STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GARRY T. VANOUSE, Complainant,

vs.

CITY OF WAUSAU and AFSCME, LOCAL 1287, Respondents.

Case 97
No. 60722
MP-3787

Decision No. 30272-A

Appearances:

Mr. James W. VanOuse, 1904 Schuylier Avenue, LaFayette, Indiana 47904, appearing on behalf of the Complainant, Garry T. VanOuse.

Mr. William P. Nagle, City Attorney, Wausau City Hall, 407 Grant Street, Wausau, Wisconsin 54403-4783, appearing on behalf of the City of Wausau.

Shneidman, Hawks & Ehlke, S.C., by **Attorney Aaron N. Halstead**, 217 South Hamilton, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of AFSCME Local 1287.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

On January 7, 2002, Garry T. VanOuse, hereinafter Complainant, filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Wausau, hereinafter City, and AFSCME Local 1287, hereinafter Union, violated the terms of the collective bargaining agreement by entering into an agreement in settlement of a grievance filed by three of the Complainant's co-workers, which settlement agreement resulted in the loss of Complainant's departmental seniority and, further, that the Union failed to fairly represent him by failing to advance his subsequent grievances relating to same to arbitration, the fourth

and final step in the contractual grievance procedure. On February 5, 2002, the Commission appointed Steve Morrison, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Secs. 111.70(4)(a) and 111.07, Stats. Hearing on the complaint was conducted by the undersigned on February 22, 2002, in Wausau, Wisconsin. Following the presentation of the Complainant's case, the Union made a motion to dismiss the complaint. The Examiner reserved ruling on the motion pending the receipt of post hearing briefs and written arguments on the motion and proceeded to hear the Respondent's cases in chief. The hearing was transcribed and the parties completed the briefing schedule by April 26, 2002.

The Examiner, having considered the evidence and arguments of the parties and being fully advised in the premises, issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Garry T. VanOuse, Complainant herein, was at all times material herein, a municipal employee, and was employed by the City of Wausau as an Equipment Services Mechanic at the Fire Department and, after March 19, 2001, at the DPW garage.

2. Respondent City of Wausau is a municipal employer, with offices located at City Hall, 407 Grant Street, Wausau, Wisconsin 54403-4783.

3. Respondent AFSCME Local 1287, the Union, is a labor organization, and has its principal offices at 318 South Third Avenue, Wausau, Wisconsin 54401.

4. At all times material to this proceeding, Respondent Union has been the exclusive bargaining representative of certain of the City's employees, including the Complainant.

5. Respondents Union and City have been parties to a series of collective bargaining agreements including the agreement involved herein which extended from January 1, 2000, to December 31, 2002. Said agreement was effective during the period involved herein and contained the following provisions relevant to this matter:

ARTICLE 5 – MANAGEMENT RIGHTS

> The City possesses the sole right to operate City government and all management rights repose in it but such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following:

A. To direct all operations City government. [sic]

B. To hire, promote, transfer, assign and retain employees in positions with the City;

C. To suspend, demote, discharge and take other disciplinary action against employees for just cause;

D. To relieve employees from their duties because of lack of work or other legitimate reasons;

E. To maintain efficiency of City Government operation entrusted to it;

F. To take whatever action is necessary to comply with State or Federal law;

G. To introduce new or improved methods or facilities;

H. To change existing methods or facilities;

I. To contract out for goods or services. Whenever possible, the Employer shall provide the Union a reasonable opportunity to discuss contemplated subcontracting that would result in the layoff of bargaining unit personnel prior to a final decision being made on such subcontracting.

J. To determine the methods, means and personnel by which such operations are to be conducted;

K. To take whatever action is necessary to carry out the functions of the City in situations of emergency.

The Union and the employees agree that they will not attempt to abridge these management rights and the City agrees it will not use these management rights to interfere with rights established under this agreement or for the purpose of undermining the Union or discriminating against with any of its members.

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this agreement (see Exhibit 'A' for a complete list of these employees) may be processed through the grievance and arbitration procedures contained herein, however, the pendency of any grievance or arbitration shall not interfere with the right of the City to continue to exercise these management rights.

ARTICLE 8 – SENIORITY

A. Role of Seniority: It shall be the policy of the City to recognize seniority in filling vacancies, making promotions and in laying off or rehiring, provided however, that the application of seniority shall not materially affect the efficient operation of the various departments covered by this agreement.

B. Definition of Seniority: Seniority shall commence upon date of hire and be based upon the actual continuous length of service for which payment has been received by the employee. In the event of transfer to another department (as defined in Article 9, Section B - Departmental Posting) city-wide seniority shall continue but the employee shall be deemed a new employee with the department for the purpose of job posting, overtime and vacation selection, which shall be handled on a departmental seniority basis. Regular part-time employees shall have seniority rights limited to their department and involving the same type of employment.

. . .

ARTICLE 9 – JOB POSTING

. . .

B. Divisional/Unit and City-Wide Posting: Whenever a vacancy is to be filled or a new job created, this position shall be posted for a period of three (3) working days on all shop bulletin boards. Any employee interested in applying for the job shall endorse his/her name and division/unit upon such notice in the space provided. The full-time employee with the greatest seniority within the division/unit when a vacancy occurs, who can qualify, shall be given the job. If the job is not filled within the division, the full-time employee with the greatest seniority with the employer who can qualify shall be given the job. For the purpose of this section, division/unit seniority shall be limited to the following divisions/units: maintenance and construction division, electrical division, engineering division, sign unit, water treatment plant division, water meter division, water distribution division, wastewater treatment plant division, sewerage maintenance division, and motorpool. If no full-time employee bidding can qualify for the work, it shall be given to the regular part-time employee with the greatest seniority who has bid for the job and can qualify.

. . .

ARTICLE 14 – GRIEVANCE PROCEDURE

. . .

H. Arbitration:

1. Time Limit: If a satisfactory settlement is not reached in Step 4, the employee and grievance committee or the representative of Council 40, AFSCME must notify the Chair of the Human Resources Committee of the City and the Labor Negotiator in writing within ten (10) days that they intend to process the grievance in arbitration.

. . .

ARTICLE 34 – TRANSFER OF BENEFITS

Employees transferring into this bargaining unit from another City of Wausau Department shall be given credit for length of employment in the other department as it related to all benefits, except as length of service applies to seniority (for example: transfer of existing vacation and sick leave balances to this department). If such a transfer is to an equal or lower wage rate class, the employee shall be placed on the wage scheduled according to his/her length of service in the City system. If such a transfer is to a higher rated class, the employee shall be placed at the step on the wage schedule which constitutes a minimum of a four percent (4%) increase, provided that no employee shall be placed at a rate higher than the maximum rate for the class. This provision shall in no way modify the provisions in Articles 9 and 10.

6. The Complainant was initially hired by the City as an equipment services mechanic in 1991 and assigned to the Fire Department to perform maintenance on the Department's vehicles. He worked at the Fire Department until March 19, 2001, during which period he was supervised by the two assistant fire chiefs and by the chief.

7. On March 12, 2001, the Complainant received the following correspondence from the City's Human Resources Department:

TO: Garry VanOuse

FROM: Ila Koss
Human Resources Specialist

DATE: March 12, 2001

SUBJECT: Transfer to Department of Public Works

The City of Wausau must continually strive to maximize its level of efficiency by improving the way it concludes City business. It has been determined that changing the existing method of operations in the City wide maintenance areas by assigning present employees to a combined Motor Pool at the Public Works Garage will increase the level of productivity provided by its employees.

Therefore, beginning Monday, March 19, 2001, you will report to work at the Public Works garage. Your normal work hours will be 7:00 A.M. to 3:30 P.M., Monday through Friday. Please meet with Mr. Don Skare, Public Works Superintendent, at 7:00 A.M. when you report for work on Monday morning.

Because this is not a change in your position you will retain your seniority date of March 25, 1991, not only for city-wide purposes but also for departmental purposes.

Don would like to meet with you at 1:00 P.M. on Friday, March 16, 2001, at the Public Works garage for a work orientation meeting. At that time will also be retrieving your personal tools and items from the Fire Department, to store at the Public Works work site.

Good Luck with these new ventures. If I can help you with anything, please call.

c: G. Buchberger
D. Koch
D. Skare
W. Nagle

8. The Complainant reported to the public works garage on March 19, 2001, pursuant to the instructions in the correspondence identified above and met with his new supervisor, Don Skare, the Public Works Superintendent. In addition to Mr. Skare, the Complainant was also to be supervised by Don Hansen, a lead worker in the public works department.

9. Following his receipt of the March 12 correspondence, the Complainant spoke with the president of Local 1287, Craig Gardener, and expressed his dissatisfaction with the move and inquired about filing a grievance about it. Mr. Gardener advised him that the City was acting within its management rights in effecting the transfer and that, in his opinion, the move was “not grievable.” The Complainant took no further action.

10. On March 19, the same day the Complainant started work at the DPW, three existing DPW employees, Robert Pagel, Gordy Schultz and Todd Mendlik, discussed with the Complainant the fact that they were planning to file a grievance because the Complainant was to maintain his departmental seniority thus moving existing DPW employees behind him in the line of seniority. They felt that this violated the terms of the Agreement. The Complainant agreed that "If I would have the same problems you guys would, I would do it, too." The three filed the grievance (hereinafter referred to as the "Pagel grievance") on that same day, March 19, 2001. It states:

. . .

> The letter dated March 12, 2001 from Ila Koss states that Garry VanOuse would move, Monday March 19, 2001 to the dept. of public works motor pool. The letter also states that because this is not a change in position that Garry would retain his seniority date of March 25, 1991 for city wide and also departmental purposes.
>
> Article 34, transfer of benefits, states that employees transfering [sic] to another dept. in the city of Wausau shall be given credit for length of employment in another dept. as it relates to all benefits except as length of service applies to seniority.

The relief sought through the grievance procedure was "that Garry VanOuse start, seniority wise on the bottom of the departmental seniority list at DPW."

11. The Pagel grievance worked its way through the initial steps of the grievance procedure and was denied by the City at each step. During this period of time, the Complainant had opportunities to participate in the process by attendance at Union meetings or through discussions of the grievance with Union personnel or, in fact, with his brother, Pat VanOuse, a steward and past Vice President of the Union. The record reflects that the Complainant did not do so. When Robert Pagel suggested to the Complainant that he should attend the Union meeting because the grievance affected his job, Pagel testified that the Complainant replied that he would not attend because he had not been "invited." The Union processed the grievance to arbitration and a hearing was scheduled before a WERC staff arbitrator who was successful in mediating a settlement prior to hearing. The settlement agreement evidences the parties' accord upon the interpretation of the language contained in Article 8 – Seniority as it relates to the transfer of the Complainant and reads as follows:

AGREEMENT IN SETTLEMENT OF AFSCME LOCAL 1287
Case 95 NO. 59958 MA-11471, DATED 3/19/01

> THIS AGREEMENT is being entered into between the City of Wausau and AFSCME Local 1287, DPW, to settle the grievance filed on March 19, 2001, and assigned by the State of Wisconsin WERC as Case 95 No. 59958 MA-11471.

The City and the Union hereby agree as follows:

1. That effective September 1, 2001, Gordy Schultz shall be assigned to and shall accept first shift duties.
2. That for all departmental applications of seniority under the collective bargaining agreement, Gary [sic] VanOuse shall have assigned to him and shall accept March 25, 2001, as his date of employment.
3. That this agreement shall not be precedential for any purposes whatsoever, except for this case, shall not be binding on the City or the Union for any purposes whatsoever, and neither the City nor the Union shall be prejudiced by anything within this agreement.

The agreement was dated July 13, 2001, and signed by the Union President, Joseph Blair and by the City Attorney, William P. Nagle.

12. As a result of the aforementioned settlement, the Complainant was moved from first shift to second shift and placed at the bottom of the departmental seniority list in DPW. In response to this development, his brother, Pat VanOuse, filed four separate grievances on his behalf on August 1, 2001, as follows:

First grievance: Alleges that "My City seniority has been violated" and seeks relief of "All wages, rights and benefits due to me by the labor agreement between City of Wausau and AFSCME, Local 1287."

Second grievance: Alleges that "My wages, hours, and working conditions have or will change without negotiations" and seeks relief of "All wages, rights, and benefits due to me by the labor agreement between City of Wausau and AFSCME, Local 1287."

Third grievance: Alleges that "Article 3 states that when a new position is created, or reclassification occurs there will be collective bargaining between both parties. The present party in this case is Garry VanOuse and the other party being operations of the City of Wausau. The decision for change shall be determined by stipulation. The fact is Garry VanOuse was never involved in anyway (sic) with the decision of eliminating or reclassifying his position. This is a direct contradiction of agreed upon understanding between the Union and the City." This grievance seeks relief of "All wages, rights, and benefits due to me by the labor agreement between City of Wausau and AFSCME, Local 1287."

Fourth grievance: Alleges that "Through out [sic] my 10 years of dedicated service as the fire station mechanic I was never repremanded [sic] and had excellent job evaluations. I have saved the City 10s of thousands of dollars during this period. My question is why wasn't I approached by a consultant team or City official on the way the maintenance department of the fire station was operated. I feel it was totally unethical in the way I was treated through out [sic] this situation." This grievance seeks relief of "All wages, rights, and benefits due to me by the labor agreement between City of Wausau and AFSCME, Local 1287.

13. Between August 1, 2001, and October 2, 2001, these four grievances were processed by the Union through the initial levels of the grievance procedure and denied by the City at each step. On October 10, 2001, at the regularly scheduled meeting of the local, the issue of whether the VanOuse grievances should be taken to arbitration was considered by the membership. Garry VanOuse was not present at this meeting but the case for taking the grievances to arbitration was argued to the membership by his brother, Pat. The minutes of the meeting indicate that the grievances had been denied at the last step and that the membership discussed the various choices available to them. The Union's representative Phil Salamone attended that meeting and that he provided his input to the membership regarding the potential of prevailing at arbitration. The Union President, Joseph Blair, stated that "We know we've made mistakes through this, but we decided to go with the many and not with the few." (Per Pat VanOuse, Tr. at 75: 7.) Upon a motion made to take the VanOuse grievances to arbitration, the membership voted 19 to 2 against.

14. The evidence fails to demonstrate that the Union's conduct in reaching the settlement set forth in Finding of Fact 11 was arbitrary, discriminatory or in bad faith. The evidence does support the conclusion that the Union made a good faith decision, weighing relevant factors such as the merits of the grievance filed, on behalf of Pagel, Schultz and Mendlik.

15. The evidence fails to demonstrate that the Union's conduct toward the Complainant was arbitrary, discriminatory or in bad faith nor does it support the notion that the Union failed to make a good faith decision, weighing relevant factors such as the merits of the four VanOuse grievances, to not advance the grievances to arbitration. The Union at all times material herein fairly represented the Complainant.

CONCLUSIONS OF LAW

1. Respondent AFSCME, Local 1287, has not been shown to have failed to meet its obligation to fairly represent Complainant herein, both regarding the settlement of the Pagel grievance and regarding its decision not to advance the Complainant's four grievances to arbitration. Therefore, said Respondent did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)1 and 5 Stats. and Sec.111.70(3)(b)1, 2 and 4 Stats., or Sec. 111.70(3)(c) Stats.

2. Having concluded that AFSCME, Local 1287, did not violate its duty of fair representation to the Complainant, the Examiner declines to exercise the Commission's jurisdiction to determine the allegations that Respondent City of Wausau violated Sec. 111.70(3)(a)5.

3. Respondent City of Wausau did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)1 or Secs. 111.70(3)(b)1, 2 or 4, with respect to the handling and settlement of the grievances herein and, consequently, did not commit prohibited practices within the meaning of Sec. 111.70(3)(c).

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

ORDER

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed in its entirety.

Dated at Wausau, Wisconsin, this 30th day of May, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steve Morrison /s/
Steve Morrison, Examiner

CITY OF WAUSAU

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

In the complaint initiating these proceedings, the Complainant alleged that the Union committed a prohibited practice by violating its duty of fair representation to him by entering into the settlement of a grievance, the affect of which stripped the Complainant of his departmental seniority and caused him to be moved from first shift to second shift and by failing to advance his four grievances relating to his loss of seniority and shift movement to arbitration. The Complainant asserted that the Employer and the Union violated the collective bargaining agreement by acting in consort with each other in reaching the settlement. The complaint also alleged that the settlement agreement entered into by the Union and the Employer constituted violations of Secs. 111.70(3)(a)1 and 111.70(3)(b)1, 2 and 4, and finally, Sec. 111.70(c) Stats., by each party. The Employer denied any violation of the contract or the statutes and the Union alleged that at all times it acted in a non-arbitrary, non-discriminatory and good faith manner with respect to the decisions made in connection with the settlement of the grievance which led to the Complainant's loss of seniority and shift movement and in all other matters relative to the complaint. At the hearing in this matter, the Union moved to dismiss the complaint in its entirety at the close of the Complainant's case in chief.

POSITIONS OF THE PARTIES

The Complainant

The Complainant argues that the settlement reached by and between the City and the Union in the Pagel grievance caused him to lose his departmental seniority and to be moved from the first shift to the second. He maintains that the Union and the City violated the collective bargaining agreement by agreeing to strip him of his departmental seniority because the agreement is clear on this point and because the grievance was without merit. The Complainant argues that he was not transferred from one "department" to another "department" under the language of Article 8 – Seniority and thus should not have lost his departmental seniority. He also argues that the actions of the Union constituted a breach of its duty of fair representation because he "was not aware of the machinations leading to this agreement until the agreement had already been reached" and because the Union's settlement of the grievance denied "him his right to enjoy the benefits of membership in the Union."

The Complainant also argues that the Union has failed in its duty to fairly represent him because it neglected to take four grievances he filed following the Pagel grievance settlement to arbitration. He agrees the Union processed these grievances through the initial four steps of the grievance procedure but asserts that it had a duty to take them to the arbitration phase. He argues that the Union's failure to take the grievances to arbitration was "arbitrary, capricious,

discriminatory and in bad faith." As such, he says, the Union's actions interfered with his MERA rights and constituted a prohibited practice in violation of Sec. 111.70(3)(b)1, Stats.

In response to the Union's motion to dismiss the complaint on the grounds that "taking all of the testimony offered in the case in chief, in its best light, and including all of the exhibits that have been marked and received into evidence . . . there is no possible way in which those documents or that testimony could be construed to find the Union failed to fairly represent Mr. VanOuse or in any other way violated section 111.70," the Complainant simply objected to the motion and stated that the "case speaks for itself."

Respondent Union

The Union argues that in order for the Complainant to prove a prohibited practices charge against it he must demonstrate that the Union acted in an arbitrary or discriminatory manner or in bad faith. The Union says that the evidence falls far short of proving such allegations. It argues, citing GRAY V. MARINETTE COUNTY, 200 WIS. 2D 426,442, 546 N.W. 2D 553 (CT. APP. 1996), that simply because a Union's decisions result in the advancement of the interests of one person or group over another does not constitute a failure to fairly represent the person or persons adversely affected.

The Union asserts that the Complainant himself admitted that the Union's decisions were not the result of any discriminatory motive (citing Tr. 60-61) and that he failed to offer any proof that the Union acted in bad faith when it entered into the settlement agreement of the Pagel grievance or in refusing to arbitrate the four grievances filed by the Complainant. It argues that the term "bad faith" equates with "hostility in the form of ill will or common law *malitia*" citing COLEMAN V. OUTBOARD MARINE CORP., 92 WIS.2D 565, 575, 285 N.W. 2D 631 (1979) (quoting RYAN V. PRESSMAN'S UNION NO. 2, 590 F.2D 451, 455 (2ND CIR. 1979)). Once again, argues the Union, the Complainant has failed in his burden to present any evidence tending to support such an allegation.

The Union says that VanOuse has failed to present any evidence that any action of the Union was the result of an arbitrary decision making process. In order to do so, it argues, the Complainant must show that the Union engaged in irrational conduct or that its actions had no rational basis. This it failed to do. On the contrary, argues the Union, there was a genuine basis for differing interpretations of the contract language which led to the Pagel grievance settlement and this fact supports the argument that the Union's settlement was reasonable and had a rational basis and, hence, was not arbitrary. Likewise, the decision not to take the Complainant's grievances to arbitration was also rational. Had the Union voted to proceed to arbitration with these four grievances it would have contradicted the settlement it had just reached in the Pagel grievance.

Respondent City

The City argues that it complied with every provision of Chapter 111 relating to grievance arbitration and that it complied with every provision of the labor agreement with regard to grievances and grievance arbitration. It states that the agreement in settlement of the Pagel grievance was entered into under the auspices of the WERC and that it was obligated to deal with the Union, not with the Complainant.

The City asks the Examiner to dismiss the complaint against it, with prejudice.

DISCUSSION

The primary question presented in this case is whether the Union violated its duty to fairly represent the Complainant. Secondary issues raised by the Complainant are whether the Employer and the Union, or either of them individually, breached the collective bargaining agreement in force at the time (Sec. 111.70(3)(a)5 and Sec. 111.70(3)(b)4); whether the Employer interfered with the Complainants rights guaranteed by Sec. 111.70(2) Stats. (Sec. 111.70(3)(a)1); whether the Union coerced or intimidated the Complainant in the enjoyment of his legal rights (Sec. 111.70(3)(b)1); whether the Union coerced, intimidated or induced the Employer to interfere with Complainant's rights (Sec. 111.70(3)(b)2); and, finally, whether anyone is guilty of violating the dictates of Sec. 111.70(3)(c).

The Complainant has the burden to demonstrate, by a clear and satisfactory preponderance of the evidence, each element of its contention. WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT, DEC. NO. 20922-D (SCHIAVONI, 10/84). Mere negligence on the part of the Union does not rise to the level of a breach of the duty of fair representation. PETERS V. BURLINGTON N.R.R., 931 F.2D 534 (9TH CIR. 1991) at 538. An error of judgment or mismanagement does not equate with arbitrary, discriminatory and bad faith conduct on the part of the Union. DIVERSIFIED CONTRACT SVCS., 292 NLRB 603 (1989).

The source of the Union's duty of fair representation is its status as the exclusive bargaining agent for its membership. In VACA V. SIPES, 87 S.CT. 903, 64 LRRM 2369 (1967) which was adopted by our Supreme Court in MAHNKE V. WERC, 66 WIS.2D 524 (1974) the court recognized this and synthesized standards enunciated by earlier courts:

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. (Id. at 910)

The Complainant argues that his Union failed in its duty to fairly represent him in essentially two respects. First, when it entered into the settlement of the Pagel grievance which stripped the Complainant of his departmental seniority and caused him to be moved from first shift to second shift and, second, when it failed to advance to arbitration the four grievances he filed relating to the above settlement and its adverse consequences for him.

Regarding the first issue, the settlement of the Pagel matter, the Complainant argues that the grievance had no merit and, hence, should not have been brought by the Union in the first place. He asserts that the agreement is clear on the point that he should have maintained his departmental seniority following his transfer to DPW from the Fire Department and that by entering into the settlement the Union and the City breached the contract and the Union failed to fairly represent him. The Examiner concludes, upon consideration of Articles 8, 9 and 34, and the agreement as a whole, that the agreement was susceptible to more than one interpretation regarding the issue of seniority following transfer. Thus, there existed a dispute between the parties, to wit, the Union and the City, and where, as here, the contract provides for a grievance procedure which is final, binding and exclusive, the Union controls the grievance as long as it does not act in an arbitrary or discriminatory manner or in bad faith. The United States Supreme Court stated in REPUBLIC STEEL CORP. V. MADDOX, 379 U.S. 650 (1965), 58 LRRM 2193 at 2194:

> . . . Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA ss. 203(d), 29 U.S.C. ss. 173(d); ss. 201 (c), 29 U.S.C. ss. 171 (c). Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.
>
> A contrary rule which would permit an employee to completely sidestep available grievance procedures in favor of a law suit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." Teamsters Local v. Lucas Flour Co., 369 U.S. 95, 103, 49 LRRM 2717. (Footnotes omitted)

There is no question that the Complainant suffered as a result of the Pagel settlement, but he fails to advance any persuasive arguments that the Union acted arbitrarily, discriminatorily or in bad faith in reaching that settlement. This he must do in order to wrest control of the grievance from the Union and prove a failure to provide fair representation. The Union has the authority to settle a grievance even against the wishes of the grievant, see CONSOLIDATED PAPERS V. DORR-OLIVER, INC., 153 WIS. 2D 589 at 599, (1989) (CT. APP. 1989), and MAHNKE, Id. quoting HUMPHREY V. MOORE, 375 U.S. 335, 349, 84 SUP. CT. 363, 11 L.Ed.2d 370 (". . . 'Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. 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. . . .")

The Complainant, at best, puts forth a case of negligence on the part of the Union in handling the Pagel grievance. Negligence is not enough to carry the day in proving a union's failure to fairly represent a unit member. VACA and MAHNKE, Id., obligate the Union to represent the interests of its members without hostility or discrimination, to exercise its discretion with good faith and honesty and to eschew arbitrary conduct. Negligence is not one of the factors. Hence, even if the conduct of the Union was negligent relative to the Pagel settlement, and the Examiner does not find that it was so, it would be insufficient to prove the Union guilty of failing in its duty of fair representation.

The Complainant argues that the Union conducted its settlement activities in secret, without involving him, and asserts that he knew nothing of the settlement until after the fact and by then it was too late for him to provide input on his behalf. The record does not support this assertion. The Complainant had a discussion with Pagel on the very day he started work at DPW wherein Pagel told him that he, Schultz and Mendlik intended to file the grievance and the Complainant agreed that they should do so. Thereafter, Pagel advised the Complainant to attend union meetings because the grievance would be discussed and "because it's involving your job" (Tr. 94) and the Complainant responded by saying that he had not been invited to attend. No invitation was necessary. The Complainant, as a member of the unit, has a standing invitation to attend meetings.

In sum, the Complainant alleges that the Union acted arbitrarily, in a discriminatory manner and in bad faith because of the way in which it handled the Pagel grievance and in reaching the settlement with the City. These are mere allegations found in the complaint filed by the Complainant and in his post-hearing brief, not facts that have been developed in the record. The record reflects only that the Complainant was unhappy with his transfer from the Fire Department to DPW; that the Union filed a grievance on behalf of three other DPW employees grieving the fact that the City allowed the Complainant to maintain his departmental

seniority following the transfer; that the Union advanced that grievance to arbitration where it was settled to the satisfaction of the City and the Union; and that he was unhappy with the results of the settlement. This is a far cry from proving that the Union violated its duty to fairly represent the Complainant.

Although the Union made a motion to dismiss following the Complainant's case in chief, the Examiner's decision is based on the record as a whole and made in light of all the evidence. The evidence fails to show that the Union violated its duty to fairly represent the Complainant as a result of its handling of the Pagel grievance and settlement and, thus, has not violated Sec. 111.70(3)(b). Having concluded that the Union did not violate its duty to fairly represent the Complainant, the Examiner has no basis for exercising the Commission's jurisdiction to consider any breach of contract claims against the Employer. (MAHNKE, Id. at 532.)

Turning now to the Complainant's assertion that the Union failed to fairly represent him because it failed to advance his four grievances to arbitration, the Examiner again looks to MAHNKE, Id. for guidance. The MAHNKE court observed that ". . . a union has considerable latitude in deciding whether to pursue a grievance through arbitration" and quoting MOORE V. SUNBEAM CORP. (7TH CIR. 1972) 459 F.2D 811, 820 said "The Supreme Court in VACA left no doubt that a union owes its members a duty of fair representation, but that opinion also makes it clear that the union may exercise discretion in deciding whether a grievance warrants arbitration. Even if an employee claim has merit, a union may properly reject it unless its action is arbitrary or taken in bad faith. . . ." Citing FRAY V. AMALGAMATED MEAT CUTTERS (1960), 9 WIS.2D 631, 641, 101 N.W.2D 782, a pre-VACA case, the MAHNKE court said ". . . 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. See 44 VIRGINIA LAW REVIEW (No. 8, 1958), 1337, 1338. 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. (Case cited.)" The court went on to say that the reference to "extreme cases of abuse of discretion" was perhaps too broad and that the test is whether the action taken was arbitrary or in bad faith and that "In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a non-arbitrary manner, make decisions as to the merits of particular grievances." (MAHNKE at 532)

The record in the instant case fails to support an argument that the actions of the Union in not taking the Complainant's grievances to arbitration were done in an arbitrary manner or were in bad faith. The Union processed the four grievances through each and every step of the grievance process even though doing so flew directly in the face of the settlement agreement it had reached with the City just months before in the Pagel case. There is no evidence that the Union acted in a perfunctory way in doing so nor does the Complainant argue that it did. When the Union had to decide whether it would take the grievances to arbitration it discussed the

options at a regularly scheduled membership meeting at which the Complainant was represented by his brother Patrick, a union steward. The record clearly demonstrates that the Complainant could have attended this meeting but chose not to do so. The Union's business representative, Phil Salamone, was also in attendance and gave the membership the benefit of his experience in the grievance arbitration process and Patrick VanOuse was allowed to plead the Complainant's case. Following these discussions, the issue was put to a vote of the membership which voted 19 to 2 not to take the grievances to arbitration. Following the vote, the Union President, Joseph Blair, made the comment "We know we've made mistakes through this, but we decided to go with the many and not with the few." This comment is insufficient to prove that the Union breached its duty of fair representation. It is not clear from the record, but this comment may well have referred to the fact that earlier comments Mr. Blair made to the Complainant about his seniority were inaccurate or, indeed, they may have referred to the fact that the Unions brought the Complainant's grievances as far as it did through the grievance procedure. The conceptual ideology behind going "with the many and not with the few," though, is consistent with the duties required of the Union and is inconsistent with the notion of unfair representation and bad faith. It formulates a rational basis for the Union's decision not to go to arbitration and the Union's actions were, therefore, not arbitrary. In short, the Union's actions in refusing to take the four grievances to arbitration did not violate the duty of fair representation it owed to the Complainant. Having so found, the Examiner has no authority to consider a breach of contract claim against the City on this point. (See MAHNKE, Id.)

The fact that the Union had acted lawfully in entering into a settlement of the Pagel grievance and to refuse to take the Complainant's four grievances to arbitration and the failure of the Complainant to prove that the Union breached its duty of fair representation in that regard, or any other, combine to negate the Complainant's allegations that the City and the Union, in consort or individually, violated Secs. 111.70(3)(a)1 and 5 or Secs. 111.70(3)(b)1, 2 and 4, Wis. Stats. Finding no violations of either paragraph (a) or (b) of Sec. 111.70(3), and because the Respondents are specifically covered by said paragraphs (a) and (b), the allegation that Sec. 111.70(3)(c), was violated must also fail and the complaint must be dismissed.

Dated at Wausau, Wisconsin, this 30th day of May, 2002.

Steve Morrison /s/
Steve Morrison, Examiner

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