STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

VINCENT MURILLO, Complainant,

vs.

MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent.

Case 413
No. 63064
MP-3997

Decision No. 30980-C

Appearances:

Barbara Zack Quindel, Hawks, Quindel, Ehlke, and Perry, S.C., 700 West Michigan Avenue, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, S.C., 823 North Cass Street, P.O. Box 514005, Milwaukee, Wisconsin, appearing on behalf of Vincent Murillo.

Donald L. Schriefer, Assistant City Attorney, City of Milwaukee, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin, appearing on behalf of the Milwaukee Board of School Directors.

ORDER ON REVIEW OF EXAMINER'S DECISION

On September 1, 2004, Examiner Lauri Millot issued Findings of Fact, Conclusions of Law and Order in the captioned matter, holding that the Respondent Milwaukee Board of School Directors (Board) had denied Complainant Vincent Murillo's right under Sec. 111.70(4)(d)1, Stats., to present a grievance to his employer, in violation of Sec. 111.70(3)(a)1, Stats. Neither party filed a petition for review.

By Order dated September 21, 2004, pursuant to its authority under Secs. 111.07(6) and 111.70(4)(a), Stats., the Commission set aside the Examiner's Order and invited the parties to submit written argument on the questions of whether Sec. 111.70(4)(d)1, Stats., creates an affirmative obligation upon the municipal employer to meet and, if so, whether the record establishes that the Respondent violated this obligation and thereby committed a prohibited practice. Both parties filed briefs on October 18, 2004.

For the reasons set forth in our Memorandum, below, we reverse the Examiner's decision and hold that Sec. 111.70(4)(d)1, Stats., does not establish an enforceable duty on the part of the employer to meet with individual employees, and the employer may lawfully precondition its willingness to meet upon the presence of the exclusive bargaining representative. Accordingly, we dismiss the Complaint.

ORDER

A. The Examiner's Findings of Fact 1 through 8 are affirmed.

B. The Examiner's Conclusions of Law 1 through 3 are affirmed.

C. The Examiner's Conclusions of Law 4 and 5 are reversed and the following Conclusions of Law 4 is made:

> 4. Where a bargaining unit employee has requested an opportunity to present a grievance pursuant to Sec. 111.70(4)(d)1, Stats., it is not unlawful for the employer to condition the meeting upon the presence of the employee's collective bargaining representative.

D. The Examiner's Order is set aside and the following Order is made:

The Complaint is dismissed in its entirety.

Given under our hands and seal at the City of Madison, Wisconsin, this 6th day of March, 2009.

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

MILWAUKEE BOARD OF SCHOOL DIRECTORS

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

The facts set forth in the stipulated record in this matter can be summarized as follows. The Complainant Vincent Murillo (Mr. Murillo) is employed by the District as a building service helper and as such is a member of a collective bargaining unit for which SEIU, Local 150 (SEIU) is the elected or recognized collective bargaining representative (hereafter "majority union").

In September 2003, Mr. Murillo developed a concern about certain issues relating to his health insurance benefits. The record does not reveal what assistance, if any, Mr. Murillo sought from SEIU regarding the issue. However, he did seek assistance from the Milwaukee Teachers Education Association (MTEA), a union that represents other bargaining units of District employees. On September 19, 2003, the MTEA conveyed a written request to District officials indicating that Mr. Murillo had authorized MTEA to represent him for the purpose of requesting a meeting with the employer regarding health insurance, citing and quoting from the language of Sec. 111.70(4)(d)1, Stats. A copy of the request was also sent to SEIU. By letter dated October 9, 2003, the District offered a meeting date, but conditioned the meeting on (1) the presence of an SEIU official and (2) an acknowledgement that the meeting did not constitute an appeal under the health plan nor did it "invoke any grievance or collective bargaining process." By letter dated October 14, 2003, the MTEA responded that the District could not lawfully refuse to meet even if SEIU declined to participate. The letter further stated, in part:

> "… whether Mr. Murillo appeals the administrations [sic] decision under his health plan or wishes to file a contractual grievance depends in large measure upon the outcome of the October 15th conference. The MTEA is not willing to rule out either possibility at the present time."

The District thereafter refused to meet with Mr. Murillo without its conditions being met. The record does not reflect whether the SEIU was willing to be present at the requested meeting. Mr. Murillo did not file a grievance about the health insurance issue pursuant to the collective bargaining agreement between the Board and SEIU, which governed his wages, hours, and working conditions.[1]

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[1] The litigation in this case has centered primarily upon the first condition that the District established for meeting with Murillo and the MTEA, specifically, that SEIU be present at the meeting. The second condition, which, as we read it, was an effort by the District to ensure that Murillo understood that any such meeting was not to be taken as contractual grievance meeting nor as part of the health plan appeal process, received relatively little attention. From the MTEA's October 14, 2003 response to the District's conditions, it appears that the MTEA may have interpreted the second condition as requiring a waiver of access to the contractual grievance procedure and/or the health insurance plan appeal procedure. If so, we believe the MTEA misread the District's intention. Since we ultimately conclude that the District has no duty to meet with individuals or their representatives pursuant to

Examiner's Decision and Positions of the Parties

The Examiner held that Sec. 111.70(4)(d)1, Stats. ("Section (4)(d)1") required the District to acquiesce in Murillo's request for a meeting and could not lawfully condition the meeting on SEIU's presence. In the Examiner's view, conditioning the meeting on SEIU's presence violated Murillo's right to refrain from union activity as set forth in Sec. 111.70(2), Stats. ("Section (2)"), which was a prohibited practice under Sec. 111.70(3)(a)1, Stats. ("Section (3)(a)1").

In connection with the instant review, the District contends that Section (4)(d)1 should be construed in alignment with the way that the U. S. Supreme Court has construed similar language in federal private sector analog, the National Labor Relations Act, 29 U.S.C. Sec. 159(a) ("Section 9(a)"). Although that statute, like Section (4)(d)1, speaks of an individual "right" to present grievances and have them "adjusted," the Supreme Court has held that the statute's purpose, given its context and sound labor policies, was to *permit* employers to meet with individual employees and their chosen representatives without being held to have violated the duty to bargain only with the exclusive bargaining representative. The District notes the potential difficulties that would flow from an obligation to meet and confer with every disgruntled employee who so requests, without the moderating benefit of the majority union's screening and counseling function. The District cites several prior Commission decisions that have propounded exactly this interpretation of Section (4)(d)1.

Mr. Murillo counters that the clear language of Section (4)(d)1 establishes an employee's "right" to meet with the employer, as long as the explicit statutory conditions have been met, and also mandates that the employer "shall confer" with the employee about his grievance. According to Murillo, "There is nothing in the statute that allows the employer to condition the meeting on the representative's actual presence…nor … requiring employees to waive their right to utilize, at a separate time, the contractual grievance machinery…." Murillo contends that the Section (4)(d)1 "right" would have no meaning if it were not enforceable as a prohibited practice; further, the (4)(d)1 conference fulfills what Murillo views as his right under Section (2) to meet with the District regardless of whether the majority union wishes to participate. Murillo distinguishes the federal cases cited by the District on the ground that, unlike those cases, Murillo was seeking "to address a concern outside of the established grievance procedure and under circumstances which do not threaten the exclusive bargaining representative." Like the District, Murillo cites several prior Commission decisions that appear to interpret Section (4)(d)1 as establishing an enforceable duty on the part of the employer to meet with individual employees who file "statutory grievances."

Sec. 111.70(4)(d)1, Stats., it follows that the District may impose reasonable conditions upon its willingness to meet, including both conditions set forth in its October 9, 2003 letter.

DISCUSSION

The issue in this case is whether a municipal employer commits a prohibited practice in violation of the Municipal Employment Relations Act (MERA) by refusing an employee's request for an opportunity to "present grievances" as set forth in Section (4)(d)1, unless the employee's collective bargaining representative is present at the meeting. The Examiner answered this question in the affirmative. Because this is the first case squarely presenting this question, and because the Commission's prior decisions discussing the language in Section (4)(d)1 have been inconsistent, the Commission has taken the unusual step of reviewing the Examiner's decision in the absence of a petition for review from either party, in order to clarify the law.

The difficulty of the instant case, and the cause of the Commission's inconsistent commentary on the subject over the years, lies in a conflict among the plain language of three separate provisions within MERA: Section (2), Section (3)(a)1, and Section (4)(d)1. As discussed below, while it may be impossible to accommodate the literal language of all these sections, interpreting Section (4)(d)1 as conferring a right of the employee to request and a right, but not a duty, for the employer to grant a meeting outside of the contractual grievance procedure, best accords with the policies and purposes of MERA.

We begin by setting out the language of each of the foregoing sections.

111.70 Municipal employment.

. . .

(2) RIGHTS OF MUNICIPAL EMPLOYEES. Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employees shall have the right to refrain from any and all such activities except that employees may be required to pay dues in the manner provided in a fair-share agreement. …

(3) PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:

1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

. . .

> **(4)** POWERS OF THE COMMISSION. The commission shall be governed by the following provisions relating to bargaining in municipal employment in addition to other powers and duties provided in this subchapter.
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> . . .
>
> (d) *Selection of representatives and determination of appropriate units for collective bargaining*. 1. A representative chosen for the purposes of collective bargaining by a majority of the municipal employees voting in a collective bargaining unit shall be the exclusive representative of all employees in the unit for the purpose of collective bargaining. Any individual employee, or any minority group of employees in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing, and the municipal employer shall confer with said employee in relation thereto, if the majority representative has been afforded the opportunity to be present at the conferences. Any adjustment resulting from these conferences shall not be inconsistent with the conditions of employment established by the majority representative and the municipal employer.

Taken literally, Section (4)(d)1 purports to gives Murilloo a "right" to present "grievances" to the District with or through the MTEA, and also to require the District to "confer" with Murillo about the grievances as long as the majority union, SEIU, has been given an opportunity to be present. The language does not describe or limit the nature of the "grievance" or "conferring" of which it speaks and seems to contemplate the possibility of multiple "conferences" in connection with any particular grievance.

On the other hand, taken literally, the "right" set forth in Section (4)(d)1 is not expressly included in the set of rights guaranteed in Section 2. Taken literally, the employer conduct that is prohibited by Section (3)(a)1 encompasses only transgressions of the rights set forth in Section (2).[2] There is no language in the statute expressly giving the Commission power to hold the employer liable for a prohibited practice based upon failure to comply with the right and/or duty that appears to be set forth in Section (4)(d)1. Hence, the conundrum.

Perhaps predictably, this statutory dissonance has led to some confusion in the Commission's case law and provided both parties in the instant case with material to support their opposing positions. The Commission commentary about Section (4)(d)1 and its analogs in the private and state sectors, much of it *dicta*, is recounted chronologically here.

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[2] In contrast, subsection (3)(b)1 of MERA makes it a prohibited practice for a union "To coerce or intimidate a municipal employee in the enjoyment of the employee's legal rights, including those guaranteed in sub. (2)."

MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 6995-A (WERB, 3/66),[3] arose under an earlier and more rudimentary form of Section 111.70, one that did not impose upon public employers a duty to bargain in good faith with the majority union. As to the instant issue, Section 111.70 at that time incorporated by reference the following provision of the Wisconsin Employment Peace Act, Sec. 111.05(1), Stats., in existence since 1939:

> Representatives chosen for the purposes of collective bargaining by a majority of the employees voting in a collective bargaining unit shall be the exclusive representative of all of the employees in such unit for the purposes of collective bargaining, provided that any individual employee or any minority group of employees in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto.

The Commission (then called the Board) held, in relevant part, that the elected majority union and the employer both "interfered" with the "rights" set forth in that section by negotiating a "Complaint Procedure" that permitted employees to bring a complaint to their principals at Step One without being represented by the majority union, but that did not permit such individuals to be represented by a minority union at that step. Without much discussion, the Board stated that this statutory right existed only at the initial step of the negotiated complaint procedure and that both individuals and minority unions lawfully could be denied access to subsequent, higher steps of the negotiated procedure.

A few years later the Commission veered away from the above analysis. In MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 11280-B (WERC, 12/72), arising under a modernized version of MERA, the Commission rejected an individual employee's claim that Section (4)(d)1 gave her standing to bring a prohibited practice claim against the employer under Section (3)(a)5 for breach of the "prompt hearing" requirement in a collectively-bargained grievance procedure. This time the Commission made clear that it viewed the entire collectively-bargained grievance procedure as "belong[ing] to the Union," and as separate and apart from whatever right is conferred upon individual employees by Section (4)(d)1. ID. at 3. The Commission expressed the following view of Section (4)(d)1:

> Said statutory provision merely requires the Municipal Employer to confer with an individual employe or minority group of employes on grievances presented to the municipal employer. The provision implements Section 111.70(2) granting a "right" to employes to refrain from engaging in concerted activity for the purpose of collective bargaining. The right to present grievances and the duty of the employer to confer on those grievances ... does not grant the grievant involved the grievance procedure negotiated in the collective bargaining agreement....

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[3] The Wisconsin Supreme Court reversed this decision on other grounds in BOARD OF SCHOOL DIRECTORS OF MILWAUKEE V. WERC, 42 WIS.2D 637 (1969). The court's decision does not address the issue at hand in the instant case.

ID. at 2. The Commission did not explain how the Section 2 right of employees to *refrain from* union activity incorporated, necessitated, or translated into an affirmative duty on the part of an employer to meet and confer with individual employees.

During this period of time, the National Labor Relations Board and the federal courts were also grappling with the similar anomaly in the National Labor Relations Act (NLRA). Section 9(a) of that law, 29 U. S. C. Sec. 159(a), entitled "Representatives and elections," provides:

> **[Sec. 9]** (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; *Provided,* That any individual or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* that the bargaining representative has been given the opportunity to be present at such adjustment.

Like Section (2) of MERA, Section 7 of the NLRA sets forth the basic rights of employees and includes the "right to refrain from any or all" concerted activities. And, like MERA, the rights set forth in Section 7 are the only ones encompassed within the prohibition against interference in Section 8(a)(1) of the NLRA; Section 9(a) is not mentioned.

Early on, the federal courts showed reluctance to give literal import or enforceability to the individual "right" set forth in Section 9(a) of the NLRA, relying in part on an analysis offered by Archibald Cox in "Rights under a Labor Agreement," 69 HARV. L. REV. 601 (1956). Since 1962, the NLRB and the federal courts have consistently followed the analysis of the Second Circuit Court of Appeals in BLACK-CLAWSON CO. V. INT'L ASS'N OF MACHINISTS, 313 F.2D 179 (2ND CIR. 1962), which had cited the Cox article. The narrow holding of BLACK-CLAWSON was that the individual employee had no "right" to compel the employer to arbitrate a grievance against the wishes of the exclusive bargaining representative. However, the court's construction of Section 9(a) swept more broadly:

> Despite Congress' use of the word "right," which seems to import an indefeasible right mirrored in a duty on the part of the employer, we are convinced that the proviso was designed merely to confer upon the employee the privilege to approach his employer on personal grievances when his union reacts with hostility or apathy. Prior to the adoption of this proviso in section 9(a), the employer had cause to fear that his processing of an individual's grievance without consulting the bargaining representative would be an unfair labor practice; section 9(a) made the union the exclusive representative of the

> employees in the bargaining unit, and section 8(a)(5) made a refusal to bargain with the exclusive representative an unfair labor practice. The proviso was apparently designed to safeguard from charges of violation of the act the employer who voluntarily processed employee grievances at the behest of the individual employee, and to reduce what many had deemed the unlimited power of the union to control the processing of grievances.

ID. at 185.

In 1975, the U. S. Supreme Court expressly adopted the Second Circuit's construction of Section 9(a) in a context involving relatively compelling individual employee interests. A group of African-American employees, by leafleting and picketing, had attempted to obtain a meeting with their employer, outside the auspices of the majority union, to discuss complaints of racial discrimination in hiring and promotion. The employer discharged the employees for this activity, and they brought charges claiming, in relevant part, that Section 9(a) gave them a right to meet directly with their employer over their complaints. The Supreme Court ruled against them, saying:

> The intendment of the proviso is to *permit* employees to present grievances and to *authorize* the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative … The Act nowhere protects this "right" by making it an unfair labor practice for an employer to refuse to entertain such a presentation ….

EMPORIUM CAPWELL CO. V. WESTERN ADDITION COMMUNITY ORGANIZATION, 420 U.S. 50, 61 N. 12 (1975) (emphasis added). Since EMPORIUM CAPWELL, the matter has been in repose in the federal private sector, with commentators generally agreeing that construing Section 9(a) in this manner sufficiently protects individual employee interests while avoiding the potential disruption and that could flow from compelling employers to confer with every disgruntled employee, without the ameliorative screening provided by the majority union, and/or from rival unions fomenting discord by attempting to demonstrate superior representational skills and thereby win favor with employees.

Some two years after EMPORIUM CAPWELL, the Commission had another opportunity to comment upon the meaning of Section (4)(d)1. In SCHOOL DISTRICT OF GREENFIELD, DEC. NO. 14026-B (WERC, 11/77), the issue was whether the contractual grievance procedure remained in effect during the hiatus between the expiration of a collective bargaining agreement and the execution of a successor agreement. The examiner held in the affirmative, based in part upon the language in Section (4)(d)1, which, in his view, required the maintenance of a grievance procedure for individual employees to access during the hiatus. On review, the Commission agreed with the Examiner that the contractual grievance procedure survived the expiration of the contract. However, the Commission distanced itself from the Examiner's view of Section (4)(d)1. Expressly quoting from EMPORIUM CAPWELL, the

Commission, without discussing its earlier cases, departed from those earlier views about the affirmative "right" or duty created by Section (4)(d)1:

> We do not, however, adopt the Examiner's reliance on Section 111.70(4)(d)1 of MERA as establishing that an employer may not unilaterally abolish a grievance procedure. … The function of Section 111.70(4)(d)1 is entirely different. Rather than requiring an employer to maintain a particular grievance procedure after contract expiration, *this subsection functions to excuse an employer from the charge of failing to bargain exclusively with the union* by dealing with employes individually over their grievances.

GREENFIELD at 7 (emphasis added).

Ten years elapsed before the Commission again touched upon the meaning of Section (4)(d)1. In COLUMBIA COUNTY, DEC. NO. 22683-B (WERC, 1/87), the Commission held that an employer violated its duty to bargain in good faith by meeting with an individual grievant, in the absence of the majority union, at Step 3 of the contractual grievance procedure. The Commission reiterated the GREENFIELD/EMPORIUM CAPWELL view of Section (4)(d)1:

> That provision does not impose an affirmative obligation that the Employer meet and confer with employes and their representatives about grievances; rather it is intended to "permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the Sec. 111.70(3)(a)4, Stats., duty to bargain only with the exclusive bargaining representative."

ID., at 10, quoting from GREENFIELD.

Between the 1987 COLUMBIA COUNTY decision and the instant case, the Commission has not revisited Section 111.70(4)(d)1. During that time, however, three cases have arisen relating to the virtually identical language in the State Employment Labor Relations Act (SELRA), Sec. 111.83(1), Stats.[4] Like MERA, the Peace Act, and the NLRA, SELRA

[4] That provision of SELRA states:

> **111.83 Representatives and elections. (1) ...** [A] representative chosen for the purposes of collective bargaining by a majority of the employees voting in a collective bargaining unit shall be the exclusive representative of all of the employees in such unit for the purposes of collective bargaining. Any individual employee, or any minority group of employees in any collective bargaining unit, may present grievances to the employer in person, or through representatives of their own choosing, and the employer shall confer with said employee or group of employees in relation thereto if the majority representative has been afforded the opportunity to be present at the conference. Any adjustment resulting from such a conference may not be inconsistent with the conditions of employment established by the majority representative and the employer.

expressly prohibits interference with the rights of employees as stated in a particular provision, in this case Sec. 111.83(2), which protects the right to refrain from concerted activity but does not expressly refer to Section 111.83(1).

In the first of these state sector cases, the University of Wisconsin Hospital had denied a state employee the opportunity to meet for purposes of processing a contractual grievance that the majority union had decided not to pursue. As to the instant issue, the examiner quoted and relied upon both COLUMBIA COUNTY and EMPORIUM CAPWELL, stating that Section 111.83(1) did not compel an employer to meet with an individual employee, but only established a defense if the state employer chose to do so. On review, the Commission affirmed the Examiner's conclusion that the State had not violated the law. However, without mentioning or discussing COLUMBIA COUNTY, GREENFIELD, or EMPORIUM CAPWELL, the Commission appeared to revert to the pre-COLUMBIA COUNTY notion, expressed in the 1972 MILWAUKEE SCHOOLS decision, that provisions like 111.83(1) established some kind of enforceable individual right and/or employer duty, but one that existed entirely apart from the contractual grievance machinery:

> … [T]he **statutory opportunity** for individual employes to meet directly with their employer is separate and **distinct from** any such **contractually bargained opportunity.** The statutory opportunity to meet directly with the employer cannot be limited by a collective bargaining agreement. However, a union and employer have no obligation to bargain a contract which will give individual employes the right to independently process contractual grievances. The employe's statutory opportunity to meet with the employer is separate and distinct from the question of whether the employe has a contractual opportunity to meet with an employer over contractual grievances.

STATE OF WISCONSIN (PRELLER), DEC. NO. 28938-C (WERC, 5/99), at 18 (emphasis in original).

Approximately a year later, in UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS BOARD (WERC, 11/00), the Hospital sought a declaratory ruling about the extent to which its collective bargaining agreement allowed individual employees to use the contractual grievance procedure without the majority union's endorsement or participation. Most of the Commission's decision dealt with this contract interpretation issue. However, the employer also sought guidance about "the interplay between its contractual rights and obligations and the requirements of Sec. 111.83, Stats." To that question, the Commission responded relatively briefly, using the above-quoted language from PRELLER and again citing the 1972 MILWAUKEE SCHOOLS decision. As in PRELLER, the Commission did not mention or discuss the intervening GREENFIELD, COLUMBIA COUNTY, or EMPORIUM CAPWELL decisions.

Shortly thereafter a third case arose under SELRA, in which the Commission considered more fully the distinction articulated in the two UW Hospital cases between the "statutory opportunity" and the "contractual opportunity" to meet with the employer regarding

grievances. A clerical employee at the University of Wisconsin-Milwaukee (UWM) had filed a grievance, with her union's assistance, at step one of the contractual grievance procedure. The union and UWM processed the grievance through steps one and two. At step three, however, the employee demanded that the grievance meeting be open to the public; both the union and the employer refused to meet in public and no meeting occurred. In her prohibited practice complaint, the employee claimed that Section 111.83(1) required UWM to meet with her about her grievance even after the union had dropped out. The Commission rejected that claim. Articulating a clear distinction between the "statutory grievance procedure" of Section 111.83(1) and the contractual grievance procedure, the Commission held that once an employee has invoked the contractual procedure she cannot thereafter "jump instantaneously" from that procedure to the statutory procedure "at her discretion." UWM (PICHELMANN), DEC. NO. 30124-D (WERC, 1/03), at 13.

In these relatively recent SELRA cases, the Commission did not actually decide the instant question of whether Section 111.83(1) *required* an employer like the district in the instant case to meet with individual employees pursuant to the "statutory grievance procedure." However, without discussing or distinguishing COLUMBIA COUNTY, GREENFIELD, or EMPORIUM CAPWELL, the Commission's language in the SELRA cases implied, contrary to the view expressed in those earlier cases, that the employer would have such an obligation. Being squarely presented now with this question, and faced with inconsistent commentary in prior case law, we conclude that the better view is that espoused by the U. S. Supreme Court in EMPORIUM CAPWELL and the Commission itself in COLUMBIA COUNTY and GREENFIELD.

We acknowledge the general rule of statutory construction that words in a statute should be accorded their common usage. See Sec. 990.01(1), Stats. The language of Section (4)(d)1 on its face refers to Murillo's "right" to "present grievances" to the District; by using the language the employer "shall confer," the statute also seems to require the District to meet with Murillo if he so requests. In the latter respect, the language in Section 9(a) of the NLRA is not identical to Section (4)(d)1. Section 9(a) also refers to an individual employee's "right" to present grievances," but does not state that the employer "shall confer." This distinction between MERA and the NLRA is muted by the language in Section 9(a) stating that the individual employee has a "right" to have his grievance "adjusted," denoting some kind of exchange or corresponding duty on the part of the employer to entertain the grievance.

This literal language is troubling. However, it is also troubling that, as the U. S. Supreme Court noted, the literal language of "[t]he Act nowhere protects this 'right' by making it an unfair labor practice for an employer to refuse to entertain such a presentation." EMPORIUM CAPWELL, 420 U.S. at 61 n. 12. The Commission's power under Section (3)(a)1 is to enforce the rights contained in Section 2 – and, like Section 7 of the NLRA, Section (2) of MERA does not on its face include Section (4)(d)1.

In its pre-EMPORIUM CAPWELL cases, the Commission skirted this statutory conundrum by asserting that Section (4)(d)1 came within the ambit of Section (2) by way of the right to refrain from concerted activity. As noted earlier in this discussion, the Commission did not

explain how a right to refrain from concerted activity necessarily or even logically implied a duty on the part of employers to meet and confer with an employee who wished to present a grievance individually. A proper interpretation of this language must begin by recognizing that, in the absence of collective bargaining statutes, individual employees might ask to meet with their employers about complaints, but such requests were not protected by law nor was the employer compelled to grant them. The language and context of Section (2) indicates that the Legislature wanted to protect an employee's right to refrain from joining a union, to vote against a union, and to choose not to participate in union or other concerted activities, including, perhaps, grievances. It would also protect an employee against retaliation by either the employer or the union for asking to present a grievance individually. However, it is one thing to protect an employee's right to ask for an individual meeting; it is another thing to require an employer to grant that request. One thing is abundantly clear from Section (4)(d)1: Section (2)'s right to refrain from union activity does not include a right to meet with the employer without the majority union being present. The majority union is always entitled to be present if it wishes.

Section (2)'s right to *refrain* from concerted activity is not reasonably interpreted to create a positive duty on the part of employers to meet and confer with every disgruntled individual employee who seeks to meet. Clearly, one purpose of Section (2) is to limit the extent to which an individual can be compelled to align himself with a union. However, MERA's overall and overriding purpose is to foster work place peace and productivity. See Secs. 111.70(1)(a) and (6), Stats. Extrapolating from the interstices of Section (2) a requirement that employers acquiesce in every individual request for a meeting might modestly assist the former purpose, but it would far more significantly undermine the latter, primary purpose of the law. Public employers generally rely upon the union's intermediary role in screening employee complaints, redirecting them to appropriate forums, and/or focusing or streamlining their presentation; such screening and moderating function is an important element in fostering work place stability and productivity. Moreover, to the extent rival unions might wish to encourage individual employee complaints in order to incite/exploit dissatisfaction with the majority union or demonstrate relative vigor or effectiveness, it ill serves the law's purpose to compel public employers to be unwilling participants in the consequent work place disruption.

In view of the statute's primary purpose, the Commission has long recognized the majority union's exclusive role in the contractual grievance procedure, as enunciated most clearly in the SELRA cases discussed above. In order to protect the union's "ownership" of the contractual grievance procedure, the Commission devised procedural limits and requirements for statutory grievances, set forth in PICHELMANN, *supra*. It is not clear, however, whether or how the substance or content of a statutory grievance would differ, if at all, from a contractual grievance, or, for that matter, from any mandatory subject of bargaining whether or not incorporated into the collective bargaining agreement. In the instant case, Mr. Murillo had a concern about his health insurance coverage. Although the record does not reveal the precise nature of Mr. Murillo's concern, health insurance is a mandatory subject of bargaining, MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 22129 (WERC, 11/84),

and most collective bargaining agreements include provisions governing benefits, premium costs, and coverage. According to the letter requesting the meeting, the District's response to Mr. Murillo's concern might result in Mr. Murillo filing a contractual grievance. Given the likely overlap in content between Murillo's "statutory grievance" and SEIU's contract and/or bargaining rights, the District's reluctance to meet with Murillo without SEIU's presence is understandable and completely rational. It is difficult to imagine what action the District could take, after "conferring" with Murillo and an outside union (the MTEA) about a health insurance issue, that would not run afoul of the District's duty to deal exclusively with SEIU regarding health insurance – whether or not the matter was specifically addressed in the contract. Indeed, if Murillo's issue involved a possible violation of the contract, the District could not resolve it without SEIU approval – and without a possibly disruptive dispute between SEIU and MTEA about what the SEIU contract required. If the District's obligation under Section (4)(d)1 is simply to meet and listen, offering no resolution or response, then the procedure is of very limited value. If the District's obligation is to do more, then participation in the statutory procedure would seem to place the District in a precarious situation, especially if the majority union declines to participate.

Given the foregoing, we conclude the Commission's interpretation of Section (4)(d)1 in COLUMBIA COUNTY and GREENFIELD, which adopted that of the U. S. Supreme Court in EMPORIUM CAPWELL is a better fit with all of the statutory language and MERA's central purposes. That interpretation protects the right of individual employees to meet with *willing* employers, but also protects employers from the disruption, distraction, and potential disputes that would attend an interpretation making such meetings compulsory on the part of the employer. Here, the District did not refuse to meet, but merely conditioned the meeting on the sensible request that the majority union be present as well, to minimize the potential for disputes. We hold that, in doing so, the District acted lawfully. To the extent that the Commission's case law, apart from COLUMBIA COUNTY and GREENFIELD, suggests that an

employer commits a prohibited practice in violation of Section (3)(a)1 or 3 by choosing not to grant an individual employee's request for a meeting pursuant to Section (4)(d)1 or by conditioning that meeting on the attendance of the majority union, that case law is hereby overruled.

Dated at Madison, Wisconsin, this 6th day of March, 2009.

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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