

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JANICE BORKENHAGEN, Complainant

vs.

UNIVERSITY OF WISCONSIN SYSTEM and AFSCME COUNCIL 24, Respondents.

Case 70
No. 70821
PP(S)-417

Decision No. 33334-B

Appearances:

Janice Borkenhagen, 1760 Chapman Street, Beloit, Wisconsin, 53511-3708, appearing on her own behalf.

Peggy A. Lautenschlager, Attorney, Bauer & Bach, L.L.C., 123 East Main Street, Madison, Wisconsin 53703, appearing on behalf of Respondent AFSCME Council 24.

William H. Ramsey, Chief Legal Counsel, Wisconsin Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of Respondent University of Wisconsin System.

ORDER ON REVIEW OF EXAMINER'S DECISION

On June 27, 2012, Examiner Mathew Greer issued Findings of Fact, Conclusions of Law and Order in the above-captioned case concluding that AFSCME Council 24 had not breached its duty of fair representation to Janice Borkenhagen and thus had not committed an unfair labor practice within the meaning of Sec. 111.84(2)(a), Stats. Based on that conclusion, the Examiner further determined that he would not exercise jurisdiction over Borkenhagen's allegation that the University of Wisconsin System had violated a collective bargaining agreement (and thus committed unfair labor practices within the meaning of Sec. 111.84(1)(e), Stats.) by suspending and discharging her. Therefore, the Examiner dismissed Borkenhagen's complaint.

On July 16, 2012, Borkenhagen filed a petition seeking review of the Examiner's decision pursuant to Secs. 111.84(4) and 111.07(5), Stats. The parties thereafter filed written argument in support of and opposition to the petition-the last of which was received August 28, 2012.

No. 33334-B

Having reviewed the record and being fully advised in the premises, 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 19th day of November, 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

UNIVERSITY OF WISCONSIN SYSTEM and AFSCME COUNCIL 24 (Borkenhagen)

MEMORANDUM ACCOMPANYING ORDER
ON REVIEW OF EXAMINER'S DECISION

The essence of Borkenhagen's duty of fair representation complaint is that AFSCME Council 24 refused to arbitrate her suspension and discharge grievances due to the friendship between a Council 24 Local president and Borkenhagen's supervisor. The Examiner concluded that the friendship did not influence Council 24's decision and thus that no breach of the duty of fair representation occurred.

On review, Borkenhagen argues: (1) the Examiner wrongly concluded all union witnesses were truthful when they denied that the friendship between the Local president and the supervisor influenced Council 24's representation; and (2) the hearing should be reopened so that she can present evidence as to the absence of just cause for the discipline she received.

As to the truthfulness of union witnesses, Borkenhagen essentially argues that a violation of the duty of fair representation (and the "falsehoods" presented by union witnesses) is established by Council 24's refusal to honor her request for a steward other than Czysak-Lyne. The Examiner rejected this argument and so do we. The State Employment Labor Relations Act did not obligate Council 24 to provide a new steward to Borkenhagen. Thus, absent persuasive evidence of improper motivation, Council 24's refusal of Borkenhagen's request was not illegal. The Examiner's decision demonstrates that he considered all the evidence, and concluded that the union witnesses' testimony was truthful¹ as to why Council 24 denied Borkenhagen's request for new steward (Czysak-Lyne was experienced, available and not hostile to Borkenhagen) and why the Council 24 decided not to arbitrate Borkenhagen's disciplinary grievances (limited likelihood of success on the merits). We have done the same and reached the same conclusion.²

As to the presentation of additional evidence, Borkenhagen asserts she did not understand the complaint process³ and that if she had been able to present her evidence as to

¹ The Examiner advised us that the demeanor of the witnesses did not influence his view of their truthfulness.

² Before the Examiner and on review before us, Borkenhagen limited her attack on the credibility of union witnesses to her view that the decision not to arbitrate was based on the friendship between a union officer and her supervisor. Thus, she did not independently challenge the Examiner's determination that Weaver directly or indirectly considered the three factors that our Wisconsin Supreme Court has held a union must evaluate when it decides whether to arbitrate a grievance. Mahnke v WERC, 66 Wis.2d. 524, 534 (1975). The absence of such an independent challenge is significant because Borkenhagen had the burden of proving a breach of the duty of fair representation by a clear and satisfactory preponderance of the evidence. See Secs. 111.84(4) and 111.07(3) as well as Mahnke, supra at 535.

³ We note that the Examiner commented at the end of the hearing (Tr. 181) that the hearing on the duty of fair representation issue was being closed. Thus, at that time, Borkenhagen had the opportunity to ask questions/resolve any uncertainty in her mind about the process being followed. We also note that we have

why the State lacked just cause to discipline her, she would have been better able to establish a breach of the duty of fair representation against Council 24. We disagree. It is the information Council 24 had at the time it decided not to arbitrate the grievances (along with any evidence of arbitrary, capricious or bad faith conduct/motivation) which is relevant to the legality of Council 24's decision. That information is in the record before us as is evidence presented by Borkenhagen as to alleged arbitrary/bad faith motivation. Particularly where, as here, there is no evidence that Borkenhagen unsuccessfully attempted to provide Council 24 with additional "just cause" evidence before or after the Council 24 decision not to arbitrate,⁴ we conclude that "just cause" evidence beyond that within Council 24's knowledge at the time it made its decision is not relevant to the duty of fair representation issue. Thus, we reject Borkenhagen's request to reopen the hearing.

Given all of the foregoing, we have affirmed the Examiner's decision.

Dated at Madison, Wisconsin, this 19th day of November, 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

generally held that even unrepresented parties in a complaint proceeding have a responsibility to understand the procedures to be followed. Madison Metropolitan School District, Dec. No. 32139-B (WERC, 10/08).

⁴ We note that Borkenhagen had the right to appeal the decision not to arbitrate within Council 24's internal structure and chose not to do so.

