STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JUDITH A. CONGER, Complainant

vs.

MORAINE PARK TECHNICAL COLLEGE AND MORAINE PARK EDUCATIONAL SUPPORT PROFESSIONALS ASSOCIATION, WEAC, Respondents

Case 35
No. 58854
MP-3646

Decision No. 29949-A

Appearances:

Ms. Judith A. Conger, N8146 Highway 151, Fond du Lac, WI 54935, appearing pro se.

Edgarton, St. Peter, Petak, Massey & Bullon, by **Attorney John A. St. Peter**, P.O. Box 1276, Fond du Lac, WI 54936-1276, appearing on behalf of the Respondent, Moraine Park Technical College.

Wisconsin Education Association Council, P.O. Box 8003, Madison, WI 53708, by **Attorney Teresa Elguezabal**, appearing on behalf of the Respondent, Moraine Park Educational Support Professionals Association, joined by **Attorney Mary Pitassi**, on the brief.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel J. Nielsen, Examiner: On May 10, 2000, Judith A. Conger (hereinafter referred to as either the Complainant or Ms. Conger) filed with the Wisconsin Employment Relations Commission (Commission) a complaint of prohibited practices against Moraine Park Technical College (either College or the District) alleging that the College had engaged in prohibited practices within the meaning of Sec. 111.70, MERA, by denying her a promotion she had posted for, and that the Moraine Park Educational Support Professionals Association (Association) had engaged in prohibited practices by failing to fairly represent her. The Commission appointed Daniel J. Nielsen, an examiner on the Commission's staff, to hear the case and to make and issue Findings of Fact, Conclusions of Law and Orders, as appropriate.

A hearing was held on September 21, 2000, in Fond du Lac, Wisconsin, during which time the parties presented such testimony, exhibits and other evidence as was relevant. A transcript was received by the Examiner on October 20th. The parties submitted post-hearing briefs, which were exchanged through the Examiner on November 22, 2000, with an opportunity to submit exceptions to the other parties' brief, if appropriate. No exceptions were received and the record was closed on December 4, 2000.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Now, having considered the evidence, the arguments of the parties, the applicable provisions of the statute and the record as a whole, the Examiner makes the following

FINDINGS OF FACT

1. The Complainant, Judith A. Conger (hereinafter referred to as either Ms. Conger or the Complainant) has been employed as a Housekeeper I by Moraine Park Technical College since 1995. She resides in Fond du Lac County, Wisconsin.

2. The Respondent, Moraine Park Technical College (hereinafter referred to as either the College or the District), is a municipal employer which provides adult, technical and vocational education services to citizens in the Fond du Lac area. It maintains its principal offices at 235 North National Avenue, Fond du Lac, Wisconsin. At all material times, Dr. Rodney Pasch was the College's administrator in charge of labor-management relations, Kathy Broske was the Associate Director of Human Resources and Norbert McCormick was supervisor over the housekeeping staff.

3. The Respondent Moraine Park Educational Support Professionals Association (hereinafter referred to as the Association) is a labor organization maintaining its offices c/o Winnebagoland UniServ Council, P.O. Box 1195, Fond du Lac, Wisconsin. It is the exclusive bargaining representative for educational support personnel at the College, including those in the Housekeeper classification. At all relevant times, Donna Miller and Linda Pratt were the Co-Presidents of the Association, Judy Freismuth was the Grievance Chair and Sam Froiland was the Winnebagoland UniServ Executive Director who serviced the Association's bargaining unit.

4. The Association and the College are parties to a collective bargaining agreement which provides, in Article 4, for seniority rights, and a procedure for posting and filling vacancies:

. . .

Section 4.04 - Seniority

(a) For the purpose of this Agreement, seniority is defined as the length of time in hours based on continuous uninterrupted employment of the individual in the District beginning at the last date of hire or transfer to a support staff position, but excluding any temporary periods of employment.

(b) Seniority shall apply only to layoff, bumping, recall, and job posting provisions of this Agreement.

(c) The following conditions shall apply to seniority:

1. Seniority shall apply for layoff — Section 4.05, bumping — Section 4.06 and recall — Section 4.07, with equal qualifications for job posting as set forth in Section 4.08.

2. Employees on paid leave shall continue to accrue seniority hours and shall not be considered as being interrupted.

3. Employees on unpaid leave or layoff status shall neither lose nor accrue seniority hours.

(d) Seniority rights for an individual terminate for any of the following reasons:

1. Resignation, quit, or retirement.

2. Discharge for just cause.

3. Failure to return to work within ten (10) working days after being recalled from layoff unless such a failure is due to bona fide medical reasons of a temporary nature, not to exceed six (6) weeks; in which case the individual shall inform the District within five (5) working days of the delay in returning to work and the medical reasons.

4. Failure to return to work from a leave of absence at the prescribed time unless such a failure is due to a bona fide medical reason of a temporary nature not to exceed six (6) weeks in which case the individual shall inform the District within five (5) working days of the delay in returning to work and the medical reasons.

5. Layoff in excess of eighteen (18) months.

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Section 4.08 — Job Posting

(a) Any vacant or newly established job position within the employee's bargaining unit will be posted on designated employee bulletin boards within the District. Such postings shall set forth a description of the available position, the work location, the wage range, required qualifications, and the due date by when applications are to be submitted for consideration. Any employee who satisfies the required qualifications may apply for a posted position; and if timely submitted, such application will be duly considered along with all other applications received for that position. The President of the ESP shall receive a copy of the posting.

(b) Group A and Group B positions will be posted for not less than five (5) work days prior to the time any external recruiting is done. Group C positions will be posted for not less than three (3) work days prior to the time any external recruiting is done.

(c) All applications and other credentials shall be submitted to the Associate Director, Human Resources on or before the due date, as indicated in the job posting. In the event that an employee anticipates the posting of a position during absence, the employee may submit to the Associate Director, Human Resources an indication of interest in the position. If the posting of the position does occur during the absence, this indication of interest will be considered as an application, but all other District employment procedures must be adhered to.

(d) If only one (1) bargaining unit employee with the requisite qualifications applies for a posted bargaining unit position, the position shall be granted to that bargaining unit employee. If two (2) or more bargaining unit employees with the requisite qualifications apply for a posted bargaining unit position the position shall be granted to that bargaining unit employee considered to be the most qualified. If two (2) or more bargaining unit employees are considered to be equally qualified, the bargaining unit position shall be granted to the more senior bargaining unit employee.

(e) All employees selected for a different position shall be placed on probation for three hundred thirty (330) hours. If, at any time during this probationary period, the immediate supervisor does not feel the employee is adequately performing the assigned duties, the employee shall be returned to the position and salary formerly held, reassigned by the District to any other job position for which the District determines the employee to be qualified without such other position's availability being posted by the District, or in absence of such other job positions being available, terminated by the District.

(f) Reasons for nonselection will be given to bargaining unit applicants upon request to the Associate Director, Human Resources.

(g) Any vacant or newly created bargaining unit position, for which there are qualified employees on layoff status, will not be posted. The District will attempt to fill these positions first by using the Recall procedure (Section 4.07).

(h) For purposes of this Agreement, an existing job position outside of the bargaining unit which becomes designated by the District a Group C position by virtue of an increase in the hours regularly scheduled for that position, shall not be considered a vacant or newly established job position subject to the job posting procedure if the employee holding that position at the time of such designation wishes to continue in the position. In such a case, however, the hours of continuous uninterrupted employment in the District which the employee has on the date of such designation shall be excluded in determining the employee's seniority for purposes of Sections 4.05, 4.06, 4.07 and 4.08(d) of this Agreement but shall be recognized in applying the other terms and conditions of the Agreement after that date.

. . .

Article 14 of the Agreement contains the Grievance Procedure:

Article XIV

Grievance Procedure

Section 14.01 - Purpose

This grievance procedure is designed to insure adequate consideration and appropriate solution of grievances, as defined in Section 14.02(a), at the lowest possible administrative level; and nothing in the procedure should be construed as inhibiting the continuation of rapport and informal discussion between employees, supervisors, and the District administrative staff.

Section 14.02 - Definitions

(a) The term "grievance" means any alleged violation of a specific article or section of the Agreement, or an interpretation, meaning or application of any specific article or section of the Agreement.

(b) The term "grievant" means any employee with a grievance except that, where a grievance involves an interpretation or application of a provision of this Agreement, the grievant submitting such grievance may be the ESP.

(c) For the purpose of Article XIV, the term "day" shall mean a calendar day excluding any Saturday, Sunday, holiday, or any days for which school is closed.

Section 14.03 - Steps of Procedure

Step 1

(a) Within ten (10) days of the date when a grievant knows, or would be reasonably expected to know, of the event giving rise to a grievance, the grievant shall identify the complaint as a grievance and discuss it with the grievant's immediate supervisor. Where the grievant is an individual employee, such discussion may be conducted by the grievant alone, or together with a representative of the ESP. Any resolution by the individual employee and the supervisor shall be consistent with the terms and provisions of this Agreement.

(b) Where several grievances have been filed that all involve the same issue and identical facts, the parties may mutually agree to have one of those grievances processed through the grievance and arbitration procedures so that its disposition will govern all such grievances.

(c) Where a grievance involves an action of the District's top administrative staff which the grievant believes a supervisor would have no authority to modify or disregard, the grievance may be commenced at Step 3 of the grievance procedure by an oral discussion of the grievance with the District's Associate Director, Human Resources (hereinafter called "Associate Director") followed by a written submission thereof to the Associate Director if the oral discussion is not satisfactory to the ESP. If the Associate Director determines at the time of such oral discussion that a supervisor does have such authority, the grievance may then be remanded to that supervisor for consideration and disposition under the grievance procedure commencing with a Step 1 meeting arranged between the supervisor and the grievant within five (5) days of such remand.

(d) If the grievant is an individual employee, the grievant may be present at any meetings held under the grievance procedure and shall be present if requested by either the District representative or the ESP representative who may be involved in any such meeting; provided, however, that if a group of employees exceeding three (3) in number file identical grievances, the ESP shall select three (3) employees from such group to be present at any such meeting.

Step 2

If the grievant is not satisfied with the disposition made at Step 1, the grievant may, no sooner than two (2) days and no later than five (5) days after the Step 1 discussion, submit the grievance to the supervisor in writing, with a copy to the chairperson of the ESP Grievance Committee. Within five (5) days after receiving such written grievance, the supervisor shall deliver a written answer to the grievant with a copy to the chairperson of the ESP Grievance Committee.

Step 3

(a) If not satisfied with the Step 2 answer, the ESP Grievance Committee may in writing refer the grievance to the Associate Director. Any grievance not so referred by the Committee within five (5) days after its receipt of the Step 2 answer shall be considered withdrawn.

(b) Within five (5) days after receipt of a timely written referral to Step 3, the Associate Director shall meet with the ESP Grievance Committee concerning the grievance.

(c) Within five (5) days after the Step 3 meeting, the Associate Director shall deliver his/her written answer to the grievant, with a copy to the chairperson of the ESP Grievance Committee.

Step 4

(a) If not satisfied with the Step 3 answer, the ESP Grievance Committee may in writing refer the grievance to the President or his designated representative. Any grievance not so referred by the Committee within five (5) days after its receipt of the Step 3 answer shall be considered withdrawn.

(b) Within ten (10) days after receipt of the timely written referral to Step 4, the President or his designated representative shall meet with the designated representatives of the ESP concerning the grievance.

(c) Within five (5) days after the Step 4 meeting, the President or his designated representative shall communicate the disposition of the grievance in writing to the chairperson of the ESP Grievance Committee.

Step 5

If not satisfied with the Step 4 answer, the ESP may in writing refer to arbitration any grievance concerning interpretation or application of this

Agreement. Any grievance not so referred by the ESP within ten (10) days after its receipt of the Step 4 answer shall be considered withdrawn.

Section 14.04 - Time for Processing Grievance

When it is necessary for an Aggrieved Person and a member of the Grievance Committee or such other representative designated by the ESP to attend a grievance meeting or hearing during a workday, the Aggrieved Person or such other person will, upon notice to the immediate supervisor, be released without loss of pay as necessary in order to permit participation in the foregoing activities. Any bargaining unit employee whose appearance in such investigations, meetings, or hearings is necessary as a witness will be accorded the same right. If the District fails to give an answer within the time limits set out for any step, the grievance shall automatically be moved to the next step.

. . .

5. Mary Dietrich was employed by the College as a Housekeeper II. In November of 1999, Dietrich accepted a job with the Fond du Lac School District as a night custodian. On November 12, 1999, she submitted a letter of resignation to Norbert McCormick:

> Due to a new job position with the F.D.L. School district, I will be resigning my position as Housekeeper II at Moraine Park Tech College as of completion of work day on November 30, 1999.

. . .

6. Dietrich worked until November 15th or so, and then started using her accumulated vacation. The vacation was sufficient to cover her through the end of her shift on November 30th. Her Housekeeper II position was posted for internal applicants.

7. The Complainant was the most senior of the four employees who signed the posting for Dietrich's position. Her application was submitted to the Human Resources Department on November 19, 1999. She met all of the qualifications for the job.

8. Associate Director of Human Resources Kathy Broske was the official with the authority to select from among the qualified internal applicants for the Housekeeper II position. She and McCormick discussed the posting. Recognizing that the Complainant was the senior qualified candidate, they anticipated offering the job to her, but for the reasons detailed below, no offer was ever made.

9. The Complainant was away on a combination of emergency medical leave and accrued vacation from November 29 through December 3. On November 29, McCormick was asked during a meeting of the housekeeping staff if a person had been selected for Dietrich's position. He said that he and Kathy Broske had discussed it and made a decision, but that no announcement would be made because one member of the staff was on vacation, and that he would wait until the following week. The Complainant and Dietrich were the only persons on vacation at that time, although there were other staff members who were not present at the meeting for other reasons.

10. On November 29th, Dietrich started her new job with the Fond du Lac Schools. On November 30th, she advised the School District's Supervisor of Building and Grounds that she was quitting the job effective immediately.

11. At 7:57 a.m. on the morning of Wednesday, December 1st, Dietrich called Broske and told her that the job with the Fond du Lac Schools was not what she expected, and asked if she could withdraw her resignation and return to her old job. Broske asked if she could report that day, so that there would be no break in her service, and she said that she could. Broske said she had to check with several people to be sure whether withdrawing the resignation would be acceptable.

12. At the time of Dietrich's call to Broske, she had not yet been removed from the College's payroll, nor had COBRA applications or other documents associated with the termination of employment been sent to her.

13. After the call from Dietrich, Broske consulted with Dr. Rodney Pasch, who was responsible for administering the labor agreements for the College; with Norbert McCormick and with Donna Miller, the Co-President of the Local Union. Pasch told her there was no problem with having Dietrich's resignation withdrawn, so long as the Union agreed. McCormick told her that he would be glad to have Dietrich return, and that had not told any candidate for the job that they had been awarded the posting. In the call to Miller, Broske asked if the Union would be agreeable to executing a memorandum of agreement allowing Dietrich to withdraw her resignation and reclaim her job, without loss of seniority or benefits. Broske advised Miller that there were internal applicants for the job, but that Dietrich had greater seniority than any of them, and had been on vacation until November 30th, and thus had continuous service up to December 1st. Broske also told her that no one in management had any problem with Dietrich's return, and that Dietrich could report for her shift that day. Miller, consulted with Co-President Pratt, Grievance Chair Judy Freismuth and Executive Director Sam Froiland. They decided that, since there had been no break in service and since Dietrich was senior to all of the applicants for the job, allowing her to withdraw the resignation would be a "win-win" solution. Miller called Broske back, and told her the Union would be willing to sign a memorandum of agreement.

14. Following the discussions with Pasch, McCormick and Miller, Broske advised Dietrich that she could withdraw her resignation. She reported for the start of her shift at 4:30 p.m. on December 1st. That same day, McCormick announced to the housekeeping staff that

Dietrich was returning with full seniority and benefits, and that the College and the Union had made an agreement to allow this. He told staff members to direct any questions to Broske.

15. Broske prepared a Memorandum of Agreement, which was signed by Dietrich, Pratt and McCormick on December 2nd, and by Broske on December 6th:

MEMORANDUM OF AGREEMENT

> The Moraine Park Technical College (College) and the Moraine Park Educational Support Professionals (ESP) agree to accept Mary Dietrich's withdrawal of her written notice of resignation effective November 30, 1999. Effective December 1, 1999, Mary Dietrich will assume the position of Housekeeper II as posted by the District with a closing date of 11/23/99. Mary Dietrich's work schedule will be 4:30 p.m. — 1:00 a.m. Monday through Thursday and 3:30 p.m. — 12:00 a.m. Friday, for a total of 40 hours per week during the school year and 4:30 p.m. — 1:00 a.m. Monday through Thursday, for a total of 32 hours per week during the summer. Mary's assigned work area will be E Building. Mary Dietrich's employment with the College will remain continuous and uninterrupted.
>
> The College and the ESP mutually agree that the College's acceptance of Mary Dietrich's withdrawal of her written notice of resignation does not violate the support professional bargaining agreement and that this agreement between the parties is made on a one-time only basis and is without precedential value or prejudice to either party's position in any future similar situations.
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> . . .

16. On the morning of December 6th, the Complainant called McCormick to find out whether she had been awarded the Housekeeper II position. McCormick told her to come in and meet with him. When they met, he told her that Dietrich had withdrawn her resignation. He confirmed for her that she had been the most senior of the four internal applicants.

17. After speaking with McCormick, the Complainant went home and called Freismuth. She told Freismuth that Dietrich's vacation had expired at midnight on November 30th, and she couldn't withdraw her resignation because she was no longer an employee. Freismuth told her that management had the right to let her rescind the resignation, and that the Union had looked at it very carefully. Freismuth suggested that she call Froiland if she wanted to follow up on the matter.

18. The Complainant did call Froiland, and she again argued that Dietrich had ceased being an employee at midnight on November 30th. Froiland said he was not aware that Dietrich's service had been interrupted, but that management had the right to let someone rescind a resignation. He told her the Union looked at the fact that Dietrich was a fairly long-term employee, a good worker and someone who would be completely out of a job if they didn't agree that she could come back. The Complainant said Dietrich would not have been left out in the cold if she hadn't quit the job with Fond du Lac Schools, and Froiland told her she could file a grievance if she wanted.

19. On December 13, the Complainant, accompanied by a neighbor, met with Freismuth and told her she wanted to file a grievance. They discussed the grievance, and Freismuth again expressed the opinion that management had the right to let Dietrich withdraw the resignation. That afternoon, the Complainant presented Freismuth with a written grievance. Freismuth said she would send it along to Broske, and explained the grievance procedure in general terms. They spoke a week later, and Freismuth told her she should come to a meeting with the leadership of the local union to review the Memorandum of Agreement. This was the first time the Complainant became aware of the Memorandum.

20. On December 21, the Complainant met with Miller, Pratt, Freismuth and Froiland. She again asked her neighbor to accompany her as a witness. The Union officials told her that they did not know precisely when Dietrich had called to withdraw the resignation, but they had been told it was done in a message that Broske got on her answering machine when she came to work on December 1st, and that they assumed it was from the night before. The Complainant told them that two co-workers, Kris Hill and Mary Schulze, would be willing to testify that McCormick had told them on November 29th that a decision had been made on who would get Dietrich's job. Freismuth asked her to get written statements from the two, and she said she would. At the conclusion of the meeting on the 21st, the Union representatives remained convinced that the Complainant did not have a viable grievance.

21. After the meeting on the 21st, it was apparent that the Complainant did not trust Freismuth, Pratt and the other Union representatives she had been dealing with. On February 2nd, Freismuth asked her if she would like to attend a meeting of the Union Executive Committee on February 9th, during which a decision would be made on her grievance. She initially said that she would attend, then subsequently sent a certified letter to Pratt, Miller and Freismuth saying that she would not attend the meeting.

22. On February 9th, the Local Union's Executive Committee met and discussed the Complainant's grievance for between a half an hour and forty-five minutes. They concluded that there was no merit to the grievance and no likelihood of success if they pursued the matter to arbitration. The factors discussed by the Executive Committee included the facts that Dietrich had no break in her service, that the Complainant had never been offered the job, and that there was no specific provision of the contract that had been violated. The Committee voted not to pursue the grievance, and directed Freismuth and Pratt to meet with the Complainant and explain the decision.

23. After the Executive Committee meeting, Freismuth called the Complainant and asked if she would meet with her and Pratt to discuss the disposition of her grievance. She agreed, and they arranged to meet that evening in the child care area of the campus. On her way to the meeting, the Complainant encountered a teacher she knew, Marty Potter, and asked him to come along as a witness. She asked if she could tape the meeting, and they asked her not to. Freismuth explained that the Executive Committee had decided not to pursue the grievance. The Complainant asked her again when the withdrawal of the resignation occurred, and Pratt told her it was on November 30th.

24. On May 10, 2000, the instant complaint of prohibited practices was filed, alleging that the District violated the contract by failing to award the Housekeeper II job to the Complainant, and that the Association had failed to fairly represent her by refusing to take the issue to arbitration.

25. The Complainant exhausted her contractual remedies by seeking to pursue the grievance to arbitration.

26. The decision of the Association's leadership to acquiesce in Broske's request that Dietrich be allowed to rescind her resignation was based upon Dietrich's seniority, the fact that she had not yet failed to report for a scheduled shift, the leadership's belief that the request had been made on November 30th, and the fact that no one had yet been awarded the posting for Dietrich's job.

27. The decision of the Association's leadership to acquiesce in Broske's request that Dietrich be allowed to rescind her resignation was not arbitrary, nor was it discriminatory as regards the Complainant. The decision was made in good faith, and was a reasonable decision under the circumstances.

28. The decision of the Association's Executive Committee not to pursue the grievance to arbitration was premised on the strong likelihood of failure in arbitration and on the Committee's judgment that the grievance lacked merit.

The decision of the Association's Executive Committee not to pursue the grievance to arbitration was not arbitrary nor was it discriminatory as regards the Complainant. The decision was arrived at honestly and in good faith, and was reasonable under the circumstances.

29. The Association did not breach its duty of fair representation to the Complainant when it signed the Memorandum of Agreement allowing Dietrich to rescind her resignation and reclaim her job.

30. The Association did not breach its duty of fair representation to the Complainant when it refused to pursue her grievance to arbitration.

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

CONCLUSIONS OF LAW

1. That the Complainant, Judy Conger, is a municipal employee, within the meaning of Sec. 111.70 (1)(i), MERA.

2. That the Respondent, Moraine Park Technical College, is a municipal employer, within the meaning of Sec. 111.70 (1)(j), MERA.

3. That the Respondent, Moraine Park Educational Support Professionals Association is a labor organization within the meaning of Sec. 111.70(1)(h), MERA.

4. That by the conduct described in the above Findings of Fact, the Respondent Association did not commit prohibited practices within the meaning of Sec. 111.70(3)(b), MERA.

5. That the Commission will not exercise its jurisdiction to determine whether, by the conduct described in the above Findings of Fact, the Respondent School District committed prohibited practices within the meaning of Sec. 111.70(3)(a), MERA, as that determination is reserved to the grievance procedure by the parties' collective bargaining agreement.

On 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 instant complaint of prohibited practices be, and the same hereby is, dismissed in its entirety.

Dated at Racine, Wisconsin, this 21st day of February, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

MORAINE PARK TECHNICAL COLLEGE

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

CONTENTIONS OF THE PARTIES

The Complainant

The Complainant argues that Mary Dietrich's seniority terminated under the collective bargaining agreement at midnight on November 30, 1999. That was the time she specified that her resignation should take effect. Her effort to withdraw the resignation came on December 1st, too late to preserve her seniority. Her service to the College may have been uninterrupted, but as of midnight, Dietrich was the least senior employee at the College, and cannot have had a superior claim to the Housekeeper II job. The loss of seniority, not the break in service, is the critical point in this matter, yet the Association utterly failed to consider this when it agreed to let her return to the Housekeeper II position. Failing to consider the critical question of seniority is, on its face, arbitrary. Sam Froiland admitted that he did not personally know whether Dietrich was the most senior person, and focused only on whether there had been a break in service. Other Union officials simply accepted Management's claim that Dietrich had more seniority than the other applicants for the job. Again, continuous service is irrelevant under the contract. Continuous seniority is the key, and favoring Dietrich, whose seniority had plainly terminated, over the Complainant, whose seniority was continuous, is arbitrary.

The Association admits that it never learned, prior to refusing to arbitrate the Complainant's grievance, that Dietrich's call came in on December 1st rather than November 30th. Yet the Complainant always demanded that they investigate this, and their failure to find out this critical fact demonstrates that they did not make any reasonable efforts to look into the merits of the grievance. Since the Complainant had greater seniority than Dietrich and all of the other applicants for the Housekeeper II, she plainly had a superior claim to the position, and a meritorious grievance over the College's failure to award it to her. The Association's failure to recognize that fact, advocate on her behalf and advance her grievance to arbitration violated its duty to fairly represent her. Thus, the Examiner should order the College to award her the job, make her whole for her losses, and award whatever other relief is appropriate.

The Respondent College

The College takes the position that before the Examiner can address the merits of her claim, the Complainant must prove, by a clear and satisfactory preponderance of the evidence, that the Association acted arbitrarily, discriminatorily or in bad faith when it refused to pursue her grievance to arbitration. There is no evidence of any of those factors. The evidence shows that the Association carefully considered the question of whether Dietrich's resignation could be

withdrawn, and concluded that it could, because there was no break in service, no one else had been offered the job, the College was willing to take her back, and she was the most senior employee eligible for the position. Whether the Complainant agreed with this analysis or not, it is plainly not arbitrary and there is no evidence that the decision was motivated by hostility towards her. In the same vein, the decision not to pursue her grievance was carefully considered and discussed. The law allows a wide range of discretion to Unions in decision making, and the Association's actions in this case fall within that permissible range. Thus, the Complainant has failed to prove a violation of the duty of fair representation, and her complaint must be dismissed in its entirety.

The Respondent Association

The Respondent Association asserts that its decision making in this case was careful, and that it gave every consideration to the Complainant's interests, but reasonably concluded that Dietrich should be allowed to return, and that it should not pursue a challenge to that decision on behalf of the Complainant. The Association's officers had to make a decision in short order on whether to agree to Dietrich's return to work. They considered the fact that she could return that day with no break in service, that no other employee had been offered the job, that Dietrich had greater seniority than any of the applicants, and that the College was willing to take her back. Thus, the Association protected the seniority of a relatively long service employee, while helping the employer retain an employee it wished to have in the job. The decision was not intended to harm the Complainant, but to assist Dietrich and the College. There is nothing arbitrary or discriminatory about such a decision.

The Complainant's single minded focus on when Dietrich called to withdraw her resignation is beside the point. Dietrich was on vacation through November 30th, and she was able to return to work in time for her normal shift on December 1st. Thus, there would be no break in service. The Complainant seems to treat midnight on November 30th as a mystical point at which Dietrich's seniority and employment relationship evaporated, simply because her letter said she was resigning as of that date. The resignation was not effective until the employer did something to implement it. Yet, according to College officials, nothing was done to separate Dietrich from the payroll before she called to withdraw her resignation. The Complainant may have been disappointed, but the fact is that the resignation turned out to be a false alarm.

As with her complaint about the decision to let Dietrich retain her job, the Complainant's claim that the Association breached its duty of fair representation in deciding not to pursue her grievance to arbitration is ill-founded. The Association's representatives met with her repeatedly and asked her to explain what the contractual basis for a grievance would have been. They listened to her carefully, and treated her with courtesy. When it became clear she did not have faith in the individual officials she was dealing with, she was invited to meet with the Executive Committee, an invitation she declined. In the end, after extensive discussion, they continued to believe that there was no viable grievance. There is nothing to suggest, much less prove, that any

of the Association's decision making was arbitrary, or motivated by hostility or discrimination against the Complainant, nor is there any evidence of bad faith. The Complainant did not agree with the Association's decision, but that it not a sufficient basis for a prohibited practice case. Thus, the instant complaint must be dismissed in its entirety.

DISCUSSION

A. The Issue In This Case

The Complainant objects to the agreement between the Association and the College to allow Mary Dietrich to rescind her resignation and return to her job. She also objects to the Association's refusal to take to arbitration her grievance over Dietrich's return. These objections led her to file the instant complaint of prohibited practices, alleging that the College violated the collective bargaining agreement and that the Association breached its duty of fair representation to her.

The essential issue here is whether the Association acted illegally in agreeing with the College that Dietrich could withdraw the resignation and return to her Housekeeper II position. If the Association acted lawfully in making that agreement, it cannot have acted unlawfully in reducing it to writing in the form of a Memorandum of Agreement, and in then declining to challenge the agreement through arbitration. Both of those subsequent actions were merely after-effects of the initial decision. The Memorandum of Agreement is a fairly common boilerplate document stating the terms of the verbal agreement, and specifying that it would not prejudice the parties in any future disputes. There is nothing in it that materially affected the interests of the Complainant beyond what had already been agreed to verbally. The refusal to arbitrate the Complainant's challenge to the Memorandum was likewise foreordained by the initial agreement. Even though the Association investigated the grievance, heard the Complainant's arguments and discussed the viability of the grievance, treating it throughout as a serious matter, the fact is that there was no point to pursuing it to arbitration. The Association had already taken a position on the validity of Dietrich's return. When it expressly agreed to let her withdraw the resignation and reclaim her job, it necessarily took the position that there was no violation of the contract. The Complainant's grievance would have lacked any credibility in arbitration, and would have had no prospect of success.

B. The Legal Standard

Section 111.70 (3)(a)5 makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. Section 111.70 (3)(b)4 is a parallel provision, making it a violation of MERA for a labor organization to violate the contract. However, where the parties have negotiated a contract which includes grievance arbitration as the mechanism for enforcing contractual rights and the grievance procedure has not been exhausted, the Commission will not exercise its discretion to hear claims of 3(a)5 and 3(b)4 violations. 1/ Instead, the Commission will honor the parties' contract and the grievance procedure will be presumed to be the exclusive

venue for these claims. The exception to this principle is that a Complainant may proceed with a Sec. 3(a)5 claim if she can demonstrate that she has been prevented from effectively protecting her contractual rights because the Union has failed in its duty to fairly represent her. 2/ Thus, the merits of a contractual claim will normally only be reached if the Complainant first proves a violation of Sec. 111.70(3)(b)4.

1/ JT. SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY, et. al., DEC. NO. 16753-A (WERC, 12/79); WAUPUN SCHOOL DISTRICT DEC. NO. 22409 (WERC, 3/85); MILWAUKEE COUNTY SHERIFF'S DEPT., DEC. NO. 27664-A (CROWLEY, 10/93).

2/ MAHNKE v. WERC, 66 Wis.2d 524 (1975).

The Association is the exclusive representative of the employees. This exclusive status confers certain legal rights on the Association and carries with it corresponding responsibilities, chief among them the duty to provide fair representation to each of its members. Fair representation is not, however, perfect representation, nor is it a guarantee that every individual member will be satisfied with each act or decision taken by the labor organization. The Commission and the courts have recognized that:

> The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. … Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. . . . 3/

3/ HUMPHREY v. MOORE, 375 U.S. 335 (1964); GRAY v. MARINETTE COUNTY, 200 Wis.2d 426 (Ct.App. 1996); See also, MILWAUKEE COUNTY, DEC. NO. 28754-B (MCGILLIGAN, 1/97).

The measure of fair representation cannot be, and is not, whether the representation is successful or whether every employee is satisfied with the outcome of a Union's decisions. The duty is satisfied so long as a labor organization represents its members' interests without hostility or discrimination, exercises its discretion with good faith and honesty and acts without arbitrariness in its decision making. Thus, the legal formulation for a breach of the duty of fair representation is whether the Union's actions are arbitrary, discriminatory or taken in bad faith. 4/

4/ VACA v. SIPES, 386 U.S. 171 (1967); MAHNKE v. WERC, 66 Wis.2d 524 (1975); GRAY v. MARINETTE COUNTY, 200 Wis.2d 426 (Ct.App. 1996); MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 29482-F (NIELSEN, 12/00); MILWAUKEE COUNTY, DEC. NO. 28754-B (MCGILLIGAN, 1/97).

C. The Duty of Fair Representation

One point that fuels the Complainant's mistrust of the Association and the College in this case is the confusion over when, precisely, Dietrich called to withdraw her resignation. Her letter said she was resigning at the end of the day on November 30th. Donna Miller was under the impression that the call was left on Broske's answering machine, and that she got the message when she came to work on the morning of December 1st. She concluded from this that the request to withdraw the resignation was made on November 30th, and passed along that information to other Association officials and to the Complainant. Broske testified that she took the call directly on the morning of the 1st, and said she had not told anyone a message was left on the 30th. Not surprisingly, the Complainant harbors the suspicion that the Association was misleading her, and trying to suggest that the resignation was withdrawn before its nominal effective date.

I find no proof that the Association tried to mislead the Complainant. Notably, Miller was not the only one who believed that a message had been left on Broske's machine. One of the other bidders, Mary Schulze, testified that Broske twice told her a message had been left on the answering machine. Whatever the reason for this conflict in various people's understandings, the record is clear that Broske actually received the call directly from Dietrich on the morning of December 1st. This point is irrelevant to the question of whether the Association violated its duty of fair representation. There are three reasons for this. First, the Association representatives had a good faith belief that the message had been left on the 30th. The fact that they were mistaken does not render their decision making arbitrary. Even if they were negligent in not investigating further, perfection is not the standard that a labor organization must meet, and mere negligence is not a sufficient basis for finding a violation of the duty of fair representation. 5/

5/ MILWAUKEE COUNTY, DEC. NO. 28754-B (MCGILLIGAN, 1/97).

Moreover, the letter of resignation was not some sort of contract that the Complainant or the Association were parties to and could somehow enforce. If it was an agreement of any type, it was between the College and Dietrich, and if they agreed to reasonably and honestly interpret it so that it could be rescinded before any actual break in service took place, they were within their rights. Finally, and most importantly, the precise time of the call is irrelevant to Dietrich's employment status. From the College's perspective, she was still an employee. She was still on the payroll, had not missed any scheduled shift, and thus, had not had a break in service. No other employee yet had more than a potential claim to her job. Surely, the College could have taken the position that the passage of seven hours and fifty-seven minutes between midnight on the 30th and her call to Broske on the morning of the 1st had terminated her employee status, and that would have been a plausible position. However, it did not take that position, and it was under no obligation to take that position.

The Complainant's central tenet is that Dietrich had forfeited all of her seniority at the stroke of midnight on November 30th. Seniority terminates on resignation, but it is not as clear as the Complainant believes that the resignation took effect before the start of Dietrich's shift on the 1st. The person who tendered the resignation believed there was still time to withdraw it. The employer to whom it was tendered believed there was still time to withdraw it. The only way in which the withdrawal could have prevented was if the Association insisted, and the College agreed.

This case illustrates the reasons that labor organizations must be allowed considerable latitude in decision making. Here, the Association was presented with a choice. It could agree to let Dietrich withdraw her resignation and come back to her job, as requested by the College. Or, it could refuse to let her come back. Whichever choice it made, someone would be adversely affected. If the Association agreed to let her come back, the employees who posted for her job would be denied the chance for an improvement in their lot. If it refused to let her come back, Dietrich would be out of work. In making their choice, the Association elected the course of action that avoided a loss of what Dietrich already had, at the cost of what the applicants might have gained. Almost certainly, the Complainant would have been the person selected for the vacancy, had a vacancy remained. Naturally, she feels great disappointment, even apparently outrage. Just as Dietrich would have been outraged had she learned that her union blocked her from returning to employment had the decision gone the other way. Faced with a decision where someone was going to be unhappy, the Union did the only thing that it could do – it weighed the pros and cons and came to a decision. Significantly, the Association's leadership never considered the personal attributes of Ms. Conger vis-à-vis Ms. Dietrich. There is no evidence at all that the Association decided to let Dietrich rescind her resignation as a means of harming the Complainant, or depriving her of something she had. They did it as a means of helping another, more senior employee keep what she had.

The Complainant's view of things is different, of course. She believes that the Association and the College deprived her of something that she may not have had yet, but that she would have had if she had not been gone and was inevitably going to have once she returned. She may be right about what might have been. Even though no offer had been made to her, Broske conceded that she was the senior applicant and that the College anticipated offering her the job. The fact remains, however, that she was gone, and no offer had been made. Dietrich had not yet missed any scheduled shift and had not been removed from the payroll. The equities and the legalities of the situation were not all one-sided and were not clear-cut. The Association's leadership could rationally have taken the Complainant's side in this matter. The fact that they could have done so does not mean that they were obligated to do so. What the Association was legally obligated to do was to make a good faith decision, and to do it in a non-arbitrary, non-discriminatory manner. That is exactly what was done in this case.

A Union cannot be put in the impossible position of being liable for damages every time it makes a choice between the competing interests of employees. Such choices are the essence of collective bargaining and contract administration. A proposal to seek employer paid health

insurance will direct money to the benefit of employees with families that might otherwise go to fund pay increases for single employees. Successfully pursuing the reinstatement of a discharged employee will displace the employee who took the grievant's job. Defending the seniority rights of an applicant for a posting will frustrate the ambitions of junior employees. In each of these cases, the Union must choose between the long-term interests of the bargaining unit and the immediate personal interests of individual employees. The individual dissatisfaction that results is not evidence of any misfeasance or misconduct by the Union. It is the inevitable by-product of the act of choosing. To find that the Union is subject to a lawsuit whenever a member is dissatisfied — even justly dissatisfied — with a decision is to find that no decision can ever be made. A ruling along those lines would ultimately destroy the ability of labor organizations to have any meaningful voice in the representation of employees.

Dated at Racine, Wisconsin, this 21st day of February, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

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