. Wagner by letter dated September 26, 1995, informed Field Staff Representative Rettke that he would not agree to said proposed settlement and insisted that he wanted to take his discharge to arbitration.

15. Council 24 Assistant Director Hacker personally met with Wagner and investigated the merits of his grievance to determine whether Council 24 should take it to arbitration. To that end, Hacker paid for, and obtained, a typed transcription of Wagner's aforementioned February 15, 1994, unemployment compensation hearing which revealed that Wagner then admitted that he had mailed his July 20, 1993, letter to Olin-Winchester before he showed it to his superiors. That information, explained Hacker, was contrary to Wagner's earlier claim at a preliminary disciplinary hearing that he mailed said letter after he had shown it to them. Hacker believed that Wagner's contradictory statements on when he showed said letter to his superiors established that he had not told the truth. Hacker also believed – based on his long experience as a Council 24 official – that arbitrators hold law enforcement-type employes like Wagner to a higher standard of conduct than other employes. Hacker also concluded that Wagner's aforementioned July 20, 1993, letter violated the State's code of ethics. Based upon these factors, Hacker decided that Council 24 should not arbitrate Wagner's grievance.

16. Hacker therefore informed Wagner by letter dated February 5, 1996:

• • •

I have reviewed, along with other members of the Wisconsin State Employees Union staff, your grievance(s) relating to Article 3, 4, 7, 9 and 11 – denied transfer(3)/work rules/reprimand/discharge (6 cases) – which have been appealed to arbitration.

After considerable review of all these cases, attempts were made to settle these grievances prior to arbitration. These attempts were to no avail. This leads us to the decision of arbitration and based on the facts and circumstances surrounding these cases, we feel an arbitrator would not rule in our favor and therefore we will not pursue them to arbitration.

Please be aware that you may appeal this decision by carefully following the Council 24 Appeal Procedure, a copy of which is enclosed.

For further information regarding your cases, please contact your field representative, Dick Rettke, at (715) 354-3339.

• • •

17. Neither Hacker nor anyone else on Council 24's behalf ever told Wagner any other reasons as to why Council 24 would not arbitrate his grievance.

18. Wagner appealed Hacker's decision to not arbitrate his termination to Council 24 Executive Director Beil in a February 27, 1996, letter that stated:

• • •

On February 5, 1996, I was sent a letter by Karl Hacker, Council 24 Assistant Director, informing me that AFSCME no longer would pursue my grievances. This information is contrary to the assurances I previously had received from Attorney Rich Graylow that my grievances, at least insofar as my termination was concerned, were meritorious.

I am writing to appeal the decision of Mr. Hacker pursuant to the Appeal Procedure which accompanied his letter to me. The Appeal Procedure indicates that I am to forward to you documents which support my appeal; however, either the Council 24 offer, my steward, Dick Rettke, or the attorneys who have worked on my cases through their retainer with AFSCME Council 24 have all the documents in my case. Because the letter stating that AFSCME would no longer represent me did not specify the reasons for that withdrawal of representation – as required by the Appeal Procedure, paragraph – I am unable to add anything more by way of explanation for my appeal.

Will you please consider this appeal and notify me as to whether AFSCME will reconsider its decision and will, in fact represent me through arbitration. I look forward to your response.

• • •

19. Beil by letter dated July 29, 1996, informed Wagner:

• • •

We have again evaluated your cases and have come to the same conclusion as before that we could not prevail in arbitration. Therefore, under Council 24 Appeal Procedure (copy enclosed), you can pursue the discharge on your own if you sign the enclosed Waiver form. Please sign both copies, keep one for your file and return the other to us in the enclosed self-addressed, stamped envelope.

Once we have received the Waiver, we will notify the Department of Employment Relations that you will be pursuing your discharge case on your own.

• • •

20. The enclosed "Waiver of Claims and Indemnification" referenced in Beil's aforementioned July 29, 1996, letter stated:

• • •

The undersigned grievant, having been discharged by the State of Wisconsin, and having filed a written request for ownership of the grievance pertaining to said discharge with the executive director of AFSCME Council 24, Wisconsin State Employees Union, hereby waives any claims against Council 24, known or unknown, growing out of Council 24's representation of grievant in this matter thus far.

In accepting ownership of this grievance from Council 24, from this day forward, grievant further agrees to indemnity [sic] and hold Council 24 harmless in any and all future claims or proceedings relating to this grievance.

• • •

21. After consulting with his personal attorney Gordon E. McQuillen, Wagner signed said Waiver of Claims and Indemnification form on August 7, 1996, and McQuillen by letter dated August 9, 1996, forwarded it to Council 24 Executive Director Beil.

22. Accompanied by Attorney McQuillen, Wagner participated in an arbitration proceeding before Arbitrator Jay E. Grenig who, in a decision dated July 5, 1997, overturned

Wagner's termination and converted it to a three-day suspension based upon his finding that Wagner had violated "the public trust". Arbitrator Grenig therefore reinstated Wagner to his former job and made him whole for his lost wages and benefits. In doing so, Arbitrator Grenig found that Wagner had shown his original aforementioned July 20, 1993, letter to Olin-Winchester to one of his superiors before he mailed it on July 20, 1993, and that a friend of Wagner's mailed a copy of said letter to the president of Olin-Winchester in an envelope postmarked July 21, 1993. Arbitrator Grenig thus found on this issue:

> From the evidence it cannot be concluded that the Grievant was giving inaccurate information when he said at the pre-disciplinary interview that he believed the letter he showed to his supervisors was postmarked July 22. The Employer has failed to prove that the Grievant violated the rule against failing to provide accurate and complete information whenever such information is requested by an authorized individual.

23. Council 24's decision not to arbitrate Wagner's termination followed Council 24's investigation of his grievance which included the testimony Wagner gave at his unemployment compensation hearing that was contrary to the testimony he gave at his arbitration hearing before Arbitrator Grenig where he said he showed his supervisors a copy of his July 20, 1993, letter to Olin-Winchester before he mailed it. Council 24 also made that decision after it appointed a special grievance representative to assist Wagner; after it preserved Wagner's right to arbitrate his grievance; after it had negotiated a proposed $7,000 settlement on his behalf; and after Hacker met with Wagner, which is something that Hacker normally does not do when he determines whether a grievance should be advanced to arbitration. Council 24's decision not to arbitrate Wagner's grievance was based on legitimate business reasons that centered on Wagner's truthfulness and his contradictory claims as to whether he mailed his July 20, 1993, letter to Olin-Winchester before or after he showed it to his superiors. Said decision was not arbitrary, or made in bad faith, or based on any discriminatory motives.

Upon the basis of the aforementioned Findings of Fact, I hereby make and issue the following

CONCLUSION OF LAW

Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, did not unlawfully refuse to fairly represent Jerry C. Wagner in violation of Sections 111.82 or 111.84 of the State Employment Labor Relations Act when it refused to submit his termination to arbitration.

Upon the basis of the aforementioned Findings of Fact and Conclusion of Law, I hereby issue and make the following

ORDER

IT IS ORDERED that the complaint allegations be, and they thereby are, dismissed in their entirety.

IT IS FURTHER ORDERED that Jerry C. Wagner pay all of the legal fees and costs that have been incurred, and may be incurred, by Council 24 in defending itself in this action.

Dated at Madison, Wisconsin this 28th day of December, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/

Amedeo Greco, Examiner

**WISCONSIN STATE EMPLOYEES UNION,
AFSCME, COUNCIL 24, AFL-CIO**

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

POSITIONS OF THE PARTIES

Wagner asserts that Council 24 "wrote off my case three years ago without even investigating the matter very thoroughly"; that Council 24 "did nothing to help me"; and that he spent "$18,000 of my own money to get my job back." He also claims that he never executed a voluntary waiver of his right to sue Council 24 because, "I was forced to sign the Union's waiver or my livelihood was gone" and that Council 24 "left me with the choice of being represented by the Union and not have my case arbitrated or not being represented by the Union and arbitration." As a remedy, he asks that Council 24 be ordered to pay the legal fees and costs he incurred when he was forced to arbitrate his discharge without Council 24's help. Wagner also maintains that his complaint against Council 24 is not frivolous and that, as a result, no legal fees should be imposed against him under Section 814.025(3), Stats., or Section 809.25(3), Stats., or under such cases as ONALASKA SCHOOL DISTRICT, ET. AL., DEC. NO. 28243-A (WERC, 1995); WISCONSIN DELLS, DEC. NO. 25997-C (WERC, 1990); MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 16471-D, (WERC, 5/81), aff'd in pertinent part, MADISON TEACHERS, INC., V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 115 Wis. 2d. 623 (Ct.App., 1983).

Council 24 maintains that Wagner waived his right to sue Council 24 when he signed the Waiver of Claims and Indemnification referenced in Finding of Fact No. 20, supra; that it, in fact, did not breach its duty to fairly represent Wagner; and that "Council 24 is entitled to an award of attorney's fees in this case based on our need to defend against Wagner's frivolous, waived claims."

DISCUSSION

There certainly is superficial merit to Wagner's claim that Council 24 breached its duty to fairly represent him by not taking his termination to arbitration since: (1), Council 24 initially told him his grievance had merit; (2), his private attorney, Richard Graylow, told him he had a good case; (3), Council 24 ultimately told him that it would not appeal his grievance to arbitration because it was not winnable; and (4), Arbitrator Grenig subsequently ruled in Wagner's favor and overturned his termination in favor of a three-day suspension.

Nevertheless, there are two major problems with his claim.

The first centers on what information was available to Council 24 representatives when they were investigating Wagner's grievance to determine whether Council 24 would appeal his termination to arbitration. Said information is crucial because the legality of Council 24's actions in not arbitrating Wagner's termination must be judged by what it knew at that time and what information Wagner provided and not on what other, undisclosed facts subsequently emerged before Arbitrator Grenig.

Council 24 Assistant Director Hacker explained that he fully investigated Wagner's grievance and that he ultimately decided not to appeal it to arbitration because – as related in Finding of Fact No. 15 above - he believed that Wagner had not been truthful when he first claimed during the State's investigation that he showed his July 20, 1993, letter referenced in Finding of Fact No. 6, supra, to his superiors before he mailed it to Olin-Winchester and when he subsequently stated at his February 15, 1993, unemployment compensation hearing that he showed them said letter after he mailed it.

The question of when the letter was mailed is crucial because the State decided to terminate Wagner in part because of what it believed were Wagner's false representations relating to when he mailed said letter and because Arbitrator Grenig found there were two letters, i.e. the original and a copy, and that Wagner had told the truth when he said during the State's investigation that he mailed one of them only after his superiors saw it. Wagner explained here that he gave a contrary answer at his unemployment compensation hearing because he was "confused". He further claims in his reply brief, "It's clear from the evidence at the arbitration I wasn't paying much attention [at the unemployment compensation hearing] to the dates because I wasn't doing anything wrong" and that: "The [correct] information was sniffed out by my attorney" at the arbitration hearing.

His "confusion" however, along with his attorney's "sniffing", were never communicated to Hacker either before or after he decided whether to appeal Wagner's termination to arbitration. Hacker thus reasonably believed -- after he personally reviewed Wagner's own testimony at his unemployment compensation hearing -- that Wagner had not been truthful in relating when he showed his July 20, 1993, letter to his superiors and that Wagner's lack of truthfulness would cause an arbitrator to rule against him. I credit Hacker's testimony that that is why he and Council 24 chose not to arbitrate Wagner's termination grievance.

Council 24's decision at that time to not arbitrate his termination thus was based on good faith considerations and was neither arbitrary nor based on any discriminatory or bad faith considerations. See FLIPPO V. NORTHERN INDIANA PUBLIC SERVICE CORP., 141 F 3D. 744, 748 (7th Cir., 1988); CRIDER V. SPECTROLITE CONSORTIUM, INC., 130 F. 3D. 1238, 1243 (7th Cir., 1997); AIR LINES PILOTS ASS'N V. O'NEILL, 499 U.S. 65, 78 (1991); GARCIA V. ZENITH ELECTRONICS CORP., 58 F. 3D 1171, 1176 (7th Cir., 1995). See, too, MARQUEZ V. SCREEN ACTORS GUILD, INC., 159 LRRM 2641, (1998), wherein the United States Supreme Court recently reiterated that unions have very broad discretion in representing their members by stating:

> That our holding in BECK did not alter the standard for finding conduct "arbitrary" is confirmed by our decision in AIR LINE PILOTS. In that case, decided three years after BECK, we specifically considered the appropriate standard for evaluating conduct under the "arbitrary" prong of the duty of fair representation. We held that under the "arbitrary" prong, a union's actions breach the duty of fair representation "only if [the union's conduct] can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary'. 499 U.S. at 78 (quoting FORD MOTOR CO. V. HUFFMAN, supra, at 338). This "wide range of reasonableness" gives the union room to make discretionary decisions and choices even if those judgments are utlimately wrong. In AIR LINE PILOTS, for example, the union had negotiated a settlement agreement with the employer, which in retrospect proved to be a bad deal for the employees. The fact that the union had not negotiated the best agreement for its workers, however, was insufficient to support a holding that the union's conduct was arbitrary. 499 U.S., at 78-81. A union's conduct can be classified as arbitrary only when it is irrational, when it is without a rational basis or explanation. *Ibid*. (Emphasis added).

Here, for the reasons stated above, Council 24's actions in not taking Wagner's grievance to arbitration were based upon a "rational basis" and a valid explanation and they thus fell within the "wide range of reasonableness" permitted under FORD MOTOR CO. V. HUFFMAN, 345 U.S. 330 (1953), and reiterated in MARQUEZ, supra. See also VACA V. SIPES, 386 U.S. 171, 191 (1967), which upheld a union's wide discretion in determining whether to advance a grievance to arbitration by stating: "We do not agree that the individual employee has an absolute right to have his grievance taken to arbitration. . ."

There is a second problem with Wagner's complaint: he signed the Waiver of Claims and Indemnification referenced in Finding of Fact No. 20 above which stated, *inter alia*, that he: "hereby waives any claims against Council 24, known or unknown, growing out of Council 24's representation of grievant in this matter thus far."

Wagner certainly understood by signing said form that he could not sue Council 24 over its failure to arbitrate his termination. Indeed, Wagner even consulted Attorney McQuillen, a highly experienced and able attorney, before he signed it and before Attorney McQuillen on his behalf forwarded it to Council 24. Wagner therefore fully understood its legal ramifications.

Wagner nevertheless claimed at the hearing that said waiver is invalid because, in his words: "That waiver in and of itself was coerced and not voluntary. Therefore it's not valid." He also argues in his reply brief that he had no choice but to sign it, as that was the only way he could arbitrate to get his job back.

The waiver at that time gave Wagner something of value; i.e. Council 24's willingness to let Wagner arbitrate his termination on his own. Thus, Hacker testified that Council 24 owns the grievance procedure and that, as a result, employes do not have the right to arbitrate their grievances on their own unless Council 24 lets them. In securing Council 24's permission to arbitrate, Wagner therefore received a valuable *quid* in exchange for his *quo*, i.e. his signed waiver. That is why Council 24 makes a good point when it states:

> . . .This was not without cost to the Council. Releasing ownership of a grievance always presents risks for the Council. It allows a grievant to make arguments which the Union may not otherwise wish to make for purposes of consistency and strategy. Few unions are willing to take such risk.

It is true that Wagner felt pressure to sign said waiver, but that is true in almost all situations in which individuals and parties agree to settle for less than they really want, but more than they might otherwise obtain if they plow ahead with their case and are ultimately rebuffed. That is why all parties to a settlement sometimes are unhappy over the very settlement terms they have agreed to.

Moreover, adoption of Wagner's claim would leave open the possibility that other individuals or parties might also try to get out of their waiver or settlement agreements on the ground that they too, like Wagner, were coerced into signing them. Absent extraordinary circumstances, such claims must be rejected lest they, too, disrupt and/or destroy the stability that comes with such waiver or settlements.

However, even assuming *arguendo*, that his waiver should be disregarded and that Wagner, in fact, had the legal right to arbitrate his grievance without Council 24's permission, Wagner's complaint still must be dismissed because, for the reasons stated above, Council 24 did not breach its duty to fairly represent him when it refused to arbitrate his termination based upon the information it had at that time and Wagner's own "confused" testimony at his unemployment compensation hearing.

Left, then, is the second question of whether Wagner must now pay Council 24's legal expenses and costs in defending itself against his complaint after he agreed in his signed Waiver of Claims and Indemnification to "indemnity [sic] and hold Council 24 harmless in any and all future claims or proceedings relating to his grievance."

In this connection, Wagner rightfully points out that legal fees ordinarily are not awarded unless an action is frivolous under either Section 814.025(3), Stats., Section 809.25(3), Stats., or under such Commission cases as ONALASKA SCHOOL DISTRICT, SUPRA, WISCONSIN DELLS, SUPRA, or MADISON METROPOLITAN SCHOOL DISTRICT, SUPRA.

However, while that is the general rule, the Commission majority in MADISON METROPOLITAN SCHOOL DISTRICT, supra, carved out a narrow exception by ruling that

attorney's fees and costs can be imposed when "the parties have agreed. . ." The Commission recently addressed this issue in DEPARTMENT OF EMPLOYMENT RELATIONS (UW HOSPITAL AND CLINICS) AND COUNCIL 24, WSEU, LOCAL 1942, AFSCME, AFL-CIO, DECISION NO. 29093-B (11/98), when it ruled that it normally lacks general statutory authority to award attorney's fees and costs to responding parties in complaint proceedings. However, the Commission in that case did not overturn its earlier decision in MADISON, supra, wherein it stated that it would award attorney's fees and costs if the parties have agreed that they can be imposed. To the contrary, the Commission there expressly quoted this part of MADISON, supra, without stating that it was being overruled.

Here, the parties have done just that via the aforementioned Waiver of Claims and Indemnification form that Wagner signed. Said waiver is aimed at preventing an employe from having his/her cake in the form of getting Council 24's approval to personally arbitrate his/her termination and then trying to eat it too by turning around and suing Council 24 after he/she has finished with the arbitration proceeding. That is why there is merit to Council 24's claim: "Fairness requires that Wagner be accountable for his actions. He cannot accept the fruits of his waiver without accepting its terms."

While Wagner is not an attorney, he can hardly plead ignorance as to what this waiver language means since: (1), the language is so clear; (2), he has never expressed any confusion as to what it means; and (3), he signed it after he consulted with Attorney McQuillen. To disregard the plain terms of his waiver under these considerations would in effect mean that any other waiver should be disregarded only because one side is unhappy with it.

That would not be sound labor policy because it is of the utmost importance that participants in labor disputes trust each other when they deal with the myriad of issues arising in the labor-management context, including those issues involving an employe's relationship with his/her union, as unions and employes interact with each other regarding almost every conceivable employment issue, including those relating to whether a union will arbitrate an employe's grievance.

Unions thus must be able to trust that the employes they represent will adhere to any waiver or settlement agreement they sign, just as they must be able to trust employers who sign other waivers or settlement agreements. For absent that trust and enforcement of whatever terms are agreed to, a union may be reluctant to enter into any future agreements with employes relating to whether they can appeal their discharges to arbitration. Hence, if the waiver here is not enforced, that will be a clear signal to all unions that any similar kinds of waivers are no longer worth the paper they are written on.

It also would signal something else: substantial expansion of an employe's right to sue his or her union over alleged breaches of the duty of fair representation. As matters stand today, employes can, and do, sue their unions over almost every conceivable alleged breach of this duty. That is why, some say, many unions today look over their shoulders to see if a duty

of fair representation charge is forthcoming whenever they refuse to advance a member's grievance to arbitration and why grievances sometimes are advanced to arbitration even though unions know they are without merit and even though the United States Supreme Court has ruled in such cases as VACA V. SIPES, supra, that unions have very wide latitude in determining whether to arbitrate particular grievances.

There is very little that unions can do in the face of such baseless complaints except for: (1), properly investigating the merits of all grievances; (2), relying on lawful, non-discriminatory reasons in determining why certain grievances should not be arbitrated; and (3), obtaining the kind of express waiver found here. Little, apparently, can be done to filter out baseless complaints even after a union has properly investigated a grievance and even after a union has decided not to arbitrate a grievance because of lawful considerations. However, something can be done when an employe has signed the kind of waiver found here because - unless they contravene some clearly-stated public policy which is not the case here - it is the function of this agency to enforce agreements that have been voluntarily agreed to, a point expressly acknowledged by the Commission in MADISON, supra, when it ruled that legal fees and costs can be imposed if the parties have so agreed.

Wagner thus must be held to the terms of the Waiver of Claims and Indemnification he signed. Hence, he must reimburse Council 24 for whatever legal fees and costs it has accrued, or will accrue, in defending itself in this action.

Dated at Madison, Wisconsin this 28th day of December, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/
Amedeo Greco, Examiner

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