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-B

Appearances:

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

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

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

ORDER ON REVIEW OF EXAMINER'S DECISION

On September 24, 2003, Examiner David E. Shaw issued Findings of Fact, Conclusions of Law, and Order dismissing the Complaint in this case in its entirety. On October 9, 2003, the Complainant, Debra Pernsteiner (Complainant or Ms. Pernsteiner), filed a timely Petition for Review of the Examiner's decision. All parties filed briefs and/or reply briefs in support of their respective positions in this matter on or before December 15, 2003.

The Examiner dismissed the Complaint prior to a hearing on the merits 1/, on the ground that the allegations against the Respondent IBEW Local 953 (Union), alleging violations of its duty of fair representation, were untimely, and that the allegations against the Respondent City of Medford (City), claiming violations of the collective bargaining agreement, could not be maintained in the absence of a timely complaint alleging a breach of the duty of

fair representation. We affirm the Examiner's decision regarding certain allegations and reverse regarding others, as set forth in our Order and Discussion below.

1/ The Examiner held a hearing on March 19, 2003, on the Respondents' Motions to Dismiss and in connection with that hearing received several exhibits into evidence for purposes of deciding the motions.

Having reviewed the record in this matter and being fully advised in the premises, the Commission makes and issues the following:

ORDER

A. The Examiner's Findings of Fact 1 through 27 are affirmed.

B. The Examiner's Findings of Fact 28 through 30 are set aside and the following Findings of Fact are made:

> 28. On October 23, 2000, the Complainant filed a discrimination Complaint with the Equal Rights Division (ERD) against the City and the Union, alleging that the City and the Union had conspired to deprive her of her rights and effect her termination from employment based upon her age and gender in negotiating the terms of a reorganization of the clerical duties in the Utility and City Hall, which terms included the Complainant's termination from employment on December 7, 2000.
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> 29. The Complainant knew more than a year before November 15, 2002, when she filed her Complaint in this case, about the alleged collusion between the City and the Union and/or their alleged bad faith in negotiating the terms of the reorganization of clerical duties that led to Complainant's termination from employment on December 7, 2000.

C. The Examiner's Conclusions of Law 1 through 4 are set aside and the following Conclusions of Law are made:

> 1. As to Complainant's claim that the Respondents unlawfully colluded and/or acted in bad faith in negotiating the Memorandum of Agreement (MOA) regarding the reorganization of clerical duties in the fall of 2000,

which included a provision terminating Complainant's employment, the one-year statute of limitations set forth in Sec. 111.07(14), Stats., began to run no later than Complainant's termination from employment on December 7, 2000, and that claim is therefore untimely.

2. The Complainant's claim as described in Conclusion of Law 1, above, is not a continuing violation that would toll the one-year statute of limitations.

3. As to Complainant's claim that the Respondent City breached the MOA by failing to implement the reorganization of clerical duties upon which the Complainant's termination had been conditioned, said claim will be timely only if Complainant did not know and should not have known on or before April 5, 2001 (one year prior to the date of the Union's grievance raising this claim) that the City had not implemented the reorganization.

4. As to the Complainant's allegation that the Respondent Union failed to monitor the City's implementation of the reorganization, said allegation will be timely only if Complainant did not know and should not have known of said alleged conduct on or before November 15, 2001, i.e., one year prior to the filing of the instant Complaint.

5. To the extent Complainant alleges that her termination from employment is void as a matter of law, because it was conditioned upon the Respondent City subsequently implementing a reorganization of clerical duties that did not occur, she is an employee and a member of the bargaining unit for purposes of grieving the alleged violation of the MOA and pursuing the instant Complaint.

6. Complainant's allegation that the Respondent Union breached its duty of fair representation on or about July 29, 2002, by failing and refusing to pursue the April 2002 grievance claiming that the City had failed to implement the reorganization, is timely.

7. Complainant's allegation that the Respondent Union breached its agreement to arbitrate her grievance in exchange for withdrawing her ERD complaint does not constitute a prohibited practice within the provisions of Sec. 111.70(3)(b), Stats.

D. The Examiner's Order is affirmed in part and reversed in part as follows:

1. The Complainant's allegations that the Respondents colluded and/or acted in bad faith in negotiating the terms of the MOA pursuant to which she was terminated from employment are dismissed, both as a finite event and as a continuing violation.

2. The Complainant's allegation that the Respondent Union violated an agreement to arbitrate her grievance in exchange for her withdrawing her ERD Complaint is dismissed as outside the Commission's jurisdiction.

3. The Complainant's claim that the Respondent Union breached its duty of fair representation on or about July 29, 2002, by failing and refusing to pursue the April 2002 grievance claiming that the City had failed to implement the reorganization, is remanded to the Examiner for hearing and decision.

4. The Complainant's allegation that the Respondent Union breached its duty of fair representation by failing to monitor the City's implementation of the reorganization is remanded to the Examiner for hearing and decision as to timeliness and, if appropriate, as to the merits.

5. The Complainant's allegation that the Respondent City violated the MOA by failing to implement the reorganization upon which the MOA was conditioned is remanded to the Examiner for hearing and decision as to timeliness and, if appropriate, as to the merits.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of January, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

City of Medford

MEMORANDUM ACCOMPANYING ORDER

Ms. Pernsteiner filed the Complaint in this case on November 15, 2002, asserting that the Union breached its duty of fair representation, in violation of Sec. 111.70(3)(b)1, Stats., by refusing to represent her in pursuing a grievance and in "concealing its abandonment of her grievance." The Complaint also claimed that the City had violated Sec. 111.70(3)(a)5 and 1 by discharging Ms. Pernsteiner in December 2000. On March 14, 2003, the City filed a Motion in Limine to Dismiss Ms. Pernsteiner's claims as untimely to the extent they were based upon the ratification of the reorganization in October 2000, her departure from employment in December 2000, and/or a refusal to process her grievance of November 2000. The Union subsequently joined in the City's motion. On March 14, 2003, the Examiner advised the parties over the telephone that he would be denying the motion at the hearing scheduled to take place on March 19, 2003.

On March 19, 2003, the Examiner conducted a stenographically recorded hearing on the motion to dismiss, during which Ms. Pernsteiner explained the basis of her claims and exhibits were entered into the record for purposes of deciding the motion. The Examiner then directed the parties to brief the timeliness issue and postponed continuation of the hearing until that issue was determined. The parties filed briefs and reply briefs on or before June 2, 2003 and as noted above the Examiner issued a decision on September 24, 2003 dismissing all claims as untimely.

Applying the analysis developed in LOCAL LODGE NO. 1424 V. NLRB (BRYAN MFG. CO.), 362 U.S. 411 (1960), and adopted by the Commission in CESA NO. 4, ET AL., DEC. NO. 13100-B (WERC, 5/79), the Examiner concluded that Ms. Pernsteiner's claims were untimely since all of her claims ultimately depended upon the alleged unlawfulness of actions taken towards her by both the City and the Union in November and December 2000. The Examiner held that Ms. Pernsteiner's claims had expired one year following her termination from employment in December 2000, that the events she alleged to have occurred within the year prior to filing her complaint were lawful in themselves, that she was no longer an employee or a bargaining unit member when she filed her complaint in the instant case, and that her claims were therefore time-barred and dismissed.

We affirm the Examiner's conclusion as to Ms. Pernsteiner's claims that the City and the Union had acted unlawfully in negotiating the MOA in the fall of 2000, whether that unlawfulness was in the nature of "bad faith," "collusion," or discrimination, and we dismiss those claims. We also dismiss the collusion claim insofar as Ms. Pernsteiner alleges it to be a "continuing violation." We dismiss her claim that the Union violated the terms of a settlement agreement under which Ms. Pernsteiner would withdraw her ERD complaint in exchange for the Union taking her grievance to arbitration, as such a claim is outside the Commission's substantive jurisdiction.

However, construing Ms. Pernsteiner's claims in the manner most favorable to her, as we must in considering a motion to dismiss, we believe she has alleged instances of unlawful conduct subsequent to her termination (albeit conduct that could affect the legitimacy of her termination) and that those claims may be timely depending upon the evidence of when she knew or should have known of the alleged misconduct. We will address this in more detail in our discussion, below.

SUMMARY OF FACTS

We have largely adopted the Examiner's findings of fact and we summarize them as follows.

Ms. Pernsteiner was employed by the City as a clerical worker at the Medford Electric Utility for about 15 years prior to her December 7, 2000 termination. During her employment she was a member of a collective bargaining unit represented by the Union comprising all of the non-supervisory employees at the Utility, including clerical workers and skilled trade and maintenance workers. At all relevant times prior to Ms. Pernsteiner's termination, her sister-in-law, Cindy Pernsteiner, also worked at the Utility in a clerical capacity. At all relevant times prior to Ms. Pernsteiner's termination, the City also employed certain clerical workers at City Hall, who were not members of a bargaining unit.

Beginning in about 1990, the City and the Union experienced friction over the City's desire to reorganize clerical and financial work at the Utility and City Hall and over the City's transferring bargaining unit clerical work from the Utility employees to the unrepresented City Hall employees. The City prevailed in an arbitration and a prohibited practice proceeding in which the Union challenged the City's attempts to combine clerical operations. In 2000, the City again initiated a reorganization designed to consolidate the clerical work of the Utility and City Hall and eliminate any clerical positions at the Utility. The City and the Union negotiated over the matter, resulting in a Memorandum of Agreement (MOA) executed in late November and early December 2000. The MOA included, inter alia, the following introductory clauses:

> 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, . . .; and
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> 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.

The MOA also called for Cindy Pernsteiner to be transferred to a newly created "Assistant Treasurer" position at City Hall, for the Complainant Debra Pernsteiner to be laid off with certain severance pay and other benefits, and for the City to recognize the Union as the collective bargaining representative of a separate clerical bargaining unit at City Hall. On October 23, 2000, during the negotiations over the MOA and prior to its execution, Ms. Pernsteiner filed discrimination charges at the Equal Rights Division (ERD) against both the City and the Union, alleging that they had collaborated with each other in effectuating her termination from employment and loss of wages and benefits, based upon her gender and age. On October 31, 2000, Ms. Pernsteiner sent a grievance to the City and the Union complaining that the City was violating the collective bargaining agreement in connection with Ms. Pernsteiner's impending termination from employment. The City refused to process that grievance. The Union responded by letter dated November 6, 2000, that stated, inter alia, "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. . . ."

On November 9, 2000, the Union also wrote to the City, addressing various aspects of the pending MOA, including the following comments:

> 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.
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> Accordingly, on behalf of Local 953, I request a complete report of 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.

By letter dated November 15, 2000, the Union informed Ms. Pernsteiner's attorney that, "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. . . . Local 953 will object to any attempt too (sic) supplant the Union in the grievance process." Similarly, by e-mail dated November 21, 2000, the Union informed the City that, "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."

Ms. Pernsteiner was terminated effective December 7, 2000, pursuant to the MOA, and was paid in accordance with its severance terms. In September 2001, the ERD issued a "no probable cause" initial determination on Ms. Pernsteiner's charges against the Union, which she appealed. Ms. Pernsteiner prepared for an ERD hearing. On March 20, 2002 Ms. Pernsteiner deposed Cindy Pernsteiner, who testified in her deposition that her duties had not changed after the "reorganization," and that after her transfer to City Hall, she was continuing to perform the same duties as she had previously performed at the Utility. This testimony elicited an agreement between the Union and Ms. Pernsteiner to the effect that the Union would file a grievance based upon its information "that the clerical reorganization did not occur as the City of Medford represented." Ms. Pernsteiner withdrew her discrimination complaint at the ERD in exchange for the Union's commitment to pursue the grievance.

On April 5, 2002, the Union filed a grievance with the City, alleging, inter alia, "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. . . . Remedies requested include . . . back wages, benefits and reinstatement for Debra Pernsteiner . . . ." The City responded in substance that the grievance was procedurally defective, lacked merit, and was also untimely, "as the consolidation took place many months ago."

By letter dated April 16, 2002, the Union informed Ms. Pernsteiner that it was in the process of obtaining information concerning the grievance and had scheduled a meeting with the City for Friday April 19, 2002, to discuss the current job duties of the City Hall clerical employees, including Cindy Pernsteiner. The letter concluded, "It remains the Union's intentions to proceed to the next step in the grievance procedure." On April 18, 2002, the Union moved the grievance to the next step in the grievance procedure, but modified the text of the grievance to state that the failure to implement the reorganization was "a violation of the Management Rights Clause in the current labor agreement . . . ." As in the initial grievance document, the April 16, 2002 document requested, inter alia, "back wages, benefits and reinstatement for Debra Pernsteiner . . . ."

By letter dated July 29, 2002, the Union informed Ms. Pernsteiner that the Union "had determined not to proceed to arbitration with the grievance" regarding the reorganization, and that the Union's attorney "will be glad to discuss the Union's reasons for the dismissal with you." The Union also indicated that, should Ms. Pernsteiner wish to reinstate her ERD complaint, the Union would not raise a timeliness defense. On the same date, the Union advised the City that it was dismissing the April 2002 grievance.

The record reflects little of what transpired between April and July 2002 regarding the grievance. The Union apparently requested certain information from the City regarding the clerical job duties. In a letter dated August 1, 2002 to Ms. Pernsteiner's attorney, the City made certain representations about what had occurred during the grievance procedure, including in relevant part the following:

> On April 29, 2002, City and Union officials met to review the grievance. [The Union representatives] were questioned in regard to whether the grievance encompassed [Ms. Pernsteiner]. I purposely and repeatedly questioned [the Union representatives] on this issue because [Ms. Pernsteiner] 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. [The Union representative] stated several times in response to my questions that the Union was not representing [Ms. Pernsteiner], that [Ms. Pernsteiner] was not a grievant, and that the Union was not grieving on her behalf. [The Union representative] stated that the Union was solely representing Ms. Cindy Pernsteiner in the matter.

Thereafter, Ms. Pernsteiner attempted to utilize the grievance procedure and its arbitration provisions regarding the April 5, 2002 grievance, but the City refused to proceed to arbitration. The instant Complaint ensued.

DISCUSSION

As the Examiner noted, the Commission is generally reluctant to dismiss complaints prior to an evidentiary hearing on the merits. To this end, "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." UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, DEC. NO. 15915-B (HOORNSTRA WITH FINAL AUTHORITY FOR WERC, 12/77) at 3; WAUSAU INSURANCE COMPANY, ET AL., DEC. NO. 30018-C (WERC 10/03) at 7. Applying this demanding standard, we conclude that Ms. Pernsteiner has stated some claims that are timely on their face or could be timely under liberal assumptions about the evidence she might adduce. Other claims could not be timely under any evidentiary scenario and are dismissed.

Ms. Pernsteiner's central argument is that the Union and City colluded with each other to negotiate a sham reorganization that was actually designed to remove the female members from the Union's Utility bargaining unit so as to increase the bargaining leverage of the male members of that unit, and correspondingly to decrease the wages and benefits of the female

clerical employees by placing them in a separate City Hall unit. Since Ms. Pernsteiner's termination was a direct result of the MOA that implemented the reorganization and transfer of clerical jobs, she claims that her termination was unlawful and should be rescinded along with the her loss of wages and benefits. This argument is the crux of her ERD charge and is a theme that is woven throughout her pleadings in the instant record.

If the foregoing claim were the only one encompassed in a liberal reading of Ms. Pernsteiner's pleadings, we would agree with the Examiner that the Complaint should be dismissed as untimely. The Commission's case law is clear that the one year statute of limitations begins to run once a complainant knew or should have known of the act that is alleged to violate the statute; it does not run from the date the complainant obtains evidence of the act's unlawfulness (such as improper motives). STATE OF WISCONSIN (DHSS AND DER), DEC. NO. 26676-B (WERC, 4/91); AFSCME, COUNCIL 24, DEC. NO. 21980-C (WERC, 2/90). Ms. Pernsteiner was obviously aware of the City's and Union's actions in allegedly colluding to undermine her employment in the fall of 2000; not only was she fully aware of the MOA negotiations and their implications, but she actually contemporaneously asserted the claim of collusion and bad faith at the ERD and in a grievance. If she subsequently discovered additional evidence bolstering her view, such discovery would not affect the limitations period. Hence, this portion of her claim was properly dismissed.

Ms. Pernsteiner's complaint may also be read to allege that the City's and the Union's conduct subsequent to the MOA amounted to a "continuing violation" (continuing collusion) such that she may still challenge the original collusion underlying the MOA. The Examiner appears to have read her pleadings in this manner and, applying the continuing violation analysis of LOCAL LODGE NO. 1424 V. NLRB (BRYAN MFG. CO.), 362 U.S. 411 (1960), adopted by the Commission in CESA NO. 4, ET AL., DEC. NO. 13100-B (WERC, 5/79), found those pleadings deficient. We agree with the Examiner on this point, as well. The pivotal concept in BRYAN and MORAINE PARK is that some misconduct must be alleged to have occurred within the limitations period. In both BRYAN and MORAINE PARK, the conduct within the limitations period was in itself perfectly lawful, i.e, was not in itself "misconduct": in BRYAN it was a monthly dues deduction and in MORAINE PARK it was a refusal to process a grievance filed by an individual who was not a member of the bargaining unit. In each case, the conduct within the limitations period could only be unlawful if some misconduct, outside the limitations period, was proven to have occurred. In BRYAN, the monthly dues deduction would only have been unlawful if the original dues deduction agreement, entered into on a date outside the limitations period, was unlawfully procured. In MORAINE PARK, the employee could only be viewed as a constructive member of the bargaining unit if she were able to prove that she had been terminated unlawfully on a date outside the limitations period. Similarly, in the present case, the Union's and the City's continued "collusion" regarding the reorganization, which arguably occurred within the limitations period, would only be unlawful if the reorganization itself had been a mutually-conceived sham from it inception – an event far

outside the limitations period. Hence, we affirm the Examiner's dismissal of Ms. Pernsteiner's complaint to the extent she intended to claim that the Union and the City were continuing to collude against her.

We also dismiss Ms. Pernsteiner's claim that the Union violated Sec. 111.70(3)(b) by reneging on its March 2002 agreement to arbitrate her grievance in exchange for withdrawal of her complaint at the ERD. Ms. Pernsteiner essentially argues that the Union's action was a continuation of its bad faith regarding the 2000 MOA and clerical reorganization. While such reneging could constitute "misconduct" within the limitations period under the BRYAN analysis, it is not the kind of misconduct that falls within our prohibited practice jurisdiction under Sec. 111.70(3)(b), Stats. The Commission's authority to oversee a union's relationship with its members lies exclusively within the parameters of its duty of fair representation; that duty, in turn, applies only to matters arising out of the collective bargaining relationship, not claims rooted in other statutes or forums. SEE, EAU CLAIRE AREA SCHOOL DISTRICT, DEC. NO. 29691-D (WERC, 4/00); BLACKHAWK TECHNICAL COLLEGE, DEC. NOS. 28448-C and 28449-C (WERC, 12/97). Therefore, if the Union's decision not to arbitrate Ms. Pernsteiner's April 2002 grievance is found to have satisfied its duty of fair representation, the Commission would have no authority to hold the Union liable for breaching a settlement reached in litigation before another agency. Such settlement agreement may well be enforceable in the other forum, but would neither add to nor detract from the Union's duty of fair representation under Sec. 111.70(3)(b).

Unlike the Examiner, however, we perceive elements in Ms. Pernsteiner's claims that may constitute misconduct occurring within the limitations period. First, construing her claims liberally, she appears to contend that the MOA was "valid" at its inception, but that the City thereafter failed to fulfill its promise to implement the consolidation and reorganization of the clerical work. Under this claim, Ms. Pernsteiner's termination from employment would be effective only if the City kept its promise. Hence, Ms. Pernsteiner, like any other dismissed employee who is challenging her dismissal, would remain constructively employed within the bargaining unit for purposes of challenging the City's violation of the MOA. Put another way, if Ms. Pernsteiner's termination had been conditioned upon the City meeting a future commitment, as she asserts, then she could claim that her termination was undone once the City reneged on its commitment. If her termination is constructively revoked, she remains an employee.

For purposes of the motion to dismiss, then, we must assume (and allow Ms. Pernsteiner an opportunity to establish) that the MOA was a "collective bargaining agreement" within the meaning of Sec. 111.70(3)(a)5, and that it was subject to the contractual grievance procedure. As with any (3)(a)5 claim brought by an individual, Ms. Pernsteiner must first establish that the applicable grievance procedure has been exhausted owing to the Union's breach of its duty of fair representation. MAHNKE V. WERC, 66 WIS. 2D 24 (1975). Normally, as the Examiner noted, the one year limitations period is tolled coterminously for both the duty of fair representation claim and the underlying breach of contract claim. LOCAL

950 INT'L UNION OF OPERATING ENGINEERS, DEC. NO. 21050-F (WERC, 11/84). This rule is intended to encourage the parties to utilize the agreed-upon procedure for resolving contractual disputes. On this record, it appears that Ms. Pernsteiner's duty of fair representation claim ripened on or about July 29, 2002, when the Union informed her that it would not pursue her grievance to arbitration. Clearly, for purposes of asserting a breach of the duty of fair representation regarding the April 2002 grievance, her complaint is timely.

On the peculiar facts of this case, however, where the underlying breach of contract claim against the City relates to conduct that could have occurred more than a year before Ms. Pernsteiner filed her grievance, we are compelled to parse the LOCAL 950 rule a bit more carefully. While we still believe that invoking the grievance procedure should toll the limitations period for a Sec. 111.70(3)(a)5 claim, we hold that it is the initiation of the grievance procedure – and not its culmination – that is the relevant date for tolling the one year limitations period. Otherwise, a party could invoke our jurisdiction over breach of contract claims indefinitely, so long as they first filed a grievance and followed with a prohibited practice charge within a year after exhausting the grievance procedure. Thus, on Ms. Pernsteiner's claim that the City violated the MOA by failing to implement the reorganization, the limitations period would be one year prior to April 5, 2002, the date on which Ms. Pernsteiner filed her grievance asserting that claim. This claim against the City will be untimely if Ms. Pernsteiner knew or should have known that the City had failed to implement the reorganization by April 5, 2001. While Ms. Pernsteiner alleges that her earliest opportunity to obtain this information was Cindy Pernsteiner's deposition in March 2002, the evidence may or may not support that allegation. Therefore, if Ms. Pernsteiner establishes a breach of the duty of fair representation regarding the April 2002 grievance, we remand the breach of contract claim to the Examiner for a hearing on the timeliness issue and, if appropriate, on the merits.

Ms. Pernsteiner also appears to claim that her termination pursuant to the MOA was conditioned upon the Union fulfilling a commitment to monitor the City's compliance with the reorganization commitment. Assuming for purposes of the present motion that this presents a viable claim under Sec. 111.70(3)(b), Stats., she would have had to file her complaint within a year after the date on which she knew or should have known that the Union was failing to monitor the reorganization. Again, the record does not allow us to determine whether, on or before November 15, 2001 (one year prior to filing the instant complaint), Ms. Pernsteiner knew or should have known about the Union's alleged failure to monitor. We therefore remand this claim to the Examiner as well, for a hearing on the timeliness issue and, if appropriate, on the merits. 2/

2/ We emphasize that we are not deciding that the claims we ascribe to Ms. Pernsteiner have legal or factual merit. In the context of this motion to dismiss, we are determining only the potential timeliness of potentially viable claims.

In sum, we hold that Ms. Pernsteiner's claims that the City and the Union entered into the MOA in the fall of 2000 in an unlawful manner or for unlawful motives are dismissed as untimely, whether as finite events or as continuing violations. We also dismiss her complaint to the extent she seeks to enforce in this forum the Union's alleged agreement to arbitrate in exchange for Ms. Pernsteiner's withdrawal of her ERD complaint.

However, we hold that Ms. Pernsteiner is an employee constructively for purposes of asserting that her termination should be rescinded on the ground that the City failed to comply with its promise to reorganize the City's clerical work, upon which her termination allegedly was conditioned. Further, we hold that her duty of fair representation claim against the Union regarding the April 2002 grievance is timely. Hence, our decision requires the parties to address the merits of the duty of fair representation claim as it relates to the April 2002 grievance; if the duty was not breached, then, as is customary, the Commission will not assert jurisdiction over the underlying breach of contract claim. On the other hand, if it is appropriate to reach the contract claim, timeliness will be a threshold issue on that claim. Finally, regarding Ms. Pernsteiner's claim that the Union violated Sec. 111.70(3)(b) in failing to monitor the City's compliance with its promise to reorganize, we hold that timeliness as well as the merits remain in dispute. The foregoing claims are remanded to the Examiner for appropriate hearing and decision.

Dated at Madison, Wisconsin, this 5th day of February, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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