STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DALE ROBERT CHAPMAN, Complainant.

vs.

SEIU LOCAL 150, STEVE CUPERY, BARGAINING REPRESENTATIVE, and MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEBORAH FORD, LABOR RELATIONS, Respondents.

Case 391
No. 59686
MP-3717

Decision No. 30137-A

Appearances:

Mr. Dale R. Chapman, 4338 North 83rd Street, Milwaukee, Wisconsin, for the complainant.

Attorney Donald Schriefer, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, for the Milwaukee Board of School Directors and Deborah Ford.

Attorney Jill Hartley, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, for SEIU Local 150 and Steve Cupery

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 14, 2001, Dale Robert Chapman filed a complaint with the Wisconsin Employment Relations Commission alleging that SEIU Local 150 and its bargaining representative Steve Cupery, and the Milwaukee Board of School Directors and its Director of Labor Relations Deborah Ford, had committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act. On March 30, Examiner William C. Houlihan of the Commission staff met with the parties in an attempt to resolve the dispute

underlying the complaint. That effort being unsuccessful, the Commission on April 9 assigned the matter to Examiner Stuart Levitan for hearing, which was held in Milwaukee, Wisconsin on July 10. A stenographic transcript of the hearing was made available to the parties by July 27. The three parties filed written arguments by August 30. The complainant and the Board of School Directors waived their right to file a reply brief; only SEIU Local 150 submitted a reply brief, which was received on September 24.

1. Service Employees International Union (SEIU) Local 150 ("the union") is a labor organization with offices at 8021 West Tower Avenue, Milwaukee, Wisconsin. Starting in September 1984 and at all times material herein, Steve Cupery ("Cupery") has been a bargaining representative employed by the union.

2. Milwaukee Board of School Directors ("the district," or "the school board") is a municipal employer with offices at 5225 West Vliet Street, Milwaukee, Wisconsin. At all times material herein, Deborah Ford ("Ford") has been the school board's Director of Labor Relations.

3. Since the winter of 1988-1989 and continuing through all times material herein, the union and Cupery have represented a bargaining unit consisting of food service managers, food service manager trainees, food service assistants, handicapped children's assistants and school nursing assistants. Cupery has been intimately involved in collective bargaining and contract administration affecting the bargaining unit during his years as staff representative. The collective bargaining agreement between the district and the union affecting this bargaining unit includes a grievance arbitration procedure providing for the final and binding resolution of disputes arising over the interpretation and application of the terms of the agreement.

4. Dale Robert Chapman ("the complainant" or "Chapman") began working for the school district as a Food Service Manager (FSM) in August 1987 has been employed by the district as an FSM continuously since August 24, 1994, which is his seniority date. For the period covering June 1999 to June 2000, Chapman's principal gave him an overall performance rating of "commendable," the highest of three rankings. Chapman received a rating of "commendable" on the evaluations submitted in 1999, 1995, 1991 and 1990. Chapman served approximately 18 months as a member of the union's bargaining team in the late 1990's; when he stated an intention to stop serving in that capacity, Cupery tried (unsuccessfully) to convince him to remain. On September 15, 1999, Chapman had filed a grievance alleging that his classification had been improperly reduced due to the district's procedures regarding the serving of a la carte meals. Without further direct action by Chapman, Cupery advanced the grievance through the grievance process, including advancing the matter to arbitration in January 2000. The union and Cupery ultimately secured redress for Chapman and other represented employees, including a commitment for supplemental back pay.

5. The School District classifies Food Service Managers (FSM) as I-VI, in ascending order, based on the average number of meals served at the school to which an FSM is assigned. From April 29, 1996 until the end of that school year, Chapman worked as a FSM V at Milwaukee Tech High School. At the time Chapman accepted that position, he was aware that, due to declining meal counts, the position would be downgraded to a FSM IV for the 1996-1997 school year, which it was. The position was further downgraded to a FSM III the following year, due to a continuing decline in meal counts. The collective bargaining agreement provides for a 91-day probationary period before an employee's status as a FSM with a particular classification vests. Chapman did not work FSM V for more than the final 32 days of the 1996 school year, and thereafter returned to his status as a FSM IV.

6. In November 2000, the district posted a vacancy for the position of Food Service Manager VI at South Division High School. Chapman sought the position, which he was awarded on November 15. He began training for the position on November 28 and entered into his new duties on December 4.

7. Immediately upon learning that Chapman had been awarded the position, seven district food service managers filed grievances, or requested that Cupery file grievances on their behalf, over the way in which the district filled the vacancy at South Division High School. The grievants claimed they were all senior to Chapman and more qualified, and were entitled to the promotion under Appendix A of the collective bargaining agreement, which provides as follows:

> Promotions, transfers and shift changes will be determined on the basis of the competing employe's knowledge, skill and ability. Where these factors are relatively equal, seniority shall be the determining factor.

Because the collective bargaining agreement requires that grievances be filed within five workdays, Cupery is not always able to conduct a full investigation into a grievance's merits prior to its submission. He does conduct the appropriate investigation, however, prior to advancing the grievance to the next step. Pursuant to that general practice, Cupery investigated the South Division FSM grievances following their initial submission. He reviewed the collective bargaining agreement, consulted the appropriate seniority lists, interviewed the grievants, obtained statements from one or two other individuals, and made two requests for information to the district. Accompanied by several of the grievants, he then met with district official Mary Kelly, the administrator of food and nutrition services. As part of the union's presentation, Cupery told Kelly he felt Chapman's brief tenure as a FSM V at Milwaukee Tech was not sufficient to give him permanent status as a FSM V; that Chapman had had problems with administrative aspects of his job, and that there were other, more senior employees whose knowledge, skill and ability were at least relatively equal and likely greater.

When Cupery and the union did not receive a disposition from Kelly within the contractual time period, Cupery and the union appealed all seven grievances to Kelly's superior, Michael Turza. Cupery and several grievants made their presentation to Turza, who did not take a position at their meeting. Cupery advanced the grievances through their steps without indicating which of the seven the union felt should ultimately receive the promotion. On or about January 23, 2001, the District awarded the position to Betty Berg, a FSM IV with a seniority date of December 13, 1982 and denied the six other grievances. Since 1991, Berg's performance has consistently been ranked as "commendable." At the time of their grievance, Berg and two other grievants were serving as union stewards.

8. When Chapman learned shortly thereafter that he was being returned to his former position and that the FSM IV at South Division was being awarded to Berg, he called Cupery on January 30 in order to initiate a grievance. When Cupery was not in the office to take his call, Chapman that day filed a timely grievance, claiming in effect that his service as a FSM VI at Milwaukee Tech in 1996 made him more qualified than Berg, whose highest classification was as a FSM IV.

9. Gone for the day when Chapman called, and out of the office for bargaining the next day, Cupery did not return Chapman's call until February 1. By that time Chapman had already called the state SEIU office twice to complain about Cupery's lack of a return phone call, including leaving a message for Local 150 President Dan Iverson, complaining about the poor representation he felt he was getting from Cupery. In their conversation on February 1, Cupery, who was not yet aware that Chapman had already filed a grievance, related to Chapman his doubts about such an action. Specifically, Cupery explained to Chapman his doubts that there was a binding past practice which addressed this situation, and noted that concerns about Chapman being behind in his paperwork went to the issue of the contractual standard of knowledge, skill and ability.

10. On or about February 8. 2001, Cupery wrote Chapman as follows:

> Re: Your grievance on South Division and threats regarding the filing of a ULP
>
> Dear Mr. Chapman:
>
> This letter is in response to the issues raised during our phone conversation on the above referenced matters. Prior to receiving an opinion from me on the validity of your grievance on South Division, in fact, prior to my knowledge you had filed a grievance on the South Division Manager Promotion, you left a message with President Dan Iverson, requesting he call you because you believed you would not get fair representation from me.

The phone call to President Iverson, was referred to me for response. Upon returning the call you indicated you would be filing a grievance on the decision by the employer to fill the South Division Manager position with Ms. Berg. You wanted the Union to represent you in this grievance.

In indicated to you that Ms. Berg's appointment to the manager position at South Division was the result of the settlement of six grievances about your promotion to that position. Appendix A of the contract contains language governing this personnel action. Specifically, that where knowledge, skill and ability are relatively equal, seniority will be the determining factor.

I explained that during the grievance proceedings, the union, Ms. Kelly and Mr. Turza (from the District), reviewed evidence that we believed was relevant. We noted the experience of each of the candidates in relationship to yourself, their relative abilities to run large kitchens, keep up with paper work and daily reports, oversee employees as well as meeting their food production, service and cleanup responsibilities. We also examined the employer's assertion (and yours) that their (sic) was a past practice that governed the employer's action.

In so doing we believe we established the fact that both Ms. Berg and Linda Drickhamer had knowledge, skill and ability that was relatively equal (if not superior) to your own. They have run large schools, led large staffs in their daily work assignments, have had performance reviews that are at least comparable to your own, and in the case of Ms. Berg, she has done so without the frequent problems you have encountered with completing paper work during your career with the District.

As noted during our conversation, given that Ms. Berg's knowledge, skill and ability is relatively equal to your own (as determined now by both the union and employer), because she has considerably more seniority than yourself, she should be the selected candidate.

I asked you if you had any evidence to refute this conclusion. You indicated that you had a associate degree and that you had worked in a grade five kitchen and that past practice should support your promotion to South Division. I explained to you that the fact you have a "degree" does not establish, in and of itself, the claim you have greater knowledge, skill and ability than Ms. Berg. A degree is not required for the grade 5 Cook Manager Position. Nor has it been the practice of the parties to give special deference to a "degree" in making this determination.

With respect to working in a grade five kitchen, I explained that the facts were that the kitchen had already been down graded to a 4 to become effective the following September. It was posted as a position that would be a grade 4 in August. When you arrived at the school in May, the school was already producing and serving meals at a grade 4 level. You portrayed the move to Jim Hadlock as a lateral move acknowledging the fact it would move down in pay in the fall.

With respect to the past practice, the employer asserted the same argument at Step 1 of the grievance procedure. We challenged the employer (and you) to produce any evidence of this so-called practice. When describing the practice, both the employer and you did so as it pertained to lateral transfers within a previously achieved grade. This would not be the case for you in South Division. This is clearly a promotional step higher than any step you have reached with the District.

I also noted that we refuted the employer's contention regarding this practice by pointing to the contract language covering restoration to a prior attained grade, after a down grade. This language is found at the top of page 50. It indicates that you would be offered the next opening within your previous classification. There has been a prior opening within your previous classification (Bell) and you did not exercise your rights with regard to that opening. I negotiated this language and recall the discussion and agreement that we would not permit employees to have some sort of endless preference over other employees and be allowed to in essence "cherry pick" their future selection exercising such return rights over other senior and equally qualified employees.

If you have any additional evidence that would cast doubt on my conclusion you are welcome to submit it at any time and I will consider it. As for your concern about not receiving fair treatment I would remind you that I prosecuted your grievance on Ala Carte (which I have been assured by labor relations and Ms. Kelly will result in back pay for you and did result in a positive change in our contract for all managers). I also noted that the last case I had where I indicated that I would not arbitrate a grievance where two managers had comparable knowledge, skill and ability, and the junior manager wanted to pursue the grievance – involved Ms. Berg. Ms. Berg accepted this determination not to pursue her grievance.

> As noted during our conversation, at Step 1 you have the right to file a grievance on your own. We have the right to be present at any discussion during this grievance and I have sent a letter to this affect (sic) to the employer. It is not normal for the employer to have meetings at Step 1 of the grievance procedure. Most are answered in writing without a meeting. If further evidence is not presented to question my current determination, we will not be pursuing this matter to the next step of the grievance procedure. Please share this information with the WERC when file your complaint.

Chapman never provided any additional information to Cupery, and Cupery took no further steps to advance the grievance. At hearing, Chapman testified he was unaware of any past practice being applicable to his situation.

11. On February 14, 2001, Chapman filed a complaint against the union and district, alleging a series of prohibited practices.

12. The district notified Chapman on February 20 that it had denied his grievance. Chapman did not contact Cupery about an appeal of the denial until March 2. By that time, any further action on the grievance was untimely under the terms of the collective bargaining agreement.

13. At hearing, Chapman submitted two notarized statements, as follows:

> I work at Milw Tech high school. We had a meeting on Wed Sept 27. At the meeting I heard Steve Cupery, say that Dale Chapman would never get South Division, if he had anything to say about it.
>
> Then one day at work Terri and I were talking to Mr. Peters and she said that Dale could be coming back to tech.
>
> She said, that over her dead body is the only way that would happen.
>
> So Mr. Peters said, that Dale could never come back here because he wouldn't let that happen.
>
> /s/ Linda Yeadon, 6-26-01

> I Patricia Ripple was attending a Presidential Rally at Milwaukee Tech High School on Wednesday Sept 27, 2000 after work. After the Rally Steve Cupery suggested we have a short meeting discussing our work load. Some of the girls went with him to discuss them. At this time Dale Chapman's name came up about him going to work at South Division High School. I heard Steve Cupery say that Dale Chapman would never get South Division if he had anything to say about it.
>
> /s/ Patricia Ripple, 6/26/01

Neither Ripple nor Yeadon testified at the hearing, and were thus not subjected to cross-examination. Cupery, who did testify under oath, denied making the statements which Ripple and Yeadon attributed to him.

14. Berg herself had filed a grievance in May, 1997, contending that the employer had violated the collective bargaining agreement in its manner of filing the vacant Food Service Manager IV position at Morse Middle School. Cupery advanced the grievance through the steps of the process, including filing an appeal to arbitration, before withdrawing the grievance on May 14, 2001.

15. Chapman has not demonstrated by a clear and satisfactory preponderance of the evidence that Cupery and/or the union acted in an arbitrary, discriminatory or bad faith manner in evaluating his grievance.

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

CONCLUSIONS OF LAW

1. That the Complainant, Dale Robert Chapman, is a municipal employee, within the meaning of Section 111.70 (1)(i), Wis. Stats..

2. That the Respondent, Milwaukee Public Schools, is a municipal employer, within the meaning of Section 111.70 (1)(j), Wis. Stats.

3. That the Respondent, Service Employees International Union is a labor organization within the meaning of Section 111.70(1)(h), Wis. Stats.

4. That by the conduct described in the above Findings of Fact, the Respondent Union did not commit prohibited practices within the meaning of Section 111.70(3)(b)1, Wis. Stats.

5. That by the conduct described in the above Findings of Fact, the Respondent School District did not commit prohibited practices within the meaning of Section 111.70(3)(a)5, Wis. Stats.

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 Madison, Wisconsin this 21st day of November, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/
Stuart Levitan, Examiner

MILWAUKEE BOARD OF SCHOOL DIRECTORS

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

POSITIONS OF THE PARTIES

In support of his position that the respondents had committed prohibited practices, the complainant asserts and avers as follows:

> The second sentence of the fifth paragraph of Cupery's letter to Chapman shows that the union had chosen to judge Chapman's job performance without any documentation to support it.
>
> The letter also mistakenly claims that the complainant was involved in the grievance procedure, when in fact he was never notified of any grievances nor informed or involved in the procedure.
>
> It appears the union does not refute the complainant's classification for a position at Bell Middle School. Why then does it refute his classification for the position at South Division?
>
> Neither Betty Berg nor the complainant had 91 working days as Food Service Manager V. The complainant was promoted to a FSM V by responding to a survey at Milwaukee Tech. A manager's highest classification attained stays on their record permanently. In keeping with past practice it would make sense that the candidate with the highest classification attained should be the successful candidate.
>
> The union presented copies of second step grievances for other employees who clearly had no evidence to support their grievances, yet the union not only submitted Step 1 but also followed through to Step 2. As a member of the union, the complainant was denied the right to the full grievance process.
>
> Due to no precedence to the complainant's knowledge of a situation involving a manager in a classification for less than 91 days competing against a lower classification manager. The complainant should have been allowed the full grievance process including assignment of an impartial referee.
>
> Clearly the union failed to represent the complainant's interests.

> Sworn statements submitted clearly state that Cupery said the complainant would never get the position if he had anything to say about it. This statement was made prior to the survey and shows a preconceived notion of his intent. Cupery acted in bad faith as the complainant's union representative.

In support of its position that the complaint should be dismissed, the union asserts and avers as follows:

> The complaint must be dismissed because neither the union nor Cupery acted in a manner which was arbitrary, capricious or in bad faith. It is well-settled that a complainant alleging that a union had violated its duty of fair representation has the burden of proving by a preponderance of the evidence that the union's conduct was arbitrary, capricious or in bad faith. The complainant had failed to meet that burden, and his complaint must be dismissed in its entirety.
>
> The union properly processed the grievances alleging a violation of the collective bargaining agreement by the district's appointment of the complainant to the South Division Food Service Manager position. The WERC and the courts have consistently recognized that union's may choose one position over another even among employees in the same bargaining unit without violating their duty of fair representations; simply because Chapman disagreed with the union's position does not mean Local 150's actions violated its duty of fair representation.
>
> Unions are afforded a wide range of reasonableness to process those grievances they find have merit and to decline to process those which, in their judgment, would not succeed. As long as that evaluation is completed in good faith and without bias, the union's decision cannot be second-guessed by the commission or a court.
>
> Here, it is clear the union's processing was not done out of any animus toward Chapman, rather, the union saw a violation of the collective bargaining agreement and a need to address the matter. Its evaluation was done without bias and in good faith and was thus consistent with its duty of fair representation.

> The reasonableness of the union's position is supported by the fact that the district eventually saw merit in its position, reapplied the relevant contractual criteria and awarded the disputed position to another employee on the basis of her seniority. Chapman's dissatisfaction with the outcome is irrelevant; he failed to prove improper conduct on the union's part and thus failed to prove a breach of its duty of fair representation.
>
> Further, Chapman failed to produce any credible evidence that Cupery acted out of hostility or animosity toward him.
>
> Further, Betty Berg's status as a union steward did not influence the union's processing of the grievance over Chapman's appointment to the South Division position.
>
> Chapman has failed to prove that the union breached its duty of fair representation by not appealing his grievance over Berg's appointment to the South Division position. Although this complaint should not properly be before the examiner at this time, the allegation has no merit and should also be dismissed. Simply because the union did not advance this grievance did not constitute a violation of its duty; the union conducted a thorough investigation into the circumstances of the disputed position, and determined that Chapman was not the appropriate employee to receive the position. Cupery and the union made a detailed, good faith evaluation of the grievance and determined that it lacked sufficient merit to appeal further.
>
> Chapman has failed to sustain his burden of proving by a preponderance of the evidence that the union and/or Cupery's conduct toward his was arbitrary, discriminatory or in bad faith. He has failed to prove a breach of the union's duty of fair representation, and the complaint should be dismissed in its entirety.

In support of its position that the complaint should be dismissed, the school board asserts and avers as follows:

> The union did not breach its duty of fair representation to Chapman, in that the union had sound reasons for supporting Betty Berg for the South Division position, and had sound reasons for not supporting Chapman's grievance. Moreover, the miscellaneous allegations raised by the complainant, such as Cupery's alleged personal animosity towards him, are without merit.

> Further, because an employee's ability to proceed against an employer on a claimed contract violation is contingent upon first establishing that the union breached its duty of fair representation, the complaint against the school board must also be dismissed.

The complainant and the respondent school board waived their right to file reply briefs. In its reply brief, the union posited further as follows:

> The complainant errs when he states that the union had no documentation that he had experienced problems in completing his paperwork, when the record shows that Cupery did have just such information.
>
> The complainant also errs when stating that it has been the practice of the parties to give special deference to an educational degree, when the credible evidence on this point shows that the parties have not considered an educational degree relevant for determining knowledge, skill and ability.
>
> The complainant presented absolutely no evidence establishing that the union's decision not to appeal his grievance was somehow arbitrary, discriminatory or in bad faith. The union fully and fairly evaluated the complainant's grievance, and determined it was without merit. Simply because the complainant disagreed with the union's decision did not entitle him to special treatment or establish a breach of the union's duty to fairly represent him.
>
> The complainant has failed to sustain his burden or proving the union or Cupery acted arbitrarily, discriminatorily or in bad faith in any aspect of its actions. The complaint must be dismissed in its entirety.

DISCUSSION

Complainant Dale Robert Chapman has brought this action against his union, the Service Employees International Union (SEIU), and his employer, the Milwaukee Board of School Directors, alleging that they and their agents committed several prohibited practices against him.

Chapman alleges that SEIU and Cupery violated sec. 111.70(3)(b)1, Wis. Stats., by refusing to bring or advance a grievance after the school district rescinded Chapman's promotion to the position of Food Service Manager V at South Division High School. He alleges that the school district violated Sec. 111.70(3)(a) 5, Wis. Stats., in that this personnel transaction violated the terms of the parties' collective bargaining agreement.

Section 111.70(3)(a) 5, Wis. Stats., makes it a prohibited practice for a municipal employer to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment. Section 111.70(3)(b)1, Wis. Stats., makes it a prohibited practice for a labor organization representing municipal employees "to coerce or intimidate a municipal employee in the enjoyment of the employee's legal rights...." 1/ Pursuant to sec. 111.07(3), Wis. Stats., complainants before the commission "shall be required to sustain (their) burden by a clear and satisfactory preponderance of the evidence."

1/ The union's duty of fair representation, discussed in detail below, flows from this section.

The Complainant asserts that his loss of the FSM V position was contrary to the contractual standard. However, where, as here, 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 a claim of a 3(a) 5 violation. 2/ 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 complainants may proceed with a 3(a)5 claim upon a demonstration that they have been prevented from effectively protecting their contractual rights because the Union has failed in its duty to fairly represent them. Thus, the merits of a contractual claim will normally only be reached if the Complainant first proves a violation of Section 111.70(3)(b)1. 3/

2/ 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).

3/ MILWAUKEE COUNTY, et al (WERC, 8/98).

The Union's Duty of Fair Representation

As the exclusive representative of the employees within the bargaining unit, the union has certain rights and responsibilities. Its most basic right is to act on behalf of all; its most basic responsibility is to give fair representation to each. These twin towers of the union's identity – the power to act for all, the obligation to be fair to each – form the core of the duality inherent in its duty of fair representation.

There's no reason why the power to act for all and the obligation to be fair to each should ever be in conflict. But sometimes they are, or are seen to be so, so the courts and commission have had to set standards.

Early on, the courts clearly found collectivism to take priority, subject to challenge only on grounds of bad faith and abuse. By giving the collective representative the widest authority to evaluate questions of contract administration or bargaining priorities consistent with the collective relationships at stake, subject only to the abuse-of-discretion standard, the courts and commission have set a high bar for a complainant to succeed in a duty of fair representation case.

Collective representation, the U.S. Supreme Court has observed, does not mean that every member of the bargaining unit will be happy with every action of the labor organization. "The complete satisfaction of all who are represented is hardly to be expected." FORD MOTOR CO. V. HUFFMAN, 345 U.S. 330, 338 (1953), cited in HUMPHREY V. MOORE, 375 U.S. 335, 349 (1964).

For more than forty years, Wisconsin law has held a high standard for employees challenging a decision by their union on whether or not to pursue a grievance. As the Wisconsin Supreme Court held in FRAY V. AMALGAMATED MEAT CUTTERS, 9 Wis. 2D 631, 641 (1960):

> The union has great discretion in processing the claims of its members, and only in extreme cases of abuse of discretion will courts interfere with the union's decision not to present an employee's grievance. In certain cases for the greater good of the members as a whole, some individual rights may have to be compromised. Whether or not a cause of action is stated depends upon the particular facts of each case.

There has been no better analysis of this issue than its seminal statement. Here is how Justice White explained it almost 35 years ago:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. See HUMPHREY V. MOORE, *supra*; FORD MOTOR CO. V. HUFFMAN, *supra*. There has been considerable debate over the extent of this duty in the context of a union's enforcement of the grievance and arbitration procedures in a collective bargaining agreement. See generally Blumrosen, "The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship", 61 *Mich. L. Rev*. 1435, 1482-1501 (1963); omment, "Federal Protection of Individual Rights under Labor Contracts", 73 *Yale L. J.* 1215 (1964). Some have suggested that every individual employee should have the

right to have his grievance taken to arbitration. 13 Others have urged that the union be given substantial discretion (if the collective bargaining agreement so provides) to decide whether a grievance should be taken to arbitration, subject only to the duty to refrain from patently wrongful conduct such as racial discrimination or personal hostility. 14 [386 U.S. 171, 191]

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. In L. M. R. A. 203 (d), 61 Stat. 154, 29 U.S.C. 173 (d), Congress declared that " Final adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration.

Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, “Rights Under a Labor Agreement”, 69 *Harv. L. Rev*. 601 (1956).

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to [386 U.S. 171, 192] arbitration. 15 This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully. See NLRB v. ACME INDUSTRIAL CO., 385 U.S. 432, 438 ; Ross, *Distressed Grievance Procedures and Their Rehabilitation, in Labor Arbitration and Industrial Change, Proceedings of the 16th Annual Meeting, National Academy of Arbitrators* 104 (1963). It can well be doubted whether the parties to collective

> bargaining agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by L. M. R. A. 203 (d), supra, if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievant unilaterally to invoke arbitration.
>
> Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration. For these reasons, we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration. VACA V. SIPES, 386 U.S. 171, 190-193 (1967)

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.

The Wisconsin court would later determine that VACA made the FRAY language "probably too broad." So over a quarter-century ago it formulated a clear, post-VACA test, in MAHNKE V. WERC, 66 Wis. 2D 524 (1975):

> The test is whether the action of the union was arbitrary or taken in bad faith in the performance of its duty of fair representation on behalf of the employee member. Id., at 532.

As the court explained:

> VACA ... provides that suit may be brought subsequent to an arbitrary, discriminatory or bad faith refusal to arbitrate by the union. VACA also requires the union to make decisions as to the merits of each grievance. It is submitted that such decision should take into account at least the monetary value of his claim, the effect of the breach on the employee and the likelihood of success in arbitration. Absent such a good-faith determination, a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation.

> This is not to suggest that every grievance must go to arbitration, but at least that the union must in good faith weight the relevant factors before making such determination. *Id., at 534.*

More recently, the state court of appeals put a personal spin on the situation, explaining, "Our supreme court recognized in MAHNKE that unions should have the freedom to represent one union member whose interests are opposed to the other." GRAY V. MARINETTE COUNTY, 200 WIS. 2D 426, 447 (1996).

I turn now to applying this legal standard to the facts in the record.

As bad faith is an element of the offense, evidence of the personal relationship between the union staff representative and the complaint can be important, even probative.

Chapman cites several aspects of the purported animus he finds the union and Cupery to harbor towards him. He starts at the beginning, with the amount of time he says it took Cupery to return his call when the Berg settlement was first announced. He is upset because Cupery didn't call him back for about 48 hours.

Chapman called Cupery around mid-day on January 30, but Cupery had already left his office for an appointment. He was also out of the office on official business the following day, engaged in both collective bargaining and contract administration. By the time Cupery returned Chapman's call on February 1, Chapman had already called SEIU International President Dave Iverson to complain. Union staff representatives are expected to provide timely call-backs and maintain open communications with the members they serve, but they don't sit around the office waiting on every member's beck and call. Chapman had an unrealistic expectation; Cupery was busy, not evidencing hostility or animus.

Chapman also includes in his complaint the allegation that when Cupery finally returned his phone call, the staff representative spoke to him "in a very unprofessional tone." Expectations of professionalism and standards of styles of communications are very subjective, and the record fails to establish that Cupery's tone of voice was tantamount to an indication of bias or hostility towards Chapman.

Chapman also charges Cupery with making a derogatory comment directed at him at a union meeting. He says that as he and another unit member walked into the meeting room, Cupery espied them and said from the front of the room, "be careful, everything you say is going to get back to the employer." Chapman produced a witness who testified to this exchange, but who could provide no further insight into precisely what Cupery's purported

comment meant, or even confirm unequivocally that the comment was necessarily directed at Chapman. The complainant also offered as supporting evidence two sworn statements attesting to derogatory or adversarial comments purportedly made by Cupery. These affiants were not present at hearing, and Cupery flatly denies the statements and attitude which they attributed to him.

Cupery makes several rebuttals. He notes that he and the union represented Chapman – successfully – in a recent grievance over duties and classification; indeed, Chapman acknowledged (reluctantly, it seemed) that he would be receiving a back pay adjustment due to the union's efforts on his behalf.

Cupery also notes that he tried to persuade Chapman to remain on the bargaining team, arguing such action connotes respect, appreciation and a positive relationship between the two.

Chapman has failed to sustain his burden of proving by clear and substantial preponderance of the evidence that Cupery bore such hostility towards him that this animus adversely affected Cupery's representation of Chapman. Cupery successfully prosecuted a grievance on Chapman's behalf, and he sought to have Chapman stay on the bargaining committee. These are not the acts of someone harboring an agenda of animosity or bias.

The union also makes strong rebuttals to Chapman's allegation that it showed favoritism to Betty Berg because she is a union steward. First, the union notes that Berg was just one of the six grievants, and that it never identified her as the highest-ranking as to entitlement to the FSM VI position at North Division. Further, it recalls that Berg herself was also recently disappointed in her efforts to get the union to advance a grievance on her behalf.

Thus, Berg and Chapman have two important characteristics in common. At one time in their service for the school district, they have both been the recipient of an improvement in their classification and pay due to the union's actions. At another time, they have both been disappointed by the union's denial of representation.

The major difference, of course, is that Chapman didn't take "no" for answer, and filed a complaint.

As noted above, it has been well-settled for over a quarter century that the test in Wisconsin of whether a labor organization has violated its duty of fair representation is whether its action was "arbitrary or taken in bad faith...." MAHNKE V, WERC, 66 Wis. 2d 524, 532 (1975). The test is not whether a grievance would have been successful.

However, while the fact that a grievance might have prevailed had it been brought does not, by itself, establish that a union violated its duty of fair representation, the fact that a grievance would clearly have been fruitless does help legitimize the union's decision not to pursue it. Beyond his sense of being personally disrespected Chapman builds his legal case on the contention that his grievance would have prevailed.

Specifically, Chapman alleges that "past practice of interpreting the contract has been that promotions to higher classifications were based first on previous classifications." Complaint, paragraph 14. Because he served as a FSM V at Milwaukee Tech, Chapman argues, he was entitled to the FSM VI position at South Division over Berg, whose highest classification was as a FSM IV.

Chapman faces several problems in advancing this theory, however. First, the record establishes that his tenure as a FSM V in the spring of 1996 lasted for only 36 days; when school resumed in the fall, the position had been downgraded to a FSM IV, as Chapman knew it would when he accepted the posting. It was further downgraded the following year to a FSM III. The collective bargaining agreement and employee handbook clearly require 91 days in a position for permanent status at that rank to accrue; inasmuch as Chapman worked only 36 days as a FSM V, he was not entitled to any presumption of that higher rank when applying for the FSM VI position at South Division.

As the veteran staff representative, Cupery legitimately felt he was in a position to know what past practices had arisen to affect administration of the collective bargaining agreement. But he allowed for the possibility that there may have been a practice established of which he was unaware. Accordingly, he asked Chapman to provide any further information indicating the existence of such a practice, and offered to reevaluate his refusal to advance the grievance in light of any new information. Chapman never provided such information.

Chapman's failure to provide such supporting evidence was apparently due to the fact that it doesn't exist. Here is the critical point in his colloquy with Atty. Schriefer at hearing:

> Q: You mentioned past practice, you think this is an instance of past practice governing this. Did you cite to Mr. Cupery any instance of a probationary employee bidding upon a higher classification job as occurred in your case and being given that job over lower classified employees?
>
> A: No, I don't have that.

Q: You don't know of any such instance, do you?

A: No.

Q: As far as you know, your particular situation is singular and unique?

A: As far as I know.

Q: So there is no past practice applicable to your situation?

A: I wouldn't know. I don't know.

Chapman's own testimony vindicates and validates Cupery's assessment of the situation – there simply was no past practice to support Chapman's grievance.

As of mid-November 2000, Cupery was aware that no fewer than seven member of his bargaining unit felt aggrieved by Chapman's promotion to the FSM VI position at South Division. He investigated, and concluded that Chapman's appointment had indeed been wrongful. Without indicating which of the seven grievants the union felt entitled to the promotion, Cupery advanced the grievances to a resolution which was successful as to Betty Berg. Success for Berg – appointment to the FSM V position at South Division – meant defeat for Chapman, namely the loss of the promotion.

Chapman complains the Cupery raised criticisms of his administrative performance, alleging that criticizing his performance to the district's administrators showed his bias and hostility. But an honest assessment of his performance was essential to a good faith determination of whether a grievance was valid.

The collective bargaining agreement provides that where "the competing employe's knowledge, skill and ability ... are relatively equal, seniority shall be the determining factor." There is no question that Berg, with a seniority date of 1982, has greater seniority than Chapman, whose seniority date is 1994. Thus, for Berg to be entitled to the position, all she needs to demonstrate is that her knowledge, skill and ability are "relatively equal" to that of Chapman; conversely, for Chapman to prevail he would have to demonstrate that his knowledge, skill and ability were *greater* than Berg's. On the record before me, it was eminently reasonable for Cupery and the union to determine that a more intellectually honest case could be made for Berg being at least relatively equal to Chapman, than Chapman being superior to Berg.

Having succeeded in securing the employer's agreement on how to administer the contract in this regard, the union was thereupon asked by Chapman to prosecute a grievance which was diametrically opposed to the grievance it had just won.

Where, as here, there are many applicants for a single promotion, there will be disappointed bidders; some bidders may become bitter. But, as noted above, it is the nature of collective representation that not everyone can be happy all the time.

The Court of Appeals faced a similar situation in GRAY V. MARINETTE COUNTY, 200 Wis. 2d 426 (1996), where one employee (Gray) felt aggrieved by a personnel transaction that was the direct result of the union's action in the grievance of another employee (Mosconi). Adopting verbatim the union's argument, the court said:

> It only makes sense ... that the Union refused to pursue Gray's grievance. Gray came to his union steward and union president ... only 17 days after the Union had settled the Mosconi grievance, and asked the Union to grieve the very employment action to which it had just agreed by resolving the contractual violation claimed in the Mosconi grievance. It would defy reason to believe that the Union could then have advocated, in good faith, a grievance which would seek to upset that resolution. Id., at 447.

Likewise, it defies reason to believe the union could have advocated on Chapman's behalf to undue the Berg grievance.

Cupery and the union didn't turn Chapman down because they were hostile towards him or were showing favoritism to Berg. They turned him down because, after an independent evaluation of the terms of the collective bargaining agreement and the practices of the parties, they determined to pursue the grievances of Berg, et al, and not that of Chapman.

Chapman has failed to show by a clear and substantial preponderance of the evidence that, in making this determination, Cupery and the union acted in an arbitrary or bad faith manner. Accordingly, I have dismissed the complaint against them.

As noted above, the question of whether the employer violated the collective bargaining agreement is moot unless a determination has been made that the union violated its duty of fair representation. There being no such determination, there is also no such question. Accordingly, I have dismissed the complaint against the district and Ford as well.

Dated at Madison, Wisconsin this 21st day of November, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart Levitan /s/

Stuart Levitan, Examiner

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