STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

VICTORIA VEASLEY, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 461
No. 56698
MP-3446

Decision No. 29467-B

VICTORIA VEASLEY, Complainant,

vs.

AFSCME DISTRICT COUNCIL 48, Respondent.

Case 464
No. 56857
MP-3462

Decision No. 29468-A

Appearances:

Attorney Rocky L. Coe, 3873 North Sherman Boulevard, Milwaukee, Wisconsin 53216, appearing on behalf of the Complainant Victoria Veasley.

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

Podell, Ugent, Haney & Delery, S.C., by **Attorney Alvin R. Ugent**, 611 North Broadway Street, Suite 200, Milwaukee, Wisconsin 53202-5004, appearing on behalf of the Respondent Union.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINTS

On July 27, 1998, Complainant Victoria Veasley filed two complaints with the Wisconsin Employment Relations Commission alleging that AFSCME District Council 48 and Milwaukee County had committed prohibited practices in violation of the Municipal Employment Relations Act, respectively, by the Union's failure in its duty to fairly represent her in a termination proceeding before the Milwaukee County Personnel Review Board and in the County's failure to comply with the terms of a settlement agreement. On October 7, 1998, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on said complaints was held on May 12, 1999, in Milwaukee, Wisconsin. After presentation of the case, the Respondents each made a Motion to Dismiss the complaints. The parties made oral arguments with respect to said Motions, and after considering the evidence and the arguments of the parties, the Examiner granted the Motions to Dismiss. The hearing was transcribed and the Examiner received the transcript on May 28, 1999. The Examiner issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Victoria Veasley, hereinafter referred to as the Complainant, is an individual whose address is 479 North 18th Street, Milwaukee, Wisconsin 53209.

2. Milwaukee District Council 48, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal offices at 3421 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

3. Milwaukee County, hereinafter referred to as the County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal offices at the Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin 53233.

4. In July of 1997, Complainant was employed as a Control Center Clerk at the County's House of Corrections, a position represented by the Union. By a letter dated July 14, 1997, the Complainant was notified that the House of Corrections had filed charges with the Milwaukee County Personnel Review Board seeking her termination for a third incident of tardiness since receiving three suspensions. Hearing was set for July 29, 1997. Complainant then contacted her Union representative, Cathy Meier, and told her that she had received the papers and wanted to know what to do. Meier, during the conversation, suggested that the grievant should consider resigning and possibly being rehired but the Complainant stated she preferred to go before the Board. Meier suggested that the Complainant get statements from her doctor to given an acceptable reason for the tardiness.

5. On July 29, 1997, Complainant met with Gerty Purifoy, Staff Representative for the Union, at the Personnel Review Board at which time the Complainant authorized the Union to represent her and her right to a hearing within 21 days was waived. Purifoy wanted to meet and discuss the case before the hearing so she would have the facts and decide the options the Complainant may have. The hearing was set for August 12, 1997. Purifoy and the Complainant met sometime before the hearing. After discussing the case, Purifoy told the Complainant what her chances of winning her case were and advised her that she should resign as she would be placed on a reinstatement list for three years and a day but there was no guarantee of a rehire and she would receive no preferential treatment. Purifoy explained the advantage of this would be she could lose her vested pension benefits if she lost her case before the Board, whereas, if she was reinstated she would retain her vested pension benefits. As to other benefits, the parties apparently had a misunderstanding. The Complainant understood that if she was rehired within three years and one day she would retain all benefits including seniority, sick leave bank and vacation at the higher accrual. Purifoy told her she would retain such benefits only if she was rehired within 30 days as provided under the terms of the collective bargaining agreement. Complainant, based on her understanding, agreed to resign.

6. At or before the August 12, 1997 Personnel Review Board hearing Purifoy had discussions with Mr. Tim Schoewe of the County's Corporation Counsel's Office with respect to the Complainant's termination. The Complainant never personally spoke to Mr. Schoewe or anyone from the Corporation Counsel's Office and did not reach any agreements with them. As a result of discussions between Mr. Schoewe and Ms. Purifoy the following was stated on the record before the Personnel Review Board:

TRANSCRIPT OF PROCEEDINGS

MS. LINTON: Victoria Veasley.

MS. PURIFOY: Madam Chairman, I have a ledger form signed – resignation signed by both the employee and Mr. Evan on behalf of the House of Correction. And they present this form as a gag line for completion because there's a lot of material still missing.

Ms. Veasley is present.

MS. LINTON: Ms. Veasley?

MS. VEASLEY: Yes.

MS. LINTON: You're in agreement with signing a resignation with the County?

MS. VEASLEY: Yes.

MS. LINTON: Okay.

MR. PARKER: Motion made to accept the withdrawal charges and resignation.

MR. KNOX: Second.

MS. LINTON: Motion made and seconded to accept the withdrawal charges and resignation of Victoria Veasley.

Ms. Purifoy?

MS. PURIFOY: On that motion there are a couple other stipulations, Counsel.

MR. SCHOEWE: Right. With discussions with Ms. Purifoy, part of this would be that in addition to resigning Ms. Veasley would be allowed to go down to the Department of Human Resources and that they would place her on such reinstatement lists as she might be appropriately certified to for a period of three years and a day from today but that she would not be certified by any means to the House of Correction; is that – is that correct, Ms. Purifoy?

MS. PURIFOY: Correct. And also that her accrued time, other than sick time, be paid out to her.

MR. SCHOEWE: Right, Whatever other time she would have other than sick.

MS. LINTON: All in favor of the resignation and with those stipulations say aye.

(All say aye.)

MS. LINTON: Motion carried.

(Whereupon, the proceedings were concluded in the forenoon.)

Ms. Purifoy testified that there was no other agreement whether implied, verbal or otherwise.

7. By a letter dated August 12, 1997, the Personnel Review Board confirmed the settlement as follows:

> This is to confirm that the Milwaukee County Personnel Review Board at its meeting held August 12, 1997, accepted a resignation with a stipulation agreed to by all parties as a settlement of this case and closed the case.
>
> The terms of this settlement are as follows:
>
> 1. Ms. Veasley agrees to resign from her position as a Control Center Clerk at the House of Correction.
>
> 2. The Department of Human Resources will place Ms. Veasley on reinstatement lists for positions for which she may be qualified for a period not to exceed three years and one day. Ms. Veasley agrees not to accept any future appointment for positions at the House of Correction.
>
> In order to be placed on reinstatement lists, Mrs. Veasley is instructed to contact Ms. Jertha Ramos, Employment and Staffing Manager in the Department of Human Resources, at 278-4146.
>
> 3. Milwaukee County agrees to pay Ms. Veasley any accrued time she may have, except for sick time.
>
> Sincerely,
>
> MILWAUKEE COUNTY PERSONNEL REVIEW BOARD
>
> Susan C. Shields /s/
> Susan C. Shields
> Executive Secretary

8. By a letter dated August 20, 1997, from Jertha Ramos-Colon, Employment and Staffing Manager for the County, the Complainant was asked to complete and return a form so the County could evaluate what re-instatement lists she would be placed on according to the settlement of August 12, 1997. The Complainant returned the completed form and on August 26, 1997, Ms. Ramos-Colon informed the Complainant by letter that she had been

placed on nine lists. On August 30, 1997, the Complainant called Ms. Ramos-Colon and inquired why she was not placed on lists of higher classifications equal to the position she resigned from. During this conversation Ms. Ramos-Colon informed Complainant that she would lose all benefits except pension if she were rehired after September 12, 1997. The parties' collective bargaining agreement provides at Sec. 2.25(2) as follows:

> (1) Bargaining unit seniority shall be interrupted and shall be measured from the most recent date of hire under the following circumstances:
>
> (a) An employe who resigns from a bargaining unit position and is not reinstated to a bargaining unit position within 30 days of the effective date of such resignation.

9. In December, 1997, the Complainant was hired into the position of Clerk Typist II at the Milwaukee County Children's Court Center. Pursuant to the collective bargaining agreement, the Complainant had no seniority, no accumulated sick leave and her vacation accrued the same as a new hire.

10. On July 27, 1998, the Complainant filed two complaints with the Commission. One complaint was against the Union and alleged that the Union misrepresented her and such conduct was arbitrary, capricious and in bad faith in violation of Sec. 111.70(3)(b), Stats. The other complaint alleged that the County violated the terms of the settlement agreement before the Personnel Review Board by not restoring all her benefits upon her rehire in violation of Sec. 111.70(3)(a)5, Stats.

11. The evidence failed to demonstrate that the Union and the County reached a settlement agreement before the Personnel Review Board that provided the restoration of seniority and all benefits to the Complainant if she was rehired after 30 days but within three years and one day of the settlement.

12. The evidence failed to demonstrate that the Union's representation of the Complainant before the Personnel Review Board was perfunctory; rather, the evidence indicates the Union acted rationally on the basis of the facts and the mutual understanding it reached with the County. The Union did not act in an arbitrary, discriminatory or bad faith manner and, at all times material herein, it fairly represented the Complainant.

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

CONCLUSIONS OF LAW

1. The Union and the County did not reach a settlement agreement before the Personnel Review Board with respect to the Complainant that provided anything beyond the express terms of the settlement as stated on the record before the Board and did not provide for all benefits to be restored to the Complainant upon rehire which would be contrary to the terms of the collective bargaining agreement, and accordingly, the County did not violate Sec. 111.70(3)(a)5, Stats.

2. The Union did not violate its duty of fair representation with respect to the processing, handling and settlement of the Complainant's case before the Personnel Review Board, and accordingly, the Union did not violation Secs. 111.70(3)(b)4 or 1, Stats.

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

ORDER

IT IS ORDERED that the complaints be, and the same hereby are, dismissed.

Dated at Madison, Wisconsin, this 24th day of June, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

MILWAUKEE COUNTY (HOUSE OF CORRECTIONS)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINTS

In her complaints initiating these proceedings, the Complainant alleged that the Union had committed a prohibited practice by violating its duty of fair representation to her in proceedings before the Milwaukee County Personnel Review Board and the County violated the terms of the settlement agreement reached before the Personnel Review Board. The Union answered the complaint denying that it had committed any prohibited practice and that it provided extremely fine representation of the Complainant and asserted that it did not make any promises to her with regard to future employment or employment benefits. The County also answered asserting that the complaint failed to state a claim and denied any agreement by it as to the Complainant's retention of benefits and denied that the full agreement disposing of her case was not presented. At the conclusion of the hearing in the matter, the Respondents moved to dismiss the complaints.

COUNTY'S ARGUMENTS

The County argued that there was no evidence that it violated any agreement it had with the Complainant. It notes the Complainant testified that she personally had no contact with the County and the agreement referenced in the Personnel Review Board's transcript and the written memorialization dated August 12, 1997, was admittedly complied with by the County. The County contends that there was no evidence that it did anything to violate any agreement or any putative rights that the Complainant would have that would bring the Complainant under the Commission's jurisdiction.

UNION'S ARGUMENTS

The Union contends that the evidence failed to prove anything. It observes that the Complainant claimed there was an agreement between the Union and the County to allow her to resign and she could be reinstated within three years and one day and she would retain all her benefits and she repeated this over and over again even though she testified that she did not understand but it was in those areas where she does not want to understand. The Union insists that Ms. Purifoy understands that there are things she has no control over such as the matter of seniority which is governed by the contract and there is no way she could have reached an agreement as Complainant suggests and there is no way she would have told the Complainant that. It claims that what Ms. Purifoy did tell the Complainant is exactly what was dictated into

the record at the Personnel Review Board and confirmed by mail and there was no other promise made to Complainant. It insists that the only promise made to her was that she would be placed on the reinstatement list and she was fortunate that she got a job with the County. It submits that the claim that Complainant was promised by Ms. Purifoy that she would retain her classification and the same rate of pay is absurd. It asks why Ms. Purifoy would do this as there would be no advantage to the Union. It states that when an employe does not like a settlement offer, the Union takes the case to hearing. It points out that the Complainant in her testimony in this hearing stated she wanted to go to a hearing before the Board on her discharge but the facts she presented to Ms. Purifoy would be obvious to anyone that the Complainant did not have a good defense to her termination case. It argues that the Union gave her very good and proper advice to resign and she had a right not to do so and no one forced her to resign and she made a good decision in resigning. Now, according to the Union, the Complainant is claiming all kinds of promises were made to her. It maintains there is no evidence to support that or any conversation with the County about those things. It concludes that there is no case and the complaint should be dismissed.

COMPLAINANT'S ARGUMENTS

The Complainant contends that the issue is whether a Union can be grossly negligent when it comes down to trying to negotiate an agreement for one of its members. It asserts that on direct examination Ms. Purifoy stated she did not negotiate anything because the contract controlled everything; then on cross, she does negotiate side agreements which may be different from the contract. It argues that the Union was able to slip around some things in Ms. Purifoy's testimony by talking about bargaining unit-wide seniority and referring to the contract but there is no similar provision for referring to a member's sick time bank. It notes that seniority, sick leave bank and pension were discussed between the Complainant and Ms. Purifoy. It notes that as soon as Ms. Ramos-Colon sent a letter to the Complainant, the Complainant stated her understanding of the terms and conditions of the settlement; It states that these did not come out of thin air. It claims that Ms. Purifoy tries to avoid her responsi-bilities by stating that she does not represent anyone.

It asserts that the Complainant asks, "why would I resign under these conditions to give up twenty-nine years of seniority? Why would I resign to give up a hundred and thirty-five days of sick leave? Why would I resign leaving my pension in danger when it was about to vest?", when I would have a better opportunity to go before the Personnel Review Board and explain to them that my family problems were the cause of the tardinesses. The Complainant contends that the Union has the duty under VACA V. SIPES, 386 U.S. 171 (1967) adopted by MAHNKE V. WERC, 66 WIS.2D 524 (1974) not to engage in conduct which rises to gross negligence as that would constitute arbitrary, capricious and bad faith conduct even though there is not a personal motive involved. It concludes an egregious wrong has been done to the Complainant.

DISCUSSION

Pursuant to Sec. 111.07(3), Stats., the Complainant has the burden of proving by a clear and satisfactory preponderance of the evidence that the Union and the County reached an agreement that upon her rehire, the Complainant would have all her benefits including seniority, sick leave bank and vacation accrual at the rate of her old seniority. The evidence failed to establish such an agreement. The evidence did establish that the Union and the County reached an agreement that was placed on the record in the transcript of the hearing before the Personnel Review Board. The Union and the County agree that the total agreement was that put before the Personnel Review Board. There is nothing in the record which shows that the County agreed to anything else as the parties' collective bargaining agreement contains an express provision on seniority upon rehire. Thus, the Complainant failed to prove there was any other agreement. The County complied with the terms of the agreement made before the Personnel Review Board and therefore the County did not violate Sec. 111.70(3)(a)5, Stats., and that complaint is dismissed.

The Complainant contends that the Union violated its duty of fair representation to her.

In VACA V. SIPES, 386 U.S. 171, 177, 64 LRRM 2369 (1967) and MAHNKE V. WERC, 66 WIS.2D 524 (1974), the courts set forth the requirements of the duty of fair representation a union owes its members. A union must represent the interests of all its members without hostility or discrimination, to exercise its discretion with good faith and honesty, and to eschew arbitrary conduct. The union breaches its duty of fair representation only when its actions are arbitrary, discriminatory or in bad faith. VACA V. SIPES, 386 U.S. 171, 64 LRRM 2369 (1967); COLEMAN V. OUTBOARD MARINE CORP., 92 WIS.2D 565 (1979). The Union is allowed a wide range in the exercise of its discretion. FORD MOTOR CO. V. HOFFMAN, 345 U.S. 330, 31 LRRM 2548 (1953). As long as the Union exercises its discretion in good faith, it is granted broad discretion in the performance of its representative duties. 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); BLOOMER JT. SCHOOL DISTRICT, DEC. NO. 16228-A (ROTHSTEIN, 8/80); AFF'D BY OPERATION OF LAW, DEC. NO. 16228-B (WERC, 8/80). A complainant has the burden to demonstrate, by a clear and satisfactory preponderance of the evidence, each element of its contention. WEST ALLIS – WEST MILWAUKEE SCHOOL DISTRICT, DEC. NO. 20922-D (SCHIAVONI, 10/84). Mere negligence on the part of the Union does not rise to the level of a breach of the duty of fair representation. PETERS V. BURLINGTON N.R.R., 931 F.2D 534 (9TH CIR. 1991) AT 538. An error of judgment or mismanagement does not equate with arbitrary, discriminatory and bad faith conduct on the part of the Union. DIVERSIFIED CONTRACT SVCS, 292 NLRB 603 (1989). A mere misunderstanding on the part of the Union representative does not breach the duty of fair representation. TEAMSTERS LOCAL 407 (WENHAN TRANSPORTATION, INC., 249 NLRB 59 (1980)).

Applying these principles to the instant case, it must be concluded that the Complainant has failed in her burden of establishing that the Union acted in an arbitrary, discriminatory or bad faith manner. The Complainant argued that the Union was guilty of "gross negligence." It is difficult to draw the line between mere negligence and gross negligence, but the undersigned finds that the record establishes at most mere negligence on the part of the Union. Obviously, there was a misunderstanding between the Complainant and Ms. Purifoy as to what benefits she would be entitled to upon rehire. Perhaps the Complainant did not understand what was explained to her or perhaps Ms. Purifoy did not explain it clearly enough or not sufficiently so the Complainant clearly understood what the benefits would be. It is difficult to determine the basis for the misunderstanding but the evidence fails to show that Ms. Purifoy deliberately or willfully mislead the Complainant. The evidence indicates that the Union representatives investigated the charges before the Personnel Review Board and made a recommendation, a judgment call. The evidence fails to suggest that they had anything but the best interests of the grievant at heart. Ms. Purifoy has a lot of experience before the Personnel Review Board and the Complainant was hoping for the best result and perhaps when Ms. Purifoy told her the best result would be to resign and get on the reinstatement list, the Complainant may not have accepted any additional bad news connected with this decision. The Complainant now feels mislead and claims that she would have taken her chances at a hearing before the Board. What would have been the result is only speculation. The Complainant may have come out with a second chance or been discharged. The Union gave her their advice and she accepted it and things may have worked out for the best or maybe not, but the Union's conduct, even if it was bad advice or an error in judgment and even if the misunderstanding was the Union's fault, it does rise to the level of unfair representation. The evidence simply fails to establish that the Union's actions were arbitrary, discriminatory or in bad faith, and thus the Union did not violate Secs. 111.70(3)(b)1 and 4, Stats. Therefore, the Motion to Dismiss the complaint against the Union has been granted.

Dated at Madison, Wisconsin, this 24th day of June, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley /s/

Lionel L. Crowley, Examiner

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