

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CURTIS A. BRZEZINSKI, Complainant,

vs.

**AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO, MILWAUKEE DISTRICT COUNCIL 48**, Respondent.

Case 22
No. 63370
MP-4032

Decision No. 30809-A

Appearances:

Curtis Brzezinski, Complainant, appearing pro se.

Mark Sweet, Attorney at Law, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On June 30, 2004, Complainant Curtis A. Brzezinski filed a complaint with the Wisconsin Employment Relations Commission alleging that the Respondent violated its duty of fair representation. The Commission appointed Karen J. Mawhinney, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. A hearing was held on March 25, 2004, in Milwaukee, Wisconsin, and at the conclusion of the hearing, the parties gave oral arguments in lieu of briefs. The transcript was received on April 15, 2004.

FINDINGS OF FACT

1. The Complainant, Curtis A. Brzezinski, is an individual whose address is 2722 West Wells Street, Milwaukee, WI 53208. He started working for Milwaukee County in 1989, first as a hearing officer, then as human resources coordinator in the Department of Public Works until he was laid off in 2002.

Dec. No. 30809-A

2. The Respondent, American Federation of State, County and Municipal Employees, AFL-CIO, Milwaukee District Council 48 (herein called Council 48 or the Union) is a labor organization whose address is 3427 West St. Paul Avenue, Milwaukee, WI 53208.

3. On July 1, 2002, Milwaukee County Department of Human Resources posted a job announcement for the position of Assistant Housing and Development Program Coordinator. At that time, the position was a non-bargaining unit position. A bargaining unit member, Dana Bilello, applied for the position. Brzezinski applied for the position. He had not previously been a member of a bargaining unit. The position was not immediately filled, and in November of 2002, the job announcement was amended, and Brzezinski applied for the position. On November 20, 2002, Brzezinski was certified as eligible for the position. He was recalled from his layoff status to fill the position as of December 23, 2002. The position was put into a bargaining unit and Brzezinski became a bargaining unit member.

4. On April 11, 2003, Dana Bilello filed a grievance protesting that Human Resources placed a non-union employee in a union position when there was an eligible union candidate. Brzezinski found out about her grievance because Bilello told other people in the office that she was going to get him fired. Bilello also told Brzezinski directly that she was filing a grievance and was going to get him fired.

5. Brzezinski contacted the District Council 48 to protect his right to the job. He was paying union dues but had not been notified of what local union he was in or who was the representative or steward. On April 14, 2003, Brzezinski called District Council 48 and told the receptionist that he wanted to be represented in a grievance process but did not know to which local he was assigned. He was transferred to a staff representative, Gerty Purifoy. He got her extension and left a voice mail message for her. Purifoy did not call him back. On April 21, 2003, Brzezinski left another voice mail message for Purifoy stating that he wanted representation in a grievance process, but Purifoy did not return his phone call. On May 7, 2003, Brzezinski met Purifoy in the lobby of a building and told her that he needed to talk to her. She told him that she would call him later but she did not call him back.

6. Purifoy was a staff representative with District Council 48 and had retired by the time of the hearing in this matter. She admitted that she did not return Brzezinski's phone calls because it was her practice to refer the call to the Local for handling those matters. She called Local 1654's Chief Steward, Ron Hart, because grievance handling is a function of the chief steward of the various locals. Staff representatives do not become involved until the grievance is scheduled for a second step hearing. Purifoy did not refer the matter to Local 645, which represents Brzezinski, because he was asking about an existing grievance being handled by Local 1654.

7. Bilello's grievance was based on language in the collective bargaining agreement that states that vacancies in the bargaining unit shall be filled by bargaining unit employees before they are filled by any non-bargaining unit position. At the time the position was filled by Brzezinski in December of 2002, Bilello did not have a chance to interview for the job, so she believed her contract rights in Section 2.25(4) were violated. In Section 2.32(1)

of the contract, under "Promotion," the language provides that if merit and fitness to perform the duties are equal, seniority prevails. Purifoy agreed that under that section, Brzezinski got the job.

8. The County and District Council 48, Local 1654 and Bilello entered into a settlement agreement to resolve Bilello's grievance. It was signed by various people between the dates of May 30, 2003, and June 3, 2003. It states:

The County, Local 1654, and Dana Bilello agree as follows:

1. Curtis Brzezinski will remain in the position of Assistant Housing and Development Program Coordinator in the Housing and Community Development office through the end of the business day on June 19, 2003. Mr. Brzezinski will be removed from that position effective June 20, 2003.
2. As soon as possible, all candidates on the eligible list including Curtis Brzezinski, Dana Bilello, and six other candidates will be certified to the Director of Housing and Community Development by Human Resources and will be considered by Nancy N. Olson, Director of Housing and Community Development for possible appointment to the position of Assistant Housing and Development Program Coordinator.
3. Ms. Olson will inform all certified individuals in writing of the procedure she will use to screen candidates and make an appointment. One portion of this procedure will consist of an independent panel of three individuals who do not work in the Housing and Community Development Division interviewing all interested candidates. The panel will recommend the three best qualified candidates for the position to Ms. Olson.
4. Ms. Olson will make a regular appointment to the position of Assistant Housing and Development Program Coordinator effective June 23, 2003.
5. By signing this Settlement Agreement, all parties to this Agreement accept the above stated terms. Further, Ms. Bilello, agrees to the withdrawal of her pending alleged merit system violation petition and the withdrawal of her grievances (grievance reference no. 40205). The Chief Steward and President of Local 1654 agree to the withdrawal of grievance reference no. 40205.

9. On June 19, 2003, Olson told Brzezinski at the end of the day to clear out his office and that he was terminated in accordance with a settlement agreement. On June 20, 2003, Olson sent an e-mail notice to DOA Housing that said that Brzezinski was removed from his position at the end of the day on June 19, 2003, that an appointment was extended to the individual unanimously recommended by the panel named in the settlement agreement, and that

Brzezinski had accepted the regular appointment and would start on Monday, June 23, 2003. Local 1654's Chief Steward, Ron Hart, objected to Brzezinski's appointment to the position and notified the County's Labor Relations Director, Troy Hamblin, about his dissatisfaction. In an e-mail to Hamblin on June 20, 2003, Hart stated that Bilello was not given a fair chance for the position. Hamblin replied on the same date, pointing out that Bilello was not among the top three candidates, and that the County entered into the settlement agreement to resolve an issue that was created by incorrectly placing a supervisory position into the bargaining unit.

10. Brzezinski missed one day of work. He put the day down as vacation on his time sheet but did not get paid for it and was short eight hours on his paycheck. When he called payroll about the eight hours, he was told that he had no benefits because he was terminated from his employment on June 19, 2003. He was also sent a notice to pay for insurance if he wanted it, because nothing was being deducted from payroll for insurance. He sent checks to cover the insurance that would normally have been deducted from the payroll checks. Brzezinski was also sent a notice from the benefits people that he would have to pay the premium under the COBRA benefits continuation plans because his insurance coverage ended due to his termination. His direct deposits of payroll checks were also stopped. He eventually got everything reinstated, sometime in August of 2003, but without any help from the Union. Brzezinski did not ask the Union to represent him about missing a day of work or losing the vacation benefit of eight hours or any other benefits. He thought it was fruitless to contact the Union because the Union had not responded to him on three separate occasions.

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

CONCLUSION OF LAW

The Respondent Union has not been shown to have committed prohibited practices within the meaning of Sec. 111.70, Stats., by any of the conduct alleged in the complaint.

ORDER

IT IS ORDERED that the complaint be dismissed in its entirety.

Dated at Elkhorn, Wisconsin, this 7th day of June, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/

Karen J. Mawhinney, Examiner

MILWAUKEE DISTRICT COUNCIL 48

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

The Complainant seeks a claim against the Union for a breach of the duty of fair representation.

THE PARTIES' POSITIONS

The Complainant

The Complainant asserts that he was not represented by the Union. After numerous attempts to get representation, he was denied any representation whatsoever. The settlement agreement was not in his best interest and guaranteed him nothing, except that he would be removed from his position on June 19, 2003. The grievance filed by Bilello was a frivolous grievance, borne out by the fact that after the interviews were held, the Complainant was the top qualified individual for the job and Bilello was last.

The Complainant found it hard to understand how a Union member could file a grievance about a specific issue regarding his employment when the Union repeatedly failed to have any contact with that member. Purifoy had great input into the settlement agreement, making District Council 48 liable in this matter. The Complainant submits that his contractual rights as a represented employee were denied because the Union took one individual over another with no equal representation in the matter.

The Respondent

The Respondent believes that Brzezinski is upset because Purifoy did not return a phone call but states that she had no reason to return the phone call. The grievance involved another person who had an issue about the job awarded to Brzezinski. Bilello was grieving because when Brzezinski came into the bargaining unit, he got a job that she had applied for but was not interviewed for. Brzezinski now thinks her grievance is frivolous, but she did not think so and the Local Union and the County did not think so. The settlement agreement guaranteed that Brzezinski would be on the list of people that would be interviewed. He was interviewed and got the job. He never requested to file a grievance about the loss of vacation pay or any other matter. The collective bargaining agreement gives him the right to file a grievance on his own.

The Respondent submits that it has a duty to represent all employees, not just Brzezinski, and it did so in this case by attempting to get the County to give Bilello an opportunity to interview for a job and be considered for it under contract language. Had the

Union pushed the grievance to the end and prevailed, Brzezinski would be without a job now. There is no harm to him whatsoever. There is no evidence that there was any bad faith, any discrimination, or any arbitrary treatment of Brzezinski.

DISCUSSION

Section 111.70(3)(b)1, Stats., has been held to incorporate a labor organization's duty to fairly represent those in the bargaining unit for which it serves as the exclusive collective bargaining representative. MILWAUKEE COUNTY, DEC. NO. 30523-A (GRATZ, 3/99). The standard to determine whether a union has breached its duty of fair representation is best known from the language of the U.S. Supreme Court's ruling in VACA v. SIPES, 386 U.W. 171 (1967), where 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. (Page 190)

VACA also requires a union to make a good faith decision, weighing relevant factors such as the merits of a grievance. MAHNKE v. WERC, 66 WIS.2D 524 (1975) adds that such a good faith decision should take into account the monetary value of a claim, the effect of the breach on an employee and the likelihood of success in arbitration, before making a determination of proceeding or refusing to proceed to arbitration. A union is allowed a wide range of reasonableness, subject to complete good faith and honesty or purpose in the exercise of its discretion. FORD MOTOR CO. v. HOFFMANN, 345 U.S. 330 (1953).

MAHNKE also requires that a union's exercise of discretion be put on the record in sufficient detail so as to enable the Commission and reviewing courts to determine whether the union has made a considered decision by review of relevant factors. The Commission has held that absent a showing of arbitrary, discriminatory or bad faith conduct, a union is not obligated to process grievances through all steps of the grievance procedure (CITY OF APPLETON, DEC. NO. 17541, (WERC, 1/80), that the failure of a union to notify a grievant as to the disposition of his grievance is not an adequate basis for finding a breach of duty (UW-MILWAUKEE (HOUSING DEPARTMENT), SUB.NOM GUTHRIE v. WERC, DEC. NO. 11457-F, (WERC, 1977), that mere negligence in the processing of a grievance including the late filing of briefs is insufficient to constitute a violation (WISCONSIN COUNCIL 40, DEC. NO. 22051-A, (MCLAUGHLIN, 3/85), and that it is not for the Commission to judge the wisdom of union policies absent proof of perfunctory or bad faith grievance handling (MARINETTE COUNTY, DEC. NO. 19127-C, (HOULIHAN, 11/82), AFF'D, DEC. NO. 19127-D, (WERC, 12/82).

This is an unusual case because the Complainant, Mr. Brzezinski, does not protest the failure to file a grievance but the failure to return phone calls to him when he sought to protect his job when another employee also sought that job through the grievance procedure.

Brzezinski also claims that Bilello's grievance was frivolous and the Union's pursuit of it and settlement of it damaged him by terminating him from his position for one day, with a resulting temporary loss of benefits.

Certainly, someone from District Council 48 or one of its Local stewards should have returned Brzezinski's phone calls, since he was asking about representation in a grievance that involved him and was being settled. However, the failure to do so does not rise to the level of arbitrary, discriminatory or bad faith. A union's actions are arbitrary only if, in light of the factual and legal landscape at the time, 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). It is difficult to say that the failure to return a phone call was irrational. Brzezinski left his first message on April 14, 2003, which was only three days after Bilello filed her grievance. It is not known whether Purifoy had any knowledge at that time about the grievance and its potential effect on Brzezinski. At any rate, she handled the message in accordance with her standard procedures, referring it to the Local's steward. Such conduct is not arbitrary or outside the range of reasonableness or irrational. Brzezinski's last contact with Purifoy was on May 7, 2003, and the record fails to show whether Purifoy was actively involved in settlement discussions by that time, since the settlement agreement itself was first signed on May 30, 2003. Thus, Purifoy continued to act according to her standard procedure. Again, this does not show that her conduct was arbitrary or outside the range of reasonableness or irrational. No one called Hart to the stand to ask why he did not return Brzezinski's phone calls. There can be no inference made about this. A complainant has the burden to come forward and demonstrate, by a clear and satisfactory preponderance of the evidence, each element of his contention; and absent such proof, the Commission refuses to draw inferences of perfunctory or bad faith grievance handling. *MARINETTE COUNTY, SUPRA*. Nor can a violation of the duty of fair representation be based on mere negligence. *PETERS V. BURLINGTON NORTHERN R.R.*, 931 F. 2D 534, (9TH CIR., 1991).

Brzezinski also complains that the Bilello grievance was frivolous and that District Council 48 should not have been pursuing a frivolous grievance, one that put him at jeopardy. Purifoy acknowledged that Brzezinski would have the right to the position over Bilello based on merit, but Bilello's grievance also alleged that the position was improperly given to a non-bargaining unit employee while a bargaining unit employee was qualified for the position. Surely, the Union has an interest in pursuing such a grievance, even though it ultimately might lose due to the unique circumstances of having an employee coming back from a layoff and the position having been out of the bargaining unit at that time. And when the grievance was settled, both Bilello and Brzezinski were bargaining unit members, putting the Union between a rock and a hard place. When there are competing interests between employees, a union does not violate the duty of fair representation by representing employees whose interests arguably conflict with those of the complaining employee. *GRAY V. MANITOWOC COUNTY*, 546 N.W. 2D 553 (WIS. APP. 1960). A union has broad discretion to adjust the demands of competing groups within its constituency as long as it does not act arbitrarily. *JONES V. TRANS WORLD AIRLINES, INC.*; 495 F.2ND 790, 798 (2ND CIR., 1974).

Finally, Brzezinski does not prove that District Council 48 harbored any ill will toward him or acted in bad faith or with any improper motive. To find bad faith, there must be evidence that the Union acted with an improper motive. *NEAL V. NEWSPAPER HOLDINGS, INC.* 349 F.3D 363, 369 (7TH CIR. 2003). There is no evidence on the record of any improper motive.

The adverse effects from the settlement of the Bilello grievance, such as the mix-up in payroll deductions on insurance and benefits, appear to be caused by the County's internal systems in payroll and benefits and were not the fault of District Council 48.

Having found no violation, the complaint is dismissed in its entirety.

Dated at Elkhorn, Wisconsin, this 7th day of June, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/

Karen J. Mawhinney, Examiner