

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**LOIS L. NOVAK**, Complainant,

v.

**SERVICE EMPLOYEES' INTERNATIONAL UNION LOCAL 150**, Respondent. 1/

Case 74  
No. 62762  
MP-3978

**Decision No. 30871-B**

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**Appearances:**

**Charles W. Jones**, Charles W. Jones and Associates, Attorneys at Law, 250 West Coventry Court, Suite 108, Milwaukee, WI 53217, appearing on behalf of Complainant Lois L. Novak.

**Matthew Robbins** and **Timothy C. Hall**, Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of Respondent SEIU Local 150.

**ORDER AFFIRMING EXAMINER'S DECISION  
CONDITIONALLY DENYING MOTION TO DISQUALIFY**

Prior to the scheduled hearing in this matter, the Complainant Lois L. Novak (Novak) filed a Motion to Disqualify Counsel for the Respondent Service Employees International Union, Local 150 (Union), on the ground that the Union's law firm had previously represented Novak in her workers' compensation claim, which Novak asserted is substantially related to the instant matter involving, inter alia, the Union's alleged failure to represent Novak in her workers' compensation claim.

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*1/ As originally filed, the Complaint named Debbie Timko and Carmen Dickinson as Respondents along with SEIU, Local 150. SEIU moved to dismiss Timko and Dickinson as Respondents and Complainant Novak did not object. Accordingly, the Examiner entered an order dismissing these two individual Respondents, for which no review has been sought.*

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Dec. No. 30871-B

On April 1, 2004, Examiner Daniel Nielsen issued an Order conditionally denying Novak's motion, on the ground that, if the Union waives any argument that its decision not to represent Novak in her workers' compensation claim was based upon an assessment of the merits of her claim or of her injuries and/or medical condition, there will be no substantial relationship between the matters on which the Union previously represented Novak and the matters on which it currently is representing the Union. The Union subsequently waived any such arguments.

On April 21, 2004, Novak filed a petition for review of the Examiner's Order accompanied by a brief in support of the petition. On May 11, 2004, the Union submitted a brief in opposition to Novak's petition for review and on June 1, 2004, Novak filed a reply brief supporting the petition.

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

**ORDER**

The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 7th day of July, 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

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

**Service Employees International Union**

**MEMORANDUM ACCOMPANYING ORDER**

To briefly summarize the allegations underlying the Motion, on October 28, 2002, while Novak was employed by the Muskego-Norway School District and a member of the bargaining unit represented by the Union, she injured her shoulder and arm at work. She asked the Union for assistance in pursuing a workers' compensation claim, but the Union declined. Novak then sought advice from the Union's law firm regarding her workers' compensation claim. An attorney in that firm reviewed Novak's medical records and related documents and advised her by letter dated August 19, 2003 that "the economic potential of your claim does not warrant the considerable time and expense required for our law firm to become involved." In the same letter the attorney recommended that Novak contact the State's Workers' Compensation office, provided her with the telephone number, returned her materials, and advised her of the statute of limitations that would govern her claim.

At relevant times, Novak was covered by a collective bargaining agreement providing that "All employees covered by this Agreement are entitled to Workers Compensation." The agreement further provided that "Any employee who is absent due to injury or illness caused during the course of his duties will receive a maximum of three (3) months' full pay" on condition that the employee turn his or her workers' compensation checks over to the employer.

On October 2, 2003, Novak filed a complaint with the Commission alleging that the Union failed to represent her in a number of ways, including refusing to assist her in securing workers' compensation benefits. In connection with the instant motion, Novak states that her complaint also encompassed the Union's failure to assist her in enforcing the contractual provision, described above, allowing employees paid leave for up to three months if they are absent due to work related injuries.

As noted earlier, Novak moved to disqualify the Union's attorneys for having previously represented Novak in a substantially related matter, which the Examiner denied on April 1, 2004. The Examiner's Order was conditioned upon the Union waiving "any argument that its decision not to pursue the Complainant's Workers' Compensation claims was based in whole or in part upon an assessment of the merits of the claim or of the Complainant's injuries and/or medical condition."

By letter dated April 6, 2004, the Union's attorney advised the Examiner that the Union "does not contend that they declined to process *a grievance or Ms. Novak's worker's compensation claim* based upon an evaluation of that claim which would be resolved through the workers compensation system. Therefore, we waive any defense based on this." (Emphasis supplied). In its Brief in Opposition to Novak's Petition for Review, the Union explains that its waiver "applies to the entire case, since the Examiner did not restrict the scope of the waiver to any particular aspect of Petitioner's claim." U. Br. at 2 n.1.

As the Examiner stated in his decision, parties before the Commission are entitled to a fair hearing as a matter of due process of law, citing his earlier decision in *HOPKINS V. KENOSHA, ET AL.*, DEC. NO. 29715-A (NIELSEN, 1/00) at 9. In the *HOPKINS* decision, the Examiner further correctly noted that "One of the 'rudiments of fair play' in a legal proceeding is the right of a party to a hearing in which his or her substantial rights are unaffected by conflicts of interest or other professional misconduct by counsel." *Id.* (citations omitted).

In determining whether one party's counsel has a conflict of interest that would impair another party's right to a fair hearing, we may look for guidance to the Wisconsin Supreme Court Rules regarding attorneys' professional responsibilities. However, the Commission has no authority to interpret and enforce those rules as such, nor would every technical transgression of those rules *necessarily* defeat a party's right to a fair administrative hearing before the Commission. While the Commission is well advised to consider the conflict of interest issue within the framework of those rules, we remain mindful that the ultimate objective is fundamental fairness to all parties in the development of the record. As the Examiner noted, even in a judicial forum, a judge has broad discretion to make sure one party's important right to choose his or her attorney is not unduly impeded by an overly rigid notion of disqualification. *BERG V. MARINE TRUST CO.*, 141 WIS. 2D 878, 887 (CT. APP. 1987).

In this case, Novak argues that the Union's counsel has a conflict of interest based on the firm having previously reviewed Novak's workers' compensation claim and determined the amount of the claim was insufficient to justify the firm's resources. Novak contends Union counsel may not now represent the Union against Novak's claims under Sec. 111.70, Stats., because that would violate SCR 20:1.9 (a). That rule forbids an attorney from representing "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." The rule requires a two-pronged inquiry: first, whether an attorney-client relationship existed between Novak and the Union's law firm; second, whether the subject matter of the instant case is substantially related to previous matter. *BURKES V. HALES*, 165 WIS. 2D 585, 591 (CT. APP. 1991).

The Examiner concluded that Novak's interaction with the Union's law firm, while "marginal," nonetheless was an attorney-client relationship, noting that, "If the firm had subsequently been hired by the School district to fight the Complainant's appeal, there could be no plausible argument that it did not have a conflict." EXAMINER'S DEC. at 8. Although the Union forcefully argues that the firm could not have established an attorney-client relationship where its only interaction with the individual was to decline to represent her, we are persuaded by the Examiner's hypothetical that an attorney-client relationship may well have been established for conflict of interest purposes.

Assuming arguendo that Novak and the Union's firm had an attorney-client relationship in the prior case, was the firm's prior interaction with Novak "substantially related" to the subject matter of the instant case? Novak seems to argue that the two cases are related simply because both concern her workers' compensation claim. In addition, she interprets the Supreme Court's decision in MAHNKE V. WERC, 66 WIS.2D 524 (1975) to require the Union to consider the merits (i.e. costs/potential benefits and likelihood of success in arbitration) of her compensation claim as part of its duty of fair representation. Hence, Novak also views the two claims to be substantially related as a matter of law.

The Examiner concluded that the two cases were not substantially related because Novak's initial case with the firm involved "the merits" of her workers' compensation claim, whereas the instant case (as confirmed by the Union's waiver) can and will be decided without regard to the merits of the compensation claim. In BERG, the Court of Appeals quoted with approval language from a Supreme Court decision defining the concept of "substantially related" to mean: "... the lawyer could have obtained confidential information in the first representation that *would have been relevant in the second.*" 141 WIS. 2d at 886. In essence, the Examiner ruled that the merits of the workers' compensation claim are irrelevant and immaterial in the instant case if the Union waives the right to raise a defense based on the merits of the compensation claim. We agree. The Union has confirmed that its defense in this case – on the compensation eligibility issue, the leave eligibility issue, or any other issue – will not depend upon the merits of Novak's compensation claim. The Union's defense regarding the workers' compensation elements of the instant case is that the duty of fair representation never attached as to Novak's compensation claim and thus the Union had no duty to represent Novak regarding her compensation claim, regardless of its merits. Hence, there is no disqualifying conflict under the BERG definition, as none of the confidential information the Union's law firm may have received from Novak regarding the first case (the merits of her compensation claim) "would be relevant in the second."

In light of the Union's legal position in this matter, we agree with the Examiner that Novak has misconceived the applicability of the MAHNKE decision, in arguing that MAHNKE required the Union to undertake a merit-based analysis of her workers' compensation grievance. However, even if the Union's defense is rejected by the Examiner and MAHNKE is held to be applicable, there would be no "substantial relationship" between the two cases under the BERG definition, because the Union has disavowed any intention to present evidence or argument that it undertook a merit-based analysis.

Accordingly, we see no derogation of Novak's right to a fair hearing by allowing the Union to be represented by the counsel of its choosing in this case and we affirm the Examiner's Order.

Dated at Madison, Wisconsin, this 7th day of July, 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

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner