STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JANIS COTTRELL, Complainant,

vs.

MILWAUKEE PUBLIC SCHOOLS and
MILWAUKEE DISTRICT COUNCIL 48, Respondents.

Case 341
No. 55257
MP-3311

Decision No. 29494-C

Appearances:

Hall, Charne, Bruce & Olson, S.C., Attorneys at Law, by **Attorney Cynthia L. Manlove**, 324 East Wisconsin Avenue, Suite 1200, Milwaukee, Wisconsin 53202-4309, on behalf of Janis Cottrell.

Attorney Donald L. Schriefer, Assistant City Attorney, City of Milwaukee, 200 East Wells Street, Room 800, Milwaukee, Wisconsin 53202-3551, on behalf of Milwaukee Public Schools.

Podell, Ugent, Haney & Miszewski, Attorneys at Law, by **Attorney Matthew J. Miszewski**, 611 North Broadway, Suite 200, Milwaukee, Wisconsin 53202-5004, on behalf of Milwaukee District Council 48.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The procedural posture of this litigation as of March 11, 1999, is noted in Dec. No. 29494 (Gallagher, 12/98), and in Dec. No. 29494-A (WERC, 3/99). After its issuance of Dec. No. 29494-A, the Commission informally transferred the matter from Examiner Gallagher to Richard B. McLaughlin, another member of its staff. On August 24, 1999, I conducted a pre-hearing conference to clarify the status of the litigation, and summarized the conclusions of the conference in a letter to the parties dated August 26, 1999, which states:

. . .

> Ms. Manlove will submit an amended complaint to clarify the Complainant's view of the factual and legal issues requiring hearing. Once she has done so, Mr. Schriefer and Mr. Miszewski will amend their answers, as necessary, to clarify each Respondent's view of the factual and legal issues requiring hearing.
>
> To the extent the pleadings or amended pleadings state a motion requiring an answer from me prior to hearing, please note this in writing.
>
> Finally, I will note my understanding that each of you agrees that the duty of fair representation issue will be heard first. Further hearing on any alleged contract violation will take place only if a prohibited practice is found as a result of that portion of the hearing process.

. . .

Complainant filed an amended complaint on November 5, 1999. In a letter dated November 24, 1999, I sought to determine whether it would be necessary to set a schedule for Respondents' answers. Milwaukee Public Schools filed an answer on December 9, 1999. In a letter to the parties dated December 14, 1999, I requested that the Union file an answer "on or before January 7, 2000." In correspondence dated January 6, 2000, and received by the Commission on January 10, 2000, the Union filed its answer. The Complainant sought to discover certain documents prior to the scheduling of hearing, but no agreement could be reached regarding providing such discovery outside of a formal hearing. On May 9, 2000, the Commission formally appointed me to act as Examiner and I set hearing for June 8, 2000. With the consent of the parties, the hearing was rescheduled to June 16, 2000.

Hearing on the complaint was conducted in Milwaukee, Wisconsin on June 16, 2000. At the hearing, Complainant amended the complaint to specify that Milwaukee District Council 48 had violated Sec. 111.70(3)(b)1, Stats., and that Milwaukee Public Schools had violated Secs. 111.70(3)(a)1 and 5, Stats. I denied, at the hearing, a motion by Milwaukee District Council 48 to dismiss the complaint based on the pleadings. A transcript of the hearing was provided to the Commission on June 28, 2000. Complainant filed a brief on July 31, 2000, and Milwaukee District Council 48 filed a brief on August 3, 2000. In a letter filed with the Commission on August 18, 2000, Milwaukee Public Schools waived the filing of a brief. In a letter filed with the Commission on September 1, 2000, Complainant asserted that District Council 48 had not complied with the briefing schedule, and that its brief "should not be considered by the examiner in rendering his decision in the case." I responded in a letter dated September 18, 2000, which states:

I write in response to Ms. Manlove's letter dated August 31, 2000, which was received by the Commission on September 1, 2000. I have received no responses to that letter, and presume there will be none.

At hearing, you each agreed to "enter your arguments post hearing by way of a single brief to be submitted post marked within 30-days of your receipt of transcript for an exchange through me" (Tr. at 144). The transcript was filed with the Commission on June 28, 2000.

Ms. Manlove's letter states a valid point, but cannot be accepted without determining a number of issues of fact. To determine when Mr. Miszewski received the transcript and when his brief was postmarked would thus require further hearing. The Commission does not, in the normal course of handling mail, retain the envelopes containing briefs. Thus, I cannot determine the postmark date of the brief from any document possessed by the Commission.

I do not consider the untimeliness, if any, questioned here to pose a significant enough point to require further hearing. Thus, I will treat his brief as timely filed. I understand this may encourage a less than rigorous compliance with briefing deadlines. Such rigor, in my view, should be the exception and not the rule.

FINDINGS OF FACT

1. Janis Cottrell (Complainant) is an adult resident of Milwaukee County, who worked for Milwaukee Public Schools in a ten-month secretarial position for roughly seven and one-half years prior to her discharge effective April 7, 1997.

2. Milwaukee Public Schools (MPS) is a municipal employer that maintains its primary offices at 5225 West Vliet Street, Milwaukee, Wisconsin 53208.

3. AFSCME District Council 48 (the Union) is a labor organization, which maintains its primary offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208. Local 1053 is affiliated with the Union, and serves as the exclusive collective bargaining representative for certain employees of MPS, including a bargaining unit of clerical and technical employees. During her employment at MPS, Complainant was an individual member of that bargaining unit, which includes roughly six hundred fifty employees. Annie Wacker serves as a Secretary for MPS, and has been at all times relevant here, the President of Local 1053 and a member of the Union's Executive Board.

4. MPS and the Union are parties to a collective bargaining agreement in effect, by its terms, from July 1, 1994 to June 30, 1997. Included in the provisions of that agreement are the following:

PART VII
GRIEVANCE AND COMPLAINT PROCEDURE

{PRIVATE }A. PURPOSE{tc \l 4 "A. PURPOSE"}

The purpose of this grievance procedure is to provide a method for quick and binding final determination of every question of interpretation and application of the provisions of this agreement, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions. The purpose of the complaint procedure is to provide a method for prompt and full discussion and consideration of matters of personal irritation and concern of an employe with some aspect of employment.

{PRIVATE }B. DEFINITIONS{tc \l 2 "B. DEFINITIONS"}

1. **A GRIEVANCE** is defined to be an issue concerning the interpretation or application of provisions of this agreement or compliance therewith . . .

2. **A COMPLAINT** is any matter of dissatisfaction of an employe with any aspect of his/her employment primarily relating to wages, hours, and conditions of employment, which does not involve any grievances as above defined. It may be processed through the application of the first two (2) steps of the grievance procedure.

. . .

{PRIVATE }D. STEPS OF GRIEVANCE PROCEDURE{tc \l 2 "D. STEPS OF GRIEVANCE PROCEDURE"}

Grievances or complaints shall be processed as follows:

FIRST STEP - An employe shall, within ten (10) workdays after the event giving rise to the grievance occurred or the employe could reasonably have been expected to have knowledge of it, submit his/her grievance or complaint directly to his/her

next higher authority, but he/she may request next higher authority to send for a) representative of the Union or b) a fellow employe of his/her own choosing, for

the purpose of joint oral presentation and discussion of the grievance or complaint at a mutually convenient time. In the event a representative is brought in by the employe, a Union representative shall also be present. If the grievance or complaint is not resolved satisfactorily, it shall be reduced to writing and presented to the employe's next higher authority within five (5) workdays of the oral presentation. The next higher authority shall give a written answer within five (5) workdays of receipt of the written grievance or complaint.

The next higher authority shall advise Labor Relations in writing of his/her disposition of any grievance or complaint presented without the presence of a Union representative with copies for the department head and the Union. All written grievances shall be set forth on a form provided by Labor Relations.

SECOND STEP -- If the grievance or complaint is not adjusted in a manner satisfactory to the employe or the Union within five (5) workdays after receipt of the written answer, then the grievance or complaint may be set forth in writing within five (5) workdays by a representative of the Union. The grievant shall sign the grievance or complaint. Thereafter, the Union representative shall transmit the written grievance or complaint to the department head. The department head shall, at the Union's request, set a mutually convenient time for discussion of the grievance or complaint. The department head shall advise the Union in writing of his/her disposition of the grievance or complaint with a copy for the superintendent or his/her designee.

THIRD STEP - If the written grievance is not adjusted in a manner satisfactory to the employe or the Union within five (5) workdays after the discussion with the department head, it may be presented within five (5) workdays by the Union to the superintendent or his/her designee for discussion. Such discussion shall be within ten (10) workdays at a mutually convenient time fixed by the superintendent or his/her designee. The superintendent or his/her designee shall render a written disposition to the Union within ten (10) workdays from said hearing. If the grievance is not certified to the impartial referee in accordance with the impartial referee procedure within twenty (20) workdays after notification of the superintendent's or his/her designee's decision, his/her decision shall become final.

FOURTH STEP - The decision of the superintendent or his/her designee upon a grievance shall be subject to hearing by the impartial referee upon certification to him/her by the Union.

. . .

H. DISCIPLINARY MATTERS

> 1. Any regularly appointed employe who is . . . discharged may, within five (5) workdays after receipt of such action, file a grievance as to the just cause of the discharge . . .

5. To determine whether to take a grievance to arbitration under the Fourth Step of the Grievance Procedure noted in Finding of Fact 4, the Union presents the grievance to its Executive Board. If the Executive Board recommends that the matter be arbitrated, the grievance is then placed before the local union representing the grieving employee or employees. If the local votes in favor of arbitration, the Union arbitrates the grievance. Because the time requirements of the Third Step of the grievance procedure may demand Union action on a grievance prior to a regularly scheduled meeting of the Executive Board or local union, the Union routinely processes grievances from the Third to the Fourth Step. Doing so avoids Union failure to comply with contractual deadlines, and means that Executive Board or local union unwillingness to proceed to arbitration will prompt a withdrawal of the grievance. Local 1053 processes roughly twenty grievances annually. Of those, roughly one-half will concern issues of discipline. The vast majority of the grievances processed are resolved or withdrawn prior to arbitration. Local 1053 typically processes one to two grievances annually concerning the discharge of an employee. MPS has, over time, developed a system of progressive discipline to address employee misconduct, including excessive absenteeism. In a typical case involving allegedly excessive absenteeism, MPS will first issue an oral warning, then a written warning, then a suspension or termination. As a part of this process, MPS may require the employee to submit a doctor's statement to justify use of sick leave. The sequence is neither specified in the labor agreement, nor applied by rote. In some cases, an employe may receive two suspensions prior to a discharge, and in other cases, steps may be combined. The sequence is applied on a case by case basis to respond to the severity of the underlying misconduct. During Wacker's tenure as President of Local 1053, the Union has not arbitrated any grievance involving the allegation of excessive absenteeism. During this period, MPS has not terminated an employee represented by the Union for excessive absenteeism without suspending the employee prior to the termination.

6. In the fall of 1996, MPS formalized a concern with the attendance record of the Complainant. A memo dated November 4, 1996 from Roy R. Robertson to the Complainant states:

> Due to your excessive use of sick leave, it will be necessary for you to furnish a doctor's certificate for each absence for which you claim sick leave, even if for only one day, until further notice. The certificate must be completed on the form provided and must be specific as to the nature of the illness, dates of treatment, and period of disability.
>
> Should you fail to submit the certificate, you will not be paid for the absence. You will be considered absent without leave and in violation of the sick leave reporting requirement, which will subject you to disciplinary action up to and including discharge.
>
> If you (sic) present record of absences is not improved, it will be necessary to take further action. . . .

Robertson was, at that time, Principal of Edison Middle School, and Complainant's direct supervisor. Robertson's handwritten notes on this memo state that it was prepared prior to November 4, but not delivered until that date due to Complainant's absences from work. Robertson formally evaluated Complainant's work performance on an MPS prepared form, dated November 19, 1996. Robertson marked each category of performance stated on that form "Unacceptable," and explained the entries thus: "Due to excessive absences, all categories of direct responsibility were rated as unsatisfactory." Complainant contacted Wacker concerning Robertson's actions and other matters. Wacker ultimately issued Complainant a letter dated November 22, 1996, which states:

> Enclosed you will find a letter that I have forwarded to Labor Relations regarding your statements that educational assistants continue to do bargaining unit work. In order to pursue this, I would appreciate written documentation from (sic) regarding those job duties being performed by the educational assistants.
>
> Regarding your concern about providing doctor's excuses for each absence, I must remind (sic) that during our last telephone conversation I requested that you send me a copy of the letter you received and as of this date I have (sic) received it. Additionally, I am investigating to determine whether or not the contract has been violated. Please forward me the above mentioned documentation as soon as possible.

David A. Kwiatkowski is employed by MPS as Coordinator of Classified Staffing. He issued a letter dated November 25, 1996, to Complainant, with a "cc" to Wacker. That letter states:

> On November 18, 1996, Mr. Roy Robertson attempted to conduct an evaluation conference with you regarding your employment at Edison Middle School. Mr. Robertson was unable to meet with you due to your continued absence from work.
>
> According to payroll records, you have worked only forty (40) full days during calendar year 1996. Your absences have had a very significant impact on the operation of Edison Middle School. Based on your attendance and the impact it has had on Edison Middle School, Mr. Robertson has recommended that you be discharged from employment with the Milwaukee Public Schools.
>
> In order to resolve this matter, it will be necessary to meet with you to review your attendance record and consider Mr. Robertson's recommendation that you be discharged from employment with Milwaukee Public Schools. Please be in Room 128 of the Central Services Building at 9:00 a.m. on Thursday, December 5, 1996. During this meeting you may be represented by your Union, legal counsel, or any other person of your choice.

The December 5 meeting was rescheduled for December 16. In a letter to the Complainant, with a cc to Wacker, dated December 20, 1996, Kwiatkowski states:

> On Thursday, December 12, 1996, you left a telephone message for me stating that you had called to cancel a disciplinary hearing that had been scheduled for Monday, December 16, 1996. You stated that your attorney, Mr. Nicol Padway, was not available on December 16, 1996, and that he would be contacting me to reschedule the hearing.
>
> On December 19, 1996, I contacted Mr. Padway in an attempt to reschedule your disciplinary hearing. Mr. Padway stated that you had failed to attend a scheduled meeting with him and that he would not make a decision to represent you until such a meeting had occurred. After talking to Mr. Padway, I attempted to call you at the telephone number you provided the district on your employment records . . . a recorded message indicated that the number had been disconnected.
>
> It is imperative that we schedule a disciplinary conference as soon as possible. Please contact me . . . regarding this matter.

This disciplinary conference was conducted on January 17, 1997. Complainant, Wacker, Complainant's attorney and Kwiatkowski attended the meeting. The parties discussed whether the

Union or Complainant's attorney would represent Complainant. It was eventually decided that the Union would represent Complainant. Wacker asked for and received a continuance of the

meeting until February 4, 1997. On February 4, Kwiatkowski, Complainant and Wacker met. Kwiatkowski summarized the meeting in a letter dated February 6, which states:

. . .

> On Februrary 4, 1997, we again met in my office to review your evaluation and Mr. Robertson's recommendation that you be discharged from employment with the Milwaukee Public Schools. During this hearing, your were represented by Ms. Anne Wacker, President of Local 1053.
>
> The specific issue discussed at the hearing was your attendance record during calendar year 1996. Documentation had previously been provided to you, Ms. Wacker, and Mr. Padway concerning your attendance. The documentation shows that out of 1,584 possible work hours during 1996, our only worked 696.7 hours or 44% of the work year. You completed only 38 out of 198 eight hour works (sic) days during 1996. Your attendance has had an extremely deleterious effect on the operation of Edison Middle School. Your attendance record was not disputed by yourself or Ms. Wacker.
>
> You are hereby warned that there must be immedicate, substantial, and sustained improvement in your attendance. Your attendance will be re-evaluated within 30 to 60 days from the date of this letter. Failure to immediately and substantially improve your attendance may result in your discharge from employment with the Milwaukee Public Schools.

During the course of this meeting, Kwiatkowski offered Complainant the options of taking a leave of absence or a voluntary demotion to a substitute, hourly clerical position. The former option was to afford her time off until she felt she could work a regular schedule. The latter option permitted her the opportunity to volunteer for work to fill in for the absences of regularly scheduled employees when she felt she could. Complainant and Wacker discussed these options, and Complainant rejected them. In a letter to Complainant, with a cc to Wacker, dated March 25, 1997, Kwiatkowski scheduled a meeting for April 3, "to review your attendance since "our meeting of February 4, 1997." A meeting was conducted on April 3. Kwiatkowski summarized it in a letter to Complainant dated April 4, 1997, which states:

> On April 3, 1997, your appeared in my office for a disciplinary hearing. During the hearing you were represented by Ms. Anne Wacker, Local 1053, and Mr. Greg Radtke, District Council 48.

Previously, on February 4, 1997, we met to discuss your attendance record for calendar year 1996. The 1996 record changed subsequent to our meeting due to changes in the coding of your absences on December 5, 6, 9, 17 and 18, 1996, to "industrial accident/disease". However, your overall attendance for calendar year 1996 remains unacceptable.

Your attendance record for calendar year 1997 (through March 20, 1997) is as follows:

Month	Possible Work Hours	Hours of Absence	% Absent
January	176	73.8	41.9
February	152	48.8	32.1
March (1-20)	112	77.6	69.3
	440	200.2	45.5

You stated that the payroll records were not accurate. However, you could not provide me with any specifics as to the alleged inaccuracies. You also stated that my letter of February 6, 1997, contained information that was "wrong". You refused to divulge what you considered to be "wrong" within the letter.

You have been unable to improve your attendance. Your poor attendance continues to have an extremely deleterious effect on the operation of Edison Middle School. Accordingly, you are hereby discharged from employment with the Milwaukee Public Schools effective at the close of business on April 7, 1997.

7. Wacker informed Complainant of her contractual right to grieve the discharge. In a letter to Complainant dated April 7, 1997, Wacker stated:

I am in receipt of your message of April 7, 1997 at 1:49 p.m. In that message you stated that you wished to file a grievance regarding your discharge. Enclosed you will find the grievance initiation form. Please sign it and return it to me . . . no later than Friday, April 11, 1997. It is **imperative** that I receive the signed grievance form by this date . . .

I also spoke with Mr. David Kwiatkowski. You will be paid for today, April 7, 1997 as if you were in attendance.

Wacker attached a grievance form to this letter, which she had filled in completely but for Complainant's signature. Complainant signed and returned the grievance form, and the Union filed the grievance with MPS on April 11. In a letter to the Complainant dated April 11, 1997, Wacker stated:

> Enclosed you will find your copy of Grievance #97/090 filed on February (sic) 11 at 12:09 p.m. As soon as the grievance has been assigned and a date scheduled I will notify you.
>
> On February 4, 1997, I again requested that you provide me with documentation relative to your attendance and your assertion that there is inaccurate coding of absences. As of this date, I have not received them. I am again requesting that you provide me with such documentation.

The Union asked for and received, by mid-May of 1997, attendance records from MPS that documented its allegations. The Union sought, but did not receive, similar documentation from Complainant supporting Complainant's contention that MPS had mischaracterized certain days of absence, and had noted her absence on days she had, in fact, worked. In a letter to Radtke, dated May 20, 1997, with a cc to Wacker and Complainant, Myra Vachon, MPS Acting Director of the Division of Staffing Services, stated the status of the grievance thus:

> Per mutual agreement, the timeline for responding at the second step to Grievance 97/090 . . . has been extended to allow time for the grievant to provide information relative to the absences recorded on the absence detail from January 2, 1997, through March 20, 1997.
>
> If information is not provided by Tuesday, May 28, 1997, we will proceed with rendering a decision. . . .

Neither MPS nor the Union received the information referred to in Vachon's letter, and MPS denied the grievance at Step 2 on a written form dated May 28, 1997. Wacker received the form on June 6, 1997, and supplied a copy of it to Complainant with a letter dated June 9, 1997, in which she requested that Complainant "notify either myself or Mr. Greg Radtke of your wishes regarding Grievance #97/090 no later than Tuesday, June 17, 1997." The Union appealed the MPS denial at Step 2 on a written form signed by Wacker on Complainant's behalf. Luis Garza, a Labor Relations Specialist for MPS, conducted the Step 3 grievance hearing. That hearing was originally set for mid-August of 1997. Garza and Union representatives appeared for that meeting. Complainant did not. The Union asked for and received a continuance. The

rescheduled meeting took place on August 26, 1997. During the course of that hearing, Complainant argued that MPS attendance records were inaccurate. The Union argued that MPS

lacked cause to discharge Complainant and asserted that the absences complained of were based on legitimate medical need. Garza sought documentation supporting these arguments. The Union and Complainant acknowledged they had no such documentation. Garza understood the Union's position to be that MPS owed Complainant $1,400 in back pay. He was not, however, certain if the Union sought reinstatement in addition to this payment. He questioned Complainant and the Union on the point by asking whether there could be a resolution of the matter if MPS offered Complainant reinstatement. Neither the Union nor Complainant unequivocally stated whether reinstatement was a necessary part of a resolution of the grievance. Garza recommended that MPS deny the grievance. MPS accepted this recommendation, and confirmed its denial in a form dated September 26, 1997. In a letter to Deborah Ford, the Director of Labor Relations for MPS, dated October 13, 1997, the Union appealed the Step 3 denial to arbitration. In a letter to Complainant dated October 22, 1997, Wacker stated:

. . .

> At the November 4, 1997, Executive Board meeting, potential arbitration cases will be presented. The Executive Board will discuss the merits of each case and will make recommendation at the next scheduled General Membership meeting of November 12, 1997.
>
> You are invited to attend the Executive Board meeting and are scheduled for 5:30 p.m. to present testimony relative to your case. You will be allotted approximately 15 minutes after which time you may leave. If you are unable or do not wish to attend, please call the Union Office . . .

Complainant did not attend the meeting of November 4, but her attorney did. The attorney stated that an investigation regarding Complainant's rights under the Family and Medical Leave Act was then-ongoing, and requested that the Union not act on the grievance until that investigation was complete. The Executive Board agreed to postpone action on the grievance. It met again on January 6, 1998. Wacker and the Executive Board understood that the investigation that prompted the continuance had proven fruitless. The Executive Board discussed the absence of a suspension preceding Complainant's discharge, the amount of absenteeism involved, and whether the grievance had sufficient merit to warrant arbitration. The Executive Board voted on January 6 to recommend that Complainant's grievance not be submitted to arbitration. In a letter to Complainant dated January 21, 1998, Wacker stated:

. . .

> The recommendation of the Executive Board was to not take grievance # 96/090 (sic) to arbitration. As previously stated to you, the recommendation needs to be voted on by the general membership. This will occur at the next membership meeting of February 11, 1998. Membership meetings are held at 5:00 p.m. at D.C. 48, 3427 W. St. Paul Ave.

Complainant did not attend the membership meeting, and the Local voted not to submit the grievance to arbitration. Wacker has not, in her tenure as Local President, seen a level of absenteeism comparable to Complainant's. Wacker presented Complainant's grievance to the Executive Board and to the membership meeting. She did not actively participate in the deliberative process of either body and did not cast a vote in either proceeding.

8. Sometime not later than mid to late January of 1997, Complainant filed a complaint with the Equal Rights Division of the Department of Workforce Development (ERD), alleging that MPS had not paid her roughly $675 of wages it owed her for time worked in the preceding three months. The ERD assigned James Chiolino to act as investigator. Chiolino secured a series of payroll documents from MPS. Those documents noted that MPS had determined it owed Complainant $61.45. The documents indicate MPS made this payment in a separate payroll check to Complainant. In a letter dated July 1, 1997, Chiolino indicated his belief that the claim had "been paid in full" and sought a "written response" from Complainant. In letters dated August 4 and 15, 1997, Chiolino indicated he had received no response and that he had closed the file.

9. The Union's processing of Complainant's grievance does not reflect arbitrary, discriminatory or bad faith behavior on its part toward Complainant.

CONCLUSIONS OF LAW

1. Complainant was, while employed by MPS, a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

2. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

3. MPS is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

4. The Union did not, through its representation of Complainant, including its refusal to arbitrate grievance 97-090, act in an arbitrary, discriminatory or bad faith fashion, and therefore committed no violation of Sec. 111.70(3)(b)1, Stats.

5. In the absence of a proven violation of Sec. 111.70(3)(b)1, Stats., the Commission has no basis to exercise its jurisdiction to interpret the labor agreement noted in Finding of Fact 4 above. There can be, therefore, no MPS violation of Sec. 111.70(3)(a)1 or 5, Stats.

ORDER

The complaint, as amended, is dismissed.

Dated at Madison, Wisconsin, this 4th day of October, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

MILWAUKEE PUBLIC SCHOOLS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

As amended at hearing, the complaint alleges Union violation of Sec. 111.70(3)(b)1, Stats., and MPS violation of Secs. 111.70(3)(a)1 and 5, Stats. The parties' labor agreement provides for grievance arbitration. Commission case law presumes that arbitration is the exclusive means to resolve disputes over the terms of the labor agreement. The Commission excepts, from this presumed exclusivity, those cases in which a union's failure to fairly represent an employee has barred access to arbitration. See, for example, MILWAUKEE COUNTY ET. AL., DEC. NO 28525-C (WERC, 8/98). Thus, Complainant's allegations against the Union and MPS presume that the Union has breached its duty to fairly represent her. On the agreement of the parties, hearing in this matter was bifurcated, with the initial determination turning on whether the Union had breached its duty to fairly represent Complainant.

THE PARTIES' POSITIONS

The Complainant's Brief

After a review of the procedural and factual background to the complaint, the Complainant contends that the Union's duty of fair representation flows from VACA V. SIPES, 386 U.S. 171 (1967), as adopted and applied to Wisconsin in MAHNKE V. WERC, 66 WIS.2D 524 (1975). The duty thus defined is that "a union breaches its duty of fair representation if its actions are arbitrary, discriminatory or in bad faith." "Arbitrary," under this standard, connotes conduct "so far outside a wide range of reasonableness as to be irrational" (citations omitted).

The evidence establishes arbitrary conduct in this case. More specifically, Complainant notes that the progressive discipline system adopted by the MPS demands a suspension prior to a termination in attendance related cases. Here, no such suspension occurred, thus opening a line of attack for the Union in an arbitration of the grievance. Nor can the absence of a suspension be defended by a Union or MPS assertion that Complainant was on a "last chance agreement." The contract does not specifically provide for such agreements. Beyond this, no such agreement was put into writing or signed by the parties. Thus, the evidence will not support an assertion that Complainant was working under a last chance agreement. That the Union did not aggressively seek Complainant's reinstatement at the third step of the grievance procedure underscores the weakness of its advocacy for her. A review of this background establishes no rational basis for the Union's conduct.

Complainant concludes that the Union decision not to arbitrate was "arbitrary in that it was irrational and contrary to the facts involved." From this, Complainant requests "the WERC to find that the Union breached its duty of fair representation and move the case forward to a hearing on the merits of the discharge before an arbitrator, pursuant to the terms of the collective bargaining agreement."

The Union's Brief

After a review of the procedural and factual background to the Complaint, the Union notes that the sole issue posed is whether it violated its duty to fairly represent Complainant. The law governing this matter flows from VACA and from MAHNKE, and the Union asserts that "(t)here has been absolutely no evidence adduced prior to or at the hearing regarding any actions the Union had taken with regard to (Complainant) that violated the duty of fair representation as outlined by the case law."

More specifically, the Union notes that it "followed the same process it always follows with the only exceptions being at the Complainant's behest and to her benefit." The Union sought MPS offers for "alternate forms of employment." The Union notified Complainant of her right to appeal to "the executive board of the local as well as to the general membership." Complainant failed to take advantage of either option.

Commission case law establishes that a "union is not under any absolute duty to pursue even a meritorious grievance"; that proof of the merit of a grievance is insufficient, standing alone, to establish a breach of the duty; and that union actions adverse to a member cannot, without more, establish a breach of the duty. Here, the Union "does not deny that it refused to take her case to arbitration." Even a cursory review of the evidence establishes that the grievance lacked merit and the Union refused to take a grievance without merit. More significantly, "(n)o other motivation was suggested or proven."

The Union concludes that the complaint must be dismissed, and that "costs and attorney's fees be awarded."

APPLICABLE LAW

As Complainant and the Union acknowledge, the Union's duty of fair representation flows through MAHNKE V. WERC, 66 WIS.2D 524 (1974). The Commission, in MARATHON COUNTY ET. AL. DECS. NO. 25757-C, 25908-C (WERC, 3/91) AT 49 put the impact of MAHNKE thus:

> The duty of fair representation imposes upon a union the obligation to make good faith determinations when determining whether to process employe grievances. To make a good faith determination, a union must evaluate the merits of the grievance by considering the monetary value of the claim to the grievant, the effect of the alleged contractual breach upon the grievant and the likelihood of success in arbitration. However, the burden to establish that a union did not honor its obligation rests upon the employe. Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., requires that this burden of proof be met by "a clear and satisfactory preponderance of the evidence." (citations omitted)

Complainant focuses on the "arbitrary" nature of the Union's conduct. What constitutes "arbitrary" as a legal matter concerns less the establishment of a synonym for "arbitrary" than the considerations that warrant third-party intervention in the bargaining process. I addressed this aspect of what constitutes "arbitrary" conduct in WISCONSIN COUNCIL 40, DEC. NO. 22051-A (MCLAUGHLIN, 3/85), AFF'D BY OPERATION OF LAW DEC. NO. 22051-B (WERC, 4/85), AT 11-12 thus:

> As I read the case law, three factors determine the deference a reviewing body will grant the action of a collective bargaining representative. The first is the nature of the employe interest in the matter. Analysis of this factor demands an evaluation of the presence and the efficacy of the remedies available to the aggrieved employe. The second factor is the nature of the action required of the collective bargaining representative to address the employe interest. The final factor is the actual exercise of judgment on the collective bargaining representative's part in addressing the employe's interest. Deference to the action of a collective bargaining representative is least likely where the employe interest in the matter is high (for example a discharge), the bargaining representative controls the only available remedy (for example arbitration), the act required of the representative is ministerial in nature (for example filing a grievance), and the representative does not exercise any judgment in addressing the employe interest involved (for example forgetting to file a grievance in a timely fashion). To the extent the employe interest is minimized, the act required of the representative is more judgmental in nature, and the representative actually exercises judgment, application of a negligence-like standard is less probable and greater deference will be accorded to the representative's decision. (Citations omitted).

The Commission's law on the awarding of attorney's fees and costs has varied over time. In DEPARTMENT OF EMPLOYMENT RELATIONS ET. AL., DEC. NO. 29093-B (WERC, 11/98) AT 4, it noted: "we conclude we have no statutory authority to award attorney's fees or costs to responding parties in complaint proceedings or to any party in other types of Commission proceedings."

{PRIVATE }APPLICATION OF LAW TO FACT{tc \l 1 "APPLICATION OF APPLICABLE LAW TO FACT"}

Ultimately, Complainant's case turns on the quality of the judgment exercised by the Union in deciding not to arbitrate her grievance. Both Complainant and the Union can advance forceful considerations falling within the factors cited above. Complainant's grievance concerns her discharge, and the Union controls access to the arbitration provision of the labor agreement. There are indications in the record that Complainant can pursue, and has pursued, relief in forums other than the labor agreement. This cannot obscure, however, that the imposition of progressive discipline is a contractual issue and that the Union controls access to the forum in which that contention can most readily be tested. These factors operate to lessen the deference to be accorded the Union.

The Union, however, can point to factors warranting deference to its decisional process. The issue does not turn on a ministerial act or on the Union's failure to act. In fact, the record demonstrates the Union undertook a series of acts to protect Complainant's rights. Wacker filled in the grievance form, asking the Complainant to do no more than sign it and return it in a timely fashion. The Union sought documentation concerning Complainant's challenge of the accuracy of MPS records. While the Union may have received some documents from Complainant, the bulk of the information it could obtain came from MPS. The Union did compare the documentation it received to the allegations lodged by MPS. Complainant testified she did produce some documentation, but there is no persuasive evidence to corroborate her claim that her response was timely or meaningful. What corroborative evidence exists supports Wacker's testimony that the Complainant never produced the information. Beside the Union, MPS representatives including Garza and Kwiatkowski, as well as the ERD investigator, sought corroborative documentation from the Grievant. None were successful in obtaining it. The Union nevertheless advanced her claims through the process. Wacker sought the Complainant's input at each step of the procedure, but Wacker, not the Grievant, signed the Step 3 form. The Union sought continuances at Step 2 and Step 3 on the Grievant's behalf. At Step 2, the issue turned on who represented the Grievant. At Step 3, the Union sought a continuance when the Grievant, without explanation, did not show up for the mid-August hearing. Although the record is unclear on this point, the documentation indicates the Union successfully requested pay for the Grievant on April 7, in spite of her absence on that date. In any event, the Union accurately argues that it acted on

the Grievant's behalf. The issue concerning its conduct must turn on the quality, not the existence, of action on its part to represent the Grievant.

Thus, the strength of Complainant's case focuses on whether the Union's refusal to arbitrate the grievance manifests arbitrary conduct rather than considered judgment. The record will not support Complainant's arguments on this point, although the force of those arguments must be noted. The record establishes that other employees received a suspension prior to a discharge under the MPS system of progressive discipline. Beyond this, the record does not manifest specific Union consideration of the evaluative process highlighted by the Commission in MARATHON COUNTY. Complainant also questions the aggressiveness of Union advocacy in permitting MPS imposition of a last chance ultimatum, and in presenting Complainant's case at Step 3.

These considerations are, however, insufficient to establish arbitrary conduct by the Union. The progressive discipline system noted by Complainant is not applied by rote. Testimony establishes that MPS varies discipline in response to the severity of the underlying employee conduct. Complainant may not have received the suspension that is typical of the progressive discipline system, but MPS and Union representatives perceived her level of absenteeism as unprecedented. While warnings given to her were not reduced to forms reflecting the rote application of progressive discipline, it is apparent that she had received warnings from Robertson and Kwiatkowski. Suspension is the only missing step, and it is not clear what could have been gained had the Union sought one. There is no indication that the Union could reasonably perceive Complainant to have improved her attendance from February through March of 1997. Had MPS suspended Complainant after the February 4 meeting, her lack of improvement could have provoked the same discharge that MPS chose to characterize as a violation of the last chance letter. The Union's assertion that it saw no purpose in demanding a suspension can not persuasively be characterized as unreasonable, much less arbitrary.

Beyond this, the existence of the last chance letter does not, standing alone, afford any basis to question the Union's judgment. The Union bargains on Complainant's behalf, thus the absence of her assent to the last chance letter is not, in itself, meaningful. More to the point, it is not apparent what avenue Complainant's conduct left the Union. She declined an offered leave of absence and a demotion to hourly substitute. Even assuming the Union played no role in securing these options, Complainant's refusal to consider them, more than Kwiatkowski's letter of February 6, made her attendance record an all or nothing proposition.

Ultimately, the force of Complainant's arguments focuses on the undocumented process by which the Executive Board and the membership of Local 1053 declined arbitration. The absence of any express Union consideration of the evaluative process cited in MARATHON COUNTY undercuts a conclusion that it thoughtfully weighed arbitration of the grievance. Wacker did not directly participate in the decisional process, and thus could afford little insight into it. The absence of rationale affords no basis to conclude a considered decision was made, and some basis to doubt it. Action without explanation is the hallmark of arbitrary conduct. Although this weakness must be noted, it affords no persuasive basis to conclude the Union's conduct is arbitrary. As noted above, the steps undertaken prior to this point manifest Union action on Complainant's part, and little action on her own part to assist in her representation. Complainant's grievance was processed to the Executive Board level in the same fashion as other grievances. Beyond this, it is not necessary to assess the factual validity of the alleged pattern of absenteeism to note that the documentation available to the Union indicated a level of absenteeism unprecedented at MPS, and effectively unchallenged by Complainant. The absence of a suspension preceding her discharge could reasonably be viewed as a technicality. Against this background, it is unpersuasive to conclude that the absence of express rationale for refusing to process the case to arbitration masks an underlying Union arbitrariness.

Ultimately, Complainant seeks unfettered oversight of the Union's conduct. The subtlety of Complainant's arguments must be noted. The labor agreement does not specify a progressive discipline system mandating a suspension prior to discharge. Complainant seeks to establish this right by implication. Similarly, the labor agreement does not expressly authorize last chance agreements. Here, however, Complainant argues the absence of contractual authority bars the implication of a contractual right. The zealousness of Complainant's advocacy is apparent, but acceptance of the advocacy calls for a level of third party intervention in a contractual relationship far from that contemplated in MAHNKE. The duty of fair representation was created to police the abuse of a union's status as exclusive bargaining representative, not to invite routine third-party oversight of a contractual relationship.

In sum, what factors Complainant asserts to undercut deference to the Union's decision not to arbitrate the grievance are outweighed by those factors indicating Union exercise of good faith judgment. Because the Union's processing of the grievance does not manifest arbitrary, discriminatory, or bad faith conduct, there has been no proven breach of the Union's duty of fair representation. There can be, then, no finding of a violation of Sec. 111.70(3)(b)1, Stats., and thus no basis to determine an MPS violation of Sec. 111.70(3)(a)1 or 5, Stats. The complaint, as amended, has therefore been dismissed.

As noted above, the Commission currently reads its statutory authority to preclude awarding attorney's fees and costs to a respondent. Because the Complainant has filed the only complaint posed here, the Union appears as a respondent. Thus, the Union's request for fees and costs must be rejected.

Dated at Madison, Wisconsin, this 4th day of October, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

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