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-C

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 the City of Medford.

Richard L. Kaspari, Metcalf, Kaspari, Howard, Engdahl & Lazarus, P.A., Attorneys at Law, 333 Parkdale Plaza 1660 S. Hwy 100, Minneapolis, MN 55416-1529, appearing on behalf of IBEW Local 953.

SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

This is a continuation of the proceedings in this matter that began on November 15, 2002, when Complainant Debra Pernsteiner filed a complaint with the Wisconsin Employment Relations Commission (Commission), alleging that the Respondents City of Medford (City) and IBEW Local 953 (Union) had committed prohibited practices in violation of Secs. 111.70(3)(a)5, Stats., and 111.70(3)(b)1, Stats., respectively. By decision issued September 24, 2003, Examiner David E. Shaw dismissed all of Ms. Pernsteiner's allegations as untimely. On January 5, 2004, the Commission issued an Order on Review of Examiner's Decision, affirming the Examiner's dismissal of certain allegations, overturning the Examiner's dismissal of certain other allegations, and ordering a hearing.

On May 20, 2004, the Commission appointed Commission Chair Judith Neumann to conduct a hearing on behalf of the Commission on the remaining allegations in this matter. In pre-hearing discussions with the Chair on May 20, 2004, the parties agreed to bifurcate the hearing and to proceed first on the issues regarding the Union. They further agreed that Ms. Pernsteiner would have no viable claim against the City if she did not prevail on the merits of her claims against the Union. They also agreed on the following statement of the issues pertaining to Ms. Pernsteiner's claims against the Union:

1. Whether the Union had a duty to fairly represent Ms. Pernsteiner regarding her rights under the Memorandum of Agreement (MOA) by monitoring the City's compliance with the consolidation and restructuring of Ms. Pernsteiner's position as provided in the MOA;

   a. If so, whether the Union breached that duty;

   b. if so, whether Ms. Pernsteiner knew or should have known of the Union's breach prior to November 15, 2001.

2. Whether the Union breached its duty of fair representation regarding its handling of the April 2002 grievance involving Ms. Pernsteiner.

A hearing on the above-described claims against the Union took place on May 25 and 26, 2004 in Medford, Wisconsin before Chair Neumann. The Union and Ms. Pernsteiner submitted briefs and reply briefs, the last of which was received on July 26, 2004.

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

SUPPLEMENTAL FINDINGS OF FACT 1/

30. At unspecified times during the approximately 15 years that the Union represented a combined bargaining unit of Utility linemen and clerical workers, unspecified male members of the bargaining unit showed hostility to female members of the bargaining unit. However, non-employee Union officials themselves did not exhibit such hostility. The

Union officials involved in deciding whether and how far to pursue the April 2002 reorganization grievance were not aware of hostility between the male and female members of the previously existing Utility bargaining unit. 2/

1/ In Decision No. 30537-B, the Commission adopted Examiner Shaw's Findings of Fact 1 through 27, set aside his Findings of Fact 28 through 30, and issued its own Findings of Fact 28 and 29. Those findings are incorporated herein by reference and will be included in the summary of the facts set forth in the Memorandum that follows our Order. Because we are supplementing our earlier findings, we will begin with Finding of Fact 30 in this decision.

2/ Cynthia Pernsteiner testified that Union official David Loechler was present at a meeting at the Medford Café, where another former Utility clerical employee, Catherine Jackson, was also present and where the women informed Loechler about the hostility they were experiencing from the linemen. However, it is undisputed that Jackson had left the City's employ in 1997 or earlier and that Loechler did not begin working with the Local until 1998. In addition, Loechler denied ever meeting Catherine Jackson at all, at the Medford Café or elsewhere. We credit the Union's account on this point. Cynthia Pernsteiner's recollection of events throughout her testimony was vague and often inaccurate, probably owing to the passage of time and the amount of litigation rather than to any deliberate attempt to mislead. Nonetheless, for example, she testified emphatically on direct examination that she had never been consulted by the Union during the investigation of the April 5, 2002 reorganization grievance, when the documentary record as well as other witness' testimony (and her own testimony on cross examination) clearly demonstrate that she was consulted extensively in connection with that grievance. As another example, Pernsteiner recollected that Connie Howard was present at the April 29, 2002 meeting with the City regarding the grievance, but in fact Howard was not present at that meeting. Accordingly, Loechler's denial that he was present at a meeting where the female unit members complained about hostility from the linemen is more credible than Persteiner's testimony to the contrary, and we have found accordingly.

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31. Beginning in about 1990, in response to recommendations by outside entities, the City implemented certain successive reorganizations of its financial and clerical work that resulted in the loss of Utility bargaining unit clerical work and positions. The Union vigorously defended the clerical portion of its bargaining unit against these actions by the City, ultimately losing both an arbitration (in 1996) and a prohibited practice complaint (in 1997). In negotiations for the 1998-99 collective bargaining agreement, the Union, with the support of the full membership, refused to agree to the City's proposal that would have provided a lower percentage increase for the clerical portion of the unit than for the linemen, a decision that resulted in the parties proceeding to interest arbitration, where the City's final offer was selected.

32. The reorganization that took place in or about November 2000 was initiated by the City. During negotiation over the impact of that reorganization upon the City's clerical workers, resulting in the Memorandum of Agreement (MOA) that was signed in or about

November 2000, the Union was not privy to or part of the City's decision-making process in determining that clerical functions would be reorganized, nor did the Union have any specific understanding or commitment from the City as to how the clerical job duties would be redistributed.

33. When the City and the Union entered into collective bargaining agreements covering two separate units as a result of the MOA in or about November 2000, the City insisted on, and the Union agreed to inclusion of language in both Management Rights clauses that had been interpreted in the 1996 arbitration award, MEDFORD ELECTRIC UTILITY, CASE NO. 52591 (BUFFET, 12/96), as giving the City a prerogative to transfer clerical bargaining unit work outside of the bargaining unit without violating the contract.

34. At or about the time the reorganization took effect, the Union asked Cynthia Pernsteiner, a former Utility clerical employee who was transferred to the new City clerical unit, to keep track of the duties she had previously performed for comparative purposes with the duties she would be performing in her new position. However, the Union did not affirmatively investigate the status of the reorganized clerical duties until Cynthia Pernsteiner's deposition testimony on March 20, 2002, nor did Cynthia Pernsteiner or any other bargaining unit member at any time complain to the Union or ask it to investigate this issue.

35. On or about January 1, 2001, the City hired a new clerical employee and member of the newly created City-wide clerical bargaining unit, Angela Dassow, to handle receptionist/clerical duties. Utility Manager Michael Frey was not involved in interviewing or hiring Dassow. Dassow's duties included working for all of the various City departments, including the Electric Utility. She was terminated at the conclusion of her six-month probationary period without a reason being offered by the City. She was not replaced and subsequently the City has employed a series of temporary non-bargaining unit clerical workers to perform some of the duties that Dassow had performed.

36. On or about March 21, 2002, then Union attorney Marilyn Townsend as well as Union official David Loechler, both of whom had been present at the March 20 deposition of Cynthia Pernsteiner, discussed with Union Business Manager and Financial Secretary John Marincel the possibility of resolving Debra Pernsteiner's ERD charges against the Union by the Union agreeing to file and pursue a grievance alleging that the City had failed to implement the November 2000 MOA in good faith. During this conversation, Marincel expressed reservations about filing such a grievance without investigating the facts as well as the effects of the 1996 arbitration award, which the Union interpreted as giving the City a general prerogative to reassign and transfer clerical bargaining unit work.

37. With a cover letter dated March 21, 2002, Union official Loechler conveyed to Cynthia Pernsteiner copies of the job descriptions for the jobs she and Debra Pernsteiner had held at the Utility prior to the January 1, 2001 reorganization. The letter stated, inter alia, "In an effort to investigate this issue, … Please go over these job duties along with any additional duties you or Rita may have or any delegation of duties from the enclosed job descriptions."

38. By letter dated March 27, 2002, the Union requested information from the City relating to the reorganization of clerical duties. The letter stated, inter alia:

> [I]t appears that the utility clerical jobs have simply been moved intact from one location to another. If, as Cindy Pernsteiner has testified, she is continuing to perform the same job functions she performed as a computer operator before the 'reorganization' under the same supervision, she should be classified and paid accordingly.
>
> I hereby request the following information from the City needed by the Union to evaluate whether to pursue a grievance and/or prohibited practice charges:
>
> 1. Current job duties and responsibilities being performed for the City/Utility by Cindy Pernsteiner; and
>
> 2. Current job duties and responsibilities being performed for the City/Utility by Rita Tischendorf.

39. With a cover letter dated March 28, 2002, the City conveyed to the Union "the job descriptions for Cindy Pernsteiner and Rita Tischendorf as requested." The enclosed job description for Rita Tischendorf, entitled "Receptionist/Clerical," was virtually if not entirely identical to the job description offered to Debra Pernsteiner and declined by her during the fall 2000 preparations for the clerical reorganization that took place on January 1, 2001. Rita Tischendorf had worked in a clerical capacity for the City, but not the Utility, prior to the reorganization. After the reorganization, Tischendorf became a member of the new City-wide clerical bargaining unit represented by the Union.

40. On or about April 1, 2002, Union official Loechler engaged in a telephone conversation with Rita Tischendorf in which Loechler informed Tischendorf that the Union was investigating whether the clericals' jobs had changed. Tischendorf stated in that conversation that her job had changed, in that she was now doing her former job duties plus duties that Debra Pernsteiner had previously performed.

On April 5, 2002, the Union filed a reorganization grievance.

41. On April 11, 2002, the Union telephoned the City to set up a meeting to discuss the April 5, 2002 reorganization grievance. By letter dated April 11, 2002, the Union advised the City that it would be available to meet on several dates between then and the end of April, 2002.

42. On April 29, 2002, prior to meeting with City officials later that day regarding the April 5, 2002 grievance, the Union met with Cynthia Pernsteiner to obtain her responses to an eight-page questionnaire that the Union had prepared comparing her job duties before and after the reorganization. Her responses indicated that she was performing essentially the same work that she had always performed, i.e., bookkeeping and accounting tasks mostly for the Utility but also for Water, Sewer, Refuse/recycling, and fire protection – accounts she had always managed even before the reorganization. According to Cynthia, the only additional duty she performed after moving to City Hall was to assist in the preparation and collection of property taxes perhaps once a week in the absence of Tischendorf or Jeffrey Albers (the Treasurer). She contended that, even though her new job description stated that she reported to Office Manager Kevin Doberstein, she in practice had always reported to the Office Manager for vacation purposes and that she continued even after the reorganization to clear her vacation schedule through Utility Manager Michael Frey and otherwise report to him "on all aspects of her job."

43. 0n April 29, 2002, Union officials and Cynthia Pernsteiner met with City officials to discuss the Union's April 5, 2002 reorganization grievance. During the course of this meeting, the City sought clarification about whether the Union was representing Debra Pernsteiner as well as Cynthia Pernsteiner for purposes of the grievance. The Union responded that Cynthia Pernsteiner was the only grievant, because Debra was no longer a member of the bargaining unit, but that Debra Pernsteiner was named in the grievance because she would be a beneficiary of any remedy the Union obtained. The Union took this position in part to ensure that the City would deal substantively with the grievance, because the Union believed that, if Debra Pernsteiner were named as a grievant, the City would refuse to process the grievance. The meeting ended with no resolution of the grievance.

44. Also on April 29, 2002, the State ERD issued its Order dismissing Ms. Pernsteiner's complaint against the Union based upon the settlement agreement.

45. On or about May 9, 2002, the City submitted its responses to the Union's questionnaire regarding changes to Cynthia Pernsteiner's job duties. The City's answers were somewhat but not significantly different from the information Cynthia Pernsteiner had provided to the same questions.

46. During the course of its investigation, the Union concluded that, although Cynthia Pernsteiner was now handling several of the job duties that Debra Pernsteiner had previously performed and some additional work, and while the City had plans to implement a

new accounting software program that was expected to alter Cynthia Pernsteiner's duties, her job had not changed significantly as a result of the reorganization. The Union concluded, however, that the reorganization had effectuated significant changes in the distribution of duties formerly performed by Debra Pernsteiner. Those duties were distributed among Tischendorf, Office Manager Kevin Doberstein, Cynthia Pernsteiner, and the temporary clerical employees.

47. The Union did not contact Debra Pernsteiner during the course of its investigation or otherwise seek information from her.

48. By letters dated July 29, 2002, the Union informed the City and Debra Pernsteiner, respectively, that the Union "after due consideration" had determined not to pursue it's April 5, 2002 reorganization grievance. The Union offered to discuss its reasons with Ms. Pernsteiner and her attorney. This was the Union's first contact with Debra Pernsteiner regarding the grievance subsequent to April 18, 2002.

49. The Union's reasons for withdrawing the April 5, 2002 grievance were: (1) that it had concluded that a reorganization of clerical duties had occurred to a sufficient degree to undermine the factual basis of the grievance; and (2) that its understanding of the City's management rights, based upon the 1996 arbitration award and the 1997 prohibited practice decision (WERC Dec. No. 28440-D), was that the City had the prerogative under the collective bargaining agreement to assign and transfer clerical duties with or without a reorganization, thus giving the April 5 grievance little chance of success.

50. The Union's decision to withdraw the April 2002 reorganization grievance was made in good faith and was not arbitrary or discriminatory.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. Respondent IBEW Local 953 had no statutory or contractual obligation enforceable under the Municipal Employment Relations Act to monitor the Respondent City of Medford's actions for compliance with the terms of the Memorandum of Understanding (MOA).

2. Respondent IBEW Local 953 did not violate its duty of fair representation towards Complainant Debra Pernsteiner by not taking the April 2002 reorganization grievance to arbitration and thus did not thereby commit a prohibited practice within the meaning of Sec. 111.70(3)(b)1, Stats.

3. Because Complainant Pernsteiner failed to exhaust the contractual grievance procedure and that failure was not attributable to a breach of the duty of fair representation by Respondent IBEW Local 953, the Commission will not assert jurisdiction over Complainant Pernsteiner's claims against the Respondent City of Medford for violations of Sec. 111.70(3)(a)5, Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

The complaint is dismissed in its entirety.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of August, 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

Summary of Facts

Complainant Debra Pernsteiner was employed 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 Medford Electric Utility, including clerical workers and skilled trade and maintenance workers. At all relevant times prior to Ms. Pernsteiner's termination, there was one other clerical worker at the Utility, Cynthia Pernsteiner, who is related only distantly to the Complainant's husband. 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 unrepresented City employees. The Union vigorously defended its clerical bargaining unit work, but the City prevailed in a 1996 arbitration award and a 1997 prohibited practice proceeding, which the Union interpreted as giving the City an unrestricted prerogative to transfer clerical work from the bargaining unit to other City employees, with or without a reorganization. While the clerical workers and the linemen were in the same Utility bargaining unit, the women experienced some hostility from the men, although the record does not disclose the nature, scope, or timing of that hostility. During the 1998-99 negotiations, the bargaining unit membership at large resisted a City attempt to give clerical workers a lower wage increase than the linemen. The Union officials involved in the instant case were unaware of any history of hostility and did not themselves harbor any hostility toward the clerical members of the unit.

In 2000, the City again initiated a reorganization designed to consolidate the clerical work of the Utility and City Hall and to eliminate the clerical positions at the Utility. The City and the Union negotiated over the effects of the City's decision to reorganize, resulting in a Memorandum of Agreement (MOA) executed in late November 2000. The MOA provided for Debra Pernsteiner to be laid off with severance pay and other benefits and for the City to recognize the Union as the collective bargaining representative of a separate bargaining unit of City clerical employees. Ms. Pernsteiner was terminated effective December 7, 2000, pursuant to the MOA and paid in accordance with its terms. 3/

3/ Debra Pernsteiner had been offered a new position at City Hall at a lower wage rate than she had been receiving at the Utility and she declined that position.

The MOA was premised upon the City's assertion that it intended to reorganize and combine Utility and other City clerical and financial functions. By letter dated November 9, 2000, addressed to the City, the Union expressed concern that "[t]he 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." In another letter to the City dated November 21, 2000, the Union stated that it "will be monitoring the situation and must reserve the right to take appropriate action to protect the rights of those employees it represents." In a November 15, 2000 letter to Debra Pernsteiner, the Union stated:

> . . . 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 [sic] economic obligations to Pernsteiner, Local 953 will not pursue a grievance on her behalf. (footnote omitted)

Sometime towards the end of December 2000 or the beginning of January 2001, the Union mentioned to Cynthia Pernsteiner that she should keep a record of her job duties and whether they changed as a result of her move to City Hall. However, the Union had no specific understanding or commitment from the City regarding how the former Utility clerical duties would be distributed among the workers at City Hall.

Between the implementation of the reorganization on or about January 1, 2001 and March 20, 2002, no one, including Cynthia Pernsteiner, informed the Union that the reorganization of clerical duties may not have occurred or asked the Union to investigate. On March 20, 2002, during a deposition in connection with Debra Pernsteiner's ERD complaint against the Union, Cynthia Pernsteiner testified that her duties had not changed after her transfer to City Hall. Beginning the next day, March 21, 2002, in order to determine the viability of a grievance challenging the bona fides of the reorganization, the Union conducted an investigation of the job duties currently being performed by personnel in City Hall as compared with the job duties that Debra and Cynthia Pernsteiner had performed prior to the 2000 reorganization. The investigation took the form of lengthy questionnaires for Cynthia to complete regarding her duties and Debra's duties before and after the reorganization, a lengthy request for information from the City relating to the clerical job duties, a telephone conversation with Rita Tischendorf, one of the members of the City clerical unit, conversations with City officials, a detailed conversation with Cynthia Pernsteiner regarding her job duties, and a meeting on April 29, 2002 among City officials, Union officials, and Cynthia Pernsteiner.

While continuing its investigation, the Union filed a grievance on April 5, 2002, 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 Complainant Debra Pernsteiner that it was in the process of obtaining information concerning the grievance and had scheduled a meeting with the City to discuss the current job duties of the City Hall clerical employees, including Cynthia Pernsteiner. The letter concluded, "It remains the Union's intentions (sic) 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 18, 2002 document requested, inter alia, "back wages, benefits and reinstatement for Debra Pernsteiner . . . ." On April 29, 2002, the Union and the City met to discuss the grievance. During that meeting, the Union stated that the grievant in the matter was Cynthia Pernsteiner but that Debra Pernsteiner would be significantly affected by any remedy should the Union prevail.

On May 9, 2002, the City submitted its responses to the Union's questionnaire regarding changes to the clerical employees' job duties. At some point thereafter, the Union concluded that the City had sufficiently reshuffled the clerical job duties to make the grievance factually weak. The Union believed that the City had done little to restructure Cynthia Pernsteiner's job, although she was doing several of Debra's former duties and some incidental tax collection work. However, the Union also believed that Complainant Debra Pernsteiner's former duties had been divided up among several clerical and financial employees at City Hall, which the Union believed would be sufficient to meet the City's vague and unspecified obligations under the MOA. The Union's views of the merits of the grievance were also influenced by its interpretation of the 1996 and 1997 grievance and prohibited practice decisions, which seemed to the Union to give the City virtually unfettered authority to assign and reassign clerical work at will. In this regard, the Union considered the fact that the City had insisted upon including in the new clerical bargaining agreement the management rights clause language from the former Utility agreement that had been interpreted to allow the City to transfer clerical work out of the unit.

Based upon the above considerations, the Union decided not to pursue the April 2002 reorganization grievance to arbitration and communicated that decision to the City and to Debra Pernsteiner by letters dated July 29, 2002. This was the Union's first communication

with Debra Pernsteiner subsequent to April 18, 2002. 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

Duty to Monitor

According to the stipulated statement of issues, Ms. Pernsteiner's first claim against the Union is that it failed to monitor the City's compliance with an implicit condition of the November 2000 MOA, i.e., to reorganize and merge the Utility's and the City's clerical work. Ms. Pernsteiner devotes little energy to clarifying the legal or factual basis for this claim, pointing only to the duty as having been "undertaken by Attorney Howard's November 15, 2000 letter." (Complainant's Reply Brief at 2).

The Union correctly argues that the duty of fair representation, which is a function of the Union's status as the exclusive collective bargaining representative, does not generally include an affirmative duty to police an employer's compliance with the terms of the collective bargaining agreement, nor has Ms. Pernsteiner offered any legal authority for such a proposition. Rather, the duty of fair representation in this context is triggered by an individual's grievance or request for representation. Thus, to whatever extent Complainant Pernsteiner's claimed breach of the duty of fair representation rests upon an alleged violation of a general affirmative duty, we reject her claim.

However, Ms. Pernsteiner's monitoring claim may rest less upon the Union's general duty of fair representation than upon a special undertaking or commitment by the Union to ensure that the City fulfilled the conditions which induced Ms. Pernsteiner's termination. Since our jurisdiction encompasses only alleged violations of "collective bargaining agreements" reached between unions and employers, Sec. 111.70(3)(b)4, Stats., Ms. Pernsteiner's claim would not fall within our jurisdiction if the alleged commitment or contract is between the Union and Ms. Pernsteiner, rather than between the Union and the City. 4/

4/ There is some authority to suggest that, in enacting Sec. 111.70, Stats., the Legislature has foreclosed such common law causes of action in tort or contract , because "disputes between a union member and his or her union which arise out of that union/member relationship, and which relate to union or work-related activities, are within the primary jurisdiction of the WERC under ch. 111, Stats. . . . Chapter 111 is a comprehensive regulatory enactment which has supplanted many previously existing common law remedies." ACHARYA V. AFSCME, 146 WIS. 2D 693, 699 (CT. APP. 1988) (CITATIONS OMITTED). If so, claims involving the union's representation activities would have to fit within one of the statutory prohibited practices set forth in Sec. 111.70(3)(b), Stats., in order to be actionable.

If, on the other hand, Ms. Pernsteiner is arguing that the Union's promise to monitor the reorganization was part and parcel of the collectively-bargained MOA, her claim has some theoretical support. The Commission has interpreted the State Employment Labor Relations Act (SELRA), the State employee analog to the Municipal Employment Relations Act (MERA), to permit an individual employee to bring a prohibited practice complaint against her union for a breach of a collective bargaining agreement separate and apart from the duty of fair representation under Sec. 111.70(3)(b)1, Stats. WSEU, COUNCIL 24, WERC DEC. NO. 22320-B (WERC, 7/86), AFF'D SUB NOM. ACHARYA V. WERC, CASE NO. 86-CV-4140 (DANE CO. CIR. CT. 1987), at 9. However, to do so, the Complainant would have to establish that the parties to the collective bargaining agreement clearly intended to create such an enforceable contractual commitment – in this case that the Union would monitor the reorganization. ID. This is and ought to be a difficult standard. As the United State Supreme Court noted, in recognizing a similar cause of action under Section 301 of the LMRA, 29 U.S.C. Sec. 185(a),

> . . . we also think it necessary to emphasize caution, lest the courts be precipitate in their efforts to find unions contractually bound to employees by collective bargaining agreements. The doctrine of fair representation is an important check on the arbitrary exercise of union power, but it is a purposefully limited check, for a 'wide range of reasonableness must be allowed a statutory bargaining representatives in serving the unit it represents.' . . . If an employee claims that a union owes him a more far-reaching duty, he must be able to point to language in the collective bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees. . . .

STEELWORKERS V. RAWSON, 495 U. S. 362, 374 (1990) (CITATIONS OMITTED).

Neither the MOA nor the ancillary correspondence comes close to establishing a clear contractual requirement that the Union monitor the City's reorganization of clerical duties. The MOA itself is completely silent on the subject, a deficit sufficient without more to negate this claim. Similarly, the Union's November 15, 2000 letter to Ms. Pernsteiner does not mention monitoring nor reference any similar agreement between the Union and the City. The relevant language reads as follows:

> . . . 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 [sic] economic obligations to Pernsteiner, Local 953 will not pursue a grievance on her behalf.

Even under the dubious premise that the quoted language was a promise to grieve if the City failed to reorganize, the promise would be from the Union to Ms. Pernsteiner, not from the Union to the City, and hence would not be a "collective bargaining agreement" actionable under Sec. 111.70(3)(b)4, Stats. The only mention of monitoring is in the Union's letter to the City of November 21, 2000, where the City was informed of the Union's view that the MOA was premised upon an asserted intent to reorganize and was warned that 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." Such unilateral assertions fall far short of an enforceable collectively negotiated agreement requiring the Union to monitor the reorganization.

Given the foregoing, we conclude that the Union did not have an affirmative duty to monitor the City's implementation of the reorganization and thus we dismiss those portions of the complaint. Accordingly, we need not determine whether the monitoring claim was timely filed or whether the Union breached the alleged duty to monitor.

Duty of Fair Representation Regarding the April 2002 Grievance

It is by now well settled that, where a labor agreement contains a grievance arbitration procedure, it is presumed (absent an express provision to the contrary) to be the exclusive method of settling contractual disputes. MAHNKE V. WERC, 66 WIS. 2D 24 (1975). Where, as here, the union has control over the contractual grievance arbitration procedure and elects not to take a grievance to arbitration, an employee may not pursue a claimed breach of the agreement under Sec. 111.70(3)(a) 5, Stats. unless the union has violated its duty of representation when deciding not to take the grievance to arbitration. 5/ MAHNKE, SUPRA.

5/ No party has argued that the contractual grievance arbitration provisions are inapplicable to alleged violations of the MOA.

The duty of fair representation "is a purposefully limited check" on a union's considerable discretion in handling grievances, RAWSON, SUPRA, and to establish a breach of the duty a complainant has the burden of establishing that the "union's conduct toward a member . . . is arbitrary, discriminatory, or in bad faith." MAHNKE, 66 WIS.2D AT 531 (quoting VACA V. SIPES, 386 U. S. 171, 190 (1967). "Bad faith" for this purpose "calls for a subjective inquiry and requires proof that the union acted (or failed to act) due to an improper motive." NEAL V. NEWSPAPER HOLDINGS, INC., 349 F.3D 363, 369 (7TH CIR. 2003).

"Arbitrariness" generally focuses on whether the union has made a reasoned decision about proceeding with the grievance, MAHNKE, 66 WIS.2D AT 534, keeping in mind the "'wide range of reasonableness'" that the union must be allowed. MAHNKE, 66 WIS.2D 524, 531, quoting HUMPHRE V. MOORE, 375 U. S. 335, 349 (1964).

Debra Pernsteiner's claim in this case implicates elements of both bad faith and arbitrary conduct. 6/ As to bad faith, she contends that the Union had a history of hostility to the clerical members of the former Utility bargaining unit, and that this hostility induced the Union both to permit the sham reorganization underlying the MOA and to ignore the clear evidence that the reorganization had not occurred. The record evinces some amorphous hostility between the male linemen and the clerical workers when they worked together at the Utility. Debra Pernsteiner's husband testified to conversations with former Union officials at unspecified dates in the past in which they told him that "the men [at the Utility] hate the women." In addition, Cynthia Pernsteiner testified about an incident at an unspecified date, certainly prior to the events giving rise to this case, in which an unspecified male bargaining unit member left an envelope containing a pantyliner in the women's bathroom labeled, "New AOC Insurance Plus, Office and Clerical personel [sic] only, Free First time users fee, Accidental & Overtime Coverage, Attention Cindy, Kathy, & Deb." Cynthia Pernsteiner also recalled a conversation with Union officials (though she misidentified David Loechler as one of them) some years ago, in which the clerical workers complained about the hostility from the linemen.

6/ Ms. Pernsteiner does not advance arguments suggesting that the Union was "discriminatory" apart from its alleged bad faith or invidiousness in agreeing to the MOA and failing to monitor compliance – arguments that are addressed in the text above.

Juxtaposed with the foregoing ill-defined evidence of intra-unit hostility is considerable undisputed evidence that the Union has been aggressive in supporting the clerical portion of the former Utility bargaining unit, not only in repudiating the City's effort to give the women a lower wage increase than the linemen in the 1998-99 negotiations and in vigorously challenging the loss of clerical bargaining unit work in the mid-1990's, but also in negotiating the 2000 MOA. The MOA garnered representation rights for the newly reorganized City clerical unit, increased the City's proposed wages for the City Hall clericals, and provided substantial severance benefits to Complainant Pernsteiner. Most importantly, nothing in the record links whatever vague hostility existed between the men and the women at the Utility in the 1990's to the Union's conduct regarding the April 2002 grievance, including the decision not to take the grievance to arbitration. There is no evidence that the Union decision-makers

regarding that grievance (Loechler and Marincel) had any knowledge of the purported intra-unit hostility, much less that they harbored any such hostility themselves. In short, Ms. Pernsteiner has not established invidiousness or bad faith in the Union's handling of the April 2002 grievance.

We also conclude that the Union handled the April 2002 grievance in a non-arbitrary manner. The Union filed the grievance promptly upon learning from Cynthia Pernsteiner's deposition that the City may have failed to implement an authentic reorganization. Although Complainant Pernsteiner makes much of the Union's failure to identify her as a grievant per se in connection with this grievance, on this record we see no prejudice to her interests in not being so designated. Whether or not the Union perceived Debra Pernsteiner as a "grievant," the Union clearly identified her as a party whose interests would be affected by the grievance. Being labeled a "grievant" would not have affected the outcome of the Union's investigation or Ms. Pernsteiner's right to invoke the arbitration clause of the contract.

Similarly, the Union's investigation was anything but arbitrary. The Union sought comprehensive information about the distribution of the clerical job duties from both the City and the clerical workers, in particular from Cynthia Pernsteiner. The Union met with City officials as well as Cynthia to gather and reflect upon the information. While the Union's investigation did not include consulting Debra Pernsteiner, Cynthia Pernsteiner was well aware of the duties formerly performed by Debra Pernsteiner and there is no reason to believe that Debra, who had not worked for the City since the fall of 2000, had any information to contribute about the dispersal of those duties. The conclusions the Union drew from the information were also reasonable, i.e., that Cynthia's duties had changed somewhat but not significantly, but that Debra Pernsteiner's duties had in fact been dispersed among several City employees. 7/ The Union reasonably decided that the substantial dispersion of Debra Pernsteiner's duties undermined its ability to prevail on the merits of the grievance, which depended upon proof that the reorganization was a sham. Moreover, while other interpretations might be available, the Union reasonably viewed the 1996 and 1997 arbitration and prohibited practice decisions, respectively, as major impediments to challenging any actions the City took in the way of transferring or assigning clerical bargaining unit work. Accordingly, the Union's decision not to pursue the April 2002 grievance to arbitration was not arbitrary.8/

7/ We emphasize that we need not determine in this case the precise accuracy of the Union's conclusions or the precise scope of the City's reorganization. While such findings would be material to Ms. Pernsteiner's claim against the City, for purposes of the instant decision we need only determine whether the Union's conclusions about the reorganization were arbitrary.

8/ We note that the court in MAHNKE indicated that, where a union's decision not to arbitrate is based upon the costs of arbitration, the union generally should consider not only the likelihood of success in arbitration but also the monetary value of the claim and the effect of the breach on the employee. 66 Wis.2d at 534. Ms. Pernsteiner has not established that the Respondent Union based its decision upon the costs of arbitration, rather than solely upon the merits of the grievance, nor has the Complainant established that the Union failed to consider these additional factors when it decided not to proceed to arbitration.

Debra Pernsteiner also challenges the Union's failure to keep her apprised of the status of the April 2002 grievance and failure to notify her until July 29, 2002, that it had decided to withdraw the grievance. It is well settled that such communication failures do not, in and of themselves, violate a union's duty of fair representation. "Since only the union can arbitrate, any breach of duty in not arbitrating hangs on the reasons for not arbitrating, not whether it communicated its reasons or decision to the grievant." UNIVERSITY OF WISCONSIN-MILWAUKEE HOUSING DEPT. (GUTHRIE), DEC. NO. 11457-F (WERC, 12/77), at 34.

Accordingly, we conclude that the Ms. Pernsteiner has not established. that the Union violated its duty of fair representation under Sec. 111.70(3)(b)1, Stats., by the manner it handled the April 2002 grievance, and we dismiss those claims. Because we have not found a breach of the duty of fair representation and because the contractual grievance arbitration procedure is the exclusive mechanism for pursuing alleged violations of the MOA, Ms. Pernsteiner's Sec. 111.70(3)(a)5, Stats., claims against the City for violating the MOA must also be dismissed.

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