

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-1102
STATE OF WISCONSIN

Cir. Ct. No. 02-CV-1011

**IN COURT OF APPEALS
DISTRICT III**

**LOCAL 1287, AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,**

PETITIONERS-APPELLANTS,

v.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION AND
GARRY T. VAN OUSE,**

RESPONDENTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marathon County:
VINCENT K. HOWARD, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Local 1287, American Federation of State, County and Municipal, Employers, AFL-CIO (the union) appeals a judgment affirming a Wisconsin Employment Relations Commission determination. The commission concluded that the union breached its duty of fair representation to Garry Van Ouse. Specifically, the commission found that the union acted in bad faith

regarding a grievance involving Van Ouse's seniority following a job transfer. We conclude there is no evidence to support a finding of bad faith and consequently reverse the judgment.

BACKGROUND

¶2 The union represents workers within Wausau's Department of Public Works and Fire Department. Garry Van Ouse has worked as a mechanic assigned to the fire department since 1991 and belongs to the union.

¶3 In March of 2001, Van Ouse received a letter from the city stating that he was being transferred to the Department of Public Works. The letter stated that the transfer was not a change in position and therefore he would not lose his seniority. However, the transfer affected three workers at the Department of Public Works, who would now be below Van Ouse for seniority purposes.

¶4 The three workers filed a grievance asserting that the collective bargaining agreement required the city to consider Van Ouse a new employee upon his transfer to the Department of Public Works. The city denied the grievance and the union requested arbitration. The grievance was settled at the arbitration hearing. The settlement provided that Van Ouse's seniority would be subjugated to the other three workers' seniority.

¶5 Van Ouse then filed a grievance, which the city denied. When the union declined to advance the grievance to arbitration, Van Ouse filed a complaint with the commission. He alleged, among other things, that the union had breached its duty of fair representation to him because (1) the settlement affecting his seniority violated the collective bargaining agreement and (2) the union failed to advance his grievance to arbitration. An examiner appointed to hear the complaint

determined that there was insufficient evidence to prove the union breached its duty of fair representation.

¶6 Van Ouse petitioned the full commission for review. The commission concluded the union did breach its duty of fair representation. The commission found the union acted in bad faith by (1) not investigating whether Van Ouse's assignment to the Department of Public Works was a transfer within the meaning of the collective bargaining agreement, and (2) refusing to request arbitration for Van Ouse's grievance.

¶7 The commission determined that Van Ouse had simply changed worksites and did not transfer to a new bargaining unit. Therefore, he would not have lost his seniority under the collective bargaining agreement. Further, the union could have easily discerned this fact had it investigated. The union filed a petition for review in the circuit court, which affirmed the commission.

DISCUSSION

¶8 We review the decision of the commission rather than that of the circuit court. *Secor v. LIRC*, 2000 WI App 11, ¶8, 232 Wis. 2d 519, 606 N.W.2d 175. Here, we are faced with a question of fact – whether the union breached its duty of fair representation to Van Ouse. See *Mahnke v. WERC*, 66 Wis. 2d 524, 532-33, 225 N.W.2d 617 (1975) (quoting *Clark v. Hein-Werner*, 8 Wis. 2d 264, 272, 99 N.W.2d 132, 100 N.W.2d 317 (1959)). When reviewing the commission's findings of fact, we apply the “substantial evidence” standard. See *Sea View Estates Beach Club, Inc. v. DNR*, 223 Wis. 2d 138, 148, 588 N.W.2d 667 (Ct. App. 1998). Substantial evidence is relevant evidence that a reasonable person might find sufficient to support a conclusion. *Id.* at 148.

¶9 A union’s duty of fair representation to its members arises under its collective bargaining agreement. *Cheese v. Afram Bros.*, 32 Wis. 2d 320, 326, 145 N.W.2d 716 (1966). A breach occurs “when a union’s conduct toward a member ... is arbitrary, discriminatory, or in bad faith.” *Mahnke*, 66 Wis. 2d at 531 (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)). The parties dispute why the commission concluded the union breached its duty of fair representation. The union claims the commission found that the union acted in bad faith. The commission argues it found that the union acted arbitrarily. This dispute is important because the standard of proof for each finding is different. Whether a union acts in bad faith “calls for a subjective inquiry and requires proof that the union acted (or failed to act) due to an improper motive.” *Neal v. Newspaper Holdings, Inc.*, 349 F.3d 363, 369 (7th Cir. 2003). However, whether a union acts arbitrarily calls for an objective inquiry as to whether the union’s behavior is “so far outside a wide range of reasonableness as to be irrational.” *Id.*

¶10 We have carefully reviewed the commission’s decision. Citing *Mahnke*, the commission correctly stated the legal standards regarding fair representation and how the duty can be breached, noting an employee must “establish that the union breached its duty of fair representation during the procedure by acting in an arbitrary, discriminatory or bad faith manner.”

¶11 The commission noted there was a link between the settlement of the three workers’ grievance and the union’s refusal to arbitrate Van Ouse’s grievance. A decision to arbitrate Van Ouse’s grievance would have put the union in the position of attempting to undo the settlement. The commission stated:

Given this linkage, the parties and the Examiner correctly focused on the legitimacy of the settlement agreement (and the process that produced it) as being the focal point of the dispute. As [the union] stated in its brief to us on review,

“... the question is whether the Union-City settlement agreement ... is a product of a good faith dispute between those parties ...[.]” If there was such a good faith dispute, then the resolution of the dispute through the settlement agreement would not constitute a breach of the duty of fair representation and the resulting decision not to arbitrate Van Ouse’s grievances would also be an appropriate one. *If there was no good faith dispute, then [the union] was proceeding in bad faith and thus breached its duty of fair representation toward Van Ouse. We turn to a consideration of whether there was a good faith dispute.* (Emphasis added.)

The commission ultimately determined that there was no good faith dispute:

However, when a union decides to arbitrate a grievance, the duty of fair representation requires that it should “take into account at least the monetary value of his claim, the effect of the breach on the employee and the likelihood of success in arbitration. In this instance, particularly where the decision to arbitrate was to the potential (and ultimately actual) detriment of another employee (Van Ouse) to whom [the union] also owed a duty of fair representation, and assessment of the likelihood of success in arbitration as to the [three workers’] grievance would include an assessment by [the union] as to whether the City was factually correct when it advised Van Ouse on March 12, 2001 that “this is not a change in your position ...” and thus that Van Ouse’s change in work site was not a transfer. There is no evidence that such an investigation of this critical factual question ever occurred. Had such an investigation occurred, the Mechanics’ erroneous belief that Van Ouse had transferred would have been corrected and there would no longer have been a *good faith* dispute as to the fact which is dispositive as to Van Ouse’s contractual rights. Had such an investigation occurred, [the union] could not in *good faith* have entered into the settlement agreement that altered Van Ouse’s seniority date. (Citation omitted; emphasis added.)

Based on this analysis, the commission concluded the union breached its duty of fair representation.

¶12 The commission's conclusion of a breach was not based on any finding of arbitrary conduct. While an argument might be made that the union acted arbitrarily, that is not what the commission actually found. Instead, the commission only found that the union acted in bad faith. We must review the decision the commission made, not that which it did not make.

¶13 Having determined the basis for the commission's decision, we turn to the next question: whether the decision is supported by substantial evidence. To find bad faith, there must be evidence that the union acted with an improper motive. See *Neal*, 349 F.3d at 369. Van Ouse never alleged that the union acted due to an improper motive. As to the union's refusal to arbitrate Van Ouse's grievance, the record shows that the issue was discussed at a union meeting where the members voted 19-2 not to arbitrate. There is no suggestion that the vote was based on improper motives. Thus, the record does not evince any evidence of improper motive.

¶ 14 We note that the commission's decision seemingly equates a lack of good faith with a presence of bad faith. However, bad faith requires proof of improper motive. The union may well have demonstrated a lack of good faith. That in and of itself does not rise to the level of bad faith.

By the Court.—Judgment reversed.

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