STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**CHRIS M. JANESKY,** Complainant,

**v.**

**GREEN BAY PUBLIC SCHOOL DISTRICT and JOHN J. WILSON,** Respondents.

Case 241
No. 68310
MP-4457

# Decision No. 32602-C

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Appearances:

**Chris M. Janesky,** 317 Cleveland Avenue, Manitowoc, Wisconsin, 54220, appearing on his own behalf.

**Geoffrey A. Lacy,** Davis & Kuelthau, S.C., 318 South Washington Street, Suite 300, Green Bay, Wisconsin, 54301, appearing on behalf of the Green Bay Public School District.

## ORDER DENYING MOTION TO DISMISS

On December 9, 2009, Wisconsin Employment Relations Commission Examiner Steve Morrison issued Findings of Fact, Conclusions of Law and Order in this matter wherein he dismissed Chris Janesky's complaint against the Green Bay Substitute Teachers Association and the Green Bay Area School District/John Wilson as untimely filed. Janesky filed a petition for review of the Examiner's decision.

On June 21, 2010, the Commission issued an Order on Review of Examiner's Decision which: (1) reversed the Examiner's determination that the complaint was untimely filed; (2) concluded that the Association had breached its duty of fair representation as to Janesky's contractual discharge grievance against the District; and (3) reopened the record so that additional evidence could be presented regarding Janesky's claim that the District violated a collective bargaining agreement by discharging him.

The District then filed a petition for review in Brown County Circuit Court. On September 22, 2010, Circuit Court Judge Kendall Kelley issued a Stipulation and Order which, pursuant to an agreement between the parties, set aside the Commission's June 21, 2010, Order and remanded the matter to the Commission for further proceedings including the taking of additional evidence. Thereafter, the matter was held in abeyance due to difficulties in scheduling hearing and efforts by the parties to settle the dispute.

In November, 2011, Janesky and the Association entered into a settlement agreement. By letter dated November 10, 2011, Janesky asked the Commission to dismiss his complaint against the Association with prejudice pursuant to the said agreement, and by Order dated November 30, 2011, the Commission did so.

On March 12, 2012, the District filed a motion to dismiss the violation of contract complaint against it arguing, among other matters, that the dismissal of the duty of fair representation claim deprived Janesky of the ability to successfully prosecute the contract claim. The parties thereafter filed written argument – the last of which was received May 12, 2012.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

## ORDER

The motion to dismiss is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 26th day of July, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Judith Neumann /s/
Judith Neumann, Commissioner

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

Green Bay Public School District

## MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

As reflected in the previously recounted procedural history of this matter, Janesky and the Association entered into a settlement agreement. Said agreement stated in pertinent part:

SETTLEMENT AGREEMENT

This agreement is made and entered into by and between the Green Bay Substitute Teachers Association, a Wisconsin labor organization ("Association") and Chris M. Janesky ("Janesky") in full and complete settlement of all controversies or issues between them.

WITNESSETH

That in consideration of the mutual covenants and agreement contained herein:

1. The Association shall pay to Janesky the sum of Seven Thousand Five Hundred and 00/100 Dollars ($7,500.00) on or before ten (10) days after the date the WERC dismisses Janesky's complaint against the Association in the proceedings now pending before the WERC under the title of Janesky v. Green Bay Area Public School District, et. al., Case Number 241, with prejudice.

2. In consideration of the payment of the above said $7,500.00 Janesky shall withdraw his complaint against the Association in the above described WERC proceedings for allegedly not properly representing him in the transactions which are the subject matter of those proceedings and shall write to the WERC requesting that the complaint against the Association be withdrawn and dismissed with prejudice. Janesky further releases and discharges the Association from any and all other claims, demands, damages, actions, or rights of action of whatever kind or nature which are alleged to have arisen as a result of said transactions.

3. The payment of the above consideration and the withdrawal of the complaint is not to be construed as an admission of any liability whatsoever by or behalf (sic) of the above names parties, and liability is expressly denied by both of them.

4. This settlement and release is intended only to settle the controversy and dispute between the Association and Janesky. Specifically, this settlement does not settle any claim Janesky has against the Green Bay Area Public School District, either in the above descried (sic) WERC proceedings, or otherwise, and Janesky specifically reserves his right to prosecute his claims against the school district.

5. The above is the entire agreement between the Association and Janesky and there have been no other representation of agreements between the parties regarding the subject matter of this agreement.

As is evident from the foregoing terms, it is apparent that neither Janesky nor the Association intended for the dismissal of the duty of fair representation claim to preclude Janesky from proceeding against the District as to his contract claim. However, the District argues that the dismissal does just that.

The premise underlying the District's argument is that a necessary party to the litigation has now been dismissed and thus that the remaining claim cannot as a matter of law proceed. We disagree.

Section 111.70(3)(a)5, Stats., provides that it is a prohibited practice for a municipal employer (such as the District) to violate a collective bargaining agreement. However, where, as here, the collective bargaining agreement in question contains final and binding impartial grievance arbitration procedures, the Commission will not assert its jurisdiction over Sec. 111.70(3)(a)5 claims (or the counterpart provisions found in Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act and Sec. 111.84(1)(e) of the State Employment Labor Relations Act) because those procedures are presumed to be the exclusive means by which alleged violations of those agreements can be resolved. Mahnke v. WERC, 66 Wis. 2d 524 (1974); Racine Educ. Ass'n. v. Racine Unified School Dist., 176 Wis. 2d 273 (Ct. App. 1993); Gray v. Marinette County, 200 Wis. 2d 426 (Ct. App. 1996); United States Motor Corp., Dec. No. 2067-A (WERB, 5/49); Harnischfeger Corp., Dec. No. 3899-B (WERB, 5/55); Melrose-Mindoro Joint School District No. 2, Dec. No. 11627 (WERC, 2/73); City of Menasha, Dec. No. 13283-A (WERC, 2/77); Monona Grove School District, Dec. No. 22414 (WERC, 3/85). However, if an employee covered by such a collective bargaining agreement can prove that his collective bargaining representative failed to fairly represent him by illegally thwarting his efforts to arbitrate a grievance over an alleged violation of the agreement, then there is a sound policy basis which overcomes the presumed exclusivity of the grievance arbitration procedure and the Commission will assert its prohibited practice/unfair labor practice jurisdiction to determine whether the agreement has been violated. Mahnke, supra., Gray, supra.

In Mahnke, only the employer was the named respondent in the complaint filed with the WERC. Thus, although Mahnke was obligated to establish that his union failed to fairly represent him before the WERC would assert jurisdiction over his breach of contract claim against his employer, his choice not to name the union as a respondent did not deprive Mahnke of the right to proceed.[1]

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[1] This conclusion is consistent with the view of the United States Supreme Court in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 164-165, 103 S.Ct. 2281, 2290-2291 (1983) as follows:

> Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. "Yet the two claims are inextricably interdependent. 'To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but

Here, Janesky chose to name both his union and his employer as respondents. By naming his union, he gained the potential for the union to be obligated to pay his costs litigating the merits of his contract claim against the employer. By settling his claim against the union, he has now lost that potential. However, because he was not obligated to name the union as a respondent in the first instance, consistent with Mahnke and DelCostello, we conclude that the dismissal of the union as a respondent does not warrant dismissal of his complaint against the District. Thus, we deny the motion to dismiss.[2] The settlement with the union does not change Janesky's ultimate burden of proof. He must produce convincing evidence that the Union breached its duty of fair representation. Only if he meets that burden will he be allowed to proceed with a breach of contract claim against the employer. Mahnke, 66 Wis. 2d at 624. Pursuant to the Court's Order, the matter is now ripe for further hearing.

Dated at Madison, Wisconsin, this 26th day of July, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Judith Neumann /s/
Judith Neumann, Commissioner

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

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must also carry the burden of demonstrating a breach of duty by the Union.'" *Mitchell*, 451 U.S., at 66-67, 101 S.Ct., at 1565-1566 (Stewart. J., concurring in the judgment), quoting *Hines,* 424 U.S., at 570-571, 96 S.Ct., at 1059. *The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.* (emphasis added).

See also, Milwaukee Board of School Directors, Dec. No. 16329-A (Malamud, 2/79) aff'd, Dec. No. 16329-B (WERC, 4/79); Milwaukee County Transport Services, Inc., Dec. No. 28531-B (Mawhinney, 1/97) aff'd by operation of law, Dec. No. 28531-C (WERC, 2/97); Ozaukee County, Dec. No. 33295-C (Carlson, 6/12).

[2] The District's motion also included a contention that Janesky's complaint was untimely filed. Pursuant to the Court's Order, that issue is to be resolved only after the record is completed with the conduct of additional hearing. Thus, we take no action as to that issue at this time.