STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FRANCIS C. TOPEL, Complainant,

vs.

MILWAUKEE COUNTY DEPARTMENT OF PUBLIC WORKS, HIGHWAY DIVISION and AFSCME, COUNCIL 48 AFL-CIO, LOCAL 882, Respondents.

Case 514
No. 60566
MP-3777

Decision No. 30351-C

Appearances:

Alan C. Olson & Associates, S.C., Attorneys at Law, by **Ms. Faye D. Boom**, 2880 South Moorland Road, New Berlin, Wisconsin 53151-3744, on behalf of Complainant Francis C. Topel.

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

Podell, Ugent & Haney, S.C., Attorneys at Law, by **Mr. Alvin R. Ugent**, 611 North Broadway, Suite 200, Milwaukee, Wisconsin 53202-5004, on behalf of Respondents AFSCME, District Council 48, AFL-CIO, and its affiliate Local 882.

ORDER DENYING MOTIONS TO DISMISS

Three days of hearing were held in this matter during which Complainant presented his case-in-chief and rested subject to the right to present rebuttal witnesses. At the end of the third day of hearing, both Respondents indicated they would be filing a motion to dismiss prior to the next scheduled day of hearing.

On February 3, 2003, Respondent AFSCME District Council 48 and its affiliate Local 882, filed a motion to dismiss the amended complaint as to the allegations against the Respondent Union, asserting that Complainant had not met his burden of proving that the Union had failed to fairly represent him in the matters alleged.

On February 7, 2003, Respondent Milwaukee County filed its motion to dismiss the amended complaint as to the allegations against the County, asserting a number of bases for its motion, which are set forth herein.

On February 11, 2003 Complainant filed his response in opposition to the Respondent Union's motion to dismiss. On February 17, 2003, Complainant filed his response in opposition to the Respondent County's motion to dismiss.

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

Having considered the parties' pleadings and arguments and concluded that dismissal would be premature at this point in the proceedings, the Examiner makes and issues the following

ORDER

The respective motions to dismiss of the Respondents are denied.

Dated at Madison, Wisconsin, this 20th day of February, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

MILWAUKEE COUNTY AFSCME COUNCIL 48, AFL-CIO, LOCAL 882

MEMORANDUM ACCOMPANYING ORDER DENYING MOTIONS TO DISMISS

Three days of hearing have been held on the amended complaint filed in this case. Near the end of the third day of hearing Complainant rested subject to the right to call rebuttal witnesses. Both Respondent Union and Respondent County indicated they would be filing a motion to dismiss, which motions were subsequently filed. Complainant has responded in opposition to said motions.

Respondent Union's Motion To Dismiss

Respondent Union essentially asserts that Complainant has not proved his allegations that the Union failed in its duty to fairly represent him as to the matters alleged. The Union asserts that as to the promotion grievances filed by Complainant, seniority is not the only factor considered in a promotion from Highway Maintenance Worker (HMW) I to HMW II and that Complainant's refusal to take the road test was part of the reason he was not promoted, as it lowered his evaluation points and thus affected his comparative standing with the other candidates for promotion. Therefore, Complainant's promotion grievances had no merit, and the Union acted properly in refusing to expend its resources on taking the grievances to arbitration.

With regard to the grievance Complainant filed over being disciplined for leaving the tailgate down on his truck, the Union asserts the Complainant disobeyed a reasonable order by management not to drive with the tailgate down. Therefore, his grievance was frivolous and the Union was not obligated to pursue it.

As to Complainant's grievance alleging he was denied his "Weingarten rights" when he was questioned by a Deputy Sheriff, the Union asserts this was a criminal investigation to determine if Complainant was making illegal threats. Therefore, there was no right to union representation and the union had no duty to arbitrate the grievance.

The Union asserts that the "Levandowski" 1/ grievance settlement was fair. The settlement involved promotions for many employees. While it did not include a promotion for

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1/ As Complainant points out in his response, the Union must in fact be referring to the Rouse settlement.

Complainant, he was excluded for very good reasons. The Union had the right to settle the case and the fact Complainant did not get a promotion does not mean the Union failed to represent him.

Regarding the Complainant's grievance regarding being disciplined for threatening another employee, the Union asserts that the Complainant failed to report an accident to management, as required, and then threatened another employee when he reported the accident. Therefore, the reprimand was justified and the Union would have been wasting its resources to pursue the grievance.

The Union concludes that looking at all of the evidence in a light most favorable to Complainant, it is clear there is no evidence that shows any failure to represent Complainant, and therefore those allegations should be dismissed.

Complainant's Response In Opposition

With regard to the promotion grievances, Complainant asserts that under the County's Civil Service Rule 1, there should not be a promotional competitive process for advancement to a higher step in the same classification. Even under a promotion between classification, the County's Civil Service Rules require that seniority not be given less weight than efficiency. By not challenging the County on these points, the Union failed to represent the Complainant and other high seniority employees in the Highway Department. As to Complainant's refusal to take the road test, the County's scoring system and the road test were illegitimate criteria for advancement, to which the Union failed to object.

As to the reprimands Complainant was given for leaving the tailgate down on his truck, he was told to leave the tailgate down by one supervisor and then reprimanded by another supervisor for doing so. The Union failed to allow the witness to this testify and failed to work to void either of the reprimands.

With regard to the violation of Complainant's "Weingarten rights", the investigation was not a criminal matter and the Union failed to challenge the County's failure to allow the Complainant to have union representation.

While the Union refers to a "Levandowski" grievance settlement, the Levandowski case was cited as precedent, finding the use of interviews as a criterion for promotion to be improper. The Union may have meant to refer to the Rouse settlement agreement, in which the Union waived Complainant's rights without consulting him.

As to the reprimand for telling another employee, "I've got your number," Complainant testified it was no threat. The Union failed to protect Complainant's "Weingarten rights" and to represent him against false accusations.

Complainant concludes that the Union has exerted only perfunctory and superficial efforts to represent Complainant in the initial steps of his grievances, has not processed any of his grievances to arbitration, and has done little or nothing to represent Complainant in those regards.

DISCUSSION

The Union essentially argues that the evidence presented by the Complainant in his case-in-chief is not sufficient to meet his burden of proving that the Union failed to fairly represent him with regard to those matters alleged. In doing so, the Union draws a number of inferences from the evidence in order to reach factual conclusions favoring its position. For example, with regard to the reprimand for leaving the tailgate down, the Union concludes that the Complainant was ordered not to do so, while Complainant testified that one supervisor told him to leave it down and another supervisor disciplined him for doing so. The Union would also have the Examiner conclude that the questioning of Complainant by the Deputy Sheriff was part of a "criminal investigation", and that Complainant's remark to another employee that "I've got your number," was a "threat" for which he was appropriately disciplined. In essence, the Union argues that the evidence should be viewed in a light most favorable to the Union.

As the Examiner has previously stated in addressing a motion to dismiss at a similar point in the proceedings:

> Deciding these questions would require a number of determinations as to what might reasonably be inferred from the evidence and whether the evidence presented is sufficient to meet the statutory standard. In the judgement of this Examiner, a decision on whether the Complainant has sufficiently proved up the necessary elements of the prohibited practices it alleges, is best done on the basis of a complete record. While it is true that this could result in Respondent's having to unnecessarily present a case in its defense, that burden must be weighed against the considerable delay that would result if the Examiner granted the motion and subsequently was reversed on appeal and the case was remanded for further hearing. The Respondent may ultimately prevail on its arguments and defenses, but it would be premature to decide the issues at this point with a less than

complete record and, in the Examiner's estimation, the interests of all of the parties are best served by completing the hearing in these matters before rendering a decision on the merits of the allegations.

CITY OF MAUSTON, DEC. NO. 28534-B (WERC, 12/96).

Respondent County's Motion To Dismiss

The County has moved to dismiss the amended complaint on the following bases:

> "Any matter occurring prior to September 30, 2002 should be dismissed as being outside the statute of limitations contained in ss. 111.70, Wisconsin Statutes.
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> Matters referencing the collective bargaining agreement and its exclusive dispute resolution mechanism should be dismissed as barred by doctrines of preclusion. Further, Milwaukee County would be denied the benefit of its bargain if finality were not accorded. There is no nexus between conduct alleged against Milwaukee County and that of the respondent union. Topel has failed to state a cause of action upon which relief may be granted. The complaint is frivolous."

The County argues, as has the Union, that Complainant has failed to prove in its case-in-chief that the Union's conduct toward Complainant was arbitrary, discriminatory, or in bad faith, in order to establish that the Union failed to fairly represent him in the matters alleged. Citing, MAHNKE V. WERC, 66 WIS.2D 524 (1975), the County asserts that Complainant's failure to establish that the Union failed to fairly represent him as regards those matters precluded him from pursuing his claims against the County that it violated the collective bargaining agreement. The County also cites GRAY V. MANITOWOC COUNTY, 546 N.W. 2D 553 (Wis. App. 1960), as holding that a union's representing other employees whose interests arguably conflicted with those of the complaining employee, as Complainant argues was the case here, did not violate the union's duty of fair representation toward that employee.

The County also asserts that none of the Complainant's claims against the County have merit. All of the disciplinary actions in question have been affirmed either by an arbitrator in final and binding arbitration or by the County's Personnel Review Board, the civil service board having the statutory duty to hear disciplines under Sec. 63.10, Stats. Those decisions must be considered to be controlling by the doctrine of preclusion.

As to the promotions Complainant was denied, Complainant offered only his own self-serving testimony to support his allegations, while the County's witness, who is an experienced expert as to the civil service rules, rebutted each of Complainant's contentions. The same is true as to Complainant's contentions regarding the Levandowski and Rouse arbitration cases. The Complainant has similarly failed to establish any nexus between any action by the County relative to any alleged lack of fair representation.

Complainant's Response In Opposition

Complainant first asserts that under MAHNKE, he does not have to prove the Union has violated its duty to fairly represent him before he can pursue his charges against the County, because the County did not raise an affirmative defense alleging the grievance procedure had not been exhausted. In MAHNKE, the Wisconsin Supreme Court outlined the procedure in these cases, holding:

> We believe the employer is obligated in the first instance by way of an affirmative defense to allege that the contract grievance procedure has not been exhausted. If this fact has been established by proof, admission or stipulation, the employee cannot prosecute his claim unless he proves the union breached its duty of fair representation to him.
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> 66 Wis. 2d at 533.

The County has not raised that affirmative defense, and has even alleged as an affirmative defense that Complainant has employed the grievance process. The Complainant asserts that if the County is now going to raise that defense, it is necessary that Complainant be allowed to expand on his bad faith and lack of fair representation claim, and if he is not, that he at least be allowed to amend his complaint to include a more specific bad faith claim against the Union.

Complainant also disputes the applicability of GRAY V. MANITOWOC COUNTY. The issue in that case was not the union's settlement of the first employee's grievance, it was instead the union's refusal to pursue the second employee's (Gray) grievance filed as a result of the employer's actions as a result of the settlement. Here, the interests of the grieving employees (including the Grievant) were not directly adverse to each other. It was the settlement giving Rouse the promotion and agreeing not to pursue the Complainant's grievance, that is at issue in this case.

The Complainant notes that the rest of the bases offered by the County to support its motion to dismiss are the same as those submitted in the County's pre-hearing motion to dismiss, and should be rejected for the same reasons Complainant asserted at that time as regards the timeliness of his allegations.

As to the County's assertion that the principle of claim preclusion applies here, the Wisconsin Supreme Court has explained:

> ". . .In order for the earlier proceedings to act as a claim-preclusive bar in relation to the present suit, the following factors must be present: (1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction." NORTHERN STATES POWER COMPANY V. BUGHER, 189 WIS. 2D 541, 551 (1995).

Here, Complainant filed grievances that the Union has failed to pursue beyond Step 2, which is a hearing before the Department of Public Works hearing officer. Complainant has not yet had a fair and full hearing in a disinterested forum, much less a final judgment on the merits in a court of competent jurisdiction. Thus, the principle of claim preclusion does not apply.

As to the nexus between the County's actions and the Union's, the County violated the Complainant's rights under the MOA, HWR and CSR, causing him harm. The Union is obligated to protect his rights, and failed to diligently represent him in pursuing his grievances.

DISCUSSION

For the same reasons the Union's motion to dismiss was denied, the County's motion to dismiss on the basis that Complainant has not proved that the Union violated its duty to fairly represent him is denied. It is premature to make such a determination on the basis of an incomplete record.

Complainant has correctly cited the Wisconsin Supreme Court's decision in MAHNKE as to the requirement that an employer affirmatively plead as a defense that the contractual grievance procedure has not been exhausted, and establish that fact, in order that the employee be obligated to first prove that the union violated its duty to fairly represent the employee before the employee may proceed against the employer. While the Complainant has alleged that the Union failed to pursue his grievances, thereby effectively alleging that the grievance procedure has not been exhausted, the County has not, to this point, raised that as an affirmative defense. ERC. 12.03(4), Wis. Adm. Code, provides that affirmative defenses are to be raised in the answer to the complaint. ERC. 12.03(5), Wis. Adm. Code, provides that an answer may, upon motion granted, be amended during the hearing upon such terms and within such period as may be fixed by the Examiner. If the County desires to raise this affirmative defense, it should make a motion in that regard prior to the next scheduled day of hearing. At that time, the Examiner would also entertain Complainant's request that he be allowed to expand on his bad faith and lack of fair representation claim.

The County's assertions regarding the application of Sec. 111.07(14), Stats., have been previously addressed by the Examiner in the order denying the County's pre-hearing motion to dismiss.

Last, as to the issue of claim preclusion, the Examiner is again not satisfied that he can make the factual determinations necessary in that regard based upon the present incomplete record.

For these reasons, the Respondent County's motion to dismiss has been denied.

Dated at Madison, Wisconsin, this 20th day of February, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

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