

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-H

Appearances:

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

Leslie A. Sammon, Axley Brynson, 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.

ORDER ON REVIEW OF EXAMINER'S DECISION

On March 7, 2011, Wisconsin Employment Relations Commission Examiner Peter G. Davis issued Findings of Fact, Conclusions of Law and Order in the above matter. The Examiner concluded that the West Salem Education Association did not breach the duty of fair representation when it entered into a settlement agreement affecting Lee Radtke and accordingly that the Commission would not assert jurisdiction over the West Salem School District for purposes of determining whether it violated a collective bargaining agreement as to Radtke and thereby committed prohibited practices within the meaning of Sec. 111.70(3)(a)5, Stats.

Radtke filed a timely petition for review of the Examiner's decision pursuant to Secs. 111.70(4)(a) and 111.07(5), Stats. The parties filed written argument, the last of which was received April 28, 2011.

No. 32696-H

Having reviewed the record, the Commission makes and issues the following

ORDER

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 14th of June, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Commissioner Rodney G. Pasch did not participate.

WEST SALEM SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
ORDER ON REVIEW OF EXAMINER'S DECISION

A union breaches the duty of fair representation only if its actions are arbitrary, discriminatory or in bad faith. MAHNKE V. WERC, 66 Wis.2d, 524, 532, 225 N.W.2d 617 (1975); VACA V. SIPES, 386 U.S. 171, 190, 87 S. Ct. 903, 17 L. Ed.2d 842 (1967). Radtke has offered not a hint of evidence as to the latter two elements. We construe his complaint as focusing on allegedly arbitrary actions by the Union. The focus of his claim is directed at the fact that the Union, acting through counsel, entered into a settlement agreement without his express approval. That agreement ended his employment at the West Salem School District. Radtke faces a difficult standard in attempting to prove arbitrary action by his union representatives. He has no absolute right to arbitration and the fact that the Union settled his grievance “does not without more constitute a breach of the duty of fair representation.” MAHNKE, *supra*.

To establish that the Union’s judgment call was arbitrary requires proof that “the union’s behavior is so far outside the range of reasonableness as to be irrational.” NEAL V. NEWSPAPER HOLDINGS, INC., 349 F.3d, 363, 369 (7th Cir., 2003). Radtke falls far short of this demanding standard – if anything the Union went to great lengths to ensure that Radtke was treated fairly. Union representatives worked closely with Radtke for a substantial period of time counseling him in dealing with an employer that showed displeasure with his work. Ultimately, facing non-renewal, the Union negotiated a favorable departure accord which salvaged Radtke’s reputation and his ability to obtain future employment. The decision not to pursue arbitration was made by an experienced labor law practitioner and independently reviewed by two other experienced members of the labor bar. The Union has the right to exercise independent judgment regarding the merits of potential claims. It did so here after careful consideration of Radtke’s rights and fairly represented his interests.

Radtke has raised a number of objections to the Examiner’s decision. He contends that the Examiner improperly decided that the Union satisfied its duty of fair representation, because the Examiner would not admit evidence at hearing or post-hearing that would have addressed the merits of the employer’s underlying reasons for non-renewing Radtke. The Examiner correctly excluded this evidence, since, as the Examiner explained, the Commission does not reach the merits of the underlying grievance if the union is found to have handled the matter consistently with its duty of fair representation. MAHNKE, *supra*. Here, regardless of the objective merits of the employer’s action or Radtke’s grievance, it is evident that the Union, after careful consideration, decided in good faith to settle the matter. Radtke also contends that the Union did not adequately discuss the situation with him before agreeing to the settlement and that the Union leadership and/or membership did not vote to accept the settlement. Assuming *arguendo* that the law requires a union to explain a settlement to a bargaining unit member, Union witnesses testified credibly that they were in touch with Radtke

throughout the process of handling and settling his nonrenewal and said communication would satisfy any such requirement. The record is also clear that the union had authorized an agent, Attorney McDougall, to negotiate a settlement on Radtke's behalf; no evidence indicates that the Union's constitution or bylaws required a membership vote to accept the settlement. Cf. FLORENCE COUNTY, DEC. NO. 32435-F (WERC, 4/11). Finally, Radtke takes issue with the Examiner's refusal to accept in toto two binders of chronologically ordered documents that Radtke proffered in support of his case; instead the Examiner chose to admit documents in the order in which they were authenticated and offered during testimony at the hearing. The Examiner's methodology is consistent with normal hearing procedure, as it permits all parties an opportunity to determine, in context of testimony, whether or not to object to the admission of any particular document. Contrary to Radtke's assumption, the order in which documents are received does not affect the fact finder's ability to follow the chronology of events when reviewing the record as a whole. It is clear that the Examiner provided Radtke ample opportunity to introduce pertinent documents and testimony. Radtke's argument is therefore without merit.

Given all of the foregoing, we have affirmed the Examiner.

Dated at Madison, Wisconsin this 14th day of June, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Chairman

Judith Neumann /s/

Judith Neumann, Commissioner

Commissioner Rodney G. Pasch did not participate.