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-D

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.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

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 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.

Hearings were held in Muskego, Wisconsin, on December 7, and 8, 2004, and January 17, 2005, at which time the parties presented such testimony, exhibits, other evidence and arguments as were relevant. At the conclusion of the Complainant's case-in-chief, the Respondents moved to dismiss the complaint on the grounds that the Complainant had failed to prove a violation of the Respondent Union's duty of fair representation. After hearing arguments in favor of and in opposition to the Motion to Dismiss, the Examiner granted the Motions. A transcript of the proceeding was received on January 23, 2005, whereupon the record was closed.

On the basis of the record evidence, the arguments of the parties, and the record as a whole, the Examiner makes and issues the following, Findings of Fact.

FINDINGS OF FACT

1. Lois L. Novak was, from 1979 until the time of her termination in October of 2003, a municipal employee, employed by the Muskego-Norway School District as a cook manager in the School District's Food Service operation, at Lake Denoon Middle School. Ms. Novak is a resident of Muskego, Wisconsin.

2. The Muskego-Norway School District is a municipal employer, which provides general educational services to children in the vicinity of Muskego in southeastern Waukesha County. The School District's Assistant Superintendent in charge of business services is Robert Rammer, and the District's Superintendent is Dr. Richard Drury. The District's business address is S87 W18763 Woods Road, Muskego, Wisconsin 53150.

3. Local 150 of the Service Employees International Union is a labor organization having its offices at 8021 West Tower Avenue, Milwaukee, Wisconsin 53223. The President of Local 150 is Debbie Timko, and the Business Agent responsible for servicing the unit at the Muskego-Norway Schools is Carmen Dickinson. Dickinson took over from the prior Business Agent, Steve Cupery, in 2001, following a change in the Local's leadership.

4. Local 150 is the exclusive bargaining representative for the regular full-time and regular part-time food service employees of the District. The District and Local 150 are parties to a collective bargaining agreement which provides, *inter alia*, that terminations will

be for proper cause, and that the District will generally follow the tenets of progressive discipline. The contract further provides for a grievance procedure, and a separate provision for the arbitration of grievances.

ARTICLE V
Grievance Procedure

5.01 Purpose
The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this Agreement. A determined effort shall be made to settle any differences through the use of the grievance procedure.

5.02 Definition
Grievance shall mean any disputed matter pertaining to conditions of employment, including the meaning, application and interpretation of this Agreement.

5.03 Steps in Procedure
Grievances shall be processed in accordance with the following procedure:

5.031 Step 1. An earnest effort shall be made to settle the matter informally between the employee and the immediate supervisor within thirty (30) calendar days after the facts upon which the grievance is based first occur or first become known.

5.0311 If the matter is not resolved, the grievance shall be presented, in writing, by the employee to the Food Service Director within thirty (30) days after the facts upon which the grievance is based first occur or first become known, or within ten (10) work days after the conference in 5.031. The director shall meet with the aggrieved employee, accompanied by a representative of the Union if the employee so chooses, within ten (10) work days of the submission of the written grievance and shall respond, in writing, to the aggrieved employee and the Union within ten (10) work days of such meeting.

5.032 Step 2. If not settled in 5.0311 above, the grievance may, within ten (10) work days, be appealed in writing by the employee to the Superintendent of Schools. The Superintendent shall meet with the aggrieved employee, accompanied by a representative of the Union if the employee so chooses, within

ten (10) work days of the submission of the appeal and shall respond in writing to the aggrieved employee and the Union within ten (10) work days of such meeting.

5.033 Step 3. If not settled in 5.032 above, the grievance may, within ten (10) work days, be appealed in writing by the employee to the School Board. The Board shall meet with the aggrieved employee, accompanied by a representative of the Union, if the employee so chooses, within fifteen (15) work days of the appeal and shall respond in writing to the aggrieved employee and the Union within ten (10) work days of such meeting.

5.04 Definition of Work Day
Work day, as used above, shall mean Monday through Friday, excluding the nine (9) holidays as identified in Section 8.03 of this contract, plus non-school days during spring and winter recesses.

5.05 Effect of Time Limits
The parties agree to follow each of the foregoing steps in the processing of a grievance. If the Employer fails to give a written answer within the time limits set out for any step, the employee may immediately appeal to the next step. Grievances not processed to the next step within the prescribed time limits shall be considered dropped.

5.06 Content of Grievances
The written grievance shall give a clear and concise statement of the alleged grievance, including the facts upon which the grievance is based, the issue involved and the relief sought.

5.07 Representation
The employee representative may assist in processing the grievance at any step.

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5.11 Extension of Time Limits
Time limits contained in this Article shall be extended by mutual consent of both parties.

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ARTICLE VI
Binding Arbitration

6.01 Requirements
In order to process a grievance to Binding Arbitration, the following must be complied with:

6.011 Written notice of request for such arbitration shall be given to the Board within ten (10) working days of the receipt of the Board's last answer.

6.012 The matter must have been processed through the grievance procedure within the prescribed time limits.

. . .

ARTICLE XXVIII
Disciplinary Procedure

28.01 Progressive Discipline
No employee shall be disciplined or discharged except for a proper cause. The Employer agrees to apply progressive discipline with the intent of correcting employee performance. The normal sequence of disciplinary measures shall be as follows:

28.011 Oral reprimand

28.012 Written reprimand

28.013 Suspension without pay (not to exceed ten [10] days)

28.014 Discharge

It is understood that the above sequence of disciplinary measures is intended to apply to routine infractions, and that serious cases of employee misconduct may result in more severe disciplinary actions, as outlined in published School Board Policy 658.2.

28.02 Written Reprimands
Any written reprimand not contested or sustained in the grievance procedure shall be considered a valid warning. An employee or employee and Union representative together, has the right to inspect the personnel file and formally append clarifying or mitigating statements to any critical item found therein.

28.03 Union Access
Copies of all written reprimands, notices of suspension, and notices of discharge shall be promptly forwarded to the President of the Union. The Union shall, also, be granted access to all records and information having a bearing on the case that will assist in the defense of the employee.

28.04 Discharge Grievances
Any employee who is discharged may initiate a grievance at Step 2 of the grievance procedure.

. . .

The collective bargaining agreement also provides that the District will carry Workers Compensation insurance, and for supplemental benefits to injured workers:

ARTICLE XX
Workers Compensation

20.01 Coverage
All employees covered by this Agreement are entitled to Workers Compensation.

20.02 Period of Full Pay
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 compensation checks for said period be endorsed and turned over to the Administrative Assistant in lieu of full pay. Any compensation insurance received after the above three months will be retained by the employee until such time as he returns to work. There shall be no deductions from the employee's sick leave accumulation when an employee is absent due to a compensable injury or illness.

. . .

5. The District provides meals to children in its schools, through a Food Service program. The Food Service program is managed by the Taher Company, under a contract for management services. The Food Service workers in the program are employees of the School District, but their supervisors work for Taher. From January through June of 2000, Christina Harrass was the Interim Food Service Director for Taher at Muskego-Norway Schools. She was replaced by Amy Welk, who stayed until September of 2002, when Harrass returned as Food Service Director. Harrass and Welk overlapped one another from mid-August until late September, 2002.

6. Lois Novak was a member of the bargaining unit represented by SEIU Local 150, and was a long-time work site leader (a steward) for the Local. As a work site leader, she served on the bargaining team for the Local in negotiations with the District, along with Carmen Dickinson. Between Dickinson's arrival in early 2002 and the events leading to Novak's termination in October of 2003, Novak and Dickinson met with one another on various issues approximately eight times.

7. On October 28, 2002, Novak reported an injury to her right shoulder as a result of tripping over an electrical cord in the kitchen at Lake Denoon Middle School. She filed a workers compensation claim, which the District opposed. On the advice of Carmen Dickinson, Novak contacted the law firm retained as counsel for the Union, which also has a substantial workers' compensation practice. After reviewing the information Novak mailed to him, attorney Steven Kruender returned the packet of documents along with a letter advising Novak that the claim was not worth the expense of retaining the law firm, and advising her of the procedures for pursuing the claim on her own. Novak sought to have the Local represent her on the claim, but the Union declined on the grounds that it did not, as a matter of policy, provide individual representation on workers' compensation claims.

8. The District has a policy that food for use in school meals should not be brought from workers' homes. On November 7, 2001, Novak was given a verbal warning for allegedly bringing food from home for use in preparing meals.

9. On September 6, 2002, Novak was given a written warning for alleged food safety violations. She was accused of cutting brownies without wearing gloves, eating brownies while she was preparing them, and continuing to prepare foods without washing her hands after she had eaten the brownies.

10. On October 30, 2002, Novak was issued a written warning for alleged unsafe food handling practices. She was accused of leaving pans of cooked ground beef on a counter for an extended period of time and with failing to keep pans of other food at proper temperatures.

11. On February 11, 2003, Novak was suspended for three days for an incident in January in which other employees reported that she had been observed chopping lettuce while suffering from a nose bleed. According to the other workers, she bled into the salad and, after being told she was bleeding, did not discard the lettuce, and continued to prepare it, including the portion she had bled into.

12. Shortly after the notice of suspension, Novak suffered a heart attack, and was off work for a period of time. Three-then pending grievances were, by agreement of the Union and the District, placed on hold until her return to work. This agreement was formalized by a letter from Rammer to Dickinson:

. . .

> This letter will confirm our conversations of March 7 and 27, 2003 concerning the three grievances filed by Lois Novak.
>
> Given Mrs. Novak's absence from work, the Union, on behalf of Mrs. Novak, and the District mutually agree to suspend all time lines outlined in Article V of the Collective Bargaining Agreement and hold all of Mrs. Novak's grievances in abeyance until her return to work.

. . .

13. The three grievances which were placed on hold were working conditions grievances, not grievances over the discipline imposed on her in 2001, 2002 and early 2003.

14. In 2003, Novak suffered from a latex allergy, eczema or other skin conditions that caused her to suffer from rashes and sores on her hands and arms. Christina Harrass met with her in late August and advised her that any open sores should be covered with bandages, and that gloves should be worn while working in the kitchen. This directive is consistent with normal and accepted practice in the food industry, and with the procedures that Novak and other kitchen workers had been trained to follow.

15. On September 9, 2003, Harrass sent Novak home from work after Harrass and several of Novak's co-workers allegedly witnessed her handling equipment and food without using gloves and without following other food safety procedures. Central to these allegations was Harrass's observation that she had open sores on her hands. She was directed to consult with Dr. Darin Maccoux, a physician used by the District, before returning to work. Dr. Maccoux examined her and released her to return to work the following Monday, September 15th.

16. On October 2, 2003, the instant complaint was filed, alleging that the SEIU had refused to represent Novak on grievances, had failed to assist her in her workers' compensation case against the District, failed to assist her in obtaining accommodations for her attention deficit disorder, failed to communicate with her, and had failed to hold elections for Union office.

17. Novak was terminated in mid-October, 2003 for allegedly unsafe food handling practices. The reasons for the termination were set forth in an October 14th letter to her from Assistant Superintendent Robert Rammer:

. . .

Dear Ms. Novak:

This letter is to summarize the conclusions reached during an investigation into recent events regarding your employment.

On September 9, 2003, you were observed working in the kitchen with food products. Witnesses reported seeing you that day and described both your hands as having noticeable open abrasions/sores on them and at times they were not bandaged or gloved. When Chris Harrass, Food Service Director, asked you about it, you indicated that you did not see any problems with working with them and that you had a longstanding condition on your hands. Ms. Harrass reminded you that any open cuts or sores needed to be both bandaged and gloved. At that time Ms. Harrass directed you to leave the kitchen preparation area and wait for her in the kitchen office. She then told you to go home. Before leaving, you were again observed handling food preparation utensils/pans without wearing gloves as you directed kitchen staff. Subsequently, you were examined by a physician on September 11, 2003, who described your hands as having non-infectious abrasions on the knuckles and contact dermatitis at the left wrist. The doctor instructed you to take precautions universally applied to all employees when working with food, and that you should be off of work until September 15th.

You have been warned, in writing, on at least four other occasions regarding food safety violations. On November 7, 2001, you were directed not to bring in food from home for use in school meals. Your actions then were in direct contravention of memos dated September 22, 2000 and July 17, 2001.

On September 6, 2002, you were warned in writing about food safety violations after you were observed cutting brownies without wearing gloves, eating brownies while preparing them and failing to wash your hands after eating the brownies. At that time, you were warned that future violations could result in additional discipline, up to and including discharge.

Less than two months later, you were given another written warning on October 30, 2002, after you had left pans of cooked ground beef sitting out on a counter for an extended time and after you failed to keep pans of other food at proper temperatures. You were again told that future violations could lead to suspension or discharge.

On February 11, 2003, you were suspended for three days without pay after you were observed chopping lettuce while your nose bled into the lettuce. After a

fellow employee alerted you to the fact that you were bleeding, you went to the bathroom to clean up, returned and continued to chop lettuce and add it to the bin in which you had bled. Once again, you were warned that your position was in jeopardy if future incidents occurred.

You did not grieve any of your prior warnings or suspensions regarding food service safety violations.

There can be no doubt that you are aware of the requirements of food safety. You have been trained and certified in food safety and proper food handling, as recently as the beginning of this school year. It is apparent that you are just not taking these requirements seriously.

On October 3, 2003, we met with you, accompanied by your attorney, and shared with you our concerns about your performance and indicating that the District was considering your termination. You were offered an opportunity to resign through a settlement agreement that would have provided you with District paid health and dental insurance for one year. Through your attorney, you have declined to resign. You were given an opportunity to provide information as to why you should not be terminated. A meeting date for your response was set, as requested by your attorney, at 5:00 p.m. on Wednesday, October 8, 2003. In lieu of a personal meeting, your attorney provided a written response to the District's concerns on Monday, October 13, 2003.

Despite repeated warnings, counseling and training, you continue to jeopardize the health and safety of the students at Lake Denoon Middle School. As the head cook at that school, you are particularly responsible for the maintenance and adherence of safety and health procedures in that kitchen. The District has given you numerous chances and has provided you with many supports and resources to perform your job in an appropriate and safe manner. Given the responsibility the District has for the well being of its students, the District can no longer tolerate these types of behaviors. Accordingly, your employment is terminated effective immediately.

. . .

18. In its investigation of the alleged incidents at Lake Denoon Middle School on September 9th, the District collected written statements from Food Services Director Christina Harrass, and four of Ms. Novak's co-workers – Kathy Adams, Cynthia Ermis, Joan Komassa and Peggy Counter.

Christina Harrass's statement was:

On August 28, 2003 I went to Lake Denoon and talked with Lois Novak. I noticed sores on her hands and arms, red, swollen, wet looking - similar sores to what I saw at the end of last school year. I told her she would have to bandage the sores, wear gloves on her hands and cover her arms until the sores were gone. She acknowledged she should keep them covered. She even told me she would get her own gloves to ensure they were properly covered.

On the afternoon of September 8, I received a phone call from the Lake Denoon staff telling me they saw Lois bleeding that day, and showing her bleeding hand to a fellow employee.

On the morning of September 9, I went to Lake Denoon and witnessed Lois Novak touching food, utensils, and pans without wearing gloves. Specifically, she was carrying 2" full pans, a stainless steel bowl, a scale, and a pair of gloves and bringing them to her work area. She then opened a pan of mozzarella cheese, "scooped" the cheese with the stainless steel bowl she was carrying without gloves, then put on her gloves to proceed with making the lasagna for that days lunch. I confronted her and told her that she had to wear gloves at all times because of her sores. I explained to her that touching a pan or bowl without gloves and then adding food to that pan could cause contamination.

At that point, she peeled back the glove on one hand, touched the sore with her other gloved hand, and was talking to me about how she is unsure why she has the sores, what her doctor has said, and how she feels uncomfortable about them. The sores were very red, and wet looking. I saw no scabs on the wounds. She then pulled the glove back in place, and walked around the table to her work area. I told her she must change her gloves before starting to work again because she contaminated the one glove by touching the sore. I asked her to stop working because I wasn't comfortable with her preparing food.

I went into the kitchen office and called Mr. Rammer. I left a message for him explaining the situation and asked him to call me at Lake Denoon as soon as he could. When he called, he agreed it would be in the schools best interest if she was sent home and saw the district doctor.

I called Lois into the office and asked her to leave for the day, and not return to the kitchen until I heard back from Mr. Rammer regarding seeing the district doctor. She agreed and said she would go. She asked about finishing some paperwork, I told her to come to my office the following day and finish it, and at that time I would let her know what was decided about seeing the doctor.

Cynthia Ermis's statement was:

Lois Novak has always had sores all over her arms and hands.

On September 9, 2003, I came in and Lois was supposed to leave. Lois was picking up pans and wasn't wearing gloves and the sores were all the way down onto the top of her hands.

Joan Komassa's statement was:

On September 8, 2003, I was at the sink in the back. Lois Novak showed me her hand that was bleeding, a lot. It's not the first time, she's left blood rags around before. This happened in between the lunches. I don't recall where she went after that. I don't miss her bloody rags that she leaves around here. I found one of the bloody rags on a table where we prepare food before.

Peggy Counter's statement was:

On September 9, 2003, Lois Novak was at the back table. She had sores on her hands, both hands. She was picking up pans without gloves on and then preparing food. The sores were open, weeping, not scabbed over, definitely open.

I told Lois to get out of the kitchen. "If you pick up the pans they have to be put through the dishwasher." After Chris came over, Lois came back into the kitchen and handled pans again without gloves on.

Kathy Adams' statement was:

I think on September 8, 2003, Lois Novak was bleeding in her gloves. She took off the glove and showed it to Joan.

On September 9, 2003, she was handling pans without gloves on. I was not close to her, but I can't imagine that they would heal over night.

On September 15, 2003, she took off her gloves, and without washing her hands, she touched uncooked chicken. There were sores on her hands at that time.

19. A grievance was filed on October 13th, protesting the termination. Carmen Dickinson met with the food service employees who had given statements to the District, and questioned them about what they witnessed. Their statements to her were consistent with the statements they provided to the District.

20. Novak told Dickinson that she had not had open sores on her hands, and she denied working without gloves, except for having picked up a dirty pan on her way out and placing it in the sink.

21. Carmen Dickinson represented Novak at the second step grievance meeting before Superintendent Drury. At that meeting, she presented a written argument to Drury, asserting that the discipline was discriminatory, that the prior discipline was unwarranted and that there were substantial mitigating factors:

STATEMENT OF FACTS
Lois Novak- 2nd step grievance hearing

Ms. Novak has been employed with the Muskego-Norway School District since December 3, 1979.

Ms. Novak had an acceptable work record up until 2002; in fact she received an award in 1988 from the American School Food Service Association.

Ms. Novak served as Manager at Muskego Elementary and then Lake Denoon Middle School until terminated on October 14, 2003.

The District cited five separate incidents as reason for termination. Ms. Novak provided a response on October 13, 2003 (attachment 1) to the allegations made by the District on 9-6-02, 10-30-02, 11-7-02, 2-11-03 and 9-9-03. The Union wishes to submit additional information in support of Ms. Novak's' position that the District acted harshly and inconsistently in administering its' discipline and terminating Ms. Novak on October 14, 2003.

l. ADHA Accommodation - Ms. Novak informed the District in March of 2003 (attachment 2) of an ongoing disability, Attention Deficit/Hyperactivity Disorder (ADHD), she had recently been diagnosed with by her attending physician. She had been prescribed medication and was in treatment for her disability as far back as 2001. In fact, the District was given a list of specific accommodations Ms. Novak would need in order to function in her daily work environment. One of the major accommodations necessary was the need to have all conversations and/or instructions reduced to writing. Ms. Novak had requested that Ms. Harrass submit a written follow-up to their conversations yet, never received such correspondence. The only

written correspondence Ms. Novak received was in the form of a write-up. Also, Ms. Novak's accommodation called for an environment free of "white noise". Ms. Novak felt this accommodation hadn't been fully enforced by the District. Therefore, making it difficult to complete her job tasks and to concentrate on paperwork and ordering.

2. Inconsistent treatment - Ms. Novak was disciplined for alleged violations that had been an accepted practice in the district.

   There has been a history of asking Manager's to buy needed food supplies at the local grocery store. The manager would then submit a receipt for reimbursement. Ms. Novak had purchased celery for her kitchen but had lost the receipt. Therefore, she didn't submit the receipt. Instead of rewarding her for going above and beyond her regular duties, Ms. Novak was written up.

3. Grievances - The district made an allegation that Ms. Novak didn't grieve her previous write-ups. This is untrue; Ms. Novak grieved each write-up and submitted a written statement outlining her grievance. Also, the District and Union had agreed to hold several grievances in abeyance in order to work with Ms. Novak on her medical accommodations. Also, the Union has requested copies of all statements which support the allegations made by the District and as of today, has not received such statements.

   In closing, we are asking the District to rescind the termination and to reinstate Ms. Novak with full back pay and to make her whole for all losses.

. . .

Drury denied the grievance, and it was advanced to the third step, a hearing before the School Board.

22. Dickinson met with Novak and her private attorney to prepare for the appeal before the School Board. At the Board hearing, Dickinson submitted the same arguments she had made to Drury, and had Novak testify on her own behalf. Dickinson and Novak left the meeting before the decision was announced. Dickinson told Novak that the next step would be an appeal to arbitration, and that she should provide any additional information relevant to her case by March 15, 2004.

23. The School Board voted to deny the grievance, and prior to the running of the time limit for notice of appeal to arbitration, Dickinson advised the District in writing on February 13, of the Local's intention to advance the grievance to arbitration.

24. Novak did not submit any further information to Dickinson prior to March 15. Dickinson reviewed the case with the Local's attorneys, and concluded that Novak was, despite her denials, provably guilty of the charges and unlikely to prevail in arbitration. On April 8, Dickinson advised Novak that she would not take the case to arbitration.

25. On August 27, 2004, the instant complaint was amended, to assert that Novak was improperly terminated, and that the SEIU had failed to provide timely representation before the termination, provided representation after termination, but abandoned that representation when it refused to take the case to arbitration, and had failed to provide representation on Novak's workers' compensation claim.

26. Carmen Dickinson did not evince hostility towards Lois Novak in the processing of her discharge grievance, nor in the 18 months preceding that grievance.

27. Carmen Dickinson reasonably concluded that Lois Novak would very likely be found guilty of the misconduct alleged if the grievance proceeded to arbitration, and that there was little chance of prevailing on the grievance.

28. The filing of an intent to seek arbitration in order to meet the time limits of the collective bargaining agreement does not constitute a binding pledge to actually arbitrate, nor does it show that the Union believes the grievance to be meritorious.

29. The decision of Local 150 not to proceed to arbitration on Novak's discharge grievance was neither arbitrary, discriminatory nor motivated by bad faith.

30. Local 150 has a uniform policy of not providing representation to individuals on contested workers compensation claims. Local 150 does not have the status of an exclusive representative for its members with respect to claims under the workers compensation statutes. The decision of Local 150 not to provide representation to Novak on her workers compensation claim is neither arbitrary, discriminatory nor motivated by bad faith.

31. Local 150 did not violate its duty of fair representation with respect to Lois Novak's termination grievance.

32. Local 150 did not violate its duty of fair representation with respect to Lois Novak's claim for workers' compensation benefits.

33. With respect to the merits of Lois Novak's termination grievance and claim for contractual workers' compensation benefits, the arbitration step of the collective bargaining agreement has not been exhausted prior to the filing of a complaint with the Commission.

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

CONCLUSIONS OF LAW

1. That the Complainant, Lois Novak, is a municipal employee, within the meaning of Section 111.70(1)(i), MERA.

2. That the Respondent, Muskego-Norway School District, is a municipal employer, within the meaning of Section 111.70(1)(j), MERA.

3. That the Respondent, Service Employees International Union, Local 150, is a labor organization within the meaning of Section 111.70(1)(h), MERA.

4. That by the conduct described in the above Findings of Fact, the Respondent labor organization did not commit prohibited practices within the meaning of Section 111.70(3)(b), MERA.

5. That because the contractual grievance procedure has not been exhausted, the Examiner will not exercise the Commission's jurisdiction to determine whether the Respondent employer has committed prohibited practices within the meaning of Section 111.70(3)(b), MERA.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

It is ORDERED that:

The instant complaint be, and the same hereby is, dismissed in its entirety.

Dated at Racine, Wisconsin, this 19th day of May, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

MUSKEGO-NORWAY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

The Complainant's case in chief was heard on December 7 and 8, 2004, and January 17, 2005. At the conclusion of the Complainant's case, the Respondents moved for dismissal of the case, and that motion was granted. The parties' arguments in favor of and in opposition to the motion to dismiss as presented at the last day of hearing were:[1]

The Argument of the Union in Favor of the Motion to Dismiss

> MR. ROBBINS: Mr. Examiner, at this time we would move to dismiss the complaint. I think the law and the duty of fair representation and the union's decision as to whether to proceed to grievance is rather well settled. Just as a union has to make a decision about holding frivolous cases, so it has wide latitude to make decisions about not so frivolous cases. And the duty of fair representation does not involve second-guessing the judgment of the Union, unless you can show that that judgment was made in bad faith.
>
> Here I think the words in the Supreme Court case is a "wide range of reasonableness is allowed the Union in its decisions." Here there was progressive discipline, there were several eyewitness statements from co-workers about violations of the food safety regulations. They were food safety regulations that Ms. Novak was well aware of. She portrayed the documents showing the very precautious steps you take for food safety. It was well known to her.
>
> And whether — Whether she had hives or rashes, open lesions, cuts, healing burns is irrelevant to what the expectation was. What it comes down to here is, Ms. Novak is saying the Union should have made a credibility judgment and not believed any of her co-workers and believed everything she said.
>
> That doesn't come within a mile of a breach of the duty of fair representation. The only evidence presented here of any hostility related to an incident in early 2002 in which she alleges she was removed as a steward; but then says "I always did remain a steward." In fact, they worked together on the Bargaining Committee together to negotiate the contract.

[1] The Union's argument appears in the transcript at pages 596-598; The District's at pages 598-599; The Complainant's at pages 599-604.

In any case, assuming arguendo, the statement was made in early 2002. That doesn't prove bad faith relating to the decision made in March or April of 2004 about the merits of whether — of the grievance, whether the Union should arbitrate it.

Given the progressive discipline, given the eyewitness statements, given the grievant's knowledge of food safety precautions, the Union was within its wide range of reasonableness in making a decision.

They simply haven't proven what they need to prove to show a breach of duty of fair representation. Therefore, we ask that the case be dismissed.

The Argument of the District in Support of the Motion to Dismiss

MR. ALDANA: The District joins. The Examiner is well aware of the high standard that Ms. Novak needs to meet in order to sustain a breach of the duty of fair rep. I'm not going to repeat what Mr. Robbins has already said, but there's just nothing that comes close to any evidence, even weighing in the light most favorable to Ms. Novak for purposes of this motion that would establish [arbitrary],[2] capriciousness, discrimination or bad faith.

There was a mountain of evidence from a number of people who said Ms. Novak did what she did, the Union members, members of the District's Administration. It was entirely reasonable for the Union to determine not to take that forward.

There's no evidence showing any kind of bad faith or arbitrariness. Ms. Dickinson requested additional information from Ms. Novak, which was never forthcoming.

Ms. Novak just cannot — No reasonable fact finder could find that the Union — that Ms. Novak has met or the Union met its duty of fair rep.

So obviously, the District would like to avoid having to put its case on. I think the plausibility of evidence here is just so apparent, we should spare everybody the time and the expense not only of the rest of this hearing, but of briefing this. There's just nothing in the record that would establish a breach of the duty of fair rep. I think the case should be dismissed.

[2] The transcript, in several places, incorrectly shows the word "arbitrability" where the speaker used the word "arbitrary."

The Argument of the Complainant in Opposition to the Motion to Dismiss

MR. JONES: Yes. The allegations against Mrs. Novak are totally – totally unreasonable. I mean as far as the September 9th, 2003, alleged incident. The witness statements are completely contradictory. Some of the witnesses didn't even recall the incident.

The statements were given on October 6th, 2003, after Mrs. Novak was fired. There was a basis for animosity by Chris Harrass against Mrs. Novak. She was a 25-year employee. She attempted to do her job in the best way she could. And basically, she's fired on the trumped-up charges that she's got bleeding hands and that's bleeding into the food.

I mean, the testimony — The testimony by Chris Harrass against her was that she — she had a bare hand using a bowl as a scoop to scoop up mozzarella cheese that was going to be used for cooking in a very hot oven, meaning — I think it's been conceded by the witnesses that if her hands were in pristine condition, she did absolutely nothing wrong. So a lot of the dispute was over the condition of her hands.

The eyewitness statements — Cynthia Ermis says later on October 6th, after Mrs. Novak is fired, that Mrs. Novak has always had sores all over her hands and arms. It's just an absurd statement.

Peggy Counter says she had — she had sores on her hands, both hands, sores were open, weeping, not scabbed over, definitely open. That just flies in the face of reality and the other testimony.

Kathy Adams says she wasn't close to observing her on September 9th, but I can't imagine that her hands would heal overnight. Well, two nights later or two days later she sees Dr. Maccoux at the direction of the School District, and he doesn't find anything substantially wrong with her hands.

I mean, this is just minor technicality that they're trying to come up with and blow it up into a big deal to get rid of her. I mean, there had been a decision by Chris Harrass to send her home even before Ms. Harrass had talked to Dr. Rammer.

As far as proving that the Union didn't represent her or failed in their duty to represent her, Carmen Dickinson indicated that this is an employee-driven process. Carmen Dickinson took the — represented Lois Novak before Dr. Drury, the superintendent, and represented her before the School District and brought these arguments forward; and then on at the hearing in December

says, even though she made these arguments to the School District and took up everybody's time, she previously had felt that they were meritless. That's just disingenuous.

Nobody in their right mind would go to the School District, provide the representation, would go to the School Board and argue a person's case and then later on say it was totally meritless.

I mean, basically, she promised right after the School Board meeting, promised Mrs. Novak that she would take it to arbitration. The first time it's two months later by letter, Lois Novak finds out that this is not going to be taken to arbitration.

I mean, we wouldn't be sittings here if it was taken to arbitration. Mrs. Dickinson — It was just unreasonable not to take it to arbitration.

Now I understand that we have a very high burden in our duty of fair representation claim, and it's difficult to look into the minds of Carmen Dickinson or whoever else is advising her on not taking it to arbitration. That sort of motivation is not easy to prove; but the decision not to take it to arbitration is unreasonable, especially after adequate representation before Dr. Drury had been provided and adequate representation before the School Board had been provided.

Nothing new came up to show that Mrs. Dickinson's statements or Mrs. Novak's statements were untrue or her credibility was weak. The credibility of these other witnesses — I mean, just from their statements, just on the face of it, the inconsistencies in these statements is just incredible. I mean, if we didn't have the duty of fair representation issue here, it would be totally unreasonable to fire Lois Novak based on this incident — this September 9th, 2003, incident.

I mean, her hands were in good shape, Dr. Maccoux testified to that. Dr. Zirbel testified, admittedly it was in January that she saw Lois Novak; but she didn't see any — any major evidence of infection of any kind of severe problems.

These witnesses were testifying that she had — they could see her arms. Well, she brought in her uniform. She had a long-sleeved shirt. I think there was a duty to provide representation, especially of somebody who had been working for the School District and working for the Union for 25 years. And on the face of it, the claims are just — the claims of improper conduct on the part of Mrs. Novak were just so inconsistent, so incredible not to provide

> representation was unreasonable; and I certainly think there wasn't proper cause for firing her on a minor allegation that's not adequately proven. It's just a shame.

DISCUSSION

Section 111.70(3)(a)5 makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. Section 111.70(3)(b)4 is a parallel provision, making it a violation of MERA for a labor organization to violate the contract. However, where the parties have negotiated a contract which includes grievance arbitration as the mechanism for enforcing contractual rights and the grievance procedure has not been exhausted, the Commission will not exercise its discretion to hear claims of 3(a)5 and 3(b)4 violations. Instead, the Commission will honor the parties' contract and the grievance procedure will be presumed to be the exclusive venue for these claims. This is a rebuttable presumption, and the Commission will assert its jurisdiction to hear contract claims where the parties waive reliance on the grievance procedure, [3/] or where there is clear and satisfactory evidence that the grievance and arbitration machinery cannot be relied upon to dispose of employee grievances.[4/] In this case, the Complainant alleges that she has not had effective access to the contract because the Association has failed to fairly represent her, by refusing to take her grievance to arbitration.

The Association's Duty of Fair Representation

The Association is the exclusive representative of the employees. This exclusive status confers certain legal rights on the Association and carries with it corresponding responsibilities, chief among them the duty to provide fair representation to each of its members. Fair representation is not, however, perfect representation, nor is it a guarantee that every individual member will be satisfied with each act or decision taken by the labor organization. The Commission and the courts have recognized that:

> The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. . . . Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes…".[5/]

[3/] ALLIS CHALMERS MFG. CO., DEC. NO. 8227 (WERB, 10/67).

[4/] Typically this occurs where the party alleged to have violated the contract rejects the arbitration provision (MEWS READY-MIX, 29 WIS.2D 44 (1965)), or where an employee does not have meaningful access to the grievance procedure because the labor organization has violated its duty to fairly represent the employee (MAHNKE V. WERC, 66 WIS.2D 524 (1975).

[5/] HUMPHREY V. MOORE, 375 U.S. 335 (1964); See also, MILWAUKEE COUNTY, DEC. NO. 28754-B (MCGILLIGAN, 1/97).

The duty is satisfied so long as a labor organization represents its members' interests without hostility or discrimination, exercises its discretion with good faith and honesty, and acts without arbitrariness in its decision making. Thus, the legal formulation for a breach of the duty of fair representation is whether the Union's actions are arbitrary, discriminatory or taken in bad faith.[6/]

The Union's Decision Not To Arbitrate The Complainant's Termination

The Complainant believes that the Union failed to represent her, in that after initially giving notice of intent to arbitrate, it declined to take her case to arbitration. Her belief is that the charges against her are false, that the evidence suffices to show that, and that Dickinson's hostility or indifference to her grievance was the underlying reason for the decision not to arbitrate.

On its face, the Complainant's dissatisfaction with the decision not to arbitrate is easy to understand. She is a 25-year veteran of the District, and has been a leader of the Union. Certainly, it is not unreasonable for her to believe that her termination would be pursued to arbitration. Her expectations do not define the legal standard. The question, instead, is whether the Union's decision making was arbitrary or based on something other than a good faith evaluation of her case. There is no evidence to support such a conclusion.

The evidence of hostility to the Complainant by Dickinson and/or the Union is largely inferential – since the Complainant believed her case to be meritorious, and since it was not arbitrated, there must be some improper motive. Beyond that circular belief, however, there is nothing to lead to a finding of hostility. The Complainant alleges an unpleasant interaction with Dickinson when she first took over servicing the bargaining unit, in the course of which she says Dickinson yelled at her and told her she was removed as the work site leader. Dickinson denies it, and the Complainant remained the work site leader for another two years after that meeting. They worked together on bargaining, work site issues and grievances, without any further evidence of hostility. No witness, including the Respondent, was able to identify any hostile comments or acts by Dickinson between the date of their first meeting and the date on which Dickinson told her that her case would not be arbitrated. The Complainant does complain that Dickinson was hard to reach and was not responsive to her, but dissatisfaction with the level of service provided is not the issue – the issue is whether the ultimate decision making was tainted by hostility or bad faith.

In assessing this grievance, Union Representative Carmen Dickinson was faced with a claim of innocence that was flatly contradicted by the written eyewitness statements of the supervisor and all of the Complainant's co-workers who were present that day. The Complainant had been exhaustively trained in food safety, and no argument could be made that she did not know the rules. The food safety infraction that led to the termination was of the same type that had led to prior warnings and discipline, including a three-day suspension earlier that year.

[6/] VACA V. SIPES, 386 U.S. 171 (1967); MAHNKE V. WERC, 66 WIS.2D 524 (1975); GRAY V. MARINETTE COUNTY, 200 WIS.2D 426 (CT.APP. 1996); MILWAUKEE COUNTY, DEC. NO. 28754-B (MCGILLIGAN, 1/97).

Dickinson interviewed the other employee witnesses, and found them credible. She met with the Complainant and the Complainant's private attorney to prepare the case for presentation to the Superintendent and the School Board. After the grievance was denied at both of those steps, she served notice of intent to arbitrate, in order to preserve that option.[7] She asked the Complainant for any additional information that was relevant, and received none. Dickinson reviewed the case with the Local's attorneys, and came to the conclusion that the Complainant was provably guilty of the charges against her, and that the District would be able to satisfy the "proper cause" standard for discipline under the contract.[8]

On the record of the case before me, the steps taken by Dickinson to represent the Complainant were prudent and would track those taken by any experienced representative. She investigated the allegations and concluded that the charge was true. Dickinson's judgment that the Grievant was provably guilty cannot be termed arbitrary, or even unreasonable. There is ample evidence of guilt. Even if she believed the Complainant to be innocent, she would have been faced with the task of persuading the Superintendent, the School Board or an arbitrator that the Complainant alone was an honest witness, and that all of the supervisors and all of the co-workers were perjuring themselves as part of conspiracy against her – a feat of advocacy that is almost impossible as a practical matter.

The tack Dickinson took before the School Board, questioning the appropriateness of the penalty, the legitimacy of the preceding discipline, and suggesting the presence of mitigating factors, is a course which one would expect in any case where the immediate charge is likely to be proved. Whether that would have been a successful strategy before an arbitrator is arguable. Certainly, there is some murkiness about the status of the prior discipline.[9] However, where the employee insists that she is innocent even though she is almost certain to be found guilty, a Union can reasonably be concerned about the arbitrator's willingness to first find that the Grievant is a liar, and then find in the employee's favor on other grounds. In any event, that judgment is the Union's to make. As noted by the court in HUMPHREY V. MOORE, SUPRA, the Union's freedom to make judgments extends to both frivolous and not so frivolous cases. The fact that this case may have been a hard call does not mean that it is a call for the Examiner, rather than the Union. The Union made its call, and its refusal to arbitrate falls well within the range of discretion guaranteed labor organizations by the statutes.

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[7] The Complainant argues, in part, that giving notice of intent to arbitrate suggests that the Union views the grievance as one which should, on its merits, be arbitrated. That action is just as reasonably understood as a necessary procedural step to preserve the option of arbitration pending a thorough judgment on the prospect of winning an arbitration.

[8] Dickinson testified that, in her experience, a "proper cause" standard places a lower burden on the Employer than does a "just cause" standard, and that the Union had attempted unsuccessfully to negotiate a higher standard for discipline.

[9] The Union and the District contended that the prior warnings and suspension were not grieved, while the Complainant contended they were, but were held in abeyance when she suffered a heart attack in February of 2003. The Union and District countered that the grievances held in abeyance were different grievances over working conditions, not grievance over discipline. I find the Union and the District's version of this more plausible, since the prior discipline spanned the period from November of 2001 through the Fall of 2002, and up to February of 2003, and at least as to the first three disciplinary actions, should not still have been pending in the grievance procedure as of February, 2003.

The Union's Decision Not To Provide Representation on the Workers' Compensation Claim

Although not extensively litigated, the Complainant also asserted a failure of the duty of fair representation in the Union's refusal to represent her on a Workers' Compensation claim against the District. The contract requires that bargaining employees be covered by Workers Compensation, and also provides for supplemental compensation for injured workers. When the District denied the Complainant's Workers' Compensation claim, Dickinson referred her to the Union's law firm. After assessing the monetary value of her claim, the firm declined to take the case.[10] Dickinson testified that the Union does not provide representation to employees in contested Workers' Compensation cases. They remind the employee to report all injuries to the employer, and provide contact information for the law firm. Reviewing the contract provisions here, she stated her understanding that they did not involve the Union in such representation, and that the contract simply requires the District to carry insurance, and to provide supplemental income in cases where Workers Compensation is already being received – e.g. uncontested cases or cases where the employee has been adjudged by the State to be entitled to benefits.

There is nothing in the record to contradict Dickinson's testimony about the Union's policy on these matters, or her view of the contract language. Both are consistent with the plain wording of Article XX, and with custom in the field of labor relations. The exclusive status of the bargaining representative, and thus its duty of fair representation, does not extend to representing the generic legal interests of members under non-labor statutes.[11] A labor organization can elect to provide such a service to its members, but it is not legally obliged to do so.

Conclusion

The threshold question in this case is not whether the District acted properly in terminating the Complainant. It is instead whether the Union could, rationally and in good faith, have decided that her grievance should not be taken to arbitration. The Complainant's length of service, her prominence in the Union, and the severity of the penalty all argued in favor of pursuing the matter. Balanced against that were the evidence of prior warnings about food handling practices, the very strong likelihood that she would be found guilty notwithstanding her denials, and the presence of a contractual standard that the parties have treated as requiring less than "just cause" for discharge. A reasonable Union representative, acting in good faith, could have determined that the chances of prevailing in arbitration were not sufficient to justify appealing the case further. As such, the Union's decision making cannot be termed as having been arbitrary, discriminatory or undertaken in bad faith. Neither can its failure to provide representation in the Complainant's Workers' Compensation claim be criticized. It was consistent with the contract language and with the normal practice of the Union is such cases. Because the Union had

[10] See NOVAK V. SEIU LOCAL 150, ET AL, DEC. NO. 30871-A (NIELSEN, 4/1/04) and DEC. NO. 30871-B (WERC, 7/7/04).

[11] See HOPKINS V. KENOSHA (FIRE DEPT.) ET AL, DEC. NO. 28715-B (NIELSEN, 5/15/00) at pages 21-22.

legitimate and substantial reasons for its decision making, I conclude that it did not violate its duty to provide fair representation to the Complainant, and I have dismissed her complaint in its entirety.

Dated at Racine, Wisconsin, this 19th day of May, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/
Daniel Nielsen, Examiner

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