

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOIS L. NOVAK, Complainant,

vs.

SERVICE EMPLOYEES' INTERNATIONAL UNION LOCAL 150
and
MUSKEGO-NORWAY SCHOOL DISTRICT, Respondents.

Case 74
No. 62762
MP-3978

Decision No. 30871-C

Appearances:

Charles W. Jones, Charles W. Jones and Associates, Suite 202, 10303 North Port Washington Road, 13 W, Mequon, WI 53092, appearing on behalf of Lois L. Novak.

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

Michael Aldana, Quarles & Brady, LLP, 411 East Wisconsin Avenue, Suite 2040, Milwaukee, WI 53202-4497, appearing on behalf of the Muskego-Norway School District.

ORDER GRANTING IN PART AND DENYING IN PART
MOTION TO QUASH SUBPOENA

Daniel Nielsen, Examiner: On October 2, 2003, the above-named Complainant, Lois L. Novak, filed with the Commission a complaint, alleging that the above-named Respondents, SEIU Local 150, Debbie Timko and Carmen Dickinson, violated the provisions of Ch. 111.70, MERA, by failing to represent her on outstanding grievances, failing to promptly respond to inquiries, removing her as Chief Steward without an election, refusing to

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assist her in securing workers' compensation benefits, and refusing to assist her in securing accommodations for her learning disabilities from her employer, the Muskego-Norway School District. The Commission appointed Daniel Nielsen, an examiner on its staff, to conduct a hearing and to make and issue appropriate Findings, Conclusions and Orders. A hearing was scheduled for January 22, 2004. Prior to that hearing, the Complainant filed a Motion to Disqualify the counsel for the Respondents. The Examiner conditionally denied the Motion, and the Complainant appealed to the Commission, which affirmed the Examiner. The Examiner also granted a Motion to dismiss Debbie Timko and Carmen Dickinson as named Respondents. That Motion was not opposed by the Complainant. In August, 2004, the complaint was amended to add the Muskego-Norway School District as a named Respondent.

The Complainant requested a subpoena for documents from the Respondent Union, and the Union filed a Motion to Quash. Arguments in favor of and opposing the Motion were submitted by Complainant and the Respondent Union, the last of which was submitted on November 10, 2004.

Now, having considered the Motion to Quash, the arguments of the parties in support of and in opposition to the Motion and the record as a whole, the Examiner makes and issues the following

ORDER

It is ORDERED that:

The Motion to quash is denied except as follows:

1. With respect to items 1 and 2 of the subpoena, the subpoena is quashed as to documents prior to 2001, except in areas where the information requested is specific to the representation of the Complainant as an individual on some specific matter by the Union.
2. With respect to item 3 of the subpoena, the subpoena is quashed to the extent that it seeks anything more than the rules, policies, procedures or other written guidelines for the representation of members, in effect as of the time of the Complainant's grievances and the processing of those grievances.
3. With respect to item 4 of the subpoena, the subpoena is quashed to the extent that it seeks documents prior to 2001 or documents which relate to representation of Novak which is purely incidental to representation of the bargaining unit generally.

4. With respect to items 5, 8, and 9 of the subpoena, the subpoena is quashed to the extent that it seeks documents prior to 2001.
5. With respect to item 10 of the subpoena, the subpoena is quashed to the extent that it seeks documents prior to 2001 and/or documents protected by attorney-client privilege.
6. With respect to item 11 of the subpoena, the subpoena is quashed to the extent that it seeks anything more than the rules, policies, procedures or other written guidelines for the processing of grievances in effect as of the time of the Complainant's grievances and the time during which those grievances those grievances were being processed.
7. With respect to items 7 and 16 of the subpoena, the subpoena is quashed with respect to the requested information, except to the extent that any grievances by, or discipline of, Carmen Dickinson relates to her representation of the Complainant in these grievances.
8. With respect to item 17, the subpoena is quashed to the extent that it seeks documents other than those addressing the cost of grievance processing and arbitration since 2001.

Dated at Racine, Wisconsin, this 29th day of November, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner

MUSKEGO-NORWAY SCHOOL DISTRICT

**MEMORANDUM ACCOMPANYING ORDER GRANTING IN PART
AND DENYING IN PART MOTION TO QUASH SUBPOENA**

The Complainant's subpoena to the Respondent Union seeks documents in 21 subject areas:

1. A copy of all documents, writings, emails or other correspondence to and from SEIU Local 150 or its agents that relate to Lois Novak.
2. A copy of each and every phone record or calendar notation in the possession, custody or control of SEIU Local 150 or its agents that relates to Lois Novak.
3. A copy of any and all SEIU Local 150 and SEIU International Union written policy or procedures manuals, rules, regulations and directives that relate to the representation of its members by its agents.
4. A copy of any and all written or recorded evidence reviewed or relied upon by any agent of SEIU Local 150 in its representation of Lois Novak.
5. A copy of any and all minutes of any meeting in the possession, custody or control of SEIU Local 150 or its agents which relate to any grievance made by Lois Novak.
6. A copy of any written or recorded directive given to Carmen Dickinson by SEIU Local 150 concerning the representation of its members that worked at the Muskego-Norway School District.
7. A copy of any and all grievances filed by Carmen Dickinson against SEIU Local 150.
8. A copy of any written or recorded statement taken from any person by any agent of SEIU Local 150 that relates to Lois Novak.
9. All records of phone calls between any employees or agents of SEIU Local 150 or with any third party since January 1, 2001 which relate to Lois Novak.
10. A copy of each and every document, record, report, fax, e-mail or other writing in the possession, custody or control of SEIU Local 150 or its agents that relates to Lois Novak.
11. A copy of all writings, documents, e-mails, faxes or other correspondence that relate in any way to the policies and determinations by SEIU Local 150 in deciding the manner in which grievances are processed.

12. A copy of all SEIU Local 150 and SEIU International Union bylaws in effect during the last three years.

13. A copy of all SEIU Local 150 contracts with the Muskego-Norway School District in effect during the last three years.

14. A copy of the job description of the position held by Carmen Dickinson as an employee of SEIU Local 150.

15. A copy of the role description of the work site leaders of SEIU Local 150 at the Muskego-Norway School District.

16. A copy of any disciplinary letters or similar documents that relate to Carmen Dickinson as an employee of SEIU Local 150.

17. A copy of any letters written by any employees of SEIU Local 150 during the last five years relating to allegations of inappropriate use of union funds or complaints by members of SEIU Local 150.

18. A copy of any documents relating to SEIU Local 150 work site leader elections at the Muskego-Norway School District during the last five years.

19. A copy of all documents provided by Lois Novak during the last four years to union employees that support her grievances or evidentiary support thereof.

20. A copy of all medical reports, notes and records furnished by Lois Novak to SEIU Local 150 union employees.

21. A copy of any documents that set forth the internal appeals procedure to be followed when employees of SEIU Local 150 decide not to pursue a member's grievance.

Items 6, 12, 13, 14, 15, and 21 are not objected to. The Union objects to the remaining 15 requests on a variety of grounds.

THE DISPUTED REQUESTS

The Union's objections are largely that the requests for documents are either overly broad, administratively burdensome, or irrelevant. In general, it asserts that the scope of these requests should be limited to documents relevant to the specific grievances the Complainant alleges the Union failed to provide representation on, and should be limited to the time those grievances arose and were processed. The Union strongly asserts that the Complainant should not be allowed to abuse the Commission's processes to litigate unrelated political complaints about the current Union administration or go on fishing expeditions in search of documents to use in her on-going campaign within the Union.

The Complainant's argument in favor of its requests generally asserts that she seeks information to show a pattern of hostility to the Complainant over time, and to show the true motivation of the Union in refusing to represent her. The Complainant denies seeking to use the complaint process to litigate internal political disputes, but asserts that the hostility and bad faith of the Union in processing these grievances are inextricably linked to the relationship between the Complainant and the current administration of the Union. Moreover, she asserts that lack of representation is due in part to a policy decision by the Union to sacrifice representation in favor of organizing efforts. She argues that all of the requested information is necessary and relevant to her pursuit of these legitimate claims.

The standard to be applied in judging the appropriateness of a subpoena in a WERC proceeding is whether, in the absence of any claim of privilege, the information sought would, if offered into evidence, be arguably relevant and material to the proceeding. MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NOS. 13787-F AND 16009-C (MALAMUD, 6/78). Each disputed item, together with the principal arguments of the parties, is measured against this standard, as follows:

1. **A copy of all documents, writings, e-mails or other correspondence to and from SEIU Local 150 or its agents that relate to Lois Novak.**
2. **A copy of each and every phone record or calendar notation in the possession, custody or control of SEIU Local 150 or its agents that relates to Lois Novak.**

The Union's Objection: The Union objects to Requests No. 1 and 2 on the bases that they are overly broad, unduly burdensome, and seek documents not relevant to this case. This would require the Union to review over 20 years' of records including every phone record. The request should be limited to those documents which relate to the grievances at issue in this case. In addition, the Union should not be required to review years of phone bills, but only produce records of phone conversations for the time period and subject of the grievances at issue.

The Complainant's Response: The Complainant denies requesting a review of phone bills or production of phone bills. Instead she asks that the Union produce its records of phone conversations, and other relevant documents created in the past ten years. The Complainant seeks to demonstrate that the Union's failure to provide representation to her was based upon improper motivation, was arbitrary, was discriminatory and was based on personal animosity and bad faith. She intends to show that Carmen Dickinson and Debbie Timko removed her from her position as work site leader and then discriminated against her by failing to represent her concerning her grievances. Records of phone contacts, calendar entries, and correspondence related to her and the Union are plainly relevant.

Ruling: The request for ten years worth of records, throughout the subpoena, is overbroad and burdensome. The Complainant alleges that her problems with the Union are the result of political and/or philosophical differences with the current administration, which

took office in 2001. Except in areas where the information requested is specific to the representation of the Complainant as an individual on some specific matter by the Union, documents and information prior to 2001 are not relevant and material.

3. A copy of any and all SEIU Local 150 and SEIU International Union written policy or procedures manuals, rules regulations and directives that relate to the representation of its members by its agents.

The Union's Objection: The Union objects to Request No. 3 on the basis that it is overly broad, seeks documents not relevant to the issues to be addressed at the hearing, and production is unduly burdensome. The duty of fair representation is a legal standard. The Union agrees to produce a copy of the Local 150 Constitution, but asserts that anything more is unjustified.

The Complainant's Response: This is not a burdensome request and the material is clearly relevant. It is highly relevant to this proceeding whether the Union followed its own rules, policies and procedures. The Complainant intends to show that the Union ignored its own rules, policies and procedures because Debbie Timko and Carmen Dickinson had bad faith motivation to treat Lois L. Novak in a discriminatory manner. The Union's own rules, policies and procedures are direct evidence of the discretion that should be followed in making representation decisions.

Ruling: The question of whether the Respondent Union violated its duty of fair representation generally involves a determination of whether its actions were arbitrary, capricious, discriminatory or undertaken in bad faith. While that is a uniform legal standard, and the Union could not defend on the basis of some lower standard in an internal document, it is also a fact-driven standard, and a finding that the Union failed to follow its own internal standards in deciding whether to represent the Complainant would have probative value. The subpoena is quashed to the extent that it seeks anything more than the rules, policies, procedures or other written guidelines for the representation of members, in effect as of the time of the Complainant's grievances and the processing of those grievances.

4. A copy of any and all written or recorded evidence reviewed or relied upon by any agent of SEIU Local 150 in its representation of Lois Novak.

The Union's Objection: This request should be limited to documents which relate to the grievances at issue in this case.

The Complainant's Response: The Complainant is requesting all written or recorded evidence reviewed or relied upon by the Union or its agents in its representation of Lois Novak because she intends to show that there has been an arbitrary, discriminatory, bad faith motivation by the Union in failing to represent her that began with her termination as a work site leader. The Union should be required to produce all evidence it has relied upon in its

representation of Lois Novak because these documents may show bad faith motivation whether or not the documents relate directly to the employer discipline which was the basis for her grievances.

Ruling: The subpoena does not give guidance as to what is meant by “representation” of the Complainant. To the extent that the request for “A copy of any and all written or recorded evidence reviewed or relied upon by any agent of SEIU Local 150 in its representation of Lois Novak” is limited to the time since 2001 and to matters involving representation of Novak on specific questions, issues or disputes, it relates directly to the Complainant’s theory of the case, is not burdensome or overly broad, and is relevant and material. The subpoena is quashed to the extent that it seeks documents prior to 2001 or documents which relate to representation of Novak which is purely incidental to representation of the bargaining unit generally.

- 5. A copy of any and all minutes of any meeting in the possession, custody or control of SEIU Local 150 or its agents which relate to any grievance made by Lois Novak.**

The Union’s Objection: The Union objects to Request No. 5 on the basis that it is overly broad. This would again require a review of over 20 years' of records. This should be limited to minutes of meetings about grievances which are the subject of the Complaint.

The Complainant’s Response: These records are relevant because an arbitrary, discriminatory and bad faith motivation for the Union's representation decisions concerning Lois Novak may be shown by these records. This request is limited to such records for the past ten years.

Ruling: The subpoena is quashed to the extent that it seeks documents prior to 2001.

- 8. A copy of any written or recorded statement taken from any person by any agent of SEIU Local 150 that relates to Lois Novak.**
- 9. All records of phone calls between any employees or agents of SEIU Local 150 or with any third party since January 1, 2001 which relate to Lois Novak.**

The Union’s Objection: Requests No. 8 and 9 should similarly be limited to the grievances which are the subject of the Complaint and should not require the Union to review all of its phone bills.

The Complainant’s Response: Again, the Complainant is not requesting the telephone company's records or bills. She seeks written or recorded statements taken by the Union that relate to her and is requesting the Union's records which document phone conversations, and is willing to limit this request to the past ten years. The request should not be limited to the

grievances at issue, since the Union's motivation in failing to represent the Complainant may be shown by documents that do not contain specific mention of her grievances, but do show personal animosity, bad faith and a discriminatory motivation.

Ruling: The subpoena is quashed to the extent that it seeks documents prior to 2001.

- 10. A copy of each and every document, record, report, fax, e-mail or other writing in the possession, custody or control of SEIU Local 150 or its agents that relates to Lois Novak.**

The Union's Objection: The Union objects to Request No. 10 on the basis that it is overly broad and unduly burdensome. The Complainant has been in the bargaining unit for over 20 years. The requests should be limited to the time period and grievances which are the subject of the case. The Union also objects to Request No. 10 to the extent it requests documents protected by the attorney-client privilege.

The Complainant's Response: The Complainant is limiting this request to documents created during the last ten years, and does not seek documents protected by the attorney-client privilege or documents that are attorney work product. As with items above, the Union's motivation in failing to represent the Complainant may be shown by documents that do not contain specific mention of her grievances, but do show personal animosity, bad faith and a discriminatory motivation.

Ruling: The subpoena is quashed to the extent that it seeks documents prior to 2001 and/or documents protected by attorney-client privilege.

- 11. A copy of all writings, documents, e-mails, faxes or other correspondence that relate in any way to the policies and determinations by SEIU Local 150 in deciding the manner in which grievances are processed.**

The Union's Objection: This should be limited to the grievances at issue in this case.

The Complainant's Response: The Complainant seeks the Union's documents that relate to policies and determinations by Local 150 in deciding the manner in which grievances are processed. These documents shed light on the written rules that the Union follows in determining how grievances are processed. A selective failure by the Union to follow its own rules in her case is plainly relevant to a determination of whether the Union's actions were arbitrary, discriminatory or motivated by bad faith or personal animosity.

Ruling: A finding that the Union failed to follow its own internal standards in processing the Complainant's grievances would have probative value. The subpoena is quashed to the extent that it seeks anything more than the rules, policies, procedures or other written guidelines for the processing of grievances in effect as of the time of the Complainant's grievances and the time during which those grievances were being processed.

7. **A copy of any and all grievances filed by Carmen Dickinson against SEIU Local 150.**
16. **A copy of any disciplinary letters or similar documents that relate to Carmen Dickinson as an employee of SEIU Local 150.**
17. **A copy of any letters written by any employees of SEIU Local 150 during the last five years relating to allegations of inappropriate use of union funds or complaints by members of SEIU Local 150.**
18. **A copy of any documents relating to SEIU Local 150 work site leader elections at the Muskego-Norway School District during the last five years.**

The Union's Objection: The Union objects to Requests No. 7, 16, 17, and 18 on the basis that they seek documents not relevant to this case. This case concerns Lois Novak's disputes with her employer, and not those of Carmen Dickinson. Equally irrelevant to this case are documents concerning allegations of inappropriate use of union funds and worksite leader elections at the School District. None of these requests relate to the issue here. The Union's internal affairs, unrelated to Novak's grievance, are confidential. Providing documents in response to these requests would serve no other purpose than to reward an abuse of the subpoena process by allowing Novak to go on a politically motivated "fishing expedition" through the Union's files on matters wholly unrelated to this case.

The Complainant's Response: The information request related to Carmen Dickinson reflects the broader contours of the case. This case does not only involve disputes with Lois Novak's employer. It also involves a very significant dispute with SEIU Local 150 that caused Lois Novak to lose the job that she held for over twenty years. The requested documents will show that Carmen Dickinson failed to provide fair representation on a legitimate basis, acted to advance her own agenda, and will be relevant to her credibility.

As to documents related to the use of Union funds, the Complainant has a good faith belief that there has been an arbitrary decision by SEIU Local 150 and its administration to refuse to provide representation to its existing members and instead focus on organizing activities. Documents that show SEIU Local 150 arbitrarily refused to provide representation and arbitrarily diverted its resources from providing fair representation to other activities are highly relevant.

With respect to the work site elections at Muskego-Norway Schools, these documents are relevant to the motivation of the Union in failing to provide the Complainant with fair representation. Claim that she was not provided with fair representation based upon personal animosity and bad faith. Specifically, the Complainant alleges that she was removed as work site leader because of her perceived loyalty to the prior administration of the Union and that Dickinson failed to represent Lois Novak because of continuing personal animosity toward Lois Novak.

Ruling: The records of grievances filed by, or discipline issued to, Carmen Dickinson are not in general relevant to any issue before the Examiner. The issue is not whether someone within Local 150 believed Carmen Dickinson did or did not provide representation in some other case, but whether Dickinson's actions in this case satisfy the standard for fair representation. To the extent that Dickinson may have been disciplined for her actions in representing the Complainant, or may have filed a grievance against Local 150 in response to some adverse action resulting from her representation of the Complainant, such discipline or grievances would be relevant. The subpoena is quashed with respect to the requested information, except to the extent that any grievances by, or discipline of, Dickinson relates to her representation of the Complainant in these grievances.

The request for "any letters written by any employees of SEIU Local 150 during the last five years relating to allegations of inappropriate use of union funds or complaints by members of SEIU Local 150" is overly broad. To the extent that the Complainant theorizes that Local 150 made a policy decision to redirect money from representational activities to organizing activities, that policy decision is a matter of internal Union politics. It would only be relevant to this case if the Complainant demonstrates that the Local decided not to pursue her grievance solely on the grounds of cost considerations. The subpoena is quashed to the extent that it seeks documents other than those addressing the cost of grievance processing and arbitration since 2001.

The request for "A copy of any documents relating to SEIU Local 150 work site leader elections at the Muskego-Norway School District during the last five years" relates directly to the Complainant's theory of the case, is not burdensome or overly broad, and is relevant and material.

19. A copy of all documents provided by Lois Novak during the last four years to Union employees that support her grievances or evidentiary support thereof.

The Union's Objection: This request should be limited to documents which relate to the grievances at issue in this case.

The Complainant's Response: The earliest incident upon which the termination of Lois Novak's employment was based was the warning to her on November 7, 2001 that she should not bring food from home. A request for documents that have been provided to the Union that support Lois Novak's grievances during the last four years is a reasonable request.

Ruling: The request for "A copy of all documents provided by Lois Novak during the last four years to union employees that support her grievances or evidentiary support thereof" relates directly to the Complainant's theory of the case, is not burdensome or overly broad, and is relevant and material.

20. A copy of all medical reports, notes and records furnished by Lois Novak to SEIU Local 150 union employees.

The Union's Objection: This request should be limited to documents which relate to the grievances at issue in this case.

The Complainant's Response: The Union's position is inconsistent with the fact that it has served a subpoena on Lois Novak for "all medical records which relate to any medical condition which affected Complainant's job performance while employed at Muskego-Norway School District for the period January 1, 2001 to the date of her termination."

Ruling: Given that the Complainant's termination was allegedly due in part to a medical condition, the information in the Union's possession related to her medical condition would be relevant to whether its decisions relative to representation were consistent with the duty of fair representation. This request relates directly to the Complainant's theory of the case, is not burdensome or overly broad, and is relevant and material.

Dated at Racine, Wisconsin, this 29th day of November, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner

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