STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KEITH A. DOMAN, Complainant,

vs.

MILWAUKEE PUBLIC SCHOOLS and
LOCAL 1616, DISTRICT COUNCIL 48, AFSCME, AFL-CIO, Respondents.

Case 415
No. 63165
MP-4007

Decision No. 30998-A

Appearances:

Keith A. Doman, 5411 West Vliet Street, Apt. #3, Milwaukee Wisconsin, appearing on his own behalf.

Donald L. Schriefer, Assistant City Attorney, 800 City Hall, 200 Wells Street, Milwaukee, Wisconsin, appearing on behalf of the Respondent, Milwaukee Public Schools.

Gene A. Holt, Attorney at Law, Law Offices of Mark Sweet, 705 East Silver Spring Drive, Milwaukee, Wisconsin, appearing on behalf of the Respondent, Local 1616, District Council 48, AFSCME, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 5, 2004, Keith A. Doman, herein the Complainant, filed a complaint with the Wisconsin Employment Relations Commission against Milwaukee Public Schools, herein the District, and Local 1616, District Council 48, AFSCME, AFL-CIO, herein the Union. The complaint alleged that the District and Union had committed prohibited practices under Sec. 111.70(3)(a)5 and Sec. 111.70(3)(b)4 of the Wisconsin Statutes, respectively, in assigning a Groundskeeper position to another employee in violation of the collective bargaining agreement between the parties. The Complainant further alleged that the District and Union committed prohibited practices under Sec. 111.70(3)(a)1 and Sec. 111.70(3)(b)1 of the Wisconsin Statutes, respectively, in coercing the other employee into accepting the position.

Finally, the Complainant alleged that the Union had failed in its duty of fair representation with respect to a grievance the Complainant had filed against the District over the assignment of the position. On June 22, 2004, the Commission appointed John R. Emery, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07 and 111.70(4)(a), Wis. Stats. On September 13, 2004, the City and Union filed answers to the complaint and, on September 15, 2004, a hearing was conducted in Milwaukee, Wisconsin. The proceedings were transcribed and the transcript was filed on September 21, 2004. On October 24, the Complainant amended his complaint by withdrawing the allegations regarding the alleged violations of Sec. 111.70(3)(a)1 and Sec. 111.70(3)(b)1 of the Wisconsin Statutes. The parties filed their initial briefs by October 28, 2004. On January 18, 2005, the Complainant filed a reply brief. Inasmuch as the District and Union had previously indicated they would not file reply briefs, the record was thereupon closed.

The Examiner, having considered the evidence, the applicable law and the arguments of the parties and being advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. The Complainant herein, Keith A. Doman, is a Wisconsin resident, residing at 5411 West Vliet Street, Milwaukee, Wisconsin. Doman has been employed as a seasonal laborer of the Respondent, Milwaukee Public Schools and a member of the Respondent, Local 1616, District Council 48, AFSCME, AFL-CIO since 1995.

2. The Respondent, Milwaukee Public Schools, maintains offices at 5225 West Vliet Street, Milwaukee, Wisconsin.

3. The Respondent, Local 1616, District Council 48, AFSCME, AFL-CIO, maintains offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin.

4. At all times pertinent hereto, a collective bargaining relationship existed between Milwaukee Public Schools and Local 1616, wherein Local 1616 was the recognized bargaining representative ". . . of those employes in the bargaining units occupying the positions and classifications as defined in the appropriate 'Certifications of Representatives,' promulgated by the WERC." Among the classifications of employees included in the bargaining unit are those of Groundskeeper and Seasonal Laborer.

5. Appendix A, Section M, of the parties' collective bargaining agreement provides as follows:

> **M. GROUNDSKEEPER VACANCIES**
>
> When a vacancy for a groundskeeper occurs, the Board will hold a promotional exam open only to Board employes. The Board will have a choice of three (3) on the promotional exam. If there are not three (3) qualified applicants on the promotional exam, the open exam will be utilized.

6. In July 1999, Doman passed a promotional exam for the position of Groundskeeper and ranked fifth among those taking the exam. In the fall of 2002, the District declared a vacancy for a Groundskeeper position. Doman was ranked third among the three candidates considered for the position, based on relative test scores. The position was ultimately offered to, and filled by, the candidate with the highest exam score.

7. At the end of 2002, a Groundskeeper retired, creating an opening within the classification. That position, along with others, was not immediately posted by the District, but was held open in the event it was necessary to transfer employees who were laid off from other positions.

8. In December, 2002, Josef Roca, the District's Manager of Buildings, Grounds and Fleet, was contacted by Dave Kwiatkowski, the District's Director of Classified Staffing, for a listing of available openings within his department, which he provided, including the Groundskeeper position.

9. In January 2003, the Groundskeeper position was offered to Russell Rapczyk, a Seasonal Laborer who had been laid off on July 1, 2002, from a position as a Radio Engineer, in an effort to settle two grievances filed by Rapczyk, which were scheduled for arbitration on January 16, 2003.

10. Rapczyk had not taken the Groundskeeper promotional exam and was not on the eligibility list for the position.

11. On January 15, 2003, representatives of the District and the Union, along with Rapczyk, executed a Memorandum of Understanding in settlement of Rapcyk's grievances, as follows:

. . .

> The following Memorandum of Understanding is made and entered into between the Milwaukee Board of School Directors and Local 1616, District Council 48, AFSCME, concerning Russell E. Rapczyk and is subject to the following:
>
> 1. Russell E. Rapczyk shall be recalled from layoff status and report at 7:30 a.m. to Patrick Pegorsch at the 39th Street and St. Paul Street facility for work as a groundskeeper, effective January 13, 2003.
>
> 2. Russell E. Rapczyk shall occupy this position as a probationary employee (transferee) in accordance with Part V, Section C, of the collective bargaining agreement.

3. In applying Appendix A, Section O, of the collective bargaining agreement to Mr. Rapczyk, he shall have a seniority date of January 13, 2003.

4. As a condition of employment, Mr. Rapczyk must attend and successfully complete a 16-week course in Introduction to Power Engineering and Fundamentals of Power Engineering. This course commences on Tuesday, January 28, 2003, and meets weekly from 9:00 a.m. to 1:00 p.m. every Tuesday until completed. The Board will register Mr. Rapczyk in the course and pay all course fees. Additionally, the Board will grant Mr. Rapczyk release time to attend the course sessions.

5. Mr. Rapczyk may elect to return to layoff status during the initial transferee probationary period if he finds he is not capable of performing the duties of the position. In such event, any unemployment compensation to which he may be entitled will be paid at the rate of earnings for a seasonal laborer, which rate he qualified for prior to layoff on November 15, 2002.

6. Mr. Rapczyk and Local 1616 agree to, and hereby do, irrevocably dismiss with prejudice pending grievances 01/155 and 02/072, currently set for hearing in arbitration on January 16, 2003.

7. Russel E. Rapczyk and Local 1616, District Council 48, AFSCME, in executing this agreement, expressly release, forever discharge, and holds harmless the Milwaukee Public Schools, all of its present and past agents, including its officers and employees, from and against any and all charges, claims, liabilities, damages, and causes of action, whether actual or alleged, arising out of Mr. Rapczyk's layoff from employment with the Milwaukee Public Schools. This release shall constitute a full and final discharge of any an all actual or alleged causes of action and claims for damages or compensation of any kind whatsoever, including attorney fees related to this layoff from employment with the Milwaukee Public Schools which could be brought by Mr. Rapczyk or Local 1616 now or in the future against the Milwaukee Public Schools or any of its past or present agents, officers, or employees.

8. In exchange for compliance with paragraphs 1-7 above by Mr. Rapczyk and the Union, the Board agrees that Mr. Rapczyk will suffer not lapse of health insurance (medical) coverage as a result of this November 15, 2002, layoff, recall, and transfer of January 13, 2003.

This Memorandum of Understanding has been made and entered into between the undersigned representatives of the Milwaukee Board of School Directors and Local 1616, District Council 48, AFSCME this 15th day of January, 2003.

. . .

12. In March, 2003, Doman, along with Gerald Beier, a Seasonal Laborer who was ranked higher than Doman on the Groundskeeper eligibility list, became aware of Rapczyk's transfer. Also in Spring, 2003, the Groundskeeper eligibility list expired. No other Groundskeeper openings occurred prior to the expiration of the eligibility list.

13. In September, 2003, Doman and Beier obtained a copy of the collective bargaining agreement and approached Union President Robert Kopecki regarding filing a grievance over Rapczyk's recall. Kopecki advised them that such a grievance would be untimely and would not have merit, based upon the Memorandum of Understanding.

14. On September 25, 2003, Doman and Beier filed a grievance over Rapczyk's transfer, based on the language of Appendix A, Section M, and seeking as a remedy to be appointed to the next two available Groundskeeper positions. The grievance was denied on the grounds that it was untimely and that the District's action was authorized by the Memorandum of Understanding. Doman and Beier did not request the Union to pursue the grievance further and the Union did not advance the grievance on its own volition.

15. Local 1616 did not violate its duty of fair representation to Keith Doman by entering into the Memorandum of Agreement with the District.

16. Local 1616 did not violate its duty of fair representation to Keith Doman by refusing to advance his grievance to arbitration.

Based upon the foregoing Findings of Fact, the Examiner herewith makes and issues the following

CONCLUSIONS OF LAW

1. For the purposes of this proceeding, the Complainant constitutes a municipal employee as defined in Sec. 111.70(1)(i), Wis. Stats.

2. For the purposes of this proceeding, Respondent, Milwaukee Public Schools, constitutes a municipal employer as defined in Sec. 111.70(1)(j), Wis. Stats.

3. For the purposes of this proceeding Respondent, Local 1616, District Council 48, AFSCME, AFL-CIO, constitutes a labor organization as defined in Sec. 111.70(1)(h), Wis. Stats.

4. Respondent, Local 1616, District Council 48, AFSCME, AFL-CIO, did not violate its duty to fairly represent the Complainant herein by entering into the Memorandum of Agreement with the District or in failing to pursue his grievance and, thus, did not commit unfair labor practices within the meaning of Sec. 111.70(3), Wis. Stats.

5. Because Respondent Local 1616, District Council 48, AFSCME, AFL-CIO, did not violate its duty to fairly represent the Complainant by refusing to pursue his grievance, the Commission cannot exercise jurisdiction to determine whether Respondent Milwaukee Public Schools violated a collective bargaining agreement and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner herewith makes and issues the following

ORDER

The Amended Complaint is dismissed as to all Respondents and causes of action.

Dated at Fond du Lac, Wisconsin this 22nd day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Examiner

MILWAUKEE PUBLIC SCHOOLS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint arises out of a Memorandum of Understanding entered into between Milwaukee Public Schools and Local 1616, District Council 48, AFSCME, AFL-CIO, in January, 2003. In the memorandum, the District and Union agreed to settle certain grievances against the District by bargaining unit member Russell Rapczyk by recalling Rapczyk, who had previously been laid off from a position as Radio Engineer, to a position as Groundskeeper. At the time, the Complainant was a Seasonal Employee with the District and was also second on the existing eligibility list for a Groundskeeper position, by virtue of his performance on a promotional exam in 1999. Rapczyk had not taken the promotional exam and was not on the Groundskeeper eligibility list.

In March, 2003, the Complainant, along with Gerald Beier, another Seasonal Employee who was first on the eligibility list, discovered Rapczyk's appointment. At approximately the same time, the eligibility list expired. In September, 2003, the Complainant and Beier obtained a copy of the collective bargaining agreement and discovered Section M of Appendix A, which governs the filling of Groundskeeper vacancies and specifies that candidacy will be based on performance on a promotional exam. Thereafter, the Complainant and Beier filed a grievance against the District over Rapczyk's recall, although they had been told by Union President Robert Kopecki that such a grievance would be untimely and would also fail substantively based upon the Memorandum of Understanding. The District denied the grievance and it was not advanced to arbitration. Subsequent to the denial of the grievance, the Complainant filed the instant action.

POSITIONS OF THE PARTIES

The Complainant

The Complainant asserts that the District and the Union breached Appendix A, Section M of the collective bargaining agreement by entering into the Memorandum of Understanding to resolve the Rapczyk grievances. Further, the breach constitutes a violation of Sec. 111.70(3)(a)5 and Sec. 111.70(3)(b)4 of the Wisconsin Statutes, which prohibit employers and labor organizations, respectively, from violating ". . . any Collective Bargaining Agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees. . ."

The case may be resolved by a plain text reading of the collective bargaining agreement and the relevant statutes, citing several cases for the proposition that such an interpretive method is the preferred means of determining the intent of the authors. (See: PETERS V. MENARD, INC, 224 WIS.2D 184; FOREST COUNTY V. GOODE, 219 WIS.2D 663; ELECTIONS BOARD V. WMC, 227 WIS.2D 650) He asserts that the language of Appendix A, Section M, is clear and unambiguous as to the approved method of filling Groundskeeper vacancies. Likewise, the statutes clearly prohibit the violation of collective bargaining agreements and neither the agreement, nor the statutes, provide for exceptions.

The appointment of Rapczyk was an obvious and blatant violation of the agreement. Most of the witnesses, including two of the signers of the Memorandum of Understanding, testified to knowledge of the language of Section M, nevertheless they entered into the memorandum. No witness, however, was able to articulate a sound explanation as to why Section M is not controlling. Deborah Ford testified to the effect that Part V, Section C of the contract was the basis for the transfer. That language, however, does not apply to employees in Rapczyk's circumstances, but to employees being transferred from other departments or governmental units. In any event, it cannot supersede the language of Appendix A, Section M, which is specific to Groundskeepers. That the District may have effected transfers this way in the past without challenge does not legitimize the practice.

The Union argues that upholding the complaint will prevent the Union from effectively settling grievances in the future. This is belied by the fact that in this case the Union had several options for resolving Rapczyk's grievances that would not have involved a contract violation and it ignored them. The parties could have offered Rapczyk a different position or made his receipt of a Seasonal Laborer position contingent on his dropping his grievances. They could also have modified the language of Section M. Instead, they chose to violate the agreement.

It is further asserted that the oft cited precedents of VACA V. SIPES, 386 U.S. 171 and MAHNKE V. WERC, 66 WIS.2D 524 are inapplicable to this case because they deal with situations where the Union refused to proceed with grievances where the initial wrongdoing was undertaken by the employer alone. Here, the Union was a party to the wrongdoing and so it would not have been reasonable for the Complainant to have expected the Union to advance the grievances. To expect the Union to essentially prosecute itself would be irrational, therefore, MAHNKE should not apply.

The fact that the Complainant was not at the top of the eligibility list for the Groundskeeper position should not preclude him from pursuing the claim. Had the District followed Section M, he and Beier, along with one other candidate, would have been considered. The Complainant would, therefore, had an equal opportunity to be the top candidate after the interview process. This claim is not frivolous, as the Union asserts. Although the Complainant is not an attorney, he has consulted legal counsel and proceeded in good faith. Section M of Appendix A should be found to be controlling and the claim should be sustained.

The Union

The Union asserts that this case is primarily about whether it violated its duty to fairly represent the Complainant. The Union's duty is to represent its members in good faith, not arbitrarily and without hostility and discrimination. Its actions must not be arbitrary, discriminatory, or taken in bad faith. VACA V. SIPES, 386 U.S. 171, 64 LRRM 2369 (1971); MAHNKE V. WERC, 66 WIS.2D 524 (1974); COLEMAN V. OUTBOARD MARINE CORP., 92 WIS.2D 565 (1979) Historically, the courts and the WERC have given the Union broad discretion to determine whether to pursue or settle grievances.

The Complainant has the burden to prove by a clear and satisfactory preponderance of the evidence that the Union acted arbitrarily, discriminatorily, or in bad faith. He has not done this, thus, the case should be dismissed. Under MAHNKE, there is a presumption that an existing grievance procedure is the appropriate means of handling contractual disputes. Thus, the Complainant cannot obtain review of the resolution of his contractual dispute unless it can be shown that the Union acted arbitrarily, discriminatorily, or in bad faith, first with respect to the handling of his grievance and then of the Rapczyk matter. This he cannot do.

In the first instance, the Complainant's grievance was untimely. The contract requires grievances to be filed within 10 working days after the event giving rise to the grievance occurred or the employee could reasonably have been expected to have knowledge of it. The grievance here was filed more than eight months after Rapczyk's transfer. The Complainant claims to only have learned of the language in Appendix A, Section M, when he obtained a copy of the contract in September. Nevertheless, that language has been unchanged for years and the Complainant appears to have been aware of its effect when he applied for the Groundskeeper position. Further, the fact that he did not consult the contract does not suspend the statute of limitations. The Union reasonably believed that the District would prevail on the timeliness issue and thus chose not to advance the grievance. This undercuts any suggestion that the Union's action was arbitrary or discriminatory.

The grievance was also precluded by the Memorandum of Understanding. The Rapczyk settlement was not arbitrary, discriminatory or made in bad faith. Sometimes the Union is put in a position where helping one member makes it impossible to help another. The courts have recognized the dilemma of pursuing the competing interests of different members or groups of members and have, thus, given the unions wide discretion in resolving them. HUMPHREY V. MOORE, 375 U.S. 335 (1964). In settling the Rapczyk matter, the Union was protecting the job of a 27-year employee without the risk of an arbitration proceeding. The transfer was consistent with the language of Part V, Section C of the contract. Further, since at least 1991, the District and Union have engaged in the practice of transferring laid off employees into vacant positions to protect their jobs. Thus, the Union's action was rooted in contract language and past practice and was not arbitrary, discriminatory or in bad faith.

It should finally be noted that the Complainant has failed to establish any harm to himself from the Union's action. On the previous eligibility list, he was third in rank and there was no guarantee that, had the position been posted he would have received it.

The District

This case constitutes a "hybrid" action. Thus, the Complainant must establish that the Union violated its duty of fair representation both as to the Rapczyk settlement and as to the Complainant's grievance, before he can pursue a claim against the District. Neither of the Complainant's claims have merit.

The Complainant focuses on Appendix A, Section M, but fails to address other aspects of the contract or the contract rights of Rapczyk to be recalled from layoff. Here, the parties have a history of trying to lessen the impact of layoffs by placing employees earmarked for layoff in available open positions, including Groundskeeper positions. The placement of Rapczyk was consistent with this practice. It also allowed the parties to resolve two grievances. It is common in this district and in other larger districts for Memoranda of Understanding to be used to modify contract language to accomplish such settlements. Here, the parties considered numerous alternatives which were not successful for one reason or another before the Groundskeeper position became available just before Rapczyk's grievances were to be arbitrated. Inasmuch as Appendix A, Section M, has never been a stumbling block to placing laid off employees in positions in the past, it is hard to see how doing so now constitutes a failure of the duty of fair representation by the Union. This is especially so, since the Complainant would not have gotten the Groundskeeper position if it even had been opened, due to his lower test scores, and the eligibility list expired shortly after the position was filled.

The Complainant's claim that the Union wrongfully failed to advance his grievance is also without merit. The grievance was untimely and the Complainant's theory of a discovery rule exception based on his late obtaining of a copy of the contract does not bear scrutiny. The Complainant had concerns about Rapczyk's transfer as early as March, 2003, and talked to Gerald Beier about it at the time. He clearly understood the process based on his participation in the steps to get on the eligibility list. Nevertheless, he waited for at least six months before filing his grievance. There is no reason the Complainant could not have obtained a copy of the contract much sooner, if he had cared to do so. His lack of diligence should not be rewarded by prevailing in the complaint.

The Complainant in Reply

The Union violated its duty of fair representation in entering into the Memorandum of Understanding. The Memorandum violates the terms of the contract. The contract must be ratified by the membership, but the MOU was not, thus, the Union's action in signing it was arbitrary, capricious and in bad faith because it did not have membership approval.

The timeliness of the grievance is irrelevant, since, under the circumstances, the Complainant had no reasonable expectation that the Union would process his grievance anyway. Further, the Union's statutory obligations could be satisfactorily addressed through the grievance procedure. Further, despite the assertions of the Respondents, Rapczyk's personal problems were not relevant to the decision to recall him and are not relevant to the facts of the case.

Had the Groundskeeper position been declared vacant, the Complainant would have been one of three candidates considered and would have had an equal chance for the job. The Respondents cannot argue that he has no standing to pursue the case based on the sole fact that he wasn't first on the eligibility list. The testimony establishes the arrogance of the Respondents in ignoring the law and the provisions of the contract to suit their whims.

Contrary to the Respondents' assertions, there were no budgetary constraints preventing Rapczyk from taking a Stockroom Custodian position. Further, Rapczyk was not a laid off employee when he was given the Groundskeeper position. He was a Seasonal Employee on temporary layoff with the other Seasonal Employees, in no better or worse a position than the others. Finally, there is no evidence to support the District's assertions that Groundskeeper positions have been filled via transfer in the past and, even if there were, it would not make the action any the less illegal. Appendix A, Section M, alone, controls the filling of Groundskeeper positions.

DISCUSSION

The Complainant's allegations consist of claims that the District and Union violated Appendix A, Section M of the collective bargaining agreement in the resolution of the Rapczyk grievances and that such violations were also violations of Sec. 111.70(3)(a)5 and Sec. 111.70(3)(b)4, Wis. Stats. Further, he alleges a violation of the Union's duty of fair representation in both its resolution of the Rapczyk grievances and its representation of him with respect to his own grievance. It is the Complainant's burden to establish each element of his claim by a clear and satisfactory preponderance of the evidence. WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT, DEC. NO. 20922-D (SCHIAVONI, 10/84).

In the first instance, it should be noted that inherent in a collective bargaining relationship is the ability, and indeed duty, guaranteed by statute, to bargain over wages, hours and conditions of employment. This includes not only the authority to enter into collective bargaining agreements, but also to amend, modify, or create exceptions to them by agreement or practice as the parties see fit. As exclusive representative of the bargaining unit, the Union is thus tasked to not only negotiate collective bargaining agreements, but also to redress the grievances of its members through the contractual procedure, involving, among other things, negotiations and/or arbitration as potential processes to be utilized.

In resolving the Rapczyk grievances, the Union processed the grievances to the point of arbitration, but negotiated a settlement just short of the courthouse steps, which was memorialized by a Memorandum of Understanding between the District, the Union and Rapczyk (Jt. Ex. 2) The agreement involved recalling Rapczyk from layoff status to an open, but unposted, position as Groundskeeper. There was substantial testimony that it is a longstanding practice of the District to hold unfilled positions toward the end of a budget cycle and not post them for the specific purpose of having them available in the event of layoffs in other classifications. As set forth above, there is nothing inherently illegal in the District and Union agreeing to modify the terms and application of the collective bargaining agreement in order to resolve grievances. The Complainant concedes this in his brief:

> The respondents had another important option, as well: To modify or even nullify Section M of Appendix A of the Collective Bargaining Agreement if they desired to have the ability to transfer persons into the groundskeeper position. The Wisconsin Employment Relations Commission has already held that a union and a civil service employer may modify previous agreements. (citation omitted)
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> Complainant's Brief at 11.

The Memorandum of Understanding was, in effect, an *ad hoc* modification of the contract for the purpose of allowing the parties to recall Rapczyk to the Groundskeeper position. The District and Union, as parties to the collective bargaining agreement, control the agreement and a Memorandum of Understanding between them that modifies the agreement is not, therefore, a violation of the agreement under Sec. 111.70(3)(a)5 and Sec. 111.70(3)(b)4, Wis. Stats. Likewise, the Union's acquiescence in the District's practice of holding unposted positions in order to ameliorate the effect of potential layoffs is not inherently unreasonable.

Ultimately, the Complainant's claim upon the Union derives from its position as the exclusive representative of the bargaining unit of which he is a member. This role imposes upon the Union a duty to represent its membership fairly. In VACA V. SIPES, 87 S.CT. 903, 64 LRRM 2369 (1967), the U.S. Supreme Court established standards for determining compliance with the duty of fair representation, which were subsequently adopted by the Wisconsin Supreme Court in MAHNKE V. WERC, 66 WIS.2D 524 (1974). In VACA, the Court stated:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.
>
> ID. at 2376.

With respect to the Rapczyk settlement, therefore, the Complainant's burden is to establish that the Union's agreement violated its duty of fair representation to him, which is to say, as stated in VACA, SUPRA:

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. (Id. at 910)

Subsequent rulings by various courts have interpreted the VACA standard to establish a significant burden for a complainant to prove failure of the duty of fair representation. Thus, a violation of the duty of fair representation cannot be based on mere negligence. PETERS V. BURLINGTON NORTHERN R.R., 931 F. 2D 534, (9TH CIR., 1991). Rather, ". . . a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' . . . as to be irrational." AIR LINE PILOTS V. O'NEILL, 499 U.S. 65, 136 LRRM 2721 (1991).

In addressing the Rapczyk grievances, the record reveals that the Union was dealing with the layoff of an employee of 27 years' experience and the Union's being able to prevail in arbitration was by no means certain. In agreeing to the settlement, the Union acted in what it at the time perceived to be its own best interests and the best interests of the grievant. While there may have been alternative settlement options to the one reached, the record is not clear as to how feasible they were. In any event, the record reflects that the Union engaged in extensive negotiations with the District over the Rapczyk grievances and its conduct therein was not arbitrary, discriminatory or in bad faith.

That is not to say that the Rapczyk settlement did not have a negative impact on other employees, but the courts have recognized that it is not always possible to satisfy every interest and that a failure to do so is not a *per se* violation of the duty of fair representation. As stated in HUMPHREY V. MOORE, 375 U.S. 335 (S. CT., 1964), cited by the Union:

> Inevitably, differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. 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 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. Nor should it be neutralized when the issue is chiefly

> between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

Nothing in the record here suggests that the Union acted with less than complete good faith and honesty in its resolution of the Rapczyk grievances, despite its potentially negative impact on those on the Groundskeeper eligibility list. Thus, it has not been established that the Union violated its duty of fair representation in its handling of the Rapczyk matter.

The remaining question is whether the Union violated its duty of fair representation to the Complainant in its handling of his grievance regarding Rapczyk's recall to the Groundskeeper position. This is because the courts have held that where there is a grievance procedure in place that calls for final and binding resolutions of disputes, that procedure must be exhausted before an aggrieved employee may resort to legal relief. REPUBLIC STEEL CORP. V. MADDOX, 379 U.S. 650 (1965) The Union, however, as a party to the collective bargaining agreement, and not the employee, controls the grievance. Therefore, where the recourse to the grievance procedure has not been exhausted, the employee must show that the Union's failure to do so was the result of a violation of its duty of fair representation to the employee. This does not mean, however, that the Union has an obligation to advance all grievances. As the Court in MAHNKE stated, quoting MOORE V. SUNBEAM CORP., 459 F. 2D 811 (7TH CIR., 1972):

> . . . that opinion (Vaca) also makes it clear that the union may exercise discretion in deciding whether a grievance warrants arbitration. Even if an employee claim has merit, a union may properly reject it unless its action is arbitrary or taken in bad faith . . .
>
> ID. at 531.

Here, the grievance was not advanced beyond the first step. The Complainant and Beier filed their Grievance Initiation Form with Recreation Supervisor Patrick Pegorsch on September 25, 2003. They alleged a violation of Appendix A, Section M, in the Board's appointment of Rapczyk to a Groundskeeper position instead of resorting to the eligibility list and sought as a remedy that the next two Groundskeeper openings be given to them. A grievance meeting was subsequently held and on November 17, 2003, Josef Roca, the District's Manager of Buildings, Grounds and Fleet, issued a Step 1 Grievance Disposition Form, denying the grievance on the grounds that it was untimely and that the Memorandum of Understanding superseded the contract language in this case.

At the hearing, the Complainant elected not to testify. Union President Robert Kopecki testified, but was not asked why the grievance was not advanced beyond Step 1. He did testify that he had been approached by the Complainant and Beier prior to their filing the grievance

and told them that in his opinion the grievance would not be successful due to the Memorandum of Agreement and the timeliness problem, but that he would not prevent them from pursuing the grievance. The co-grievant, Gerald Beier, testified that he did not attend the Step 1 meeting, but had no recollection of receiving the disposition form. Thus, the record is barren of evidence regarding why the grievance was not pursued, either by the grievants or the Union.

In his brief, the Complainant states that VACA and MAHNKE do not apply because the Union here was a party to the original act that resulted in his grievance. In his view, the Union's involvement in the Rapczyk settlement made it futile for him to pursue a grievance because the Union would be asked to support a grievance against an action it had supported. Thus, he contends that the element that the Union be required to refuse to process the grievance to find a failure of the duty of fair representation be waived because it would be an unreasonable expectation. The problem is that a failure to fulfill the duty of fair representation must be based upon evidence, not upon an assumption of what the Union would or would not have done under particular circumstances. There is no evidence here that the Union was ever asked to advance the grievance, much less that it refused to do so. On this record, therefore, I cannot conclude that the Union failed in its duty of fair representation to the Complainant in its handling of his grievance.

Insofar as this decision makes a determination that the Union did not violate its duty of fair representation to the Complainant, under MAHNKE, I have no jurisdiction to rule on the Complainant's underlying contractual claims against the Employer and they are, accordingly, dismissed.

Dated at Fond du Lac, Wisconsin this 22nd day of March, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Examiner

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