

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-B**

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**Appearances:**

**William T. Flemming**, N2949 Old F Road, Route 2, Rio, Wisconsin 53960, appearing on his own behalf.

**Larry W. O'Brien**, Assistant City Attorney, Room 401, City-County Building, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53703-3345, appearing on behalf of the City of Madison.

**Andrea F. Hoeschen**, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Union Local 695.

**ORDER ON REVIEW OF EXAMINER'S DECISION**

On July 2, 2004, Examiner John R. Emery issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in this matter concluding that Respondent Teamsters Union Local 695 had not violated its duty of fair representation by deciding not to arbitrate Complainant Flemming's grievance and thus had not committed a prohibited practice within the meaning of the Municipal Employment Relations Act. Because he concluded that Local 695 had not breached its duty of fair representation, the Examiner did not reach the merits of Complainant Flemming's violation of contract allegation against Respondent City of Madison.

Dec. No. 30789-B

Complainant Flemming timely filed a petition for review pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition and the record was closed September 16, 2004.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

**ORDER**

- A. The Examiner's Findings of Fact are affirmed.
- B. The Examiner's Conclusions of Law are affirmed as modified to read:

1. Respondent Teamsters Union Local 695 did not violate its duty to fairly represent the Complainant by refusing to arbitrate his grievance and thus did not commit a prohibited practice within the meaning of Sec. 111.70(3)(b)1, Stats.

2. Because Respondent Teamsters Union Local 695 did not violate its duty to fairly represent the Complainant by refusing to arbitrate his grievance, the Commission will not exercise its jurisdiction to determine whether Respondent City of Madison violated a collective bargaining agreement and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

- C. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 18th day of October, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate.

City of Madison

MEMORANDUM ACCOMPANYING  
ORDER ON REVIEW OF EXAMINER'S DECISION

Complainant Flemming contends that the Respondent City of Madison violated the contract by denying his vacation request and that Respondent Teamsters Local Union 695 then breached its duty of fair representation by refusing to arbitrate the vacation pick grievance he then filed. Complainant argues that the language of the applicable contract clearly gave him the right to use his vacation as requested.

The Examiner found that Local 695 investigated the vacation grievance, concluded that the practice under the contract was consistent with the City's denial of Flemming's vacation request, and then decided that the grievance lacked merit and would not be arbitrated. Applying *MAHNKE v. WERC*, 66 WIS.2D 524 (1974), the Examiner concluded that Local 695's decision was not arbitrary, discriminatory or in bad faith.

On review, Flemming argues the Examiner erred because the practice on which Local 695 and the City relied clearly conflicts with the clear language of the contract. Flemming asks, why isn't the language of the contract being followed?

However, the question posed by Flemming's duty of fair representation complaint as to Local 695 is not whether practice should prevail over contract language but rather whether Local 695 acted in an arbitrary, discriminatory or bad faith manner when it concluded that the Flemming grievance lacked merit after investigating the matter. As the Examiner correctly held, even if Flemming is right as to the merits of his grievance, a union does not breach its duty of fair representation by deciding not to arbitrate what might ultimately be found to be a meritorious grievance. Where, as here, the union investigates the matter and concludes that the grievance lacks merit, it does not act in an arbitrary, discriminatory or in a bad faith manner even if its judgment as to the merits is incorrect.

Therefore, we have affirmed the Examiner. We have modified his Conclusions of Law only to accurately identify the alleged prohibited practices and our standard decision not to exercise our Sec. 111.70(3)(a)5, Stats., jurisdiction where, as here, there is no breach of the duty of fair representation.

Dated at Madison, Wisconsin, this 18th day of October, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate.