

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**WILLIAM T. FLEMMING**, Complainant,

vs.

**CITY OF MADISON and  
TEAMSTERS UNION LOCAL 695**, Respondents.

Case 241  
No. 62281  
MP-3921

**Decision No. 30789-A**

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**Appearances:**

**William T. Flemming**, N2949 Old F Road, Route 2, Rio, Wisconsin, appearing *pro se*.

**Larry W. O'Brien**, Assistant City Attorney, Room 401 City-County Building, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin, appearing for the City of Madison.

**Andrea F. Hoeschen**, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C, 1555 North RiverCenter Drive, Suite 202, Milwaukee, Wisconsin, appearing for Local 695.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

On April 3, 2003, William T. Flemming, herein the Complainant, filed a complaint with the Wisconsin Employment Relations Commission against the City of Madison, herein the City, and Teamsters Union Local 695, herein the Union. The complaint alleged that the City had committed prohibited practices under Sec. 111.70(3)(a)5, Wisconsin Statutes, and that the Union had failed in its duty of fair representation, with respect to a grievance the Complainant had filed against the City regarding vacation scheduling, which the Union had refused to pursue. On February 2, 2004, the Commission appointed John R. Emery, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07 and 111.70(4)(a), Wis. Stats. On February 11, 2004, and February 12, 2004, the City and Union, respectively, filed answers to the complaint and, on February 24, 2004, a hearing was conducted in Madison, Wisconsin. The proceedings were transcribed and the

Dec. No. 30789-A

transcript was filed on March 17, 2004. The Complainant filed his brief on April 12, 2004, the Union filed its brief on April 15, 2004, and the City filed its brief on April 16, 2004. On May 6, 2004, the parties advised the Examiner that they would not be filing reply briefs, whereupon the record was closed.

The Examiner, having considered the evidence, the applicable law and the arguments of the parties and being advised in the premises, hereby makes and issues the following

### **FINDINGS OF FACT**

1. The Complainant, William T. Flemming, resides at N2949 Old F Road, Route 2, Rio, Wisconsin, is a municipal employee within the meaning of Sec. 111.70(1)(i), Wis. Stats., and is employed by the City of Madison Metro Transit Division as a shop employee.

2. The Respondent, City of Madison, is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., with offices located at 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin.

3. The Respondent, Teamsters Union, Local 695, is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., with offices located at 1314 North Stoughton Road, Madison, Wisconsin.

4. Pursuant to a collective bargaining agreement, dated July 24, 2003 and covering the period January 1, 2002 – December 31, 2003, the Union is the sole bargaining agent for a bargaining unit of City employees including all mass transit operators, office employees and garage employees, including mechanics, washers, janitors and helpers, and excluding guards, supervisors, confidential, professional and managerial employees of the Metro Transit Division, of which unit the Complainant is a member.

5. Pursuant to Article 37 of the collective bargaining agreement, bargaining unit members receive paid vacation annually based upon their years of service. Section 37.21A provides, in pertinent part: “Vacation days must be taken within the calendar year; i.e., January 1 through December 31.”

6. At some point in the past, but subsequent to the creation of the language in Section 37.21A, the City and Union agreed to stagger the vacation calendars for operations and shop employees by one week and also to arrange vacation schedules on a 52 week, Sunday-Saturday calendar. The vacation calendar for the operations employees begins one week earlier than the calendar for shop employees. As a result, the operations vacation calendar occasionally begins a few days prior to end of the previous calendar year and the shop vacation

calendar occasionally ends a few days into the subsequent calendar year. On January 20, 2004, the City and Union entered into a contract settlement in which this practice was formally added to the contract.

7. For 2002, the vacation calendar for shop employees ran from January 6, 2002 – January 4, 2003. The vacation calendar for operators ran from December 30, 2001 – December 28, 2002. Thus, the week of December 29, 2002 – January 4, 2003, was the last week of the shop employees' 2002 vacation calendar and the first week of the operations employees' 2003 vacation calendar.

8. In 2002, the Complainant desired to use the weeks of December 22, 2002 – January 4, 2003 for vacation, but did not have two weeks of vacation time remaining for 2002, so requested to use 2003 vacation time for January 1 – 4, which he believed to be the existing practice. The request was denied and the Complainant did not take the second week of vacation. He subsequently filed a grievance against the City based on the off-setting vacation schedules of the operations and shop employees, which he contended violated the contract and prejudiced the shop employees.

9. Subsequent to the filing of the grievance, an investigation was conducted by Union Representative Gene Gowey. Gowey addressed the grievance at a meeting of the Madison Metro labor/management committee. The meeting was attended by management and labor representatives, including Gowey and Union Stewards John Kalanowski, Gary Edge, Gary French, Billy Roeth, Roger Walls and Jackie Neindorf. Management personnel attending the meeting included Madison Metro General Manager Catherine Debo and Assistant Manager Ann Gullickson, Human Resources Manager Brad Wirtz, Operations Manager Richard Buss and Shop Manager Steve Kelly. At the meeting, Gowey asked about the circumstances underlying the grievance and was informed of the practice regarding vacation calendars set forth in Finding of Fact #6. Kelly also informed him that there was no practice of allowing employees to borrow against the next year's vacation in advance, which was not contradicted by the Stewards. Further, Kalanowski reported an earlier meeting with the Complainant where the Complainant had asked about the possibility of using 2003 vacation in 2002 and Kalanowski had told him he was unaware that such a practice had ever been allowed in the past. Subsequently, Gowey examined records supplied by management indicating no prior practice of permitting the use of future vacation. On that basis, Gowey concluded the grievance had no merit and informed the Complainant the Union would not pursue it. During the course of his investigation, Gowey did not seek input about the grievance or vacation practices from the Complainant or the Union membership generally.

10. Gowey's investigation was sufficient and his determination appropriately considered relevant factors.

11. The Union's conduct in refusing to arbitrate the Complainant's grievance was not arbitrary, discriminatory or in bad faith and was not a violation of the Union's duty of fair representation to the Complainant.

**CONCLUSIONS OF LAW**

1. Respondent, Teamsters Union, Local 695, did not violate its duty to fairly represent the Complainant herein in refusing to arbitrate his grievance and, thus, did not commit unfair labor practices within the meaning of Sec. 111.70(3), Wis. Stats.

2. Respondent, City of Madison, did not commit unfair labor practices with respect to the Complainant within the meaning of Sec. 111.70(3), Wis. Stats.

**ORDER**

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

Dated at Fond du Lac, Wisconsin, this 2<sup>nd</sup> day of July, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

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John R. Emery, Examiner

CITY OF MADISON

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

**BACKGROUND**

The Complaint grows out of a dispute between the Complainant and Employer over his 2002 vacation request. That year the vacation schedule for shop employees at Madison Metro overlapped into the next calendar year, running from January 6, 2002 to January 4, 2003. For the same year, the vacation calendar for operations employees ran from December 30, 2001 to December 28, 2002. The Complainant, a shop employee, wished to take vacation during the week of December 28, 2002 – January 4, 2003, but had exhausted his 2002 vacation, so wished to borrow against his 2003 allotment in advance. His request was refused and he grieved the refusal, as well as the discrepancies between the practice regarding the vacation calendar and the contract language. He sought as a remedy to either be able to use 2003 vacation in advance or to require the shop and operations employees to utilize a standard vacation calendar consistent with the contract language. The Union investigated the grievance and determined it had no basis for pursuing the matter based on the prevailing practice regarding vacation picks. The Complainant was so notified and thereupon commenced the instant action against the Union and the City.

**POSITIONS OF THE PARTIES**

**The Complainant**

The Complainant argues that the contract is clear and unambiguous, requiring all vacation to be used between January 1 and December 31 in the year it is accrued. The contract also specifies that shop and operations employees using identical vacation pick procedures. The contract does not allow for employees to borrow against future vacation.

The current vacation pick procedure violates the contract and discriminates between shop and operations employees. This practice was developed by the City with the complicity of the Union. The Union argues that its action was not arbitrary or capricious, but in fact it was a violation of the contract based on the Union's whim or fancy, rather than reason. The Complainant requests a cease and desist order against the City and Union and reimbursement of his costs in maintaining this action.

**The Union**

The Complainant has the burden of proving by a preponderance of the evidence that the Union's action in refusing to support his grievance was arbitrary, discriminatory, or in bad faith. This requires that the Union represent all members without hostility or discrimination,

acting with good faith and honesty, eschewing arbitrary conduct. The Union has considerable latitude in acting on behalf of its members, however, and fair representation is not determined by whether the member obtains the desired result (citations omitted).

The Complainant presented no evidence that the Union acted discriminatorily or in bad faith. There was no contention that the Union acted with animus toward the Complainant or treated him differently than other employees, only that it incorrectly evaluated the merits of his grievance. It is not enough to contend that the grievance had merit. The stewards have no reservations about the practice and the courts have held that Unions may and may have to, within their discretion, choose between the competing positions of bargaining unit members. The Union representative's decision to not pursue the grievance based on his investigation of the existing practice was reasonable in that it was possible the Union would not have prevailed. Further, he could reasonably have weighed the fact that the Complainant had no loss and that a successful arbitration could have resulted in a prospective practice change that would be detrimental to the unit as a whole. The Complainant has not proved the elements of his case and it should be dismissed.

### The City

The Complainant may not proceed against the Employer until he has satisfactorily proved a failure of the duty of representation by the Union. The City contends that the Union met its duty and the claim should be denied.

In *MAHNKE V. WERC*, 66 WIS. 2D 524, (1975), the Court held that the Union should at the least consider the relevant factors of the monetary value of the claim, the effect of the breach on the employee and the likelihood of success in arbitration. There was no monetary impact in this case. The Complainant did not contend that he was denied vacation days in 2002 or 2003, and, in fact, he received the correct number of vacation days. The impact on the Complainant was minimal. He was unable to borrow against future vacation, but could have, with proper planning, saved enough vacation to use at the end of the year. On the other hand, were his claim sustained it would likely have had a negative effect on other employees who had already selected vacation, generating more grievances. The likelihood of success in arbitration would have been affected by the weight given the existing practice. The Union Representative's investigation revealed a long-standing practice regarding vacation picks that was agreeable to both the City and the Union. Thus, the Union Representative properly weighed the relevant factors in deciding that the grievance had no merit. There was no evidence offered that he acted arbitrarily, discriminatorily, or in bad faith, only that the Complainant disagreed with him about the merits of his case. In such a case the complaint must fail even if the underlying grievance might have been meritorious.

## DISCUSSION

In a case such as this, before the Complainant can raise the merits of his underlying grievance against the City, he must first establish that the Union violated its duty of fair representation to him. *MAHNKE V. WERC*, 66 WIS.2D 524 (1974) The duty of fair representation is derived from the Union's position as the exclusive collective bargaining agent for all the employees covered by the collective bargaining agreement, pursuant to Article II, Section 1, thereof. In *VACA V. SIPES*, 87 S.CT. 903, 64 LRRM 2369 (1967), the U.S. Supreme Court established standards for determining compliance with the duty of fair representation, which were subsequently adopted by the Wisconsin Supreme Court in *MAHNKE*. In *VACA*, the Court stated:

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.

Id. at 2376. Expanding on that proposition, the Court made it clear that this standard does not require the Union to arbitrate all grievances, regardless of its perception of the grievance's lack of merit, even if another body later determines the grievance to have been meritorious. This view was also expressed by the Wisconsin Supreme Court in *MAHNKE, SUPRA.*, wherein the Court, quoting *MOORE V. SUNBEAM CORP.*, 459 F. 2D 811 (7<sup>TH</sup> CIR., 1972) said:

. . . that opinion (*Vaca*) 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 . . .

Id. at 531.

Subsequent rulings by various courts have interpreted the *VACA* standard to establish a significant burden for a complainant to prove failure of the duty of fair representation. Thus, a violation of the duty of fair representation cannot be based on mere negligence. *PETERS V. BURLINGTON NORTHERN R.R.*, 931 F. 2D 534, (9<sup>TH</sup> CIR., 1991). Rather, “. . . a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' . . . as to be irrational.” *AIR LINE PILOTS V. O'NEILL*, 499 U.S. 65, 136 LRRM 2721 (1991).

The Complainant here asserts that the Union's conduct in handling his grievance was arbitrary. He does not contend that the Union acted discriminatorily or in bad faith, nor does the record independently support such a contention. Under the *O'NEILL* standard, articulated above, this requires a showing that the Union's decision to not pursue the Complainant's grievance was so unreasonable as to be considered irrational. This is a very high threshold and I do not find that the Union's conduct meets this standard.

The record in this case shows that Article 37, Section 37.21A of the contract does specify that employees must use their annual vacation within the calendar year, i.e., January 1 through December 31, that it is earned. Further, Section 37.26 and Section 37.28 provide for separate vacation pick boards for operators and shop employees (Jt. Ex. 1). Under the language, therefore, if an employee wanted to take a week of vacation in a week overlapping the end of one calendar year and the beginning of the next, the employee would be required to use vacation from both calendar years. Over time, however, the parties developed a practice of using 52-week, Sunday through Saturday vacation calendars, with the respective calendars for operators and shop employees being offset from each other by one week (Tr. 11-12). This practice has been in place for approximately 25 years (Tr. 61). Due to the offset schedules, overlapping weeks have been the first week of the vacation calendar for operators and the last week of the vacation calendar for shop employees. Thus, the week in question here, December 29, 2002 – January 4, 2003, was the first week of the operators' 2003 vacation calendar, but the last week of the shop employees' 2002 vacation calendar. In the Union's view, this practice is more beneficial to the employees because it allows them to allocate and schedule their vacation days more easily (Tr. 66-67).

At the end of 2002, the Complainant wanted to use the week of December 29 – January 4 as vacation, but didn't have a full week of vacation available. He thus requested to "borrow forward" against 2003 vacation, which he believed had been allowed in the past (Tr. 13-14). His request was denied. He then discussed the situation with Union Steward John Kalanowski, who told him he was unaware of any existing practice of allowing the use of vacation in advance of accrual (Tr. 59-60). Nonetheless, the Complainant grieved the denial, seeking either to be allowed to use 2003 vacation in 2002 or to have the operators' and shop employees' vacation calendars synchronized (U. Ex. 1).

In determining whether to advance the grievance, Union Representative Gowey conducted an investigation of the grievance. This included a meeting with a labor - management committee, which included the Union Stewards as well as the Department managers, where he was told that there was no history of allowing employees to borrow against future vacation (Tr. 58-60). Gowey also reviewed pay records provided by the City, which supported the assertion that no such practice had been allowed in the past (Tr. 64). Gowey thus concluded that the grievance had no merit and decided not to pursue it (Tr. 60-61).

The Complainant believes his grievance was meritorious, based on his perception of how such requests have been handled in the past and the disparity between the practice and the contract language. Under, MAHNKE, however, even if the Complainant is correct, this alone will not avail him if the Union's decision was not arbitrary. As evidence of arbitrariness, the Complainant challenges the thoroughness of Gowey's investigation, because he did not interview the Complainant or other bargaining unit members before making his decision. The question then becomes, how much is enough? How exhaustive must an investigation be before the Union can withstand a charge of arbitrariness? Certainly, as with many cases, more could



probably have been done, with perhaps the same result being reached. The Union, however, has discretion in evaluating grievances, to determine, based on the nature of the claim, how much of an investment of resources is warranted in pursuing it. MAHNKE, SUPRA. On this record, I cannot say that the steps Gowey took to investigate the Complainant's grievance were so inadequate as to be unreasonable. Nor, based on the information he had, can I say that his decision not to pursue the grievance was irrational. Thus, I conclude that the Union's refusal to advance the Complainant's claim was not arbitrary and it did not violate its duty of fair representation to him.

As previously stated, because I hold that the Union did not violate its duty of fair representation, under MAHNKE I do not reach the merits of the Complainant's claim against the City. The complaint is dismissed.

Dated at Fond du Lac, Wisconsin, this 2<sup>nd</sup> day of July, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

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John R. Emery, Examiner