STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DEBRA A. PERNSTEINER, Complainant,

vs.

CITY OF MEDFORD and IBEW LOCAL 953, Respondents.

Case 31
No. 61797
MP-3875

Decision No. 30537-A

Appearances:

Roy T. Traynor, Attorney at Law, 925 South Third Avenue, P.O. Box 86, Wausau, Wisconsin 54402-0086, on behalf of Complainant Debra Pernsteiner.

Crivello, Carlson & Mentkowski, S.C., Attorneys at Law, by **Michelle M. Ford**, 710 North Plankinton Avenue, Milwaukee, Wisconsin 53203, on behalf of Respondent City of Medford.

Metcalf, Kaspari, Howard, Engdahl & Lazarus, P.A., Attorneys at Law, by **Richard L. Kaspari**, on behalf of Respondent IBEW Local 953.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 15, 2002, Complainant Debra Pernsteiner, hereinafter Complainant, filed a complaint with the Wisconsin Employment Relations Commission wherein she alleged that Respondent City of Medford, hereinafter Respondent City, violated Complainant's contractual rights and that thereafter Respondent IBEW Local 953, hereinafter Respondent Union, violated its duty to fairly represent Complainant, and that thereby Respondent City and Respondent Union committed prohibited practices in violation of Secs. 111.70(3)(a)5, Stats., and 111.70(3)(b)1, Stats., respectively. Thereafter, Respondents filed their respective answers wherein they denied they had committed a prohibited practice and raised certain affirmative defenses.

On January 29, 2003, the Commission appointed the undersigned, David E. Shaw, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter. Hearing was set in the matter for March 19 and 20, 2003.

On March 17, 2003, Respondent City filed a "Motion in Limine to Dismiss Untimely Claims and Bar Evidence" on the basis that the Complainant's claims against the City were time-barred. A conference call was held on that date between the Examiner and the parties' counsel, in the course of which the Respondent Union joined in the City's motion and counsel were given the opportunity to argue in support of their respective positions. The Examiner then indicated that he would be denying the motion on the record when the hearing convened.

Hearing was convened in the matter before the undersigned on March 19, 2003 in Medford, Wisconsin. The hearing was transcribed. At hearing, the parties agreed to the admission of Exhibits 1 through 34, and those exhibits were admitted. Complainant then moved to amend the complaint to strike the allegation of a violation of Sec. 111.70(3)(b)5, Stats., by the Respondent Union and said motion was granted. The Examiner then stated his ruling denying the Respondents' motion on the record. The Respondent Union then moved to amend its answer to plead the affirmative defense that allegations against the Union for conduct occurring in 2000 are barred by Sec. 111.07(14), Stats., and that motion was granted. Complainant was then asked to clarify what conduct by the Union was being alleged to have violated its duty to fairly represent Complainant. Upon Complainant doing so, the Respondents renewed their motion to dismiss the allegations as untimely. In the course of those discussions, Complainant moved to strike Respondent City's answer on the basis that it captioned an earlier proceeding in a different venue. The Respondent City moved to amend its answer to provide the correct caption in this case, which motion was granted. The Examiner then directed the parties to brief the motion to dismiss and adjourned the hearing. It was agreed that the parties would be able to rely on the exhibits admitted into the record to support their respective positions.

Submission of written argument was completed on June 2, 2003.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Having considered the pleadings, the exhibits in the record and the arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, Debra Pernsteiner, is an individual and a resident of Wisconsin. On November 15, 2002, Complainant filed the complaint in this matter which states, in relevant part:

> 1. Debra Pernsteiner is an individual (hereinafter referred to as "Deb P.") .
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> . . .
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> 2. City of Medford (hereinafter referred to as "Medford") is a municipal employer with its principal offices at 639 South Second Street, Medford, Wisconsin 54451-2058, whose phone umber is (715) 748-4321, and has a Personnel Committee Chair, Mike Wellner.
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> 3. Local 953 International Brotherhood of Electric Workers of America, AFL-CIO, (hereinafter referred to as "Local") is a labor organization with its principal offices situated at 2206 Highland Avenue, P.O. Box 3005, Eau Claire, Wisconsin, 54702-3005, whose business manager is John A. Marincel and whose phone umber is (715) 834-4911.
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> 4. For several years prior to December 7, 2000, Local has represented a bargaining unit comprised of non-supervisory all-female clerical workers and all-male electrical skilled trade and maintenance workers (hereinafter referred to as "Unit") at Medford Electric Utility, (hereinafter referred to as "MEU") an electric utility owned and operated by the City of Medford. Medford and Local are parties to a series of collective bargaining agreements including the latest two (2) covering calendar years 1998-2000 (hereinafter referred to as "1998 CBA") and 2000-2001 (hereinafter referred to as "2000 CBA") and a third 2000-2001 establishing a City Clerical Unit (hereinafter referred to as "Clerical CBA"). All of these collective bargaining agreements prohibit discharges of unit employees without just cause and recognize Local as the exclusive bargaining representative of all persons performing MEU's clerical and electrical skilled trade and maintenance work and all such agreements provide for a multi-step grievance procedure culminating in final and binding grievance arbitration.
>
> 5. For fifteen (15) years prior to December 7, 2000, Debra P. was employed by MEU as a clerical worker and as such was a member of Unit which was represented by Local.

6. For many of those years, the all-male skill trade and maintenance members of Unit had frequently expressed intense dissatisfaction with the existing composition of Unit including the all-female clerical members on the grounds that such inclusion was an impediment to economic gains they sought in their collective bargaining agreements with Medford. These all-male members of the Unit made it clear to other persons and to other members and officers of Local that they wanted the all-female clerical workers out of Unit.

7. On July 27, 2000, Medford notified Local that it was going to reorganize MEU and transfer the all-female clerical workers of MEU to Medford's city clerk office and city hall where they would perform substantial non-MEU work for Medford in addition to the existing MEU work. As part of that reorganization Medford, in purported reliance upon a previous arbitration decision (hereinafter referred to as "1996 decision"), announced unilaterally a new reduced wage scale for the all-female clerical workers with the caveat that if any of the all-female clerical workers did not agree to the wage reductions, they would be terminated. When both Deb P. and another long-term clerical worker, Cindy Pernsteiner (hereinafter referred to as "Cindy P.") objected, Local entered into a series of purported negotiations with Medford which resulted in an agreement which both Medford and Local told Debra P. and Cindy P. and others was consistent with the governing 1996 arbitration decision. In November 2000 Debra P. attempted to file a grievance but Local and Medford both refused to process that grievance. In so doing, Local's attorney ("Howard") on November 15, 2000, wrote, "if the City reneges on its economic commitments to Pernsteiner, the Union will pursue a grievance on her behalf. However, if Medford completes the clerical reorganization as anticipated, and abides by the terms of the new contract, including it's economic obligations to Pernsteiner, Local 953 will not pursue a grievance on her behalf", the converse of which is that Local 953 committed itself to pursue a grievance in behalf of Deb P. if Medford did not abide by its agreements and representations.

8. At about the same time, during the fall of 2000, Debra P., who was anticipating termination, filed two (2) charges with the Equal Rights Division of the Wisconsin Department of Workforce Development (hereinafter referred to as "ERD") which separately alleged sex discrimination against Debra P. by both Medford and Local (See attached exhibits "D" and "E"). After an extended investigation ERD's investigator issued two (2) initial determinations: (a) no probable cause against Local and (b) probable cause against Medford. Subsequently after Debra P. had been terminated on December 7, 2000, and after the long-delayed initial determination of no probable cause Debra P. commenced discovery proceedings in March 2002 against Local by notice and subpoenas duces tecum of Cindy P. and five (5) officers and members of Local.

9. On March 20, 2002, Cindy P. testified at her deposition that there was considerable hostile sex discrimination by Local officers and members and, even more significantly, that in the almost one and one-half years since the reorganization had taken effect, her job, work and duties had not changed at all nor had the job, work and duties of any female clerical former member of Unit. Local's (new) Attorney ("Townsend") cross-examined Cindy P. extensively and then requested a recess to make a settlement proposal to Debra P.

10. Townsend proposed that Debra P. agree to dismiss her charge against Local only and that as a quid pro quo, Local would file and vigorously prosecute a grievance against Medford to arbitration if necessary on the grounds that Medford acted in bad faith in its reorganization and that the objective of the purported reorganization was actually for union-busting only – not fiscal economy and efficiency. Debra P. agreed to Local's proposal. No further depositions of the five (5) subpoenaed officers and members were held.

11. Subsequently, Local filed a poorly drafted grievance in behalf of itself and both Deb P. and Cindy P. against Medford which was immediately rejected by Medford on April 10, 2002 as technically and procedurally deficient so on April 18, 2002, Local filed a re-drafted replacement grievance in behalf of itself and Deb P. and Cindy P. which is attached hereto as **Exhibit A** and is incorporated herein as if set forth in full. Then in reliance upon Local's repeated promises and representations of vigorous prosecution of the grievance to arbitration if necessary, Deb P. dismissed her ERD no probable cause charge against Local.

12. Subsequently, although Deb P. made several inquiries of Local as to the status of the grievance, Local did not advise Deb P. of anything except that on or about May 13, 2002 Local's Attorney Townsend advised Deb P. that she was no longer representing Local on the replacement grievance and that Local was again represented by Attorney Howard. Howard did not reply to repeated inquiries about the status of the replacement grievance until belatedly late on July 29, 2002, Howard faxed to Deb P.'s undersigned Attorney a copy of a letter to Medford's Attorney Jones (hereinafter referred to as "Jones") in which she voluntarily dismissed the replacement grievance (which is attached hereto as **Exhibit A-1** and is incorporated herein as if set forth in full) along with a belated and inaccurate explanation of her decision. On July 30, 2002, Deb P. made a written objection to the voluntary dismissal and on August 8, 2002 made a written notice of intent to proceed to arbitration (a copy of the August 8, 2002 Notice of Intent to Proceed to Arbitration is annexed here to as **Exhibit A-2** and is incorporated herein as if set forth in full).

13. About the same time period, on or about August 1, 2002 and August 13, 2002 (not received until August 25, 2002), Medford's Attorney Jones wrote to Deb P.'s undersigned Attorney that Medford would not arbitrate and that during the first initial steps of the grievance procedure Local advised Medford that it would no longer represent Deb P. in the grievance procedure, thus effectively voluntarily dismissing her grievance without her knowledge or consent.

14. On August 8, 2002, upon learning of the voluntary dismissal and of the non-representation of Deb P., she made written demand for arbitration of the replacement grievance by way of a notice of intent to proceed to arbitration which notice was directed to Medford and was also given by copies to Local's Attorneys Howard and Townsend. Medford formally denied this demand/notice on August 13(25), 2002. Local never responded to Deb P.'s notice of intent to proceed to arbitration. Medford's denial was not received by Deb P.'s undersigned attorney until August 25, 2002. (A copy of the notice of intent to proceed to arbitration is annexed hereto as **Exhibit B** and a copy of Medford's denial is annexed hereto as **Exhibit C**.) Both Exhibit B and C are incorporated herein by reference as if set forth in full.

15. Copies of the Equal Rights Division charges filed by Deb P. against Local and Medford are annexed hereto as Exhibit D (Local) and Exhibit E (Medford) and copies of the April 29, 2002 order of Dismissal of Deb P.'s charges against Local and subsequently on October 17, 2002 against Medford are also annexed hereto as Exhibit D-1 (Local) and E-1 (Medford) and are all incorporated herein as if set forth in full.

16. Local's refusal to represent Deb P. and to pursue Deb P.'s grievance is contrary to its November 15, 2000 written representations and Local's own proposal for settlement and dismissal of the ERD charge and the no probable cause hearing proceedings in March and April 2002 and its extended blatant concealment of its abandonment of her grievance to this date is arbitrary, capricious, malicious and in bad faith. As such it constitutes interference with Deb P.'s MERA rights and is a prohibited practice in violation of Sec. 111.70(3)(b)1 of the Wisconsin Statutes.

17. By its discharge of Deb P., Medford committed a prohibited practice in violation of Sec. 111.70(3)(a)1 and Sec. 111.70(3)(a)5 of the Wisconsin Statutes.

18. Because Local has unlawfully refused to prosecute Deb P.'s grievance to arbitration the Commission should decide the merits of the grievance without deferring to the results reached in the grievance procedure.

19. As for the remedy for the prohibited practices noted above, the Wisconsin Employment Relations Commission should declare that the Respondents Local and Medford have committed the prohibited practices alleged above and should order both Respondents to cease and desist from such violations in the future and to post notices to that effect. The Commission should also order Medford to offer to reinstate Deb P. to a position equivalent to that which she held immediately prior to her discharge, and to make Deb P. whole financially for the losses of pay and benefits she has experienced by reason of the discharge and appropriate legal fees and costs.

. . .

2. Respondent IBEW Local 953, hereinafter Union, is a labor organization with its principal offices located at 2206 Highland Avenue, P.O. Box 3005, Eau Claire, Wisconsin 54702-3005. At all times material herein, John Marincel has been the Union's Business Manager and David Loechler has been a Business Representative for the Union.

3. Respondent City of Medford, hereinafter the City, is a municipal employer with its principal offices located at 639 South Second Street, Medford, Wisconsin 54451-2058. At all times material herein, the City has maintained and operated the Medford Electric Utility, hereinafter the Utility.

4. On March 14, 2003, the City filed a Motion in Limine to Dismiss Untimely Claims and Bar Evidence wherein it requested an order:

1. Dismissing time-barred claims, including but not limited to claims based upon the ratification of the reorganization of City Departments, completed on October 30, 2000, Debra Pernsteiner's December 5, 2000 departure from employment with the City of Medford, and the alleged refusal to process Ms. Pernsteiner's grievance in November 2000 [Complaint, paras. 7, 17]; and

2. Prohibiting the introduction of evidence or testimony relating to the time-barred claims.

A telephonic conference was held on that date between the Examiner and the parties' counsel, during which the Union joined in the motion. The Examiner advised the parties that he would be denying the motion at hearing on March 19, 2003.

During on-the-record discussions at hearing on March 19, 2003, but prior to taking any testimony, the Examiner asked the Complainant's counsel to clarify Complainant's position. Upon doing so, further discussion ensued on the matter of which allegations Complainant asserted as prohibited practices. The Examiner then directed the parties to brief the motion to dismiss on the timeliness issue and adjourned the hearing. The parties agreed they would rely on the exhibits which had been admitted at hearing in support of their respective positions on the motions to dismiss.

5. The Union had been the certified exclusive collective bargaining representative of all employees of the City employed at the Utility, excluding the superintendent, and office clerical employees. On November 26, 1965, the bargaining unit certification was amended to include the office clerical employees. The City and the Union have had a collective bargaining relationship and have been parties to a series of collective bargaining agreements since that time.

6. Complainant was employed as a clerical employee at the Utility for approximately fifteen years until her termination on December 7, 2000, and was a member of the bargaining unit at the Utility during that time. At all times material herein, Cynthia Pernsteiner, Complainant's sister-in-law, was also employed as a clerical employee at the Utility.

7. The subject of reorganizing the clerical work and financial duties at the Utility and City Hall had been raised in 1990 and had been an ongoing issue since that time. In 1994 and again in 1995 certain clerical work was transferred from Utility employees to employees at City Hall who were unrepresented. Grievances were filed over the 1994 and 1995 transfers of work, as well as a prohibited practices complaint in 1995. The City ultimately prevailed in the arbitrations of the grievances and with regard to the complaint.

8. In 2000, the City again began plans to reorganize and consolidate the clerical work of the Utility and City Hall. By letter of July 27, 2000 to Loechler, the City's labor counsel, Jeffrey Jones, advised the Union of the City's intentions regarding the reorganization.

9. Following his July 27, 2000 letter to Loechler, Jones entered into negotiations with the Union's legal counsel, Connie Howard, regarding the impact of the reorganization of clerical duties on the wages, hours and working conditions of the Utility clerical employees, including the Complainant.

In the course of those negotiations, Howard made the following proposal to Jones in an e-mail of September 6, 2000, which reads in relevant part:

> Jeff:
>
> I was unable to reach you by telephone, so I am writing to follow up on our discussions this morning. I talked to the union and to the women in the unit. Rita does not want to be part of the union. The women are concerned about going without any raise until January 1, 2002. And, unfortunately, it does not look like we are going to be able to reach an agreement regarding a wage rate for Deb. With these considerations in mind, the Union proposes the following:
>
> 1. Cindy and Deb will remain in the utility bargaining unit through the expiration of the existing collective bargaining agreement (i.e. through October 31, 2000). During that time they will both help train Rita and whoever else is hired to take the receptionist slot Deb was offered. (Abiding by the existing agreement through its expiration date will reduce the impact of extending the first clerical contract until December 31, 2001. It will also allow a transition period for Deb to help with training and to secure other work.)
>
> 2. Deb will be laid off, effective November 1, 2000. Upon separation, she will be paid for all unused, accrued vacation. In addition, she will receive 1 week's pay for each year of service, to be paid at her final rate of pay.
>
> 3. The City and the Union will enter into a collective bargaining agreement, effective November 1, 2000, through December 31, 2001, covering a clerical bargaining unit including Deb, Rita, and the new hire.
>
> 4. The new clerical collective bargaining agreement will carry over all of the provisions of the current utility contract with the following exceptions:
>
> * The unit description will be revised to reflect only those clerical classifications to be covered.
> * The sick leave provisions will be revised to track the current City policy; provided that Cindy will be grand fathered at 150 days.
> * The City's health insurance obligation will be revised to substitute the current dollar figure for the requirement that the City pay 90% of premiums. (I need to get that figure from you.)
> * The hours of work will be revised as proposed by the City.

5. The wage scales will be as follows:
$15.00/hr – Cindy
$10.00/hr – Rita and the other new receptionist

6. The subcontracting language contained in the current contract will be carried over unchanged, with the understanding that it is to be interpreted in keeping with past practice and arbitration decisions.

I look forward to hearing from you.

Connie Howard

By the following e-mail of September 13, 2000, Howard advised Cindy Pernsteiner of the status of the negotiations with the City:

Cindy:

I am writing to give you an update on the status of negotiations. On September 6, 2000, based on my discussions with you and the Union, I e-mailed our offer to the City. (I understand the Union faxed you a copy of the offer to you. If that is not the case, let me know and I will forward a copy to you.) Yesterday morning Jeff Jones called to accept the offer, with the exception of the wage rate for Rita and the other new receptionist. He is going to get back to me today.

In as much as the City has accepted our proposal, we are not in a position to go back and ask for more now. Both the Union and I are concerned about jeopardizing our credibility with the City in future negotiations if we keep trying to up the ante now after there has been a tentative agreement.

With respect to Deb, Jones made it clear to me that the City was not going to go to $12. Since Deb told me that was her bottom line, and that she would prefer severance to taking less, I sought and got severance for her. Under the proposal accepted by the City, she will keep working at her existing salary for until the expiration of the utility contract. Then she will get 15 weeks severance pay. The City wants to pay the severance out in installments by keeping her on the payroll for an additional 15 weeks. She would not get benefits during those 15 weeks, but would have the option under COBRA to continue her group health insurance at her own expense. The payment over time should work to Deb's advantage for tax purposes, but will disqualify her

from receipt of unemployment compensation benefits during the severance pay period.

I know that you both would have preferred to keep your existing jobs in the utility unit at your current pay rates. However, in evaluating your situations, I encourage you to keep in mind how much we have been able to accomplish in negotiations. Initially, the City was going to lay you off September 15, with no severance, and you would have had to compete for non-union jobs paying $14/hr and $9/hr respectively. Under the tentative agreement, you will continue at your existing salaries through the end of the utility contract, and the City clerical positions will remain union. In addition, Cindy will be getting $15 per hour, and Deb will get 15 weeks severance pay based on her current salary.

Connie

Subsequently, on September 12, 2000, Howard advised Cindy Pernsteiner that Jones had accepted the Union's proposal.

10. Complainant retained her own legal counsel, Roy Traynor, to represent her interests, as she did not believe the Union was fairly representing her. By the following letter of September 22, Traynor advised Howard that he was representing the Complainant:

Ms. Connie Howard
333 Parkdale Plaza
1660 South Highway 100
Minneapolis, MN 55416-1531

Re: Medford Electric Utility
IBEW Local 953
My Client: Debbie Pernsteiner

Dear Ms. Howard:

I represent Debbie Pernsteiner regarding certain aspects of her employment including, but not limited to, her forced termination.

Before I go further let me introduce myself generally as a strong supporter of organized labor, one who has represented many small locals over many years, frequently successful attorney in a broad variety of matters and the successful attorney in the Wisconsin case which restored informational picketing for unions

in Wisconsin, and, finally, one who once had his office in the Wausau Labor Temple.

However, I am appalled at what is happening now to one-third of the union members in the bargaining unit for the employees of the Medford Electric Utility. There appears to be a collaborative effort between the employer and the male two-thirds of the bargaining unit to completely destroy everything that has been accomplished since the clerical employees were brought into the bargaining unit thirty-five (35) years ago in 1965. The local steward (Tom Rohrick) has been so unconcerned and, indeed, antagonistic toward his clerical one-third membership that for all intents and purposes he might as well be part of the management. Acquiescence in a union-busting thirty-one percent (31%) reduction in pay for the only females in the bargaining unit is not representation.

With regard to your September 12, 2000 memo to Cindy, please be advised that Debbie Pernsteiner is not going to sign any severance agreement that includes any release and waiver against the employer or the union. The facts that have been related to me by Debbie Pernsteiner clearly indicate that both the local steward (and the male two-thirds membership) as well as the utility management have discriminated against the female one-third membership in the bargaining unit both as to sex and age. Apparently, the parent local (IBEW Local 153) has sanctioned this discrimination and absence of representation as well.

With regard to Ruder & Ware and Attorney Jeff Jones, my personal opinion is that their bark is bigger than their bite and consideration of their sensibilities and concern for closure of this mater are not legitimate considerations.

My client, Debbie Pernsteiner, expects and hereby demands that IBEW Local 953 represent and protect her interests and those of her co-worker clerical union member.

Please advise me of IBEW Local 953's position.

Yours truly,

Roy Traynor /s/
Roy T. Traynor

Howard responded to Traynor's letter with the following letter of September 25, 2000:

Roy Traynor
925 South Third Avenue
P.O. Box 86
Wausau, WI 54402-0086

RE: Medford Electric Utility

Dear Mr. Traynor:

I am writing on behalf of IBEW Local 953 in response to your September 22, 2000, letter to me. Please be advised that the Union respectfully rejects your analysis of the situation. Local 953 has worked diligently to represent Debbie Pernsteiner and her co-workers at the Medford Electric Utility in very difficult circumstances. I suspect you may not have all of the facts.

The Union and the linemen have been supportive of the clerical workers in the unit. In 1995, when the City first sought to reduce the hours of one clerical worker, and to transfer the work to non-union workers at City Hall, the Union grieved the matter and filed prohibited practices charges against the Utility. A consolidated hearing was held on the grievance and the prohibited practice charges. Unfortunately, in a decision dated May 29, 1997, the arbitrator/hearing examiner found that the Utility had a contractual right to transfer the work and to partially lay off Cathi Jackson. He also found that, because the contract addressed the possibility of layoff resulting from work transfers, the Utility had no duty to bargain further regarding the work transfer and reduction in force affecting Jackson. Finally, based on reorganization studies conducted by the City suggesting it would be more efficient and economical to centralize clerical operations, the arbitrator/hearing examiner rejected Union allegations of discrimination, despite evidence of anti-union animus. Although you or I might disagree with the arbitrator/hearing examiner's findings of fact and interpretation of law, we are not free to ignore the decision and its implications in the current situation.

Following the 1997 decision, the unit and the Union continued to support the interests of the clerical workers. In negotiations for the most recent contract, the Utility offered the linemen a larger percentage increase than the clerical workers. According to the Utility, the offer reflected the economic reality that the clerical workers were already making significantly more than most other clericals in the market. However, the unit stood together. Rather

than accept lower increases for the clericals, the unit decided to take the matter to binding arbitration, thereby automatically delaying wage increases. The arbitrator granted the entire unit a 1.5% increase, rather than the 2% increase which the Utility had offered the linemen. At that time, other electrical workers throughout the state were routinely getting increases of between 2% and 3%.

Furthermore, when the Utility announced in late July, 2000, that it was planning further clerical restructuring, Local 953 promptly stepped in to represent the interests of the clerical workers affected. The Utility's initial position was that it intended to abolish the jobs of remaining utility workers in the unit, and to lay off the individuals in those positions. The work the women had been performing would be transferred to non-union clerical workers employed by the City. The letter provided in relevant part:

> "Three non-union positions are being created at City Hall. The City may be willing to offer two of these positions to the Electric Utility clerical employees whose positions are being abolished, assuming they are qualified for the positions, so they can maintain their City employment. The two positions are Assistant Treasurer and Clerical/Receptionist."

In response to the threatened layoffs, the Union met with the City Council and requested information regarding the restructuring plans. The Union complained that the City Council was making the changes to escape its obligations under the Collective Bargaining Agreement, and urged the Council to work to accomplish the desired consolidation of clerical operations under the Collective Bargaining Agreement.

A review of the job descriptions and other materials provided by the City Council in response to the Union's information requests demonstrated that Jeff Jones and the Council had carefully planned the reorganization, not only to bring it under the rubric of the 1997 arbitration award, but to defeat any subsequent organizing attempt. At least on paper, the City has been careful not to transfer the jobs intact. Duties currently being performed by the Utility clericals have been split between several positions, which report to different supervisors. (I understand that your client has gotten some information from her supervisor that the practical reality would be the same. However, it is not clear whether he would be willing to testify to that. In addition, even if the work ultimately reverted, I would expect the City to stick to the script long enough to defeat grievance arbitration and/or prohibited practice charges.)

Following my review of the contract, the arbitration history, and the information provided by the City, Union officials and I met with Cindy and Deb Pernsteiner. I explained to them the circumstances described above, and my evaluation of the problems that we would face if we tried to attack the restructuring via either the grievance procedure or prohibited practice proceedings.

We also discussed potential sex discrimination claims. I told them then that, although one could argue that the Utility is discriminating against them on the basis of gender, I did not believe they could prevail with respect to such a claim. The evidence suggests that the City's primary motivation in making the change is to cut its costs, and secondarily to get rid of the Union. The unfortunate reality is that the City can, and does, employ clerical workers at far less than it pays the Pernsteiners under the Collective Bargaining Agreement. I did tell the women that, if they wanted to pursue discrimination claims, I could put them in touch with appropriate state or federal agencies.

As per Local 953's instructions, I asked the clerical workers whether they wanted to continue to be represented by the Union, and if so, how they wanted the Union to proceed on their behalf. The instructions I got were to negotiate the best possible deal I could for them to continue to work for the City and to be represented by the Union. Deb Pernsteiner informed me that she wanted to stay only if the City was willing to pay her at least $12 per hour.

In discussions with Jones, it rapidly became clear that the City was not willing to go to $12 per hour for Deb Pernsteiner, because that is what the woman who was going to be supervising her would be making. The most it looked like I was going to be able to get was $11.50 per hour. I touched base with the Pernsteiners regarding that and other features of the City's bargaining position. Deb Pernsteiner reiterated that she was not willing to work for $12 per hour, and asked that I negotiate a severance package on her behalf. Following the woman's instructions, I submitted the enclosed September 6, 2000, offer to Jones.

The offer has been tentatively accepted by the City, including those provisions requiring the City to continue to employ Deb Pernsteiner through the expiration of the Collective Bargaining Agreement, and, upon separation, to pay her accrued vacation and the requested one week's severance pay for each year of her 15 years of employment. The agreement does not require her to sign any release to obtain such severance.

In such circumstances, I hope you will agree that Local 953 has taken seriously its duty to fairly represent your client, and has done its best to represent her interests, in keeping with her stated desires. If you have questions, or if Local 953 can be of assistance in any action you may be contemplating against the City, please feel free to contact me.

Sincerely,

Connie L. Howard

11. On October 17, 2000, the City and the Union reached a tentative agreement with regard to the reorganization and consolidation of clerical duties at the Utility and City Hall. By the following letter of October 19, 2000, Howard advised Traynor of the settlement:

Roy Traynor
925 South Third Avenue
P.O. Box 86
Wausau, WI 54402-0086

RE: Debra Pernsteiner

Dear Mr. Traynor:

I am writing to bring you up to date on the Medford negotiations. Following my conversation with you earlier this week, I called Jeff Jones and urged him to encourage his client to reconsider its rejection of the Union's September 6, 2000, proposal. (I am enclosing another copy of that proposal for your convenience.) When I spoke to him today, Jones advised me that the Personnel Committee had met to consider the matter on October 17, 2000. He said the Committee voted unanimously to accept that proposal, and that the City Council would formally approve the agreement on October 30, 2000. I confirmed with Jones that, under the agreement, Debra Pernsteiner will receive the separation package she requested **without** signing any kind of release.

Accordingly, you can advise your client that she can anticipate being laid off by the City, effective November 1, 2000. She will be paid for all unused accrued vacation at that time. In addition, she will receive one week of severance pay for each year of service with the City. She will remain on the City payroll, and continue to receive her regular salary, less taxes and other

required withholding, for 15 weeks following the layoff. During the severance pay period, she will not be eligible for City paid fringe benefits. She may continue her health insurance coverage at her own expense under COBRA.

Please feel free to contact me if you have any questions.

Sincerely,

Connie L. Howard /s/
Connie L. Howard

12. On October 23, 2000, Complainant filed substantively identical discrimination complaints against the City and the Union with the Wisconsin Equal Rights Division, Department of Workforce Development, wherein she alleged that she was being discriminated against based on her gender and her age on the basis of the following:

. . .

7. **STATEMENT**: What did the respondent do? List each action that you believe was discriminatory. (*For example: I was terminated, not hired, disciplined more harshly, retaliated against, etc*.) Then, tell us why you believe you were treated differently because of the basis shown above.

The IBEW Union Local 953 bargaining unit and the City of Medford have, without the consent of Debra A. Pernsteiner and contrary to her expressed demands and directions, have mutually collaborated, conspired and/or entered into an agreement by which its intentions and result (1) has terminated her membership in (a) the collective bargaining unit and (b) the union, (2) has terminated her protected activity as a member of (a) the collective bargaining unit and (b) the union, (3) has reduced her pay, benefits and compensation by approximately forty-four percent (44%), and (4) has terminated fifteen (15) years of public employment with the City of Medford, and that such mutual collaboration, conspiracy and action has been because of Debra A. Pernsteiner's sex (female) and age (43).

See attached July 27, 2000 letter from the attorney for the City of Medford to IBEW and attached September 6, 2000 letter from IBEW's attorney (Connie Howard) to the City of Medford's attorney (Jeff Jones).

Notwithstanding these attached documents, no agreements have been finalized and the only certain event appears to be the date of termination (10/31/00).

8. **DATES**:

When did the above action(s) first happen? (mo/day/yr)
On or about July 27, 2000
On what date did it last happen? (mo/day/yr)
On going (termination scheduled for Nov. 1, 2000)

. . .

13. By letter of October 31, 2000, Traynor sent a grievance to the Utility's Director, Michael Frey, the City's Administrator, Michael O' Gara, and to Loechler which grievance reads, in relevant part, as follows:

GRIEVANCE OF DEBRA A. PERNSTEINER

City of Medford and Medford Electric Utility has violated several applicable provisions of its collective bargaining agreement with Local 953 IBEW with regard to the wages, hours, conditions, duration and termination of employment of the undersigned. For reference and incorporated herein is a copy of the undersigned's complaint filed with the Equal Rights Division of the State of Wisconsin Department of Workforce Development.

Dated this 31 day of October, 2000.

Debra A. Pernsteiner /s/
Debra A. Pernsteiner

Attached to the grievance were copies of the complaint filed with the ERD against the City, Jones' letter of July 27, 2000 to Loechler, and Howard's September 6, 2000 e-mail to Jones.

The City refused to process the grievance and Howard responded to Traynor on behalf of the Union by the following letter of November 6, 2000:

Roy Traynor
925 South Third Avenue
P.O. Box 86
Wausau, WI 54402-0086

Re: Debra Pernsteiner

Dear Mr. Traynor:

I apologize for my delay in getting back to you. I was out of town all last week. Upon my return, I found your fax waiting for me, along with messages from Jeff Jones informing me that the City Council had approved the tentative agreement between the Union and the Utility, including the severance package for your client without her having to sign any release. If Ms. Pernsteiner has not already received a layoff notice from the City, she should receive one today, along with a check for all unused accrued vacation. As I indicated to you in my October 19, 2000, letter, Ms. Pernsteiner will receive her regular wages through the date of her layoff. Thereafter, she will remain on the City payroll, and will continue to receive her regular salary, less taxes and other required withholding, for 15 weeks following her layoff. During the severance pay period, she will not be eligible for City-paid fringe benefits, but may continue her health insurance coverage at her own expense under COBRA.

Please be advised that, absent a breach of the City's agreement to pay severance to Ms. Pernsteiner, Local 953 will not be pursuing a grievance on her behalf against the City of Medford and Medford Electric Utility. Both the Union and I are sorry that Ms. Pernsteiner was not satisfied with the outcome of the negotiations. However, the Local did the best it could for your client and her co-workers in a very difficult situation. By vigorous advocacy, the Union was able to postpone anticipated layoffs and/or wage concessions from early September through the expiration of the Collective Bargaining Agreement. In addition, we were able to obtain for Ms. Pernsteiner a severance package equal to 15 weeks salary, without any requirement that she sign a release. Under the 1999-2000 Collective Bargaining Agreement, the Utility could have laid her off without paying her any severance. The Local requested Ms. Pernsteiner's input at each stage of the negotiations, and proposed the severance package, at her request, only when it became obvious that we were not going to be able to negotiate wages satisfactory to her.

If you have any questions, please feel free to contact me.

Sincerely,

Connie L. Howard /s/
Connie L. Howard

14. Howard sent Jones the following letter (dated November 9, 2000) regarding Complainant and the reorganization of the clerical work:

Jeffrey T. Jones
Ruder Ware & Michler
500 3rd Street
P.O. Box 8050
Wausau, WI 54402-8050

RE: City of Medford

Dear Mr. Jones:

I am faxing you a copy of a letter and discrimination charges I received today from Roy Traynor. I was unable to reach you by telephone today, so I am writing to request that you call me as soon as possible. Under the terms of the clerical labor agreement approved by the City Council, Deb Pernsteiner was to have been laid off on November 1, 2000, and to receive pay for her unused, accrued vacation at that time. Since we did not connect to confirm the City Council's approval of the agreement until November 6, 2000, it was my understanding that the City was going to pay Ms. Pernsteiner for her work through that date at the rate provided by the expired Utility contract, and lay her off effective November 6. Today, I received Mr. Traynor's letter informing me that she has not received a termination notice or the required vacation pay. She is apparently continuing to work.

If the City wishes to pursue the possibility of extending Ms. Pernsteiner's employment with the City temporarily until a replacement has been hired and trained, I will be glad to broach the matter with the Union, Ms. Pernsteiner, and her counsel. However, in the absence of an agreement to modify the new clerical contract, the City cannot simply ignore its contractual obligations to Ms. Pernsteiner and the other clerical workers. Under the current

labor agreement, Rita Tischendorf must be paid $10 per hour, effective November 1, 2000. Deb Pernsteiner is entitled to immediate payment of her accrued unused vacation, and to a full 15 weeks severance pay following her layoff. Furthermore, since the contract was premised upon Ms. Pernsteiner continuing to receive her existing rate of pay until her layoff, Local 953 insists that she continue to be paid at that rate.

In addition, although it may not be mandated by the new contract, the Union requests that Cindy Pernsteiner continue to receive pay pursuant to the expired utility contract until Deb Pernsteiner's layoff. Given the disparity in their job duties, it would be grossly inequitable to pay Cindy Pernsteiner less per hour than Deb Pernsteiner.

Finally, unit members have raised questions about the City's failure to follow through with the announced consolidation and reorganization which were the City's stated reasons for the layoffs announced in July. It was this reorganization that the City offered as its justification for demanding that the clerical workers be removed from the utility unit, and that they take significant wage cuts. The new clerical agreement was also premised upon reorganization. If nothing changes but clerical workers' wages, the City invites the conclusion that the purported reorganization was a smokescreen to conceal wage reductions for improper reasons.

Accordingly, on behalf of Local 953, I request a complete report on the status of City reorganization and consolidation plans, including an implementation schedule, and final job descriptions and salary information for all clerical positions, and the alleged clerical supervisory position awarded to Diane.

Thank you for your consideration. I look forward to hearing from you at your earliest convenience.

Sincerely,

Connie L. Howard

Following her November 9, 2000 letter to Jones, Howard sent the following letter of November 15, 2000 to Traynor:

Roy Traynor
925 S. Third Ave.
P.O. Box 86
Wausau, WI 544402-0086

RE: Debra Pernsteiner
Our File No. 3955

Dear Mr. Traynor:

Following your October 31, 2000, letter, I sent the enclosed letter to Jeff Jones. I have also been in touch by telephone with Jones. He advises me that the City will continue to pay your client at the applicable pay rate under the expired Utility contract until she is laid off, and that, upon lay off, she will receive the accrued vacation pay and severance pay provided by the agreement between the City and the Union establishing the 2000-2001 City Clerical contract. He tells me that the City does not want to issue a lay off notice to Debra Pernsteiner until both the City and the Union have signed off on the final paperwork regarding the new contract. Jones said he would be sending me draft language incorporating the agreed changes within a few days.

As I indicated in my last letter, if the City reneges on its economic commitments to Pernsteiner, the Union will pursue a grievance on her behalf. 1/ However, if the City completes the clerical reorganization as anticipated, and abides by the terms of the new contract, including it's economic obligations to Pernsteiner, Local 953 will not pursue a grievance on her behalf. Furthermore, under the grievance and arbitration provisions of both the expired 1998-2000 Medford Utility collective bargaining agreement and the 2000-2001 Medford City Clerical collective bargaining agreement, only the Union is authorized to take a grievance to the Second Step of the grievance process. Accordingly, Local 953 will object to any attempt to supplant the Union in the grievance process.

1/ The Union has not grieved the City's failure to pay Pernsteiner, effective November 1, 2000, because it is our understanding that your client would prefer to continue to work at the pay rate provided by the expired contract for as long as possible. Please let me know if that is not the case.

Sincerely,

Connie L. Howard /s/
Connie L. Howard

15. By letter of November 20, 2000, Jones provided Howard with a copy of the "revised Clerical Collective Bargaining Agreement" and an explanation of the revisions, as well as the revisions in the draft of the Memorandum of Agreement regarding the reorganization of the clerical unit and the layoff of the Complainant. Said letter reads, in relevant part, as follows:

MS. CONNIE HOWARD
METCALF KASPARI HOWARD
ENGDAHL & LAZARUS PA
333 PARKDALE PLAZA
1660 SOUTH HIGHWAY 100
MINNEAPOLIS, MN 55416-1531

Re: City of Medford – Electric Utility and City Hall Consolidation Issues

Dear Attorney Howard:

. . .

In regard to the Memorandum of Agreement, we have deleted Item 6. In essence, this provision addressed the Union's obligation not to commence or support an action against the City with respect to the elimination of the clerical positions and the transfer of the duties of those positions to City Hall in light of the negotiated agreement reached by the parties. We eliminated this position based upon the assurance which you provided on the Union's behalf that the Union would not be filing such actions against the City if the City complies with the terms of the Memorandum of Agreement. If this is not the case, or we have misunderstood you in any way, please so advise.

You requested that the provision in Item 3 pertaining to waiving the fifteen day notice requirement with regard to a layoff be deleted. We have discussed this matter with the City Administrator, Mr. Michael O'Gara. When the parties initially began to discuss the possible terms of the elimination of the Electric Utility Clerical positions, the parties contemplated that Ms. Debra

Pernsteiner would be laid off effective November 1, 2000. That date has long past. The City is also providing Debra with a very generous severance package. That package includes fifteen weeks of pay following her layoff. We believe it is in the interest of all parties to proceed with the layoff at this time.

We believe that you will agree that the issues in regard to the consolidation of the Electric Utility and City Hall operations, and the elimination of the Electric Utility Clerical positions, are unique and not likely to reoccur. Even so, please be advised that the City considers the terms of the Memorandum of Agreement to be nonprecedential in nature and that the City is not bound to provide any severance packages, such as those provided to Ms. Debra Pernsteiner, to other City employees, union or nonunion, who may have their employment terminated or who may elect to terminate their employment. For example, if Ms. Cindy Pernsteiner were to elect at sometime in the near future to resign from her employment with the City, she cannot expect any type of severance package from the City. We would propose that such a nonprecedential clause, in general language, be included within the Memorandum of Agreement. If you object to doing so, please notify in writing and advise as to the Union's understanding as whether the Memorandum of Agreement is precedential or nonprecedential in nature, and whether it creates an obligation upon the City to provide a severance package to other employees in the future.

Please feel free to contact the undersigned if you wish to discuss this matter. Thank you.

Very truly yours,

RUDER, WARE & MICHLER,
A LIMITED LIABILITY S.C.

Jeffrey T. Jones /s/
Jeffrey T. Jones

Howard responded to Jones' letter by the following e-mail of November 21, 2000:

Jeff Jones
Ruder, Ware & Michler
500 Third St, Suite 700
Wausau, WI 54402-8050

Dear Jeff:

I received and have reviewed your November 20, 2000, letter with IBEW, Local 953. As we have discussed, the trust level between the bargaining unit and the City is at an all time low. Given that the City's claim that the clerical employees should be removed from the Utility unit rested in part upon relocation of the employees, Local 953 is concerned that the reference to "City Hall" clerical employees could give rise to a later argument by the City that it could avoid the obligations of the clerical collective bargaining agreement merely by moving workers to a location other than City Hall. Accordingly, the Union suggests deleting "Hall" to clarify that contract coverage is not dependent upon the physical location of the workers.

In addition, please be advised that although Local 953 does not object to excluding "temporary employees" from the unit, the Union will object to any effort by the City to circumvent the requirements of the collective bargaining agreement by use of temporary workers. For example, you have assured me that the City intends to promptly hire a new permanent clerical/receptionist to replace Debra Pernsteiner. Local 953 will object if the City seeks to use one or more "temporaries" to perform the work on an ongoing basis instead.

With respect to Item 3, Local 953 reluctantly concedes that the parties' agreement regarding Debra Pernsteiner's separation and severance package did not call for 15 days notice of lay off. In addition, Presetting (sic) has had more than 15 days notice that her lay off was imminent. Accordingly, the Union cannot insist upon it. However, I again urge the City to reconsider and retain Debra Pernsteiner until a replacement can be hired and trained. Without a trained person in that position, an extraordinarily heavy load will undoubtedly fall on Cindy Pernsteiner.

With respect to the deletion of Item 6, I told you that the language was not part of the deal and that the Union would insist upon its removal. Provided that the City follows through with the announced reorganization and abides by the newly negotiated City clerical collective bargaining agreement, Local 953 does not anticipate taking or supporting action against the City. However, the Union will be monitoring the situation and must reserve the right to take appropriate action to protect the rights of those employees it represents.

Finally, the Union will object to the inclusion of any language in the agreement regarding whether the severance package offered to Debra Pernsteiner is to be deemed precedential. The matter was not discussed, and the deal did not include any agreement regarding the issue. Hopefully the issue will not arise again. If it does, we can deal with it at that time. Meanwhile, the Union will advise the bargaining unit that it is the City's position that it is not obligated to provide a severance package to other departing employees in the future.

Thank you for your cooperation. I will look forward to receiving the final documents from you. I will be in the office all day today and tomorrow until about noon. After that I will be leaving town for the Thanksgiving week end and will not be returning until Monday, November 27. To expedite getting the final documents signed, please provide copies to John Marincel at Local 953, as well as to me.

Sincerely,

Connie Howard

16. The City and the Union signed their Memorandum of Agreement (MOA) and a 2001 collective bargaining agreement covering the consolidation and the new clerical bargaining unit on December 4 and November 29, 2000, respectively. Said MOA contained, in relevant part, the following provisions:

MEMORANDUM OF AGREEMENT IN REGARD TO CONSOLIDATION OF CITY OF MEDFORD ELECTRIC UTILITY AND CITY HALL OPERATIONS

The undersigned parties, representing the City of Medford, hereinafter "City", and the International Brotherhood of Electrical Workers, Local 953, representing the City of Medford Electric Utility employees, hereinafter "Union", hereby enter into this Agreement with regard to the consolidation of the City of Medford Electric Utility operations and the City of Medford City Hall operations, and elimination of the Electric Utility Clerical positions:

RECITALS

WHEREAS, there are currently two clerical employee positions at the City of Medford Electric Utility including a cashier position held by Ms. Debra Pernsteiner and a computer operator position held by Ms. Cindy Pernsteiner;

WHEREAS, the parties recognize that the City of Medford Electric Utility and City Hall operations will be consolidated and said operations will be located at the City Hall, located at 639 South 2nd Street, Medford, Wisconsin; and

WHEREAS, as a result of the consolidation of the Electric Utility and City Hall operations, the two clerical positions at the Electric Utility will be eliminated, employee positions at the City Hall will be restructured, and the restructuring will include the assignment of job duties currently performed by the two Electric Utility Clerical employees to various positions at City Hall.

NOW, THEREFORE, the parties enter into the following terms of this Memorandum of Agreement in consideration for the mutual promises stated herein including without limitation, the payments stated herein:

1. Effective upon the day following full execution of this Agreement, Cindy Pernsteiner will transfer to the newly created Assistant Treasurer position at the City Hall and shall not be considered part of the Bargaining Unit encompassing the Electric Utility Linemen employees;

. . .

3. Effective upon the day following the full execution of this Agreement, Debra Pernsteiner will be permanently laid off from her position and thereafter she shall have no seniority or recall rights under the terms of the Electric Utility Linemen Collective Bargaining Agreement or the Clerical Unit Collective Bargaining Agreement noted below. The parties waive the fifteen (15) day advance notice requirement set forth in Article III (C) and Article VIII (G) of the Collective Bargaining Agreements with respect to layoffs;

4. Upon the date of her lay off, or within the next payroll period, Debra Pernsteiner will be paid for accrued and unused vacation as of the date of her layoff. She will also receive a severance payment. The severance payment shall constitute 15 weeks of pay, or approximately $9,156.00 gross, which represents one week of pay for each year of service. The severance amount will be paid to Debra Pernsteiner over the course of the 15 week period following her lay off; that is, she will remain on the City's payroll for 15 weeks after her lay off. Normal state and federal taxes, and other withholdings required by law, shall be withheld

> from the vacation payment and severance payments. During the 15 week period and thereafter, Debra Pernsteiner shall not be eligible for, be paid, or accrue any City provided fringe benefits, with the exception of the continuation of her health insurance coverage, at her cost, as required under the state and federal health insurance continuation laws (i.e., COBRA laws) and for the period of time specified by those laws;
>
> . . .

On December 7, 2000, the City 's Administrator, O'Gara, issued the Complainant a termination letter, which reads, in relevant part, as follows:

> Re: Termination of Employment
>
> Dear Debbie:
>
> It is with regret that I must inform you that in accordance with the terms of the Memorandum of Agreement between the International Brotherhood of Electrical Workers Local 953 (Clerical Unit) of which you are a member, and the Electric Utility, your employment with the Medford Electric Utility is hereby terminated.
>
> We regret that you did not wish to accept a position with the City as Clerical Receptionist. In light of your long service to the Electric Utility, the Council has agreed to a generous severance package as outlined in the collective agreement.
>
> . . .

Complainant's employment with the City was terminated on December 7, 2000, and thereafter she was paid in accord with the severance package agreed to by the Union and the City. By letter of December 11, 2000, Howard provided the Equal Rights Division (ERD) and Traynor with copies of the Memorandum of Agreement and 2001 clerical collective bargaining agreement.

17. In September of 2001, the ERD issued a "Initial Determination – No Probable Cause" with regard to Complainant's discrimination complaint against the Union, dismissing said complaint. Complainant appealed the dismissal of her complaint against the Union.

18. On March 20, 2002, in preparation for hearing on her complaint against the Union, Complainant and the Union deposed Cindy Pernsteiner. In the course of the deposition, Cindy Pernsteiner indicated that her duties had not changed after the reorganization; that she was continuing to perform the same duties for the Utility, as before the City's reorganization of her clerical duties.

Subsequently, Complainant's attorney, Roy Traynor, and the Union's attorney, Marilyn Townsend, who had taken over representation of the Union in the discrimination litigation, began discussing possible settlement of the matter. By letter of April 2, 2002, Traynor advised Townsend of Complainant's position, which letter reads, in relevant part, as follows:

Dear Attorney Townsend:

Thank you for keeping me advised of your progress by copies of:

1. Dave Loechler's letter of March 27, 2002 to City Administrator Michael O'Gara

2. City Administrator O'Gara's two letters of March 28, 2002 and their attachments responding to Loechler's letter.

As I indicated to you on the phone, I think the union should file a grievance immediately on this matter. The testimony of Cindy Pernsteiner is quite clear (and I understand from our discussion that you have double-checked with Cindy Pernsteiner) that the only work that she is doing is Electric Utility work and general city work. That clearly contradicts the representations made at the time of the negotiations in late Summer and Fall 2000, and the job descriptions that O'Gara is now producing.

As I have indicated previously, and it reflects both our discussions between you and me as well as my discussions with my client, that if the union now acts to file a grievance with a good faith intent of pursuit to arbitration (and hopefully a favorable decision from the arbitrator, for the union as well as Debra Pernsteiner,) then the ERD complaint and no probable cause appeal against Local 953 will be withdrawn and pursued no further. We will continue to focus on the City through the Equal Rights Division process and hearing on the merits.

Obviously, we can't get a decision by an arbitrator immediately but we do expect that the grievance will be filed and with that filing the union will have resolved any uncertainties and reservations about the matter and be determined to put their shoulder to the wheel to obtain proper redress and remedial results for my client as well as others and the union itself. After all, Debra Pernsteiner is the one who has suffered the most here by a wage reduction of approximately forty-four percent (44%) for the past year-and-a-half, plus benefits, seniority, etc.

My understanding is that you will be talking to your people this afternoon and will get back to me either this afternoon or tomorrow morning. I will not be in the office until after 9:30 a.m. because of an early scheduling conference.

Yours truly,

Roy T. Traynor /s/
Roy T. Traynor

Townsend responded to Traynor by letter of April 4, 2002, which reads, in relevant part, as follows:

Dear Mr. Traynor:

Based on the information the Union has received to date, it appears that the clerical reorganization did not occur as the City of Medford represented. As a result, the Union will be filing a grievance tomorrow, a copy which is enclosed.

You advised me that your client will withdraw her Complaint of sex discrimination against the Union tomorrow. Based on your representation we have canceled all plans for further discovery in this case.

Sincerely,

Marilyn Townsend /s/
Marilyn Townsend

19. On April 5, 2002, Loechler submitted the following grievance to O'Gara:

Mr. Michael O'Gara
City Administrator
City of Medford Electric Utilities
330 So. Whelen Ave.
Medford, WI 54451-1897

RE: GRIEVANCE

Dear Mr. O'Gara:

1. Whereas the IBEW Union entered into a Memorandum of Agreement with the City of Medford based on the City's representations that **"the two clerical positions at the Electric Utility** [held by union members Cindy Pernsteiner and Debra Pernsteiner] **will be eliminated, employee positions at the City Hall will be restructured, and the restructuring will include the assignment of job duties currently performed by the two Electric Utility Clerical employees to various positions at City Hall."**

2. Whereas it was this reorganization that the City offered as its justification for demanding that the clerical workers be removed from the utility unit, and that they take significant wage cuts.

3. Whereas Union member Cindy Pernsteiner stated in sworn testimony dated March 20, 2002, that her clerical position was not eliminated, and that she continues to perform the same duties but only at a different location, and whereas Debra Pernsteiner refused to accept a "restructured" assignment at substantially reduced pay and was therefore terminated on December 7, 2000.

4. Whereas the purported reorganization was a smokescreen to conceal wage reductions for improper purposes.

5. Since the clerical reorganization has not occurred as represented, Cindy Pernsteiner and Debra Pernsteiner were constructively discharged and terminated respectively, in violation of the labor contract.

6. Remedies requested include return to the status quo, back wages for Cindy Pernsteiner, back wages, benefits and reinstatement for Debra Pernsteiner and such other remedies which are allowable and just.

Sincerely,

LOCAL UNION 953, I.B.E.W.

Dave Loechler /s/
Dave Loechler
Asst. Business Manager

Also on April 5, 2002, Traynor sent a letter to the administrative law judge in Complainant's discrimination case against the Union, in which he indicated "the parties have reached agreement for settlement and dismissal of this case."

O'Gara responded to the April 5, 2002 grievance by letter of April 10, 2002, which reads, in relevant part, as follows:

> Re: Grievance of April 5, 2002
>
> Dear Mr. Loechler:
>
> I received your "grievance" of April 5, 2002. Your letter of April 5, 2002 does not constitute a grievance under the grievance procedure since it does not allege the specific contract provisions of the Collective Bargaining Agreement which allegedly has been violated. Article V, Paragraph A, Item 4, sets forth such a requirement. Also, under the terms of the grievance procedure, the grievance is to be presented to the Personnel Committee since you have apparently implemented the procedure at the second step (i.e., with a written grievance).
>
> Also, the City bargained in good faith with the Union in regard to the consolidation of the Utility and City Hall operations and the placement of Cindy Pernsteiner and the proposed placement of Debra Pernsteiner in new positions at new wage rates as a result of the restructuring that took place. The parties discussed numerous issues in regard to the restructuring and finally came to an agreement. I find no violation of the Collective Bargaining Agreement or the parties' agreement with respect to the consolidation of the Utility and City Hall operations. Further, to the extent that it may be necessary, I believe that your grievance is untimely. The consolidation took place many months ago.
>
> Thank you.

Sincerely,

Michael O'Gara /s/
Michael O'Gara
City Administrator

20. By letter of April 16, 2002, Traynor asked Townsend to fax him a copy of a "replacement grievance." Townsend responded by the following letter and fax of the same date, which reads in relevant part:

Dear Mr. Traynor:

> This is in response to your letter dated today. As I advised you during our phone call yesterday, the Union is in the process of obtaining additional information concerning the grievance we filed. This is consistent with the Union's responsibilities in connection with processing grievances through the various steps of the grievance procedure.
>
> In this regard, the Union requested a meeting with the City to ascertain the City's position with respect to the current job duties and responsibilities of Cindy Pernsteiner and other office employees. After some delay and reluctance, the City agreed to a meeting. A meeting is scheduled for this Friday, April 19, 2002. It remains the Union's intentions to proceed to the next step in the grievance procedure.
>
> Sincerely,
>
> Marilyn Townsend /s/
> Marilyn Townsend

Traynor responded with the following letter of the same date, which reads in relevant part:

Dear Attorney Townsend:

I have your fax of this afternoon.

Apparently, according to the 2001 Collective Bargaining Unit Agreement, the union should be presenting a separate grievance on behalf of Debra Pernsteiner, who continued to be a dues-paying member of Local 953 until her termination on December 7, 2000. Your fax does not even refer to Debra. Obviously, if the Local doesn't present a replacement grievance on behalf of Debra, we don't have a settlement of the ERD complaint or appeal from the No Probable Cause determination. Debra Pernsteiner is the person who has truly been damaged by the City's misrepresentations.

The purpose of the settlement was not to give the City the opportunity to clean up its act by suddenly changing Cindy's actual duties. Your letter refers to "obtaining additional information". This is not part of our agreement with Local 953. What have they been doing for the past several weeks?

I repeat my demand for a copy of the separate replacement grievance being made by Local 953 in behalf of Debra Pernsteiner. The earlier grievance specifically referred to Debra. Your fax does not.

At this point I can't tell what step Local 953 and the City are at. Obviously, O'Gara's objection is based upon Paragraph 4. However, there was nothing improper with the grievance having been presented as it was to the City Administrator.

This is the second time that Local 953 has acted in a manner that ignores Debra Pernsteiner's grievance. We submitted a grievance earlier, before the termination, but it was ignored. See attachments dated November 1, 2000 and November 16, 2000.

Yours truly,

Roy T. Traynor /s/
Roy T. Traynor

21. On April 17, 2002, Townsend sent Traynor the following letter, which reads in relevant part:

Dear Mr. Traynor:

I telephoned Administrative Law Judge Gary Olstad this morning to inquire whether the Complaint has been withdrawn. Judge Olstad advised me that he spoke to you yesterday and you indicated uncertainty whether a settlement had been reached. This is news to me! We reached a settlement two weeks ago. I have requested a telephone conference with the judge tomorrow at 2:00 p.m. to resolve this matter. If that time is not convenient, please advise. The Judge informs me that is available all day.

I request that the Complaint be withdrawn immediately, as per your representation to the Administrative Law Judge, in your letter dated April 5, 2002, a copy of which is attached as document A. In this letter, you state that the "parties have reached an agreement for settlement and dismissal of this case Please send me the necessary papers for dismissal."

In my letter to you dated April 4, 2002, I stated that based on your representation to me that "your client will withdraw her complaint of sex discrimination against the Union tomorrow", the Union has "canceled all plans for further discovery in this case." (See document B) I further advised you that "based on the information the Union has received to date, it appears that the clerical reorganization did not occur as the City of Medford represented. As a result, the Union will be filing a grievance tomorrow, a copy of which is enclosed." Id. I subsequently forwarded to you the signed copy of the grievance filed by the Union. (See document C)

But for your letter of April 5, 2002, in which you represented to Judge Olstad that you would withdraw the Complaint, the Union would have gone forward to hearing, and at the hearing in my view would have successfully upheld the initial determination of no probable cause. In short, at this point the case would have been over. Instead, you now appear to suggest that there was no agreement to withdraw the Complaint.

Apparently, because you are not in agreement with all the steps the Union is taking with respect to processing the grievance, you believe you can renege on your client's promise to withdraw. I disagree. The Union filed a grievance in good faith and is processing the grievance in good faith. The Union expects you to withdraw the Complaint as you represented you would do.

While I am reluctant to burden the Administrative Law Judge with more papers, I am enclosing the following letter with respect to the events leading up to the settlement:

. . .

Sincerely,

Marilyn Townsend /s/
Marilyn Townsend

22. By the following letter of April 18, 2002, Loechler moved the grievance to the next step in the grievance procedure:

City of Medford – Personnel Committee
220 So. Whelen Avenue
Medford, WI 54451-1897

RE: GRIEVANCE

Dear Personnel Committee Chairman:

Upon receiving the letter of denial of grievance, dated April 10, 2002, from Mr. Michael O'Gara, City Administrator, please consider this the next step of the grievance procedure. The facts of the grievance are as follows:

1. Whereas the IBEW Union entered into a Memorandum of Agreement with the City of Medford based upon the City's representations that "the two clerical positions at the Electric Utility [held by union members Cindy Pernsteiner and Debra Pernsteiner] will be eliminated, employee positions at the City Hall will be restructured, and the restructuring will include the assignment of job duties currently performed by the Two Electric Utility Clerical employees to various positions at City Hall."

2. Whereas it was this reorganization that the City offered as its justification for demanding that the clerical workers be removed from the utility unit, and that they take significant wage cuts.

3. Whereas Union member Cindy Pernsteiner stated in sworn testimony dated March 20, 2002, that her clerical position was not eliminated, and that she continues to perform the same duties but only at a different location, and whereas Debra Pernsteiner refused to accept a "restructured" assignment at substantially reduced pay and was therefore terminated on December 7, 2000.

4. Whereas the purported reorganization was a smokescreen to conceal wage reductions for improper purposes.

5. Since the clerical reorganization has not occurred as represented, Cindy Pernsteiner and Debra Pernsteiner were constructively discharged and terminated respectively, in violation of the labor contract.

6. Whereas the above is a violation of the Management Rights Clause in the current labor agreement as well as the parties previous labor agreements, which clause requires the employer to act in good faith, forbids the employer from discharging employees but for just cause, and forbids the employer from using its management rights to establish new jobs, abolish or change existing jobs, as a smokescreen to conceal wage reductions and eliminate members' jobs.

7. Remedies requested include return to the status quo, back wages for Cindy Pernsteiner, back wages, benefits and reinstatement for Debra Pernsteiner and such other remedies which are allowable and just.

Please arrange a meeting with the Personnel Committee and the Local Union as soon as possible.

If you have any questions, please contact me at my office.

Sincerely,

LOCAL UNION 953, I.B.E.W.

Dave Loechler
Asst. Business Manager

23. On April 22, 2002, the administrative law judge in Complainant's discrimination case against the Union dismissed the complaint with prejudice based upon those parties have notified ERD that they had reached an agreement that included dismissal of the case.

24. By the following letter of July 29, 2002, Attorney Howard, who again took over representation of the Union in the matter, informed Traynor that the Union was withdrawing the grievance Loechler filed on April 5, 2002, which letter reads in relevant part:

> Dear Mr. Traynor:
>
> Upon careful investigation and consideration, Local 953 has determined not to proceed to arbitration with the grievance filed April 5, 2002, regarding the City of Medford's 2000 reorganization and consolidation of its utility and city clerical workers. I will be notifying the City shortly that Local 953 has decided to dismiss the grievance. I will be glad to discuss the Union's reasons for the dismissal with you.
>
> It is the Union's position that its good faith evaluation and dismissal of the grievance satisfies Local 953's obligations to your client. However, should you disagree, and seek to reinstate ***Pernsteiner v. IBEW Local 953***, ERD Case No. CR200003699, please be advised that the Union will not raise a timeliness defense based on the passage of time between the dismissal of the case and your receipt of this letter.
>
> Sincerely,
>
> Connie L. Howard

25. By the following letter of July 29, 2002, Howard advised Jones that the Union was dropping the April 5, 2002 grievance, which letter reads in relevant part:

> Dear Mr. Jones:
>
> I am writing to inform you that, after due consideration, IBEW Local 953 has determined to dismiss its April 5, 2002, grievance related to the City's 2000 reorganization and consolidation of its utility and city clerical workers. In light of this dismissal, the Union will not be responding to the City's information request relating to the grievance.

Sincerely,

Connie L. Howard

26. By letter of July 30, 2002, Traynor advised Jones as to the Complainant's position regarding the Union's dropping of the April 5, 2002 grievance, which letter reads in relevant part:

> RE: IBEW Local Union 953 and City of Medford Grievance
>
> Dear Mr. Jones:
>
> I represent Debra Pernsteiner. Regarding Attorney Connie Howard's July 29, 2002 letter to you which purports to be a voluntary dismissal of the April 5, 2002 grievance, it is the position of Debra Pernsteiner that Attorney Howard and Local 953 have failed to obtain Debra Pernsteiner's informed consent and have no authority to dismiss the grievance because neither has exercised appropriate legal or professional responsibility with regard to keeping Debra Pernsteiner advised of the status of the grievance.
>
> In addition, both Attorney Howard and Local 953 have failed to communicate with Debra Pernsteiner at any time and both have failed to inform her of their evaluation of the grievance and reasons for dismissal. Finally, the purported voluntary dismissal without communication with Debra Pernsteiner is not consistent with the terms of dismissal of ERD Case No 200003699.
>
> Therefore, for all these reasons, Attorney Howard's July 29, 2002 letter to you is an unauthorized nullity and should be regarded as such by you. Failure to do so may be the basis of a new charge of collusion. Copies of this letter are being sent contemporaneously to those indicated below.
>
> Yours truly,
>
> Roy T. Traynor /s/
> Roy T. Traynor
>
> cc: Debra Pernsteiner
> Attorney Connie Howard

Jones responded to Traynor's letter by the following letter of August 1, 2002, which reads, in relevant part, as follows:

> Re: IBEW Local Union 953 – Grievance of April 5, 2002
>
> Dear Mr. Traynor:
>
> The purpose of this letter is to respond to your hand delivered letter of August 1, 2002.
>
> By letter dated July 29, 2002, Attorney Connie L. Howard notified us of the withdrawal of the grievance filed by Local 953 dated April 5, 2002. In your letter, you state that the grievance at issue is not the grievance dated April 5, 2002, but a grievance dated April 18, 2002. There is only one grievance at issue in this matter. The original grievance was dated April 5, 2002 and denied by Mr. Michael O'Gara in his letter dated April 10, 2002. Mr. O'Gara raised the issue that the grievance did not meet the requirements of the contract provisions.
>
> In a letter dated April 11, 2002 (enclosed), Mr. David Loechler, the Union Assistant Business Manager, responded to Mr. O'Gara and disagreed with him that the April 5, 2002 letter did not constitute a grievance. By letter dated April 18, 2002, Mr. Loechler processed the April 5, 2002 grievance to the next step of the grievance procedure (before the Personnel Committee).
>
> The April 18 letter was not a new grievance, it was simply a processing of the April 5 grievance to the Personnel Committee level. Please note that the April 5 and April 18 documents setting forth the alleged wrongdoings by the City are identical.
>
> In regard to whether the April 5, 2002 grievance encompassed your client, Debra Pernsteiner, you are incorrect. On April 29, 2002, City and Union officials met to review the grievance. Mr. John Marincel and Mr. Dave Loechler, Union Representatives, were present. They were questioned in regard to whether the grievance encompassed your client. I purposely and repeatedly questioned Mr. Marincel and Mr. Loechler on this issue because your client was not employed by the City, was not a member of the bargaining unit and, yet, the written grievance referred to her. Therefore, I wished to clarify this issue. Mr. Marincel stated several times in response to my questions that the Union was not representing your client, that your client was not a grievant, and that the Union was not grieving on her behalf. Mr. Marincel

stated that the Union was solely representing Ms. Cindy Pernsteiner in the matter.

You stated that the employment of your client, Debra Pernsteiner, was terminated. Whether or not your client resigned from her employment or her employment was terminated is not relevant as to whether she was a member of Local 953 when the April 5 grievance was filed. At the time that the April 5, 2002 grievance was filed, she was not employed by the City and was not a member of Local 953.

If you believe that Local 953 did something that was improper with regard to withdrawing the grievance, your dispute is with Local 953. Local 953 chose to withdraw the grievance (whether it is referred to as the April 5 or April 18, 2002 grievance). The City of Medford had nothing to do with that withdrawal. For reasons which Local 953 determined, it decided to withdraw the grievance. The City simply accepted the withdrawal of the grievance. Acceptance of the withdrawal of the grievance was not even necessary for its withdrawal. The City considers the grievance withdrawn, dismissed, and all issues raised in the grievance to be closed in their entirety.

Thank you.

Very truly yours,

RUDER, WARE & MICHLER,
A LIMITED LIABILITY S.C.

Jeffrey T. Jones /s/
Jeffrey T. Jones

27. By the following letter of August 8, 2002, Traynor advised the City that Complainant intended to proceed to arbitration of the grievance:

August 8, 2002

City of Medford Personnel Committee Chair
through it's Attorney:
Jeffrey T. Jones, Esq.
Ruder Ware & Michler
500 3rd Street
P.O. Box 8050
Wausau, WI 54402-8050

RE: City of Medford and IBEW Local Union 953 Grievance of April 18, 2002
Notice of Intent To Proceed To Arbitration

Dear Mr. Jones (and Personnel Committee Chair):

Your letters of July 31, 2002 and August 1, 2002 following Attorney Howard's July 29, 2002 voluntary dismissal of Local 953's grievance raise a number of factual and legal issues that can only be resolved by an arbitrator and/or a court.

Accordingly, my client, Debra Pernsteiner has decided to pursue the grievance/arbitration procedure. From your description of the facts, together with Attorney Howard's letters of July 29, 2002, it is clear that IBEW Local 953 violated the terms and conditions of the settlement of Debra Pernsteiner's no probable cause case against Local 953 (which settlement was initiated by Local 953) so that Debra Pernsteiner was not represented by Local 953 and then Local 953 voluntarily dismissed Cindy Pernsteiner's part of that grievance. Since, according to you, Local 953 had previously ceased to represent Debra Pernsteiner, that voluntary dismissal does not cover Debra Pernsteiner.

Clearly, this matter has reached an impasse so the only recourse is arbitration.

Therefore, pursuant to the Grievance Procedure – Arbitration provisions of the collective bargaining agreement(s) between Local 953 and the Electric Utility and the City of Medford, Debra Pernsteiner, ex rel Local 953 IBEW hereby notifies the City of Medford through you and the City's Personnel Committee's Chair that it/she intends to process the replacement grievance of April 18, 2002 to arbitration. I will be representing the grievant-not Attorney Howard.

I shall be out-of-state and unavailable for the period of Tuesday, August 13, 2002 through Saturday, August 24, 2002, but upon my return I will contact you to make arrangements for selection of an arbitrator and other matters, pursuant to the Arbitration provisions of the contract. Of course, if your client refuses to perform under the Grievance Procedure – Arbitration Article of the collective bargaining agreement, an action will be commenced to compel arbitration.

Yours truly,

Roy T. Traynor /s/
Roy T. Traynor
Attorney for Debra Pernsteiner ex rel

Jones responded to Traynor's letter by letter of August 13, 2002, which reads, in relevant part, as follows:

RE: IBEW Local Union 953 – Grievance of April 5, 2002

Dear Mr. Traynor:

The purpose of this letter is to respond to your letter of August 8, 2002. You stated in your letter that your client, Debra Pernsteiner, has decided to pursue the grievance/arbitration procedure. You stated that you believe IBEW Local 953 violated the terms and conditions of the settlement of Debra Pernsteiner's discrimination case against Local 953 so that Debra Pernsteiner was not represented by Local 953 and then Local 953 unilaterally dismissed Cindy Pernsteiner's part of that grievance.

Whether Local 953 violated the terms and conditions of the settlement is a matter between Local 953 and your client. It is not a matter involving the City of Medford. The City of Medford was not part of the settlement agreement. Also, we have no idea if Local 953 violated the terms of the settlement since we are unaware of the terms of the settlement. Please provide a copy of the terms of the settlement so we may properly assess this matter.

Your client is not now a member of Local 953 and is not an employee of the City of Medford. Previously, the Union and City officials negotiated the termination of your client's employment and a severance package because she did not wish to accept a position at City Hall when the Electric Utility and City

Hall operations were consolidated. Local 953 voluntarily withdrew the grievance of April 5, 2002. Therefore, the City will not process a grievance to arbitration on Debra Pernsteiner's behalf.

Thank you.

Very truly yours,

RUDER WARE

Jeffrey T. Jones /s/
Jeffrey T. Jones

Thereafter, the City has refused to proceed to arbitration with respect to Complainant's claims.

28. The Complainant has not been an employee of the City, and has not been a member of the bargaining unit represented by the Union, since December 7, 2000.

29. The Complainant filed a discrimination complaint with the ERD against the City and the Union on October 23, 2000 based upon her belief that the City and the Union were conspiring to deprive Complainant of her rights and effect her termination pursuant to the reorganization of the clerical duties in the Utility and City Hall. Complainant was aware upon receipt of Howard's November 15, 2000 letter that the Union would not file a grievance on her behalf unless the City failed to meet its obligations to Complainant under the severance agreement the Union negotiated on her behalf.

30. None of the acts alleged in the complaint which could be considered in and of themselves to constitute a prohibited practice occurred within the one-year period preceding the filing of the complaint.

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

CONCLUSIONS OF LAW

1. As against the Respondent Union, the one-year statute of limitations set forth in Sec. 111.07(14), Stats., began to run upon Complainant's termination from the City's employ on December 7, 2000.

2. As against the Respondent City, the one-year statute of limitations set forth in Sec. 111.07(14), Stats., began to run upon Complainant's termination from the City's employ on December 7, 2000.

3. Those acts alleged in the complaint that could be considered to constitute a prohibited practice in and of themselves, are barred by Sec. 111.07(14), Stats., and the Commission is without jurisdiction to proceed.

4. Those acts alleged in the complaint to constitute prohibited practices which occurred within the one-year period preceding the filing of the complaint cannot be considered as a substantive matter, to constitute prohibited practices within the meaning of Ch. 111.70, Stats.

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

ORDER

The complaint is dismissed in its entirety as against both the Respondent City of Medford and the Respondent IBEW Local 953.

Dated at Madison, Wisconsin, this 24th day of September, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

CITY OF MEDFORD and IBEW LOCAL 953

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Respondents have moved to dismiss the complaint on the basis that it is barred by Sec. 111.07(14), Stats. Complainant asserts that the motions should be denied as the conduct alleged to constitute prohibited practices on the part of Respondents occurred within the one-year period prior to the filing of the complaint.

POSITIONS OF THE PARTIES

City

The City asserts that Complainant is barred from pursuing her complaint by operation of Section 111.07(14), Stats., the one-year statute of limitations applicable to MERA. In that regard, the City asserts that Complainant claims that the City committed a prohibited practice by "terminating" her, and that, at hearing, Complainant's counsel clarified that this claim was not premised on an allegation that the agreement relating to Complainant's layoff was invalid. Rather, Complainant's counsel claimed that while the agreement was not invalid, the City's conduct in allegedly taking advantage of a "continuing history of hostility towards the women who work for the Medford utility" forms the basis for the claim. Complainant also alleges that by the letter of November 15, 2000, the Union agreed to monitor the consolidation and to file a grievance on Complainant's behalf if the City took advantage of this alleged climate of hostility towards women. Complainant alleges that the City breached an obligation of good faith by failing to alter the duties of female workers as contemplated by the consolidation agreement and thus benefited from the Union's alleged failure to maintain a proper grievance on behalf of Complainant.

Complainant alleges the City violated Section 111.70(3)(a)5, Stats. by its conduct leading up to Complainant's layoff in 2000. Section 111.07(14), Stats., requires that actions be filed as to any alleged violations within one year of "the specific act or unfair labor practice alleged." This provision has been strictly construed by the Commission and by reviewing courts. CITY OF MADISON, DEC. NO. 15725-B (WERC, 6/79), aff'd DEC. NO. 79-CV-3327 (Cir. Ct. Dane, 6/80); BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 28598-A (WERC, 12/97).

The "prohibited practice" alleged against the City cannot be Complainant's layoff, since it is not claimed that the agreement actuating the layoff is invalid and Complainant acknowledges that a claim based on the formation of the agreement would be time-barred. Complainant cannot be permitted to bind the City to an alleged promise on the part of the

Union to monitor the consolidation and file appropriate grievances, as any such alleged agreement between Complainant and the Union is not part of the collective bargaining agreement binding the City. Therefore, any alleged Union violation would not constitute a prohibited practice on the City's part. Nor can the alleged promise serve as a link between timely and untimely events. The Commission applies the reasoning developed in LOCAL LODGE NO. 1424 VS. NATIONAL LABOR RELATIONS BOARD (BRYAN MFG. CO)., 362 U.S. 411 (1960), in addressing the significance of events outside of the statutory limitations. MORAINE PARK TECHNICAL COLLEGE, DEC. NO. 25747-C (McLaughlin, 9/89), aff'd DEC. NO. 25747-D (WERC, 1/90).

Just as any alleged agreement between Complainant and the Union does not bind the City, neither may Complainant attempt to raise as a prohibited practice an alleged pattern of taking advantage of hostility against female Union members, as such allegations of gender discrimination do not meet the definition of a "prohibited practice" under MERA. Such claims are governed by the Wisconsin Fair Employment Act and the remedies under the WFEA are exclusive. BACHAND V. CONNECTICUT GENERAL LIFE INSURANCE CO., 101 Wis. 2D 617, 623-24 (Ct. of Appeals, 1981).

Complainant may also not be heard to argue that she did not know of any alleged violations until after the limitations period had run. Her theory that the consolidation was a ruse to deprive her of her union rights was raised repeatedly during and after the negotiations leading up to her layoff agreement, as evidenced by the letters from her counsel annexed to her complaint. As Complainant alleges no substantive claims against the City premised on a "prohibited practice", her complaint must be dismissed.

In its reply brief, the City asserts that Complainant's brief in opposition to the motion to dismiss establishes that her claim against the City involves allegations that the City engaged in a prohibited practices for "performing its management prerogatives in bad faith" following a memorandum of agreement regarding the consolidation and the execution of the 2001 agreement between the City and the Union, and that the discovery of "reliable" evidence of bad faith and non-performance was not made until March 20, 2002. The alleged "bad faith" was clarified by Complainant's counsel to consist of the City's alleged failure to go forward with the stated purpose for the consolidation. Thus, only one theory of liability remains against the City, i.e., that the City engaged in a prohibited practice when it severed its relationship with Complainant via the settlement agreement that was not discovered until Cindy Pernsteiner's March, 2002 deposition. Where it has been alleged that the prohibited practice was not discovered until after the running of the limitations period, the Commission has generally held that "the statute of limitations begins to run once a Complainant has knowledge of the acts alleged to violate the Statute." BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 28598-A (WERC, 12/97). Applying the BRYAN analysis, Complainant cannot simply assert that she recently uncovered the alleged motivation underlying the alleged prohibited

practices. It has long been held that discovery of the act, not the alleged wrongful nature of the act, serves as a date for the running of the limitations period. JOHNSON V. AFSCME, COUNCIL 24, DEC. NO. 21980-C (WERC, 2/90). In JOHNSON, the Commission recognized the danger of allowing a limitation period to be tolled upon allegations of discovery of wrongful motivations, as opposed to the acts themselves, concluding that to do so would undermine the policy of encouraging rapid and final resolution of labor disputes. Contrary to the holding in Johnson, Complainant attempts to make the discovery rule apply to the discovery of bad faith motivations.

As in JOHNSON, to allow Complainant to resurrect a cause of action would be tantamount to holding that collective bargaining actions may be attacked independently. Furthermore, the evidence in the record, which Complainant agreed to admit, establishes that both Complainant's counsel and Complainant felt that the City had improper motives as early as 2000. Howard's September 25, 2000 letter to Traynor on behalf of the Union advised Traynor that suspicion of the City's bad faith as to consolidation began as early as 1995 when the Union unsuccessfully grieved and filed a prohibited practice complaint against the City. That letter confirms both Traynor's and Complainant's awareness of the alleged improper motives Traynor now claims he did not learn of until March, 2002.

Based upon the evidence, "under no interpretation of the facts alleged would the Complainant be entitled to relief. . ." BLACKHAWK TECHNICAL COLLEGE, supra. Thus, the City requests that the complaint against the City be dismissed with prejudice.

Union

The Respondent Union takes the position that the complaint is time-barred pursuant to Section 111.07(14), Stats., because Complainant's status as a member of the bargaining unit represented by the Union ended completely and permanently as of December 5, 2000 under the terms of the Memorandum of Agreement between the City and the Union. Contrary to Complainant's assertion presented at hearing, Howard's letter of November 15, 2000 to Traynor did not and could not extend Complainant's contractual rights or her right to be fairly represented by the Union beyond that date. Because the Union executed the MOA nearly two years before the filing of this complaint and because the Union owed the Complainant no duty of fair representation at any time during the one-year period preceding its filing, the complaint must be dismissed as untimely.

A union's duty to fairly represent an employee arises from its status as that employee's exclusive bargaining representative. MAHNKE V. WERC, 66 WIS. 2D 524 (1975). When an employee leaves the bargaining unit which the union represents, the union owes that person no further duty of fair representation. ALLIED CHEMICAL AND ALKALI WORKERS V. PITTSBURGH PAINT AND GLASS CO., 404 U.S. 157 (1971); WERC V. JEWEL FOOD STORES, 848 F. 2D 761

(7th Circuit, 1988). A person who leaves a bargaining unit without a "reasonable expectation of re-employment ceases to be an 'employee' whom the union must fairly represent for purposes of enforcing alleged subsequently arising rights under either a collective bargaining agreement or the labor laws." JEWEL FOOD STORES, supra. The Commission adopted the rule that a union owes no representational duties to a person who has previously left the relevant bargaining unit in affirming the examiner's decision in STEINKE V. AFT LOCAL 212 and MILWAUKEE AREA TECHNICAL COLLEGE, DEC. NO. 28664 (Burns, 5/96), aff'd DEC. NO. 28664-C (WERC, 1/02). In that case, the examiner applied the analysis developed by the Supreme Court in BRYAN MFG. CO., supra, and adopted by the Commission in CESA #4, DEC. NO. 13100, and held that the complainant was not a member of the bargaining unit represented by the union during the one-year statute of limitations period applicable to the complaint, and that therefore the union did not owe the complainant a duty of fair representation for conduct alleged to have occurred within the one year statute of limitations period. The examiner then found the claim to be time-barred.

The Union asserts that the MOA regarding the reorganization of clerical positions and bargaining units signed by the Union on November 29, 2000 and by the City on December 4, 2000, unambiguously terminated any expectation the Complainant might have had regarding further employment in the bargaining unit in providing that: "As of December 5, 2000, Debra Pernsteiner will be permanently laid off from her position and thereafter shall have no seniority or recall rights under the terms of the . . .collective bargaining agreement." From that day forward, Complainant had no contractual rights based on her former membership in the bargaining unit, other than the previously-negotiated right to receive severance pay over the course of the following 15 weeks. The complaint acknowledges Complainant's departure from the bargaining unit in late 2000 and goes on to allege that the Union filed a poorly-drafted grievance on behalf of itself and Complainant and Cindy Pernsteiner against the City and re-drafted a replacement grievance on April 18, 2002, and that in reliance upon the Union's repeated promises of vigorous prosecution of the grievance, to arbitration if necessary, Complainant dismissed her ERD no probable cause appeal. The complaint also alleges that the Union's refusal to represent Complainant and pursue a grievance on her behalf is contrary to the representations in Howard's November 15, 2000 letter.

Complainant's counsel represented at hearing that while Complainant wished to present evidence concerning the hostility of the City and some Union members towards Complainant in the period leading up to the negotiations of the 2000 MOA, Complainant was not challenging the validity of that agreement. However, the entire complaint aims precisely at invalidating the December, 2000 termination of Complainant. If the agreement terminating Complainant's rights and membership in the bargaining unit in December of 2000 was valid, the Union had no obligation to represent the Complainant, fairly or otherwise, in April of 2002, nor could that termination be a prohibited practice under MERA. Unless the Commission invalidates the December, 2000 MOA, it cannot grant Complainant the reinstatement and backpay she seeks.

Because the Complainant failed to challenge the validity of the MOA before the Commission prior to December 4, 2001, her attempt to do so in November of 2002 must be dismissed as untimely.

Reading the complaint in a light most favorable to Complainant, it advances two grounds for permitting a long-delayed challenge to the Union's representation of her with regard to her termination. Paragraph 16 of the complaint alleges that the Union's failure to represent Complainant in April of 2002 interfered with her rights under MERA because it was contrary to the representations in Howard's November 15, 2000 letter and the Union's proposals for settlement and dismissal of the ERD charge. Neither assertion alleges an independent prohibited practice occurring within the limitations period. Assuming, for purposes of this motion only, that the Union had reached a settlement agreement with Complainant in her ERD case which required it to vigorously prosecute a grievance on her behalf, any obligation the Union would have to represent Complainant would flow from that agreement, rather than from any statutory duty of representation as her exclusive collective bargaining representative. While the violation of obligations existing solely under the terms of a settlement agreement in litigation before the ERD might have a variety of legal consequences elsewhere, it does not constitute a prohibited practice under MERA, and is beyond the Commission's jurisdiction. STEINKE V. AFT, LOCAL 212, supra.

In both the pre-hearing conference and at hearing, Complainant's counsel placed great emphasis on obligations allegedly undertaken in Howard's letter of November 15, 2000, indicating that Complainant viewed the letter as creating a monitoring situation and that the letter kept Complainant's rights alive. To the contrary, Howard's letter commits the Union to filing a grievance on a Complainant's behalf under only one set of circumstances, i.e., the City's failure to pay the severance benefit the Union had negotiated on Complainant's behalf. The second operative sentence cited states that the Union will not pursue a grievance if matters regarding the reorganization proceed as anticipated, but makes absolutely no affirmative commitment to file a grievance under any specific circumstances. Even if the letter had stated that the Union would "monitor" the reorganization indefinitely to ensure that the City and Utility clerical work were intermingled to an acceptable degree, and that if not, it would pursue and, if necessary arbitrate, a grievance seeking Pernsteiner's reinstatement with backpay, such a representation would have created no contractual right in Pernsteiner to be re-employed by the City in the context of the MOA executed by the Union and the City two weeks later, which MOA stated in writing that the Union and City agreed to permanently terminate Pernsteiner's future employment rights in the bargaining unit. If Complainant wished to challenge the termination of her employment rights in December of 2000 as a prohibited practice under MERA, she should have done so by December of 2001. As she did not, the instant complaint is untimely and must be dismissed.

In its reply brief, the Union reiterates that the argument that the Union violated a settlement agreement with Complainant in her earlier ERD case in failing to prosecute the 2002 grievance to arbitration, ignores the fact that even if such an agreement existed, the Commission would not provide the proper forum for its enforcement. While the Complainant argues that the Union violated its duty to fairly represent her with regard to the 2002 grievance, the Union owed Complainant no duty of fair representation in that time frame, as her membership in the bargaining unit terminated in December of 2000 with the execution of the MOA between the Union and the City. Finally, the Complainant implies that she could not have discovered the Respondents' "bad faith" until 2002. However, by their execution of the 2000 MOA, Respondents jointly, finally and unambiguously terminated any contractual right on her part to employment in the bargaining unit, and with it, any further obligation on the Union's part to represent her. Complainant's counsel received a fully-executed copy of that agreement in December of 2000. These facts belie any claim that Complainant could have harbored any reasonable doubt regarding her status as of December of 2000, or that she was in any way impaired from filing a complaint with the Commission within one year of the real "operative fact" in the matter, the execution of the MOA.

Complainant

Complainant sees the following as the issues to be decided in this case. First, does Section 111.07(14), Stats., bar this action against the City for performing its management prerogatives in bad faith during 2001 and 2002 following the MOA regarding consolidation and the 2001 agreement between the City and the Union, where discovery of reliable evidence of bad faith and non-performance was not made until March 20, 2002; and does that provision bar denial of the fair representation action against the Union for its failure to monitor the City's performance of the MOA, which was agreed upon and became effective while Complainant was an employee of the City and represented by the Union, and its failure to act in accord with Howard's letter of November 15, 2000 and response to Complainant's October 31, 2000 grievance, and its failure to act in accord with the 2001 clerical collective bargaining agreement between the City and the Union, and its willful failure to pursue its April 18, 2002 grievance on behalf of Complainant in good faith and, its early withdrawal and denial of representation of Complainant without any notice to her.

Complainant first asserts that Section 111.07(14), Stats., does not bar this action against the City and the Union because the operative facts of bad faith that triggered the action all occurred between March and April, 2002 and August, 2002. The operative facts occurred in March and April, 2002, beginning with the deposition testimony of Cindy Pernsteiner on March 20, 2002. This discovery testimony immediately brought into serious question whether the City had bargained in good faith with the Union in the summer and fall of 2000 when it adopted the city hall – utility clerical staff consolidation. The Union then realized it had an evidentiary, historical and factual basis for a timely grievance against the City for not

bargaining and exercising its management prerogatives in good faith, and also realized that if it pursued that grievance on behalf of both Cindy Pernsteiner and Complainant, it might be able to extricate itself from Complainant's costly and time-consuming ERD sex discrimination case that was scheduled for hearing in April of 2002. The Union proposed such a settlement, and after some discussion, an agreement in principle was reached and the further depositions of Union members and officers were put on hold pending the Union following up on the grievance. That follow-up was accomplished poorly by the poorly-drafted April 5, 2002 letter to the City, and then on April 18, 2002, a technically and procedurally properly drafted grievance on behalf of Cindy Pernsteiner and Complainant, all of which was consistent with Howard's November 15, 2000 letter to Complainant's attorney. However, on April 29, 2002, the Union's business representative, Marincel, abandoned Complainant without ever advising Complainant or her attorney he was doing so. Thus, it is clear that the operative facts of bad faith of both the City and the Union occurred in 2002, beginning with the March, 2002 discovery of the City's bad faith, and on or about August 1 and 13, 2002 with the discovery that the Union had failed to fairly represent Complainant at the very first grievance meeting on April 29, 2002.

Contrary to the City's assertions, this is not a sex discrimination case; rather, the operative facts are bad faith acts, all of which occurred well within the one-year statute of limitations. The ERD case and its operative facts, although significant history, is only history and background in this case. While there is a connection between the representations made by the City to the Union in the summer and fall of 2000, the MOA reached on the consolidation, the collective bargaining agreement reached, and Howard's November 15, 2000 letter, they are not the operative facts that created Complainant's action in this case.

Chapter 111's fundamental *raison d'etre* is to establish good faith collective bargaining so that peace will be maintained in the workplace. When good faith is replaced by bad faith, by either party in any direction, the bargaining process becomes a mess or worse, a war. There is evidence that the City was not acting in good faith when it discharged Complainant, but that evidence did not develop until after the termination of her employment, and even then, not until its discovery in Cindy Pernsteiner's testimony on March 20, 2002. There is also evidence that the Union did not act in good faith in its representation of Complainant before her termination, but that bad faith did not become more than a strong suspicion and develop into operative facts until the denial of representation in April, 2002 through August, 2002. Bad faith, like fraud, only becomes legally operative when it is discovered. It is at this point that Chapter 111 came into operation in this case, even though historical promises and representations and agreements and conducts occurred earlier. This is consistent with case law.

In her reply brief, Complainant asserts that both the City and the Union miss the point of this action. The crux of this case is the failure to perform agreements in good faith. The key issue is whether the City performed in good faith the MOA. Cindy Pernsteiner's testimony on March 20, 2002 completely undermined and challenged all of those representations upon which the MOA was based. Similarly, the Union did not perform as it said it would in its attorney's November 15, 2000 letter when it refused to process Complainant's October 31, 2000 grievance. The Union's position then essentially was that Complainant did not have to worry because the Union was going to watch this, but the Union did not monitor the situation and did nothing until after Cindy Pernsteiner's testimony, when it filed a grievance on behalf of both Cindy Pernsteiner and Complainant. The Union initiated and undertook to represent Complainant in three written documents: a letter on April 5, 2002; Attorney Townsend's April 16, 2002 letter copied to the ERD Administrative Law Judge, with its 13 enclosures describing the agreement and *quid pro quo*s of April, 2002; and in the replacement grievance of April 18, 2002. However, the Union did not perform according to its undertaking, as on April 29, 2002, it abandoned its representation of Complainant. As with the City, the Union did not perform as it had promised and once it promised, it had a duty, especially where Complainant voluntarily dismissed her ERD case against the Union.

Complainant asserts that this action is a case of first impression and that the cases cited by Respondent are not controlling. The issues in this case are not simple one-liners set forth by Respondent, but are the more factually described issues set forth by Complainant. As to each Respondent, the underlying issue is whether it performed its agreed-upon obligations in good faith. The allegations of the Complainant and the admitted exhibits make it clear that the conduct complained of all occurred within the one-year statutory period of limitations.

Complainant concludes that the remedies sought by Complainant are basically those available in arbitration, which Complainant has sought since October of 2000, and in the ERD proceedings, i.e., reinstatement, backpay and back benefits. The remedies sought do not constitute the factual basis of the cause of action and no significant factual basis beyond suspicion existed for a prohibited practice action until Cindy Pernsteiner's testimony of March 20, 2002. It is at that point that the statute of limitations began to run as to the City. Until the Union formally abandoned its grievance on behalf of Complainant on April 29, 2002, there was no clear act showing the credible, factual basis, beyond suspicion, that the Union did not represent Complainant in good faith. It is at that point that the statute of limitations began to run as to the Union. Given Cindy Pernsteiner's testimony of March 20, 2002 and the abandonment of the April 29, 2002, the Commission should issue an order that compels arbitration of the April 18, 2002 grievance, and that Complainant be permitted to choose her own representative in that arbitration, the Union having forfeited that right by its conduct.

Complainant also responded to the reply briefs of the City and the Union, both of which relied on the Howard affidavit and attachments that were included in the record without

objection from Complainant. Complainant asserts that the "new argument" made by the City and the Union based on that affidavit is that Complainant should have filed a prohibited practice complaint in 2000 or 2001. Complainant's October, 2000 ERD age and sex discrimination complaint refers to collusion between the City and the Union, but the ERD investigator found no evidence of collusion. Complainant does not challenge the validity of the MOA. Obviously, if there had been evidence of collusion in the fall of 2000, it would have been discovered in the course of the ERD's 11-month investigation, and Complainant would have had a smoking gun of bad faith. Although Complainant had a strong suspicion, she did not have any evidence of any operative facts to form the basis of a prohibited practice complaint in the fall of 2000 or 2001. That changed in March and April of 2002 in the form of the testimony of Cindy Pernsteiner, who at various times held supervisory, middle management, and titled positions with the City after the MOA was reached, and thus could not be interviewed by Complainant's attorney before March 20, 2002, without violating ethical rules. On that date, new, credible testimonial evidence came to light which put the focus not on the validity of the MOA, but on the performance of that agreement by both the City and the Union. It was the Union's conduct on April 29, 2002, which was not discovered by Complainant until August of 2002, that completed the circle so that a prohibited practice bad faith complaint could be timely filed against both the City and the Union, but not on the grounds of collusion, age or sex discrimination. The difference between 2000 and 2002 is that of strong suspicions and a smoking gun as between strong suspicions with allegations about events of the fall of 2000 and credible evidentiary facts and documents about different events and different conduct of more recent occurrence in 2002. These are huge differences and they have resulted in very different causes of action about very different operative facts.

Union Response

The Union responded to Complainant's response to Respondents' reply briefs. The Union notes that the Complainant specifically concedes the "validity" of the MOA, but finds perplexing the assertion that some question concerning the "performance of that Agreement by both Medford and Local 953" arose in 2002, giving Complainant a timely cause of action under Chapter 111 at that time. The MOA contains only two stipulations regarding Complainant. At paragraph 3 it provides that all of her contractual rights to future employment in any bargaining unit represented by the Union terminated as of December 7, 2000. Paragraph 4 of the MOA provides her with a severance package in consideration of the termination of her employment rights. Complainant has never claimed that the Union and City failed to perform either of these components of the MOA.

The Union finds Complainant's references to the deposition of Cindy Pernsteiner equally perplexing. The transcript of that deposition indicates throughout that Cindy Pernsteiner does not believe that her position has actually been changed to include a substantial amount of work unrelated to the City's electrical utility. However, the deponent's only

references to Complainant's position indicate that Complainant's former utility-related work is now being performed by another employee, together with that employee's prior clerical/receptionist work for the remainder of the City's operations. More importantly, nothing in the MOA provides for Complainant's reinstatement, or otherwise qualifies the termination of her contractual employment rights, in the event the City should fail to consolidate its operations. In short, the deposition of Cindy Pernsteiner is irrelevant to Complainant's rights. The Union and the City terminated all of Complainant's collectively-bargained rights to further employment with the City effective December of 2000 and any claim under Chapter 111 that the City violated Complainant's collectively-bargained rights or that the Union failed to fairly represent her with respect to those rights, could not be timely sought after December 7, 2001. Thus, Complainant's claims must be dismissed.

DISCUSSION

The Respondents have made what are in effect pre-hearing motions to dismiss. 1/ The

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1/ However, the parties have agreed that they would rely on, and the Examiner should take into account, the exhibits submitted by them and admitted at hearing. Before testimony was to begin, the Complainant's counsel clarified what it is she is alleging as prohibited practices within the one-year statute of limitations period, at the request of the Examiner. Upon doing so, the Examiner directed the parties to brief the motions to dismiss and adjourned the hearing.

Commission has, with judicial approval, authorized examiners to decide such motions. VILLAGE OF RIVER HILLS, DEC. NO. 24570 (WERC, 6/87), aff'd DEC. NO. 87-CV-3897 (CirCt Dane County, 9/87), aff'd Dec. No. 87-1812 (CtApp, 3/88); COUNTY OF WAUKESHA, DEC. NO. 24110-A (Honeyman, 10/87), aff'd DEC. NO. 24110-B (WERC, 3/88). The following standard has been applied by the Commission and its examiners in deciding a pre-hearing motion to dismiss:

> Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. 2/

2/ UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3. EAU CLAIRE AREA SCHOOL DISTRICT, ET AL, DEC. NO. 29689-C, 29690-C, 29691-C (McLaughlin, 1/00), aff'd DEC. NO. 29689-D, 29690-D, 29691-D (WERC, 2/00)

Lack of jurisdiction or lack of timeliness would be proper bases for dismissing a case prior to an evidentiary hearing. 68 OAG 31,34 (1979).

In this case, Respondents have moved to dismiss the complaint on the basis that it is time-barred by Sec. 111.07(14), Stats., in that the conduct alleged to constitute prohibited practices is dependent upon a finding that earlier conduct of Respondents occurring outside the one-year statute of limitations period constituted prohibited practices.

Sec. 111.07(14), Stats., made applicable to prohibited practices arising under MERA by Sec. 111.70(4)(a), Stats., provides:

111.07 Prevention of unfair labor practices

. . .

(14) The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

The Complainant alleges that the following conduct constitutes prohibited practices. With regard to the City, the Complainant asserts that the City performed its management prerogatives in bad faith during 2001 and 2002 after entering into the MOA regarding the consolidation of the City and Utility clerical operations and the Clerical Unit collective bargaining agreement with the Union. With regard to the Union, Complainant asserts the Union violated its duty of fair representation to Complainant by failing to monitor the consolidation, by failing to act in accord with Howard's letter of November 15, 2002 and the Clerical Unit collective bargaining agreement, and by failing to pursue its April 18, 2002 grievance filed on behalf of Complainant in good faith and withdrawing and denying representation to Complainant without notice to her.

In clarifying her position at hearing, and in Complainant's briefs in opposition to the motion, Complainant's counsel stated that Complainant was not challenging the validity of the MOA or Clerical Unit collective bargaining agreement reached in late 2000, nor was she alleging the Union's refusal to process a grievance on her behalf in October of 2000 was now being alleged as a prohibited practice, that evidence in that regard is only offered as historical background to the later events.

The Examiner disagrees this is a case of first impression. As the complaint refers to events outside the one-year period preceding the filing of the instant complaint, the timeliness of the complaint is governed by the principles of BRYAN MFG. CO. 3/ In its decision, the U.S. Supreme Court addressed two situations relevant in this case:

> The first is one where occurrences within the . . .limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose Sec. 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There, the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice. 45 LRRM at 3214-3215.

3/ LOCAL LODGE NO. 1424 V. NLRB (BRYAN MFG. CO.), 362 U.S. 411, 45 LRRM 3212 (1960). The Commission approved the BRYAN analysis in CESA NO. 4, ET AL, DEC. NO. 13100-B (WERC, 5/79) and has since approved it in EAU CLAIRE AREA SCHOOL DISTRICT, DEC. NO. 26989-D, supra; MORAINE PARK TECHNICAL COLLEGE, DEC. NO. 25747-D (WERC, 1/90).

As Examiner McLaughlin concluded in his decision in MORAINE PARK TECHNICAL COLLEGE 4/:

> The Bryan analysis, read in light of the provisions of Secs. 111.70(4)(a) and 111.07(14), Stats., requires two determinations. The first is to isolate the "specific act alleged" to constitute the prohibited practice. The second is to determine whether that act "in and of (itself) may constitute, as a substantive matter" a prohibited practice. Because granting the motion to dismiss would deny an evidentiary hearing, the second determination can be made against the complainant only if under no interpretation of the facts alleged could the specific act complained of be found to constitute in and of itself a prohibited practice. (Footnote omitted).
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> At 27.

4/ DEC. NO. 25747-C (McLaughlin, 9/89), aff'd DEC. NO. 25747-D (WERC, 1/90).

In a case such as this, where Complainant has alleged a violation of her rights under the collective bargaining agreement and that the Union failed to fairly represent her by refusing to process a grievance on her behalf, the two claims are treated alike with regard to tolling the statute of limitations period pending an exhaustion of contractual remedies. LOCAL 950 INTERNATIONAL UNION OF OPERATING ENGINEERS, DEC. NO. 21050-F (WERC, 11/84). In this case, that would mean that the one-year statute of limitations would begin to run against both the City and the Union when Complainant knew or should have known of the conduct alleged to violate the Union's duty of fair representation.

The Complainant asserts that the allegation of collusion between the Union and the City during the time the MOA regarding consolidation was negotiated, and the Union's refusal to process a grievance on her behalf in October of 2000, are offered as background, and are not the "operative facts" upon which the complaint is based. Complainant's counsel stated at hearing that Complainant was not attacking the validity of the MOA which resulted in her termination.

As noted above, Complainant alleges the City failed to exercise its management prerogatives with regard to the consolidation of city hall and utility clerical operations in good faith during the one-year limitations period. That period is from November 16, 2001 to November 15, 2002. The problem for Complainant is that she was terminated on December 7, 2000, and therefore, she was not an employee of the City and was not in the bargaining unit covered by the collective bargaining agreement between the City and the Union during the limitations period. Thus, under MERA, the City would owe no duty of good faith to Complainant, nor would she have any rights under the collective bargaining agreement to enforce, nor would the Union have a duty to fairly represent her during the limitations period.

Notwithstanding Complainant's assertions as to what are the operative facts in this case, the discussions between the City and the Union regarding the consolidation of city hall and utility clerical operations began in the summer of 2000, and by the Fall of 2000 Complainant had a choice to make between accepting a lower paid clerical position in the new Clerical Unit or leave the City's employ with the severance package the Union had negotiated for her. Complainant eventually chose the latter and was terminated from City employment on December 7, 2000. By that time, Complainant had retained her own legal counsel, filed a sex and age discrimination complaint against the City and Union alleging that they ". . . mutually collaborated, conspired and/or entered into an agreement by which its intentions and result (1) has terminated her membership in (a) the collective bargaining unit and (b) the union, (2) has terminated her protected activity as a member of (a) the collective bargaining unit and (b) the union, (3) has reduced her pay, benefits and compensation by approximately forty-four percent (44%), and (4) has terminated fifteen (15) years of public employment with the City of Medford, and that such mutual collaboration, conspiracy and action has been because of Debra A. Pernsteiner's sex (female) and age (43)" Complainant also had, on October 31, 2000, attempted to file a grievance alleging the City and the Utility had violated her rights under the existing collective

bargaining agreement, which both the City and the Union refused to process. Complainant's actions in those regards make clear that she believed then that the City and the Union were not acting in good faith toward her, and that the Union was failing and refusing to fairly represent her at the time she was terminated from the City's employ. Thus, the one-year limitations period with regard to the Union's conduct, as well as the City's, began to run with her termination. Complainant's claim that she only discovered evidence of the City's bad faith in March of 2002 misses the point. Complainant had been terminated in December of 2000 by agreement of the City and the Union, and had previously filed the discrimination complaint effectively alleging bad faith on the part of the City and the Union. The subsequent discovery of evidence to support her earlier allegations does not create a new, timely cause of action.

The Complainant attempts to avoid her statute of limitations problem by asserting that Howard's letter of November 15, 2000 constituted an on-going promise to monitor the consolidation of clerical duties and to file a grievance on her behalf if the City did not follow through on its representations regarding the consolidation. The Examiner is again not persuaded. Howard's letter states, in relevant part,

> As I indicated in my last letter, if the City reneges on its economic commitments to Pernsteiner, the Union will pursue a grievance on her behalf. However, if the City completes the clerical reorganization as anticipated, and abides by the terms of the new contract, including it's economic obligations to Pernsteiner, Local 953 will not pursue a grievance on her behalf. Furthermore, under the grievance and arbitration provisions of both the expired 1998-2000 Medford Utility collective bargaining agreement and the 2000-2001 Medford City Clerical collective bargaining agreement, only the Union is authorized to take a grievance to the Second Step of the grievance process. Accordingly, Local 953 will object to any attempt to supplant the Union in the grievance process. (Footnote omitted).

While the second sentence creates some ambiguity, Howard references her "last letter", i.e., her letter of November 6, 2000 to Traynor, wherein she stated, "Please be advised that, absent a breach of the City's agreement to pay severance to Ms. Pernsteiner, Local 953 will not be pursuing a grievance on her behalf against the City of Medford and Medford Electric Utility. . ." Finally, as the Union points out, less than three weeks later the Union and the City agreed to the MOA which terminated the Complainant's employment and all of her rights under the collective bargaining agreement.

Even if the letter were found to make such a promise as Complainant alleges, it is a promise the Union could not keep as far as being able to indefinitely file a grievance on Complainant's behalf after her termination. Even without the MOA terminating her contractual rights, once the time for filing a grievance under the collective bargaining

agreement with regard to her termination had passed, Complainant had no rights under that agreement the Union could enforce, or which the Union had a duty to enforce, absent a finding that the City's and the Union's actions resulting in her termination had constituted a prohibited practice. 5/ However, once the one-year statute of limitations had run following her termination, Complainant had no basis on which to challenge her termination or the Union's actions under MERA.

5/ Obviously, if Complainant's termination were overturned in another forum, e.g. her discrimination case, her contractual rights and the Union's obligation to represent her would be reinstated.

Once the statute of limitations had run, Complainant was not an employee of the City and not a member of the bargaining unit represented by the Union, and had no rights under MERA to be reinstated to employee status. Thus, once the one year had run without Complainant filing a prohibited practice complaint challenging the Union's actions resulting in her termination, Complainant had no enforceable rights under either the collective bargaining agreement or MERA. Howard's letter cannot change this.

Complainant not being in the City's employ after December 7, 2000, it would owe her no duty of good faith regarding its consolidation of clerical duties during the one-year period preceding the filing of this complaint. Similarly, Complainant not being an employee of the City and not a member of the bargaining unit represented by the Union, the Union would owe Complainant no duty of fair representation during that period. 6/ It is only if the Union's

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6/ MILWAUKEE AREA TECHNICAL COLLEGE, DEC. NO. 28664-C (WERC, 1/02).

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actions leading to her termination, with the Union's refusal to process a grievance on her behalf, were found to have constituted prohibited practices, that the Union's alleged failure to monitor the consolidation and to process the April 18, 2002 grievance on Complainant's behalf could constitute prohibited practices under MERA. Thus, the conduct Complainant asserts as constituting prohibited practices within the one-year limitation period do not withstand application of the analysis in BRYAN. Similar to the case in MORAINE PARK TECHNICAL COLLEGE, 7/ Complainant was not a member of the bargaining unit when she alleges the Union

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7/ Supra, footnote 4/.

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promised to file and process a grievance on her behalf challenging her termination, in exchange for her agreeing to the dismissal of her appeal of her ERD case against the Union. 8/ As was the case in MORAINE PARK, Complainant is attempting to "cloak with illegality that which is otherwise lawful" in an effort to challenge her termination, which challenge is untimely under Sec. 111.07(14), Stats.

8/ Violation of such an agreement would be as between litigants in that forum, and not as between an exclusive collective bargaining representative and an employee to which it owes a duty of fair representation under MERA.

In sum, the alleged actions of the Union occurring within the one-year limitations period the Complainant alleges as violations of its duty to fairly represent her, can only be found to constitute a prohibited practice if the earlier conduct occurring outside the limitation period is found to constitute a prohibited practice, a finding precluded by operation of Sec. 111.07(14), Stats. Therefore, the instant complaint alleges no timely cause of action over which the Commission has jurisdiction. Thus, the complaint has been dismissed in its entirety as to both the Union and the City.

Dated at Madison, Wisconsin, this 24th day of September, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/
David E. Shaw, Examiner

DES/gjc
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