

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**CAROLINE L. KNITTER**, Complainant,

vs.

**MILWAUKEE POLICE SUPERVISORS' ORGANIZATION**, Respondent.

Case 537  
No. 67714  
MP-4404

Provision of Legal Counsel

**Decision No. 32356-A**

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**Appearances:**

**John F. Fuchs**, Attorney at Law, Fuchs & Boyle, S.C. Mayfair Crossing, Suite 210, 1233 North Mayfair Road, Milwaukee, WI 53226-3255, appearing on behalf of Caroline L. Knitter.

**William R. Rettko**, Attorney at Law, Rettko Law Offices, S.C., 15430 West Capitol Drive, Suite 200, Brookfield, WI 53005-2621, appearing on behalf of the Milwaukee Police Supervisors' Organization.

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER**

Daniel Nielsen, Examiner: On January 25, 2008, the above-named Complainant, Caroline L. Knitter, filed with the Commission a complaint, alleging that the above-named Respondent, Milwaukee Police Supervisors' Organization, violated the provisions of Ch. 111.70, MERA, by refusing to indemnify her for the costs of legal representation incurred in the course of defending herself before the Fire and Police Commission against charges of violating the City of Milwaukee's residency rule.

Hearings were held on June 30, September 10 and November 11, 2008, at which time the parties presented such testimony, exhibits, other evidence and arguments as were relevant. The hearings were transcribed and the last transcript was received on November 26, 2008. The Complainant filed an initial brief on February 9; the Respondent replied on May 6; and the Complainant's final argument was received on May 18, 2009 whereupon the record was closed.

No. 32356-A

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. The City of Milwaukee Police Department (hereinafter referred to as the Department) is a unit of the City of Milwaukee government, providing law enforcement services to the citizens of the city. Management of the Police Department is provided through the Chief of Police, with oversight by the independent Board of Fire and Police Commissioners. At the times relevant to this matter, Nannette Hegerty was the Chief of Police. Prior to becoming Chief, Hegerty had been a member of the Department, most recently a Captain.

2. Among the employees of the City of Milwaukee Police Department are those in the supervisory ranks of sergeant through Deputy Inspector, who are represented for the purposes of collective bargaining by the Milwaukee Police Supervisors' Organization, hereinafter variously referred to as the Respondent, the MPSO, or the Organization.

3. The MPSO is managed through an elected Board of Directors, headed by the President. From 1997 through 2000, the President of the MPSO was Jerald Filut. In 2001, Filut was succeeded in office by Konrad Ellenberger. In 2004, Thomas Klusman took office as President of the MPSO.

4. The City of Milwaukee has an ordinance requiring City employees, including Police Department employees, to reside within the boundaries of the city. This is reflected in the rules of the Police Department by Rule 4, Section 2/04.00. The customary penalty for violating the residency requirement is termination. Within the sworn ranks of the Police Department, this would be accomplished through an investigation, and investigatory interview, and the filing of charges by the Professional Performance Division. The employee would be given an opportunity to submit rebuttal information. If following a review of the charges, and the supporting and rebuttal materials, the Chief concluded that the charged member was not a resident of the city of Milwaukee, he or she would issue a Personnel Order directing that the member be discharged. The Order would be stayed if the member appealed, and requested a hearing before the Fire and Police Commission, which has the final authority to act on the discharge of members of the Department.

#### **5. MPSO Provision of Legal Representation to Members**

a. Prior to Klusman's election as President of the MPSO in 2004, the organization routinely provided legal counsel to members who were accused of infractions exposing them to discipline, so long as the alleged conduct was not a violation of criminal law. At the time of Klusman's election, legal counsel for the MPSO was provided by attorney John Fuchs.

b. During Ellenberger's term as President, MPSO member Brian Ketterhagen was accused of violating the residency ordinance. MPSO President Ellenberger engaged attorney Fuchs to represent Ketterhagen from the beginning of the investigation, although the Board of Directors eventually capped the amount the Organization would spend on the case at \$10,000. After a time, however, Fuchs informed the Board that he felt he might have a conflict of interests in representing Ketterhagen. Ketterhagen wished to investigate the Chief and an Assistant Chief's living arrangements as part of his defense, but both had been represented by Fuchs in the past. Fuchs suggested that the MPSO Board engage his former partner, William Rettko, to represent Ketterhagen, and Rettko assumed the representation. Ultimately, Ketterhagen resigned from the Department, and the charges against him were dismissed.

c. In September 2003, the MPSO newsletter included a caution to members not to contact MPSO's legal counsel directly unless directed to do so by a member of the Board of Directors, or by one of the attorneys, as that would create unnecessary legal fees, and could result in the member paying the cost of the attorney's time.

d. In the Spring of 2003, Klusman attended a seminar on the effective operation of a labor organization. One of the sessions focused on controlling legal costs and establishing a systematic means of deciding whether to provide representation to members accused of an infraction. Following his election as President of the MPSO, he drafted a policy on how to decide whether to pursue a grievance or a legal case on behalf of a member. The policy involved the establishment of a new Grievance/Legal Review Committee. Klusman had the draft reviewed by MPSO legal counsel John Fuchs and Rebecca Boyle, who suggested some minor changes. In January 2004, he presented the policy to the MPSO Board of Directors which voted to approve it:

#### Grievance / Legal Review Committee

This committee will consist of three (3) members of the Board of Directors, as chosen by the President.

When an MPSO member requests that a grievance be filed or a legal defense/offense be prepared, he/she shall make the request to one of the committee members. The receiving committee member shall consult with the other committee members, and a majority shall decide.

The committee shall have the option to do all or any combination of the following:

- File the grievance
- Not file the grievance
- Authorize use of MPSO funds for a legal defense/offense
- Not authorize the use of MPSO funds for a legal defense/offense
- Refer the decision to the full Board of Directors
- Request an independent evaluation of the file from legal counsel on the merits of the discipline or the organization's duty of fair representation

The president shall report the activities of the Grievance/Legal review Committee to the full Board of Directors at their next regular meeting. Any member of the Board of Directors shall have the ability to call for a full-board vote of the committee's action. The vote of the full board shall supersede the committee's vote.

If the requesting member does not agree with the decision of the Grievance/Legal review Committee, he/she shall be allowed to request the full Board of Directors to vote on this matter.

e. The creation of the new committee was announced to the membership in the February newsletter. The newsletter set forth the text of the resolution creating the committee, and offered the following explanation:

. . .

This committee has been created to ensure that any expenditure(s) of MPSO funds are in the best interests of the Organization as a whole. As all of us are aware, at times people may involve themselves in matters/conduct that are violation(s) of the law, an ordinance, or department rule(s). As long as the member is treated fairly by the department, grievance(s), lawsuit(s), etc., which are extremely costly, may sometimes not be warranted. Conversely, anytime a member of the MPSO is treated unfairly, the resources of the Organization will be brought to bear, in order to vigorously defend that member.

The members of this committee are currently; Tom Klusman, Konrad Ellenberger, and Mike Edwards.

f. The May 2005 MPSO newsletter repeated the advice to contact members of the Board of Directors with grievance and discipline concerns and the caution against directly contacting the Organization's attorneys, as part of an explanation of the cost of legal services for the Organization.

g. In August of 2005, the MPSO replaced Organization legal counsel John Fuchs with his former law partner, attorney William Rettko.

6. **The Charges Against Caroline Knitter and the Preparation for a Defense of Those Charges**

a. On October 25, 2002 information was received by the Department that Sergeant Caroline Knitter was claiming residence within the city while actually residing with her husband in the city of South Milwaukee. An investigation was commenced, but no charges were brought for the next four years.

- b. In late 2004, Sergeant Knitter was advised that she was under investigation.
- c. In September, 2005, Sergeant Knitter was advised that a PI 21 - an investigatory interview - would be held on October 5<sup>th</sup> on the allegations that she was not actually a resident of Milwaukee.
- d. Sergeant Knitter contacted MPSO President Thomas Klusman and requested assistance. Klusman arranged a meeting with the MPSO Board of Directors to discuss the case with Sergeant Knitter and her husband. He advised her to bring along pictures of her residence and living area, and any documents relevant to her living arrangements.
- e. On October 5th, 2005 a PI 21 interview was conducted with Sergeant Knitter. MPSO Vice President Mike Edwards and another Board Member accompanied her on behalf of the Organization. At this interview, Sergeant Knitter brought along packets of correspondence addressed to her at her Milwaukee address, pictures of her living area, and other materials to buttress her claim that she was actually a resident of the city. Prior to the interview, she commented that she would be more comfortable if an attorney was present, and the Board Member replied that the MPSO's attorney was on standby if needed. In the course of the interview, her mortgage documents were provided to the investigator, but the additional documents and pictures were not.
- f. On September 15, 2006 the Professional Performance Division issued a specification of charges against Knitter, accusing her of not residing within the city of Milwaukee.
- g. Sergeant Knitter contacted both Mike Edwards and Tom Klusman. Edwards told her that they would meet to prepare a rebuttal to the charges. Sergeant Knitter was quite emotional during the conversation, and Edwards was frustrated at what he viewed as her refusal to let him get a word in during the conversation. She then contacted Klusman, who said they would meet to prepare the rebuttal packet.
- h. Sergeant Knitter and her husband met with Klusman on the evening before the rebuttal package was due to prepare her response. Mike Edwards did not attend the session. Sergeant Knitter asked for Klusman to involve legal counsel, and he replied that it was not yet necessary, and that they would wait until charges were filed. Neither the sergeant nor her husband raised any objection.
- i. On the drive to her house after the meeting, Sergeant Knitter and her husband discussed the situation and she told him she wanted to hire an attorney. Once she was home, she finished the rebuttal and reviewed it again with Klusman, who suggested some modifications.

- j. The following day, Sergeant Knitter submitted her rebuttal, and went out on a stress leave of absence.
- k. In November, 2006 Sergeant Knitter retained John Fuchs privately as her counsel.
- l. The investigators for the Department made several more requests for information from Sergeant Knitter between October 2006 and May of 2007. Fuchs advised her to provide them with the paperwork and documentation she had compiled showing that she received business mail and the like at the Milwaukee address. During this time, she had several more conversations with Klusman, and raised the issue of legal counsel again. He responded that legal counsel was not yet necessary and that he was more experienced than most attorneys in matters involving Department rules, and was capable of handling the case to that point.
- m. On May 21, 2007, formal charges were issued against Sergeant Knitter, accusing her of violating the Department's residency requirement.
- n. On July 6, 2007, Chief of Police Nannette Hegerty issued a Personnel Order, adjudging Knitter guilty of violating Rule 4, Section 2/040.00 – Failure to reside in the City of Milwaukee, and ordering that she be discharged. Such Orders are stayed if the accused officer files a timely appeal letter.
- o. Sergeant Knitter called Klusman on his cell phone to tell him that the Order had been issued. He told her that he was in Washington D.C. on a family vacation, but that he would have Mike Edwards submit the appeal. Klusman told her to have Edwards call him, because Edwards had not previously filed an appeal letter, and Klusman would need to tell him where to find the template for the letters.
- p. Sergeant Knitter decided to have Fuchs handle the filing of the appeal. On July 9, 2007 Fuchs filed a two sentence form letter, providing notice of appeal of the Chief's Order, requesting a hearing and waiving the time limits. These letters are not copied to the Organization.
- q. Sergeant Knitter subsequently advised Klusman that the filing of the appeal had been handled. She did not mention Fuchs' involvement.
- r. On July 21, Sergeant Knitter sent Klusman an e-mail, advising him that the hearing was scheduled for September 12, and that "I do not plan to ask for any adjournments. I'm [pretty much ready. I just need to go over my matter off's (sic) again, fill in anything else that I may have missed before, and come up with a list of witnesses." Klusman wrote back, expressing surprise at the quick hearing date and asking if she was sure, since the Organization had other appeals that had been waiting for a hearing for a year.

He also told her he would be discussing the case with the Board of Directors on July 30<sup>th</sup>. Knitter wrote back, confirming the date, and promising to provide him with all of the information she had provided to the Department to that point, before the Board meeting on the 30<sup>th</sup>.

s. On August 2, Sergeant Knitter e-mailed Klusman a timeline of the investigator's notes. She cautioned him that she was not yet done with it, but said she was leaving for a family vacation in Mexico and would not be able to finish it until she returned on August 12<sup>th</sup>. She said she would also have all of the remaining information ready to provide to him by then.

7. **The Board of Directors' Deliberations on Knitter's Appeal and Its Aftermath**

a. On August 28, 2007 the MPSO Board of Directors met to discuss, among other things, whether to pay for an attorney to represent Sergeant Knitter at her September 12<sup>th</sup> hearing. The Board voted unanimously not to fund the appeal.

b. On Friday, August 31, Fuchs sent a letter to the Attorney General's office, advising him of the potential for a constitutional challenge to the residency requirement. The letter was copied to, among others, the Milwaukee Police Supervisors' Organization.

c. Klusman and Knitter spoke on Labor Day, Monday, September 3<sup>rd</sup> regarding her hearing and the MPSO's representation of her. In the course of that conversation, Knitter revealed to Klusman that she had engaged Fuchs to represent her in the residency case and at the FPC hearing, and had incurred \$7,000 in legal fees. She explained that she was concerned that Rettko lacked the necessary experience to successfully defend against a residency charge.

d. On September 4, Sergeant Knitter and Klusman had an exchange of e-mails regarding her case. Sergeant Knitter indicated that she would seek reimbursement from the MPSO for her legal fees. Klusman responded by telling her that the news of Fuchs' hiring had come as a surprise to him, and advising her that the Board had voted not to fund her appeal. Klusman closed by telling Knitter that he would like to attend her hearing to keep informed and offer whatever assistance he could. Knitter replied, expressing surprise and disappointment that the Board had acted without having heard from her personally.

e. Sergeant Knitter followed up with an e-mail accusing the Organization of not fairly and objectively representing her, ignoring her requests to meet with the Board, and providing her with no representation or assistance. She explained that she had waited to mention the hiring of Fuchs and to ask for a contribution to his fees because she was "waiting for the opportunity to meet with the entire Board to make a formal request" rather than doing it casually through Klusman. She added that she hoped his appearance at her

hearing would be “well intended, and not for the greater benefit of the MPSO to see how this issue plays out at my expense...” Klusman replied with an e-mail disputing her version of events, and noting that she had never requested any meeting with the Board to discuss legal fees. He advised her that, as Union President, he was obligated to act for the greater benefit of the MPSO, and that since she objected to that he would decline to appear at her FPC hearing. He closed by advising that if she prevailed in her appeal, she would be able to appear at the September 24<sup>th</sup> Board meeting to ask for reconsideration of the decision not to fund her appeal.

f. On September 12, 2007, a hearing was conducted before the Fire and Police Commission on the charges against Sergeant Knitter. She was represented in the hearing by attorney Fuchs. At the close of the hearing, the members of the Commission voted to dismiss the charges against her, as having not been proved.

g. On September 24, Knitter met with the members of the Board of Directors, and requested that they reimburse her \$12,000 for the cost of Fuchs’ representation. The Board members suggested that she make an application to the Police Officers’ Defense Fund, a fund established through the Milwaukee Police Association for paying the cost of defending rank and file officers from prosecution. She made application to the Fund, but her request was denied on the grounds that it was more properly a cost of representation through her labor organization. She then asked for reconsideration by the Board of Directors of the MPSO, which again voted unanimously to refuse her request. The instant complaint was thereafter filed.

8. The filing of an appeal to the Fire and Police Commission is not a right conferred by the collective bargaining agreement between the City of Milwaukee and the Milwaukee Police Supervisors’ Organization.

9. The Milwaukee Police Supervisors’ Organization does not have the authority to require that a member of the Department facing discipline file an appeal with the Fire and Police Commission, nor to prevent a member from filing an appeal with the FPC. The Organization does not have the authority to dictate to a member what arguments can be made in the course of an appeal. The Organization does not have the authority to require that a member pursuing an appeal engage legal counsel, or refrain from engaging legal counsel.

10. The enactment of a Grievance / Legal Review Committee structure in January 2004 was a material change in policy concerning the provision of legal representation in cases where members faced discipline for violating the residency requirement. The new policy tightened controls on the expenditure of Organization funds for legal representation. The policy was a legitimate, non-discriminatory and reasonable exercise of the Organization’s authority to exercise control over expenses.



11. The Complainant, Caroline Knitter, engaged the services of attorney John Fuchs in November, 2006 without the knowledge or agreement of the Milwaukee Police Supervisors' Organization. Knitter engaged Fuchs' services knowing that she would be personally responsible for the cost of his fees.

12. There is no prior instance in which the MPSO has provided retroactive funding of legal representation secured without its knowledge or consent.

13. The engagement of private counsel without the prior agreement of the MPSO violates the Grievance / Legal Review Committee policy.

14. The August 28, 2007 vote of the MPSO Board of Directors to refuse funding of legal counsel for Caroline Knitter's appeal was based upon the Board Members' evaluation of the merits of her case, the likelihood of success, and its importance to the membership as a whole.

15. The vote of the MPSO Board of Directors to refuse reimbursement for Caroline Knitter's legal fees was based upon the Board Members' evaluation of the importance of the case to the membership as a whole, the merits of her claim, and the fact that she had failed to obtain prior permission to fire Fuchs to represent her.

16. In 2007, the Milwaukee Police Supervisors' Organization did not owe a duty of fair representation to its members with respect to appeals to the Fire and Police Commission.

17. The decisions of the Board of Directors of the Milwaukee Police Supervisors' Organization with respect to the representation of Caroline Knitter, including the decision to refuse to fund or reimburse the cost of her appeal, were not arbitrary, discriminatory or undertaken in bad faith.

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

### **CONCLUSIONS OF LAW**

1. That the Complainant, Caroline Knitter, is a law enforcement supervisor employed by a city of the first class.

2. That the Respondent, Milwaukee Police Supervisors' Organization, is a labor organization within the meaning of Section 111.70(1)(h), MERA.

3. That by the acts described in the above and foregoing Finding of Fact, the Respondent did not violate its duty of fair representation with respect to the Complainant.

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 7<sup>th</sup> day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/

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Daniel J. Nielsen, Examiner

MILWAUKEE POLICE SUPERVISORS' ORGANIZATION

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

This case involves the Organization's refusal to pay Caroline Knitter's attorney fees for a successful defense against charges that she had violated the City of Milwaukee's residency rules. The customary penalty for violating the residency rule is termination. Knitter was investigated for a period of four years. The initial investigation commenced in October of 2002, and charges were finally brought in September, 2006. A hearing was eventually held in September 2007, in which Knitter was represented by attorney John Fuchs, the former legal counsel for the Organization. Fuchs had conducted the only previous successful defense of a residency case, brought against then-Captain Nannette Hegerty while he was counsel to the Organization.

Knitter retained Fuchs as her attorney in November, 2006, because she was concerned that the Board members the Organization had assigned to represent her in the early phases of the case were not as skilled as Fuchs, and that she needed an experienced attorney to guide her defense. However, she did not inform the Organization that Fuchs was representing her until September 3, 2008, right before her FPC hearing. She then made a request to be reimbursed for fees to that point, and to be indemnified for fees through the remainder of the case. The Organization declined to pay Fuch's fees, and the instant complaint was filed, asserting a breach of the duty of fair representation.

The Arguments of the Complainant

The Complainant argues that a labor organization breaches the duty of fair representation whenever its actions toward a member are arbitrary, discriminatory or taken in bad faith. Here, the Organization has paid for the legal defense of members charged with residency violations in the past, specifically Hegerty and Ketterhagen, and possibly another individual named Spignola, though no one could provide any details as to that possible case. Caroline Knitter was the only person denied legal counsel. There was no rational, non-discriminatory basis for this. Even if the Examiner were to find that the change in policy claimed by MPSO somehow allows them to deny legal counsel in the early stages of the disciplinary proceedings, the Organization's own witnesses conceded that counsel is required for a hearing before the FPC. Yet, Knitter was denied counsel at that stage as well. By any definition, this was an act of discrimination. Moreover, the Board of Directors of MPSO, which voted to deny her counsel on August 27<sup>th</sup>, never bothered to tell her that. She discovered it several days later in the course of a phone call to Klusman, which she initiated.

The Organization's bad faith is illustrated by the multiplicity of excuses it offers for not providing counsel, some of which came up for the first time during this hearing. These include failure to follow procedure, failure to follow policy, the adequacy of lay representation by the Organization, the amount of the bill, the fact that the conduct was off duty, and the fact that she hired someone they didn't like. None of these defenses holds up. As for the adequacy of lay representation by the MPSO, it was evident at hearing that all of the MPSO Board members understood that legal counsel was required for a successful defense at a FPC hearing, and the Board members knew little or nothing about how to prepare or present a successful defense to a residency case, especially in the early stages of the investigation. Her choice of Fuchs as an attorney should be a non-issue, but it bears noting that he is the only attorney to have ever successfully defended a residency case, having now done it twice. Konrad Ellenberger even admitted that he would hire Fuchs if he faced these charges. The amount of the bill is a red herring. They had no bill from Fuchs when they voted not to provide legal counsel, and they showed no interest in examining the bill or knowing the basis for the charges when they met with Knitter in late September.

Perhaps the clearest evidence of bad faith are the repeated lies that Board members told Knitter as this case proceeded. She was told that legal counsel was on call for the PI 21 hearing, yet there are no billings to support this claim, and Vice President Edwards was forced to admit that Organization legal counsel Rettko was not on call, simply that he was usually easy to reach. Knitter was told repeatedly that counsel would become involved once charges were filed, and once a hearing was scheduled, but the evidence shows that counsel was never involved in her case, other than her own private attorney.

The suggestion that the Complainant failed to follow correct procedures in securing legal representation is absurd, given that the Board voted to deny her legal counsel without even telling her, on the eve of a hearing in which they concede she needed legal counsel. Nor is there any basis for concluding that her case fell outside the parameters of any policy on legal representation. It was not purely off-duty conduct, since residency is and has been a subject of collective bargaining between the Organization and the City, and according to Hegerty's testimony, this was a test case to establish whether residing separately from a spouse was proof of a residency violation. If her claim was outside the policy, the Organization must explain why Ketterhagen and Hegerty's claims were paid. These patently untrue explanations for the denial of legal representation all serve to demonstrate the bad faith of the Organization in its dealings with Sergeant Knitter.

The Organization's actions fall into the category of arbitrary action for much the same reasons that establish bad faith. Again, there is no rational reason for denying Knitter legal counsel, while providing it to every other person accused of residency violations. There is no dispute that legal counsel is a necessity in this type of case, and it must be remembered that, by securing competent legal counsel early in the process, she mitigated her damages and the Organization's liability, by winning the case.

### The Arguments of the Respondent

The Respondent argues that, while it owes a duty of fair representation to its members, it enjoys discretion in deciding how best to fulfill that duty, subject only to the obligation to refrain from actions which are arbitrary, discriminatory or taken in bad faith. The duty of fair representation flows from the Organization's status as the exclusive bargaining representative for employees, and that status does not extend to representing employees before a Fire and Police Commission. The right to appear before the FPC belongs to the individual, under statute, and is not the result of collective bargaining. The Organization has no status before the FPC and, as a matter of law, it cannot breach its duty of fair representation by deciding not to provide legal counsel in such a proceeding. *HOPKINS V. CITY OF KENOSHA*, Dec. No. 29715-B (Nielsen, 5/15/00) at page 22.

The Respondent denies that it acted in an arbitrary, discriminatory or bad faith manner towards Sergeant Knitter. A course of conduct is arbitrary only if it lacks a rational basis. In this case, the Organization had a policy, known to its members, that if they secured legal representation without the prior approval of the Organization's Board, they would be responsible for paying the cost of that representation. Knitter hired outside counsel in November of 2006, understanding at the time that she was responsible for paying his fees. She never informed the Organization that she had retained Fuchs until September 2007, and never requested that the Organization pay for outside counsel until that time. She never asked how to go about receiving permission for outside counsel. In short, she followed her own agenda, and cannot reasonably expect the Organization to ignore its own rules and cede control over the members' funds to her.

Neither is there any evidence to show that the Board acted arbitrarily in deciding not to fund any legal counsel for Knitter's appeal. The Organization had already provided representation to her in advising her and assisting in the preparation of her PI 21 presentation and the submission of additional materials to the Professional Performance Division. The MPSO offered to file her appeal from Hegerty's dismissal order, but she declined and said it had been taken care of, without mentioning that she had a private attorney file the appeal. In late July, she informed Klusman that she was "pretty much ready" for the September 12<sup>th</sup> hearing and hoped the Union would stand behind her. This clearly evinces her knowledge that the Board would have to make a decision about whether to support her appeal, and that it was not automatic. Further, she knew that decision would not be made until the Board meeting at the end of August.

At the August 27<sup>th</sup> meeting, the Board made a reasoned decision not to fund an appeal. The Board members individually had a variety of reasons for deciding this. Some felt, based on the file and the totality of the circumstances, that she was guilty of the charges and had knowingly put herself in violation of the residency rule. Some felt it was not an issue of sufficient importance to the membership as a whole. Some felt the Organization should not fund cases involving off duty conduct. In any event, this was not an arbitrary decision. It was based on rational considerations of cost, the relative importance of the case, and the benefit to the membership as a whole. The reasonableness of this decision is not affected by later events,

including the Chief's failure to prove the case at hearing, or the fact that the Chief's claim during this hearing that this was a "test case" on residency, and thus a matter of unit-wide importance. The Chief never told anyone of her view prior to the hearing on Knitter's dismissal, and thus the Board, even if it agreed, could not have considered it.

The Complainant's claim that the Board acted in bad faith is belied by the facts. The central argument is that the Board waited until the end of August to decide against funding an appeal, and did not tell Knitter this until September 3<sup>rd</sup>, two weeks before her hearing. Knitter had already told Klusman in late July that she was going forward before the FPC, and that she was "pretty much ready" for the hearing. She provided information for the Board's consideration, but acknowledged that it was incomplete and would need to be supplemented when she returned from a vacation in Mexico. The late consideration of her request did not prejudice her in any way and was, in any event, due to her vacation plans, not some lack of good faith by the Organization. As for the delay in telling her of the vote until September 3<sup>rd</sup>, there is nothing to show that this had any effect on her plans or on the outcome of the case.

The claim that the Organization voted against funding Knitter's appeal because she hired John Fuchs is simply untrue. The Board had no knowledge that Fuchs was involved until after the vote. Whether the attorney was Fuchs or someone else does not change the fact that no member is entitled to hire outside counsel without approval and then expect the Organization to pay the bill. That is a clear rule, which the Complainant was responsible for knowing. Neither can the Examiner give weight to the argument that, by paying for the defense of Ketterhagen and, perhaps, Hegerty, but not Knitter, the Organization discriminated. Those cases arose before Klusman became President and instituted the Review Committee system for deciding whether to pay for a legal defense, and are therefore not relevant. The Committee system was put in place to take control over legal fees, it was in place when this appeal arose and it was followed in this case.

## DISCUSSION

The Organization is the exclusive representative of the employees. This exclusive status confers certain legal rights on the Organization 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. . .<sup>1</sup>

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<sup>1</sup> 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.<sup>2</sup>

The complaint asserts that the Organization violated its duty of fair representation by refusing to provide or pay for legal counsel to the Complainant at the hearing before the Fire and Police Commission. In order to prevail, the Complainant must establish by a clear and convincing preponderance of the evidence, that (1) the Organization had a duty of fair representation with respect to the act or omission complained of, and (2) that the decision to act or not act was arbitrary, discriminatory or taken in bad faith. This complaint fails on both counts.

#### A. The Scope of the Duty of Fair Representation

As discussed above, the roots of the duty of fair representation lie with the Union's responsibilities as the exclusive bargaining representative for employees. It is with respect to those responsibilities that the Union must provide fair representation. There are other areas where a Union might appropriately provide services to members, but is not obligated to by the labor laws of the State of Wisconsin. At the time this case arose, the right to appeal to the Fire and Police Commission was an individual statutory right, and not a right bestowed by, or controlled through, the contract or the processes of collective bargaining.<sup>3</sup> / <sup>4</sup> A refusal to provide representation, much less legal representation, before the FPC is not, in and of itself, a violation of the duty of fair representation because the ability of the individual to access that process does not depend upon any action or decision of the union.<sup>5</sup> As demonstrated by Sergeant Knitter's own course of action, an individual may prepare a defense, appeal the Chief's actions, and present a defense before the Fire and Police Commission, all without the permission or the involvement of the exclusive bargaining representative.

The Complainant places great stress on the testimony of various witnesses, including members of the Organization's Board of Directors, that engaging an attorney is a practical necessity for someone hoping to prevail before the FPC. That may well be the case, and it is clear that Sergeant Knitter's decision to engage counsel was prudent and beneficial to her. The issue here, though, is not whether it is a good idea to be represented by competent legal counsel in a quasi-judicial proceeding such as an FPC hearing. Nor is the issue whether it is appropriate for a labor organization to provide or pay for counsel for members who elect to pursue their

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<sup>2</sup> 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).

<sup>3</sup> JANESVILLE V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, 193 WIS. 2D 492, 535 N.W.2D 34 (CT.APP. 1995)

<sup>4</sup> This refers to the state of the law in 2007, when Sergeant Knitter's appeal was heard by the FPC.

<sup>5</sup> HOPKINS V. CITY OF KENOSHA, Dec. No. 29715-B (Nielsen, 5/15/00), aff'd, Dec. No. 29715-C (WERC, 8/14/00).

individual rights to a hearing before the FPC. The issue is whether a labor organization violates Section 111 of the Wisconsin Statutes by refusing to provide or pay for legal counsel in a proceeding unrelated to its role as exclusive bargaining representative. As there is no duty of fair representation connected to such proceedings, the answer is clearly “no”.

B. Satisfaction of the Duty of Fair Representation

Even if the right to proceed before the Fire and Police Commission were to be analogized to the right to proceed to arbitration under a collective bargaining agreement, the Complainant would bear the burden of persuading the Examiner that the Organization breached its duty of fair representation by refusing to take or fund her appeal. This is an intentionally heavy burden:

It is exceedingly difficult for an individual bargaining unit member to establish a breach of the duty of fair representation, and properly so. Decades of experience under federal and state labor relations laws have demonstrated the wisdom and necessity of maintaining this exceptionally high bar. It acknowledges that unions have limited resources, that grievances may be handled by relatively unsophisticated fellow employees or union staff, who as human beings sometimes make mistakes of judgment or are negligent, that a union's resources come from dues and fees paid by employees, that the union is a collective enterprise that must serve the interests of the overall group, that serving those collective interests frequently comes at the cost of a particular individual's real or perceived interests, and that a union must have discretion to make these decisions without being subjected to expensive second-guessing by agencies or courts. MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 31602-C (WERC, 1/02/07) (“KAREN BISHOP”), at page 13.

While the Complainant fliespecks many of the Organization's actions in the course of the investigation and appeal, a reasonable interpretation of the record as a whole reveals almost no basis for the allegations that Klusman, Edwards or the other leaders of the Organization conducted themselves in an arbitrary, discriminatory or bad faith manner.

The central complaint is that the MPSO provided legal counsel to Ketterhagen and Hegerty when they were accused of residency violations, while denying it to Sergeant Knitter.<sup>6</sup> If this was a random decision, it could be said to be arbitrary. If it was prompted by some improper motive, it could be said to be discrimination, or evidence of bad faith. However, the Organization's course of conduct was the considered result of a change in policy, after the Ketterhagen and Hegerty cases, to make greater use of lay representation and more tightly monitor and control the Organization's legal costs.

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<sup>6</sup> While the Organization argues that it has no record of having paid for Hegerty's defense, Hegerty testified that it had. Weighing her positive recollection against the Organization's lack of records, I conclude that the most reasonable interpretation of the record is that the Organization did fund her defense.



Prior to Klusman becoming President in January, 2004, the Organization routinely referred these cases to legal counsel as soon as it became aware of them. Klusman testified credibly that he considered the lack of control over legal fees a serious defect in the Organization's practices, and took affirmative steps to rein them in. Specifically, in January 2004, he successfully proposed the creation of a committee to oversee grievance processing and litigation. The existence of that committee was made known to all of the members through the February 2004 newsletter, with an accompanying explanation:

This committee has been created to ensure that any expenditure(s) of MPSO funds are in the best interests of the Organization as a whole. As all of us are aware, at times people may involve themselves in matters/conduct that are violation(s) of the law, an ordinance, or department rule(s). As long as the member is treated fairly by the department, grievance(s), lawsuit(s), etc., which are extremely costly, may sometimes not be warranted. Conversely, anytime a member of the MPSO is treated unfairly, the resources of the Organization will be brought to bear, in order to vigorously defend that member.

Even prior to that time, the Organization had publicized, in its newsletter, a policy of requiring members to go through the Board of Directors to access legal counsel, and cautioning them that unauthorized legal fees could be the member's personal responsibility.

Given all of this, it is very difficult to understand how Sergeant Knitter could possibly have had a good faith belief that she was free to hire outside counsel for her case<sup>7</sup>, without ever telling Edwards or Klusman, the two officers of the Organization who were responsible for directing her defense, and that the Organization would simply pick up the cost. Even in the absence of a policy prohibiting it, this would be an extraordinary procedure for any prudent labor organization to follow. Such a procedure would effectively cede control of the Organization's treasury to the individual members, along with any ability to coordinate legal policy, screen cases and make judgments about their merits.

Sergeant Knitter, of course, did not have any such belief. She conceded that she knew of the Organization's policies on legal fees, and that members were responsible for any unauthorized legal fees. She conceded that she never sought or received authorization to hire Fuchs. She conceded that she knew she was personally responsible for Fuchs' bills when she hired him and that she never requested any reimbursement from the Organization until early September, 2007, after the Board had already voted not to support her appeal. Again, the thrust of her complaint is that because the Organization had paid for a defense of Ketterhagen and Hegerty it was obligated to pay for hers. The logic of this argument is that once a labor organization pursues a grievance for a member on a subject, it is obligated to pursue all similar cases in the future or be found to

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<sup>7</sup> Even if the Ketterhagen and Hegerty cases had not been handled in accordance with a different policy, they would be poor comparisons for this case. In both of those cases, it was the MPSO that referred the case to counsel and willingly undertook the cost of the defense. Here, it was employee who decided to secure counsel, without the Organization's knowledge or consent.

have violated its duty of fair representation. That never has been, and could not be, the law. A labor organization has the right to consider what course of action to take in each case that comes its way, subject to a duty to be able to explain its decision making process in rational and good faith terms. "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..." HUMPHREY V. MOORE, *supra*. Here, any expectation that there was an automatic right to an Organization-funded legal defense should have been extinguished by the well publicized change in policy in January 2004.

The Complainant's other central contention is that the Organization acted arbitrarily or in bad faith by deciding not to fund her appeal in late August. On the contrary, the Board of Directors appears to have discussed the case, and various members concluded that the residency violation did not raise issues related to the collective bargaining agreement, that she was guilty, and/or that there was little chance of prevailing. Whether these were correct judgments is not really relevant. They were non-arbitrary judgments, and formed a rational basis on which to decide on the expenditure of limited resources. As such, the decision not to fund the appeal was well within the wide range of discretion allowed a labor organization. Moreover, Klusman, after the Board's vote, offered to appear and to assist Sergeant Knitter at the Fire and Police Commission hearing. Thus it was not the case that the Organization refused to provide any representation to the Complainant. The vote was not to expend money on an attorney to provide representation. A conclusion that a union violates the duty of fair representation by electing to proceed with lay representatives, rather than attorneys, would do considerable violence to the right of labor organizations to decide how best to deliver services to their members.

Finally, the Complainant points to a variety of actions she believes are deficiencies and defects in the efforts and decisions of the MPSO in assisting her with the investigation and the appeal. Without agreeing with her that the MPSO's efforts were in some way deficient, the Examiner notes that the law does not seek to regulate the quality of representation, except in the very broadest terms:

Thus, as the Examiner and the Union have pointed out, it is well-established that a union does not breach its duty of fair representation simply by negligently processing a grievance, simply by failing to communicate with a grievant, simply by making unwise or improvident decisions about the merits of a grievance, or simply by settling a grievance against the wishes of the grievant. Imperfections in representation are permitted the union, with one important caveat: "... subject always to complete good faith and honesty of purpose in the exercise of its discretion." BISHOP, *SUPRA*, at page 13, citing HUMPHREY V. MOORE, 375 U. S. 335, 349 (1964).

While the Complainant equates these perceived flaws with a lack of good faith in the Organization's dealings with her, she provides no basis on which to conclude that Klusman, Edwards or anyone else in the MPSO leadership had any hostility to her personally, or to her situation.<sup>8</sup>

The right to proceed with an appeal to the Fire and Police Commission rests with the individual. It is not the result of collective bargaining, and the MPSO has no right to control a member's decision to proceed or not proceed, nor can it dictate the arguments or strategy a member chooses to present and follow in an appeal. As such, the MPSO has no duty of fair representation in appeals to the Fire and Police Commission. Even if it did have a duty in such cases, that duty does not extend to automatically providing legal counsel to represent a member. The Organization's decision not to pay for Sergeant Knitter's defense in September of 2007 was based upon a policy of limiting legal expenses, and a non-arbitrary decision that the merits of her case did not warrant the expenditure of Organization funds on an attorney. Those decisions are all within the range of discretion granted to a labor organization, and there is no evidence that the Organization's decision making was motivated in any part by bad faith considerations. Accordingly, the complaint has been dismissed in its entirety.

Dated at Racine, Wisconsin, this 7<sup>th</sup> day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/

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Daniel J. Nielsen, Examiner

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<sup>8</sup> The Complainant speculates that the Organization's leaders may have actually known that Fuchs was representing her, and that lingering hostility from the contentious termination of his role as counsel to the Organization may have colored their actions towards her case. The record evidence simply does not support this speculation. She admits that she first told them of Fuchs' role in September, after the Board had voted against funding her appeal. Fuchs' first public appearance as counsel was in an August 31 letter to the Attorney General, which was copied to MPSO. However, August 31 was three days after the Board's vote, and given the Labor Day holiday, it is likely that the copy of the letter would not have been seen by any MPSO official until after the Complainant had revealed Fuchs' involvement.