

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LEE RICHARD RADTKE, Complainant,

vs.

WEST SALEM SCHOOL DISTRICT, Respondent.

Case 29
No. 68488
MP-4467

Decision No. 32696-G

Appearances:

Lee Richard Radtke, P.O. Box 101, West Salem, Wisconsin 54669, appearing on his own behalf.

Leslie A. Sammon, Attorney at Law, Axley Brynerson, LLP, Two East Mifflin Street, Madison, Wisconsin 53703, appearing on behalf of the West Salem School District.

Stephen Pieroni and **Priscilla Ruth MacDougall**, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Road, Madison, Wisconsin 53705, appearing on behalf of the West Salem Education Association.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On December 12, 2008, Lee Richard Radtke (Radtke) filed a complaint with the Wisconsin Employment Relations Commission (Commission) asserting that the West Salem School District (District) had committed prohibited practices within the meaning of the Municipal Employment Relations Act. On May 6, 2009, the District filed a motion to dismiss the complaint and a pre-hearing conference on the motion was held on May 8, 2009 in the Commission's offices before Commission Examiner Raleigh Jones. Examiner Jones orally granted the motion to dismiss during the pre-hearing conference, finding that the allegations raised in the complaint fell outside the Commission's jurisdiction under Secs. 111.70(3)(a), Stats. Examiner Jones formalized that ruling in writing by issuing Findings of Fact, Conclusion of Law and Order on June 1, 2009.

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Complainant Radtke then filed a petition for review of Examiner Jones' decision with the Commission. On October 27, 2009, after considering the petition and argument filed by the parties, the Commission reversed Examiner Jones and concluded that, under a "liberal interpretation," Radtke's complaint did raise three violation of contract claims under Sec. 111.70(3)(a)5, Stats. The Commission then assigned the matter to Examiner Peter G. Davis for further proceedings.

A hearing was held on December 17, 2009 in West Salem, Wisconsin to address the limited issue of whether there was a collective bargaining agreement in effect at the relevant times referred to in Radtke's complaint. The parties submitted written argument in support of their positions, the last of which was received March 1, 2010.

On April 27, 2010, I issued a decision concluding that a collective bargaining agreement was in effect on the three instances as to which Radtke alleges that the West Salem School District violated a collective bargaining agreement. In that decision, I also advised the parties that the next portion of the litigation would be limited to the issues of whether Radtke exhausted the grievance procedure applicable to the three alleged violation of contract claims and whether the West Salem Education Association violated its duty of fair representation as to those claims.

Hearing on those issues ¹ was held in West Salem, Wisconsin on August 5 and 6, 2010. The West Salem Education Association participated in said hearings as an intervener. Post-hearing argument was received until January 5, 2011. ²

Having reviewed the record and being fully advised in the premises, the Examiner makes and issues the following

FINDINGS OF FACT

1. West Salem School District, herein the District, is a municipal employer.
2. Lee Richard Radtke, herein Radtke, was employed by the District as a teacher.

¹ The three alleged violations were suspension without just cause, failing to respond to the suspension grievance, and non-renewal without just cause. The alleged failure to respond to the suspension grievance was not litigated by Radtke in this portion of the proceedings and thus has been abandoned.

² As part of his post-hearing argument, Radtke requested that additional documents and an audio tape become part of the evidentiary record. Both the District and the Association opposed his request. Pursuant to ERC 12.05 and 18.08(8), once the hearing is completed, "no additional evidence may be submitted except on motion for good cause." The materials in question were available to Radtke at the time hearings were held. Said materials did not become part of the record created at said hearings. Therefore, even assuming for the sake of argument that said materials would provide evidence relevant to the issues in this proceeding, Radtke has not established good cause for post-hearing receipt of said evidence. Thus, Radtke's request is denied.

3. West Salem Education Association, herein Association, is the collective bargaining representative of a bargaining unit of teachers employed by the District. The Association represented Radtke during his employment as a teacher with the District.

4. At all times pertinent herein, the District and the Association were parties to a collective bargaining agreement which stated "No teacher shall be disciplined, non-renewed or reprimanded without just cause. That same collective bargaining agreement included a grievance arbitration procedure through which alleged violations of said agreement could be litigated. Although the grievance arbitration procedure gives an individual employee the right to file a grievance, an employee does not have the contractual right to arbitrate a grievance over the opposition of the Association.

5. In January 2008, Radtke received a three day suspension and subsequently filed a contractual grievance alleging the District did not have just cause for said action.

6. In February and March, 2008, the District advised Radtke of its intent to non-renew his teaching contract for the 2008-2009 school year.

7. In response to the non-renewal notice, authorized representatives of the Association (a Wisconsin Education Association Council attorney and an Executive Director of the Coulee Region United Educators) engaged in extensive settlement discussions with representatives of the District. Said discussions produced a tentative settlement agreement which included the following:

- A. Radtke's resignation effective June 30, 2008.
- B. Radtke would be placed on paid leave of absence for the period March 1, 2008-June 30, 2008.
- C. Radtke would continue to receive single health insurance coverage through August 31, 2009.
- D. Radtke would receive a mutually agreeable letter of reference.
- E. Radtke would receive the three days pay previously lost due to the January 2008 three day suspension.
- F. All correspondence "related to discipline and disputes between the District and Mr. Radtke" would be removed from Radtke's personnel file.
- G. Any Radtke application for unemployment compensation would not be contested by the District.

- H. Radtke would be allowed to appear before the District school board for up to two hours to “present his concerns about his treatment in the District.”
- I. Radtke did not concede to having engaged in any “wrongdoing.”

The Association then considered whether to accept the tentative settlement agreement instead of pursuing Radtke’s suspension and probable non-renewal to grievance arbitration. When making that choice, the Association was aware of and considered the monetary value of the suspension and probable non-renewal, the impact of the suspension and non-renewal on Radtke, and the likelihood of success in arbitration. Because it viewed the terms of the settlement agreement to be of substantial value to Radtke and had been advised by experienced Association representatives that it was unlikely that a grievance arbitrator would overturn a non-renewal, the Association accepted the settlement agreement in March, 2008.

Although Radtke had input into the terms of the settlement and was aware of the terms of the settlement ultimately reached between the Association and the District, he did not find the settlement acceptable and did not sign same.

Based on the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Unless the West Salem Education Association breached its duty of fair representation to Lee Richard Radtke by entering into the settlement agreement referenced in Finding of Fact 7, the grievance arbitration procedure contained in the collective bargaining agreement between the West Salem School District and the West Salem Education Association is the exclusive means by which alleged violations of that agreement can be litigated.
2. By entering into a settlement agreement referenced in Finding of Fact 7, the West Salem Education Association did not breach its duty of fair representation to Lee Richard Radtke.
3. Because the West Salem Education Association did not breach its duty of fair representation to Lee Richard Radtke by entering into the settlement agreement referenced in Finding of Fact 7, the grievance arbitration procedure contained in the collective bargaining agreement between the West Salem School District and the West Salem Education Association is the exclusive means by which alleged violations of that agreement can be litigated. Therefore, the Wisconsin Employment Relations Commission will not assert its jurisdiction to determine whether the West Salem School District violated a collective bargaining agreement and thereby committed prohibited practices within the meaning of Sec. 111.70 (3)(a) 5, Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The complaint filed by Lee Richard Radtke is dismissed.

Dated at Madison, Wisconsin, this 7th day of March, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/

Peter G. Davis, Examiner

WEST SALEM SCHOOL DISTRICT

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

Section 111.70 (3)(a) 5, Stats., provides that is an prohibited practice for a municipal employer (such as the District) to violate a collective bargaining agreement. However, where, as here, the collective bargaining agreements in question contain final and binding impartial grievance arbitration procedures, the Commission will not asserts 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.*, MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 31602-C (WERC, 1/07).

As reflected in Finding of Fact 4 and Conclusion of Law 1, the record here satisfies me that the grievance arbitration clause in the bargaining agreement between the District and the Association is the exclusive means by which the merits of Radtke's contractual claims can be resolved unless Radtke can prove that the Association breached its duty of fair representation by entering into the settlement agreement. Thus, I proceed to consider the alleged breach of the duty of fair representation.

In GRAY, *supra.*, a case involving a union that was the collective bargaining representative of municipal employees such as Radtke and thus covered by the Municipal Employment Relations Act, the Wisconsin Court of Appeals adopted and applied the burdens and standards set forth by the Wisconsin Supreme Court in MAHNKE, *supra.* (a case involving a private sector employee advancing a Sec. 111.06(1)(f) breach of contract claim under the Wisconsin Employment Peace Act) for determining whether a union has breached its duty of fair representation. GRAY and MAHNKE establish as a general matter that an employee must prove that the union acted in an arbitrary, discriminatory or bad faith manner to establish a breach of the duty of fair representation. More specifically, where, as here, the claim is that the union breached its duty of fair representation by failing to arbitrate a grievance, MAHNKE

holds that a union making such a decision should take into account at least the monetary value of the claim, the effect of the alleged breach on the employee and the likelihood of success in arbitration.

The record, as reflected in the Findings of Fact, persuades me that the Association met its obligations under GRAY and MAHNKE when deciding to settle rather than to arbitrate Radtke's existing (the suspension) and likely future (the non-renewal) contractual claims. The Association was aware of and considered the monetary value of Radtke's claims, the effect of the alleged contractual breaches on Radtke and the likelihood of success in arbitration.

The record further persuades me that the Association always represented Radtke's interests in "good faith and with the honesty of purpose" as encompassed by the duty of fair representation. See CITY OF MEDFORD, DEC. NO. 30537-C (WERC, 8/04); MILWAUKEE BOARD OF SCHOOL DIRECTORS, *supra*. During the months leading up to the non-renewal recommendation, the Association's representatives devoted substantial resources to an attempt to improve and defuse Radtke's increasingly confrontational relationship with the District. Those Association efforts continued despite the Radtke's general resistance to the Association's advice. As a result of those efforts, the Association was generally well aware of the evidence (and its likely persuasive value) the District would rely upon in any grievance arbitration as to Radtke's suspension and proposed non-renewal. Thus, there can be no doubt that the Association was not guilty of arbitrary, discriminatory or bad faith conduct in its representation of Radtke's interests.

Radtke denies that he engaged in any of the alleged misconduct upon which his suspension and proposed non-renewal were based. Thus, it is understandable that Radtke wanted to clear his name by litigating the suspension and proposed non-renewal before a grievance arbitrator and now wants to do so before me. However, the contract between the Association and the District does not give him an independent right to proceed to grievance arbitration over the Association's objection and I lack jurisdiction to do so where, as here, the contractual grievance arbitration procedure is the exclusive means of litigating Radtke's contract claims against the District and the Association did not breach its duty of fair representation by settling said claims. Thus, the question of whether Radtke engaged in any of the alleged misconduct in question remains unresolved and his complaint against the District has been dismissed.

Dated at Madison, Wisconsin, this 7th day of March, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/

Peter G. Davis, Examiner

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