STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KAREN BISHOP, Complainant,

vs.

MILWAUKEE PUBLIC SCHOOLS

and

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 150, Respondents.

Case 437
No. 65294
MP-4200

Decision No. 31602-G

Appearances:

Alan C. Olson, Alan C. Olson and Associates, S.C., 2880 South Moorland Road, New Berlin, Wisconsin 53151-3744, appearing on behalf of Complainant Karen Bishop.

Donald L. Schriefer, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, appearing on behalf of Respondent Milwaukee Public Schools.

Ying Tao Ho, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Respondent Service Employees International Union Local 150.

ORDER ON REHEARING

On January 2, 2007, the Wisconsin Employment Relations Commission issued an Order on Review of Examiner's Decision (Decision No. 31602-C), holding that the Respondent Service Employees International Union, Local 150 ("the Union") violated its duty of fair representation in its handling of a grievance the Complainant, Karen Bishop, had filed to challenge her termination of employment by the Respondent Milwaukee Public Schools ("MPS"). The Commission ordered the Union to pay Ms. Bishop's attorneys fees and expenses during the second phase of the bifurcated proceedings, during which Ms. Bishop

would advance her contractual claim that MPS had terminated her employment without just cause. The Commission appointed Examiner Daniel J. Nielsen with final agency authority to hear and decide the claim against MPS, but the Commission retained jurisdiction over implementation of its order in the first phase of the case involving the Union's breach of its duty of fair representation ("DFR").

On May 20, 2008, Examiner Nielsen issued Decision No. 31602-E, concluding that MPS had terminated Ms. Bishop's employment without just cause and ordering MPS to reinstate her with all lost back pay. The Examiner rejected an MPS contention that Local 150 should pay a portion of the back pay liability. In doing so, the Examiner commented that:

> The Commission's prior order addressed the remedy for the Union's breach, and limited it to the costs of litigation.

On June 9, 2008, MPS filed what the Commission denominated as a petition for rehearing pursuant to Sec. 227.49, Stats. On July 8, 2008, the Commission granted MPS's petition for rehearing, "for the sole purpose of allowing the Commission to determine whether it committed an error of fact and/or law by failing to require [in its January 2, 2007 decision in the DFR phase of the case] that Local 150 contribute to Bishop's back pay." Thereafter MPS and Local 150 each filed written argument in support of their respective positions on this issue, the last of which was received on August 15, 2008.

Having reviewed the parties' submissions and being fully advised in the premises, and for the reasons set forth in the accompanying Memorandum, the Commission makes and issues the following

ORDER

The Commission reaffirms its Order issued on January 2, 2007, and declines to require that Service Employees International Union Local 150 pay a portion of the back pay that Milwaukee Public Schools owes Bishop.

Given under our hands and seal at the City of Madison, Wisconsin, this 29th day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

MILWAUKEE PUBLIC SCHOOLS and SEIU LOCAL 150 (Bishop)

MEMORANDUM ACCOMPANYING ORDER ON REHEARING

To briefly recap the instant case, in March 2004, MPS terminated Ms. Bishop's employment as a Handicapped Children's Assistant. With the Union's assistance, Bishop filed a timely grievance challenging her discharge. The grievance remained unresolved as late as November 2005, and Ms. Bishop filed a complaint with the Commission in January 2006 contending that MPS had discharged her in violation of the collective bargaining agreement and that the Union had failed to process her grievance properly. Since, where an applicable grievance procedure exists, the Commission will not assert jurisdiction over an employee's breach of contract claim unless the employee first establishes that the Union breached its duty of fair representation in processing the grievance, the proceedings were bifurcated so that the prerequisite DFR claim could be decided first. As noted above, the Commission eventually concluded that, after processing the grievance properly during the initial phases of the grievance procedure, the Union then arbitrarily and unlawfully mishandled the grievance between November 2004 and November 2005 to Bishop's detriment. As a remedy the Commission ordered the Union to pay Bishop's attorneys fees and costs during the second phase of the proceedings, during which she pursued her claim against MPS that she had been terminated without just cause.[1]

After issuing its decision on the DFR prong of the case, the Commission appointed Examiner Daniel J. Nielsen to hear and decide the second phase of the case, giving him final authority for the Commission over the breach of contract issues related to whether MPS had terminated Ms. Bishop without just cause. In its Order Appointing Examiner, the Commission expressly retained jurisdiction over issues as to Local 150's compliance with the Commission's Order in the DFR phase of the case. DEC. NO. 31602-D (WERC, 3/07).

As to the instant issue, MPS argued in its brief to Examiner Nielsen that:

> … union delay and wrongdoing in its representation of the complainant, dating from issuance of the third-step disposition on January 5, 2005 (at which time it received or, with proper diligence, should have received MPS's third-step disposition), contributed significantly to any backpay that has accrued **should** the Examiner, contrary to MPS's expectations, should rule in the complainant's favor. MPS submits that backpay, if awarded, from January 5, 2005, through

[1] MPS was present during the DFR portion of the litigation but did not actively participate and did not submit a post-hearing brief to the examiner nor otherwise assert a claim for apportionment of back pay during the DFR phase of the case. The Union argues in connection with the instant petition for rehearing that it relied upon the Commission's Order in the DFR portion of the case, imposing no back pay liability on the Union, and that it would be deprived of due process if the Commission were to amend the Order now, after the Union had intentionally chosen not to participate actively in Bishop's litigation against MPS. This point has some merit but, in view of the outcome here, we see no need to address it more fully.

> the date of the Commission's January 2, 2007, decision on Phase I (the DFR component) of the present case should be assessed against the union.

In his May 20, 2008 decision, Examiner Nielsen concluded that MPS had terminated Bishop's employment without just cause and ordered MPS to reinstate her with back pay to the date she had been discharged. The Examiner rejected MPS's request for apportionment of the back pay, stating, *inter alia*, "The Commission's prior order addressed the remedy for the Union's breach, and limited it to the costs of litigation." ID. at 23.

In the instant petition for rehearing, MPS asks the Commission to revise the remedy it had imposed upon the Union in the January 2, 2007 DFR decision, by requiring the Union to contribute to Bishop's back pay award. MPS contends that Bishop's loss of wages "for a significant period of time occurred solely because of" the Union's prohibited practice. Assuming that premise is valid, [2] the first consideration is whether the Commission has authority to require a union to pay a portion of the wages an employer owes for having wrongfully discharged an employee.

As MPS points out, the Commission generally has broad remedial authority, so long as the remedy has a reasonable tendency to effectuate the purposes of the law. See, e.g., WERC V. EVANSVILLE, 69 WIS.2D 140, 158 (1975); BOARD OF EDUCATION OF UNIFIED SCHOOL DIST. NO. 1 V. WERC, 52 WIS.2D 625, 635 (1971). That general rule, however, appears to conflict

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[2] The proposition that any significant portion of Bishop's back pay was attributable "solely" to the Union's misconduct is subject to question. We begin by noting that MPS was solely responsible for the breach of contract here; this is not a situation where the Union urged or encouraged Bishop's discharge. MPS argues that, after its January 5, 2005 communication, denying the grievance at Step 3 of the grievance procedure, "[T]he ball was entirely in the union's court for requesting an arbitration." MPS Brief to the Examiner at page 28. The Examiner responded in footnote 7 of his decision that MPS "knew at all times that Bishop actively disputed the termination, and at all times it retained the sole ability to reinstate her and thereby limits its liability." Nothing in this record suggests that MPS did or reasonably could have believed that the Union had affirmatively chosen to drop or release the grievance. While MPS apparently had conveyed a third step response to the Union in January 2005, nothing suggests that the Union's silence thereafter was actually or impliedly a release of the contractual claim. On the contrary, MPS appears to have willingly engaged in discussions with the Union about Bishop's grievance in November 2005 when the Union again picked up the ball. Even after that settlement effort fizzled, the record contains no affirmative communication from the Union to MPS to the effect that the grievance was resolved, withdrawn, or released. It appears that Bishop filed her complaint at the Commission less than two months later, without either the Union or MPS having taken any affirmative steps to end the grievance. These circumstances are too ambiguous to conclude that MPS actually relied for any specific period of time on the grievance having been resolved so as to provide a reasonable basis for shifting "sole" back pay liability to the Union for any period of time. Rather both parties appear to have acquiesced in the languishing of this grievance between November 2004 and January 2006. MPS, having discharged Bishop, presumably believed it could sustain the discharge; even after Bishop filed her complaint in January, 2006, putting MPS on notice that it might be put to its proof, MPS chose to maintain the discharge. MPS was entitled to rely upon its proof, but, having done so, having no clear affirmative reason to believe the Union had released MPS from its grievance liability, and having at all times the sole power to reinstate Ms. Bishop and avoid liability, MPS would have difficulty making a case for contribution from the Union here, even if we had authority to so order and even if we believed that apportionment was an appropriate remedy.

narrow issue presented here, viz., the Commission's authority to assess the Union for some portion of Bishop's back pay: INTERNATIONAL UNION, UAAAIW v. WERB, 245 WIS. 417 (1944); INTERNATIONAL BROTHERHOOD v. WERB, 249 WIS. 362 (1946); and WERB v. ALGOMA PLYWOOD & VENEER CO., 252 Wis. 549 (1948), AFF'D 336 U. S. 301 (1949). MPS argues that these cases should be limited to their factual settings and are not dispositive precedent here. In order to address MPS' contention fully, it is necessary to set forth a relatively extensive synopsis of those early cases.

As MPS acknowledges, the pertinent provisions within the Commission's remedial statute have not changed in material respects since the 1940's when those cases were decided. Section 111.07(4) of the Wisconsin Employment Peace Act (Peace Act), incorporated by reference into the Municipal Employment Relations Act at Sec. 111.70(4)(a), Stats, provides as follows:

> ... Final [Commission] orders may dismiss the charges or require the person complained of to cease and desist from the unfair labor practices found to have been committed, suspend the person's rights, immunities, privileges or remedies granted or afforded by this subchapter for not more than one year, and require the person to take such affirmative action, including reinstatement of employees with or without pay, as the commission deems proper. ...

In INTERNATIONAL UNION, UAAAIW v. WERB (hereafter UAAAIW), the Wisconsin Supreme Court reviewed a decision of the Wisconsin Employment Relations Board (the Commission's predecessor, hereafter referred to as "the Board") under the Peace Act. In that case, an employer and a union had maintained and enforced a contract provision requiring employees to either join the union or secure a "working permit" from the union that cost one and one-half times the amount of dues, a provision that was unlawful under the Peace Act. The complainant employee was discharged after refusing to obtain the working permit. The Board held that, by enforcing an unlawful contract provision, the respondent employer had violated Sec. 111.06(1)(c), Stats., and the respondent union had violated Sec. 111.06(2)(b), Stats. Among other things, the Board ordered the employer to reinstate the complainant with back pay and the union to pay the employer "one-half of the money required to be paid by this Order by the respondent ... to the complainant ... to make [him] whole ...." WISCONSIN MOTOR CORPORATION AND INT. UNION, UAAAIW, DEC. NO. 520 (WERB, 10/43) at 4. On review, although no one apparently had argued the point,[3] the Supreme Court overturned the portion of the Board's order requiring payment to the employer for one-half of its back pay liability, opining in conclusory fashion, "... [W]e do not find any provision in the act vesting the board with power to require the payment. This provision of the order should therefore be stricken." UAAAIW, 245 WIS. at 435.

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[3] See Lampert, "The Wisconsin Employment Peace Act", 1946 *Wis. L. Rev*. 193 at page 235. The author, Beatrice Lampert, was at the time an Assistant Attorney General who represented the WERB in numerous cases in the Wisconsin and U. S. Supreme Courts, including the UAAAIW litigation.

During approximately the same time frame, the Board generated another decision on much the same subject matter, RHINELANDER PAPER CO. AND INT. BROTHERHOOD OF PAPER MAKERS, LOCAL 66, DEC. NO. 514 (WERB, 10/43). There, as in UAAAIW, the employer and the union were held to have committed separate unfair labor practices by enforcing an unlawful union security provision resulting in the complainant's discharge and again the Board required the union to pay to the company one-half of the money the company was ordered to pay to the complainant to make him whole. Court review of RHINELANDER was delayed by order of the War Labor Board, but in 1946 the Supreme Court issued its decision on appeal, again reversing the Board's order as to the union's liability for half of the back pay. The court stated: "The obligation to pay being upon the employer and not upon the union, the trial court correctly held that there was no authority under the act for dividing the obligation imposed upon the employer by requiring his employees to pay one-half as the order of the board required them to do." INTERNATIONAL BROTHERHOOD, 249 WIS. 362, 369 (1946). Although the court did not expand upon this pronouncement, it adopted by reference the reasoning of the trial court on this subject, which was as follows:

> The statute permits the Wisconsin Employment Relations Board to enter an order requiring "reinstatement of employees with or without pay." The above quoted language is not punctuated, and therefore the question is, "who must reinstate the employee with (or without) pay?" Obviously, only the employer can reinstate the employee, and only the employer may reinstate the employee with pay. It seems clear to this court that the Board's power to direct the reinstatement with pay can be directed only to the person whom it can order to reinstate or reemploy the employee, -- or, in other words, the employer.

INT. BROTHERHOOD OF PAPER MAKERS, LOCAL 66 V. WERB, Boileau, Circuit Judge (Slip Op., 2/44), at page 4.

The third and last time the court commented upon the agency's authority to require a union to contribute to back pay was WERB V. ALGOMA PLYWOOD & VENEER CO. Like the earlier cases, ALGOMA involved an unlawful contractual union security provision pursuant to which the complainant was discharged. Unlike the earlier cases, however, the company alone, and not the union, was a respondent before the Board. As a remedy for the unfair labor practice, the Board ordered the company to reinstate the complainant with full back pay. ALGOMA PLYWOOD & VENEER CO., DEC. NO. 1291 (WERB, 4/47). On appeal, the company urged the court to overturn the back pay portion of the remedy. Before the circuit court, the union agreed with the employer, as witnessed by the following quote from the union brief contained in the circuit court decision:

> "… [T]he Board erred in awarding back pay since the claimant should not be permitted to benefit by his own rescission of the contract of employment. The Board cannot declare the contract unenforceable and in the next breath award [the complainant] the emoluments of the same contract. By doing so it is

> permitting an award to the employee for the accomplishment of a contract at the request of his own agent, in which the employer acceded. Under these circumstances such an award would not accomplish the purpose of the Wisconsin Employment Peace Act."

WERB v. ALGOMA PLYWOOD & VENEER CO., Duquaine, Circuit Judge (Slip Op. 11/47) at 3-4. The circuit court voided the Board's back pay order against the company entirely, stating,

> Fault for the retention of the clause in the contract must as a matter of realism be attributed principally, if not wholly, to the union. This was [the complainant's] union. He was a dues-paying member when the contract was signed. The union agents were his agents. The order of the Board insofar as it orders back pay imposes a penalty on the employer, whose fault in the premises is little, if any, compared to that of the union.

The Board appealed and the Wisconsin Supreme Court reversed the Circuit Court on this point, affirming the Board's original order of full back pay from the employer. In pertinent part, the Supreme Court stated:

> What the board has done is to impose such penalty as would in its judgment be likely to retard the employer's inclination to yield to this compulsion [from the union] in the future. We cannot say that the board might not reasonably consider that its action would tend to effectuate the policy of the act. It is also contended that it is unfair to visit the entire consequences of the situation upon the employer. However, the term "backpay" in its ordinary sense and as used in the statute clearly indicates that its source is the employer and that it is not an appropriate penalty to visit upon the union. We think that this objection is without validity.

252 Wis. at 561. It is not clear whether the company in ALGOMA had requested the Supreme Court to apportion some of its back pay to the union, but it is clear that that issue had not been in play before either the Board or the Circuit Court, most likely because the union was not a respondent in the case and apparently was in support of the company's unsuccessful argument that there should be no back pay liability at all.

MPS distinguishes these cases on two principal grounds. First, MPS argues that the actual holdings of the foregoing cases involved "situation[s] where the violation of the act is based solely upon a collective bargaining agreement provision." Hence, MPS argues, the principle articulated therein should be viewed as "dicta" to the extent it is applied in any other factual context. According to MPS, the factual context in the instant case is indeed different from these earlier cases, in that this case involves "two independent and separate wrongs … breach by an employer of the contractual 'just cause' requirement for discipline [and] breach by the union of its duty of fair representation that caused months of delay that would not otherwise have occurred…." MPS Brief at 3. Moreover, even if the foregoing cases limited

that the relief it seeks in this case is better viewed as ordinary make-whole relief and/or a penalty for the Union's misconduct, rather than as "back pay." Finally MPS argues that, since the early cases are not controlling here, then the Commission's traditional broad remedial authority surely allows it to apportion Bishop's damages against the Union to the extent they are attributable to the Union. To do so would further the purposes of Municipal Employment Relations Act by discouraging unions from breaching their duty of fair representation.

As to the language in ALGOMA PLYWOOD, there is merit to MPS's argument. From its inception, that case involved only the employer's liability (or not) for back pay; the union had never been a respondent in the case and neither the Board, the lower court, nor any party had presented the issue of the union's possible liability for back pay. The court's comment in that regard, given to emphasize the Board's authority to assess back pay as well reinstatement against the employer, would seem to fit the traditional notion of dictum, i.e., addressing an issue not before the court and not essential to the outcome.

With the caveat that we do not necessarily agree with the court's dated and somewhat undeveloped view of the Commission's authority to compel a union to contribute to an employee's back pay in appropriate situations, we think it likely that both UAAAIW and INTERNATIONAL BROTHERHOOD supply more than "dicta" for the instant situation. If, as those cases squarely hold, the Commission lacks authority to require a union to pay 50% of an employee's damages even where the union (together with the employer) directly caused the employee's damages by causing the discharge, then how could the Commission have authority to impose a similar remedy where the union played no role whatsoever in the action (discharge) that resulted in the back pay damages, and in addition has already been assessed a monetary remedy for its own unfair labor practice in the form of attorneys fees and litigation costs? Nor does substituting the term "damages" or "make whole relief" for the statutory term "back pay" create a meaningful distinction given the nature of the actual Board orders that were under review in the early cases. In those decisions, the Board did not require the unions to pay back pay, as such, to the employees, but rather required the union to pay the companies half of the "amount of money" the companies were being ordered to pay to make the employees whole. Hence, while we tend to agree with MPS that the remedy it seeks here could properly be characterized as standard make-whole relief within the Commission's generally wide remedial authority, we believe the same was true of the orders that the court overturned in UAAAIW and INTERNATIONAL BROTHERHOOD. Thus substituting a different label for the term "back pay" is not a persuasive ground on which to distinguish those cases.

Even if we agreed with MPS that the language in these early cases is undeveloped dicta that should be limited to the factual situations therein, the circumstances of the present case would not impel us to alter our longstanding remedy for a breach of the DFR. We would not be inclined to follow federal labor law on this issue, at least under the circumstances of this case, because our jurisdiction is distinct in important ways and because apportionment seems both problematic and unnecessary to effectuate the purpose of our law.

We acknowledge that the National Labor Relations Board (NLRB) may impose partial back pay liability on unions as a remedy in DFR cases. See, IRON WORKERS LOCAL 377 (ALAMILLO STEEL CORP.), 326 NLRB 375 (1998). Unlike this Commission, however, the NLRB does not have jurisdiction over the underlying breach of contract claim. Hence, DFR cases at the NLRB are not "hybrid" cases, such as Ms. Bishop's case here, where, after finding a DFR violation on the part of the union, the agency can proceed to the merits of the just cause claim against the employer and obtain relief from the employer for any contractual violation that is found. Thus, this agency, unlike the NLRB, has power to implement a direct remedy for the actual damage the Union did to Bishop in failing to prosecute her grievance by requiring the union to pay for Bishop's representation in pursuing her claim against the employer in the second phase of the hybrid litigation. Because the NLRB cannot compel an employer to address the employee's underlying breach of contract claim, the NLRB is far more limited than is the Commission regarding the relief available to an employee such as Bishop.

We also acknowledge that the U. S. Supreme Court has directed such apportionment in "hybrid" cases more analogous to the instant case, that are brought pursuant to Sec. 301 of the Labor Management Relations Act, 29 U. S. C. Sec. 185. See BOWEN V. U. S. POSTAL SERVICE, 459 U. S. 212 (1983). BOWEN was a 5 to 4 decision accompanied by a sharp dissent challenging the legal basis for requiring, in effect, that a union indemnify an employer for the employer's breach of contract, noting that "the employer can and more properly should be required to bargain for such a provision, if desired." 459 U. S. 212, 241 (White, J., dissenting). BOWEN has been criticized not only for its odd jurisprudence,[4] but for failing to establish clear fault lines for allocating the back pay as between the employer and the union, adding complexity to the litigation, protracted remedial proceedings, and unpredictability to the outcome. [5] As discussed in footnote 2, above, MPS would have difficulty establishing what, if any, portion of Bishop's back pay should be attributed "solely" to the union.

We are also doubtful that apportionment is necessary in order to serve the purposes of the law, so as to warrant the problems that accompany such a remedy, at least in the circumstances present here. Clearly, such an order adds nothing to the relief available to Bishop, the successful complainant herself, but instead ameliorates the damages required from one of the two wrongdoing respondents. While, arguably, such apportionment might operate to deter future wrongful conduct by unions, we believe the Commission's traditional remedy, first articulated almost 25 years ago in GUTHRIE (LOCAL 82, COUNCIL 24 AFSCME, DEC. NO. 11457-H (WERC, 5/84), requiring a union to pay an employee's attorneys fees and

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[4] See 5 *Corbin on Contracts*, Sec. 999 (1994 Supp).

[5] See, e.g., Kirschner and Walfoort, "The Duty of Fair Representation: Implications of Bowen", 1 *Lab. Lawyer* 19 (1985); Murray, "Apportionment of Damages in Section 301 Duty of Fair Representation Actions: The Impact of bowen v. United States Postal Service", 32 *DePaul L. Rev*. 743 (1983); Malin, *Individual Rights Within a Union* (BNA 1988) at 477-78.

litigation costs in prosecuting the case against the employer, provides a substantial and sufficient incentive for unions to comply with their duties.[6]

For the foregoing reasons, we decline to amend the Order in our January 2, 2007 decision in this case.

Dated at Madison, Wisconsin, this 29th day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

[6] It is worth noting that the instant BISHOP case is one of a tiny handful of successful DFR claims over the past 25 years, which perhaps argues for the adequacy of the existing remedies for deterrence purposes.