

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LISA GRIBBLE, Complainant,

vs.

**FLORENCE COUNTY, WISCONSIN and
LABOR ASSOCIATION OF WISCONSIN, INC.**, Respondents.

Case 55
No. 66969
MP-4344

Decision No. 32435-E

Appearances:

Nicholas Fairweather, Attorney at Law, Hawks Quindel, S.C., 222 West Washington Avenue, Suite 450, P.O. Box 2155, Madison, Wisconsin 53701-2155, appearing on behalf of the Complainant.

Jonathan Swain, Attorney at Law, Lindner & Marsack, S.C., 411 East Wisconsin Avenue, Suite 1800, Milwaukee, Wisconsin 53202, appearing on behalf of Respondent Florence County.

Christopher MacGillis and Linda Vanden Heuvel, Attorneys at Law, Vanden Heuvel & Dineen, W175 N11086 Stonewood Drive, P.O. Box 550, Germantown, Wisconsin 53022-0550, appearing on behalf of Respondent Labor Association of Wisconsin, Inc. (LAW).

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

On May 11, 2007, Lisa Gribble filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against Florence County, Wisconsin and the Labor Association of Wisconsin, Inc. (LAW). The complaint alleged the following: 1) that in November, 2006, the County disciplined Gribble without just cause and that a grievance challenging that discipline was filed by the Association; 2) that in January, 2007, Gribble's supervisor (the county treasurer) removed Gribble's deputy treasurer duties and reduced her work hours, whereupon Gribble filed a grievance challenging that action; and 3) that both Respondents had refused to arbitrate "this" grievance. The complaint contended that these

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actions, in turn, violated Secs. 111.70(3)(a)3 and (3)(a)5, Stats. After the complaint was filed, it was held in abeyance for almost a year pending efforts to resolve the dispute. Those efforts were unsuccessful. On May 27, 2008, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Secs. 111.07(5) and 111.70(4)(a), Stats. On August 13, 2008, the County filed an answer denying the allegations made against it. The hearing convened on August 26, 2008 in Florence, Wisconsin, but no testimony was taken that day because the parties engaged in settlement discussions. Those efforts were ultimately unsuccessful. Hearing was subsequently scheduled and postponed twice. It was postponed the second time at the Complainant's request after the Complainant asked that a mediation session be held. On January 5, 2009, the Complainant filed an amended complaint as well as a motion to amend complaint. The amended complaint was identical to the original complaint in all respects except that it raised one new claim. The new claim, which was listed in paragraph 12, was that "By engaging in the conduct described above, L.A.W. has breached its duty of fair representation to Gribble." Thus, the amended complaint raised a duty of fair representation claim against the Association. After the amended complaint was filed, the Examiner advised the parties that he was deferring a ruling on the Complainant's motion to amend complaint until after a complaint mediation session had occurred. The complaint mediation session just referenced was held in Green Bay, Wisconsin on April 23, 2009. On June 30, 2009, the Complainant notified the Examiner that the parties had not been able to resolve their dispute, and asked that the case be set for hearing. The Examiner responded that before the hearing could be rescheduled, a ruling needed to be made on the Complainant's pending motion to amend complaint. On September 11, 2009, LAW filed an answer. On November 11, 2009, the Examiner issued an order wherein he denied the Complainant's motion to amend the complaint. On November 24, 2009, the Commission set aside the Examiner's order. On January 4, 2010, the Commission issued an order reversing the Examiner's order and granting the Complainant's motion to amend complaint. On January 25, 2010, the County filed an amended answer. On March 18, 2010, the Commission issued an order modifying its January 4, 2010 order. Hearing on the complaint was held on April 14, 2010 in Florence, Wisconsin. At the hearing, the Complainant dropped their (3)(a)3 claim. Following the hearing, the parties filed briefs by June 29, 2010. Having considered the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. At all relevant times herein, Complainant Lisa Gribble, hereinafter Gribble, was an employee of Florence County.

2. Respondent Florence County, Wisconsin, hereinafter referred to as the County, is a municipal employer which provides certain governmental services to its residents. Its offices are located at 501 Lake Avenue, Florence, Wisconsin.

3. Respondent Labor Association of Wisconsin, Inc., hereinafter referred to as LAW or the Association, is a labor organization with its offices located at N116 W16033 Main Street, Germantown, Wisconsin. It has been representing public employees in Wisconsin since 1985. LAW represents 127 locals throughout the State of Wisconsin. Prior to this case, LAW had never had a member file a duty of fair representation claim against it.

Since it was founded, Patrick Coraggio has been its president. Coraggio has 32 years experience in public sector labor relations. During that time period, he has been involved with the drafting and overseeing of nearly 1300 grievances. From 1985 to 2007, Thomas Bauer was employed by LAW as a labor consultant and vice-president. During that time period, he handled hundreds of grievances on behalf of the many locals that LAW represents.

LAW represents the courthouse employees in Florence County. It became their certified bargaining representative in 2002. The name of its local affiliate is the Florence County Courthouse Employees Association.

4. The County and the Association were parties to a 2006-08 collective bargaining agreement. That agreement included the following provision:

ARTICLE IV – SENIORITY

. . .

Section 4.02: Layoffs and recall from layoff will be determined on the basis of seniority, provided the senior employee can qualify to do the work. Layoff shall be by inverse order of seniority.

. . .

That agreement did not include a bumping provision.

5. JoAnne Friberg is Florence County's County Treasurer and Property Lister. She has held that position since January, 1995. The position of county treasurer is an elected position. During all times relevant herein, the elected term for county treasurer was two years. They take office in January following their election the prior November. County treasurers are empowered by state statute, specifically Sec. 59.25(2), Stats., to appoint and remove a chief deputy. The decision of who they appoint as deputy is vested solely with the county treasurer. At the commencement of a new term, a county treasurer (newly elected or not) can appoint a new deputy of their own choosing.

6. In early 2002, the Florence County Treasurer's office announced, via a job posting, that it had vacancies in two separate positions: deputy county treasurer and property listing assistant. The job postings document provided in pertinent part:

JOB POSTINGS

The Florence County Treasurer's Office has vacancies in two separate part-time positions, as described below. Each position is for an average of 14 hours per week, with hours added as needed; both are union positions, but under Wisconsin Statute guidelines; both have a one-year probationary period;. . . Because both of these positions work for an elected official, both positions are guaranteed until the end of 2002 only; then, the positions are in 2-year increments. . .

POSITION #1: DEPUTY COUNTY TREASURER

The Deputy Treasurer assists the County Treasurer in all statutory duties, such as: collecting and receipting all revenues to the County, depositing all receipts, disbursing funds in conjunction with the County Clerk's office, keeping an accurate accounting of all receipts and expenses, filing mandatory reports to the State, and any other necessary activities relating to real estate assessment/taxation and general receipting.

POSITION #2: PROPERTY LISTING ASSISTANT

The Property Listing Assistant helps maintain accurate ownership and legal description information for all parcels of real estate within the County; provides such information to assessors, town officials, state officials, other county departments, and the general public; helps maintain computer services and required forms; and, creates and maintains CAD parcel maps for the whole County. The Property Listing Assistant may also serve as a Deputy County Treasurer or Back-Up Deputy Treasurer.

Since these two positions were designated by the County as separate part-time positions, the County could have filled them with two different people. Had that occurred, two people would have had part-time jobs with the County. That did not happen though, and the County instead hired one person to fill both of the part-time positions referenced above.

7. In 2002, Lisa Gribble was hired to fill both of the part-time positions referenced in Finding 6. At the time she was hired to fill those two part-time positions, she was working for the County as a limited term employee in the Sheriff's Department. After she was hired to fill those two positions, she had full-time employment with the County, but she technically held two separate part-time positions: deputy county treasurer and property listing assistant. These two positions had different job responsibilities and different job descriptions. Both were bargaining unit positions which were represented by the Association. While the deputy county treasurer position is a bargaining unit position and the Association negotiates a wage rate for that position, that position is subject to the state statute referenced in Finding 5. As noted in

that Finding, the county treasurer has the ability to appoint and remove the deputy county treasurer. As a result, the position of deputy county treasurer is not protected by the collective bargaining agreement the way the position of property listing assistant is. The person holding the property listing assistant position cannot be removed by the county treasurer the same way that a deputy county treasurer can be removed. The removal of the property listing assistant is subject to various provisions in the collective bargaining agreement which exists between the County and the Association. In that sense, the deputy county treasurer position is not protected the same way that the property listing assistant position is.

8. Friberg officially appointed Gribble as deputy treasurer in April of 2002. Friberg subsequently reappointed Gribble to additional two-year terms in January, 2003 and January, 2005.

9. In 2006, conflict developed between Friberg and Gribble over Gribble's handling of some work-related matters and Gribble's performance of her job duties. In October, 2006, Friberg sent Gribble a two-page memo concerning these matters. At the end of that memo, Friberg made the following handwritten entry: "Lisa and I went over this document; we discussed parts of it for 2 days. At the end of Oct. 12, she refused to sign."

10. On November 6, 2006, Friberg gave Gribble a letter which began thus:

Lisa:

On 11/02/2006, I discovered a mistake that you had made on a bank deposit done on 10/05/2006. Although you are aware of the correct steps in receipting money and making bank deposits, I want to review with you the standard procedure for making bank deposits for the County Treasurer's office. It is a relatively simple process, as follows. . .

The letter went on to identify, in detail, what Friberg considered to be the correct procedure for preparing bank deposits. The letter concluded as follows:

I know that you are very capable of making accurate deposits. But because this is not your first mistake like this (see attachment), if you make another similar mistake, then I will not allow you to make deposits any more without direct supervision.

The attachment referenced in this paragraph was entitled "Previous Errors".

11. Gribble considered the letter referenced in Finding 10 to be disciplinary in nature. As a result, she contacted LAW representative Tom Bauer and discussed the matter with him. Following their discussion, Bauer prepared a grievance form which alleged that Friberg's November 6, 2006 letter to Gribble constituted a "letter of reprimand for alleged errors." Building on that premise, the grievance alleged that there was not just cause for the "letter of reprimand". The Association subsequently filed the grievance with the County.

12. In an undated letter, Friberg replied to the grievance referenced in Finding 11. Therein, she denied that she had issued any form of discipline to Gribble. She elaborated on that contention as follows:

There were no disciplinary actions taken. The document states the problem (the employee did not properly balance the receipts with the total of cash & checks); it explains the correct procedure for preparing bank deposits, and then states that if the problem should occur again, then the employee will no longer prepare bank deposits without direct supervision.

13. Bauer subsequently spoke to Gribble about Friberg's response. Bauer told Gribble that he (Bauer) was satisfied with Friberg's response, so he felt that Gribble had not, in fact, been disciplined via that letter. Bauer also told Gribble that if she wanted to appeal it further (up the grievance procedure), she could. In response, Gribble did not ask or tell Bauer to move the grievance to the next step. Consequently, the grievance was never appealed beyond the first step of the contractual grievance procedure.

14. About the same time, Friberg lost confidence in Gribble's ability to perform her deputy treasurer's job duties. Friberg decided to let Gribble serve out the remainder of her current term as deputy treasurer, but to not reappoint her for the upcoming 2007-08 term.

15. On December 14, 2006, Friberg told Gribble that she (Gribble) would not be reappointed as deputy treasurer for the 2007-08 term and that she (Friberg) intended to appoint someone else as deputy treasurer. Friberg further told Gribble that she (Gribble) could keep her property listing assistant position. This action effectively reduced Gribble's employment with the County from full-time to part-time beginning January 1, 2007.

16. Immediately after learning she was being removed from the deputy county treasurer position, Gribble called Association representative Thomas Bauer but could not reach him, so she left him a message. She called Bauer again the next day and left him another message.

17. On December 18, 2006, Gribble and Bauer talked by phone. During their conversation, Gribble told Bauer that Friberg had told her (Gribble) that she would not be reappointed to the deputy treasurer position effective January 1, 2007. Bauer responded that he would investigate the matter and get back to her.

18. Bauer then called Patrick Coraggio, LAW's president, and reviewed Gribble's case with him. After getting what Coraggio characterized as the five W's (who, what, where, why and when) from Bauer, Coraggio and Bauer undertook the following actions to investigate, review and evaluate a potential grievance against Florence County. First, both reviewed and researched the state statutes dealing with deputy positions, namely Sections 17.10 and 59.25. Second, Coraggio spoke with one of LAW's attorney's law clerks regarding the matter. Third, Bauer researched the WERC's database for any applicable case law. Fourth,

both Bauer and Coraggio reviewed the collective bargaining agreement to determine if there was any pertinent language relating to Gribble's issue. After doing so, both determined that the collective bargaining agreement had no provisions that addressed either of the statutes just referenced or offered any protections for Gribble relative to the deputy county treasurer position. They also concluded that an arbitrator would not have standing to overrule the statutory authority of the county treasurer. Additionally, both concluded that the collective bargaining agreement did not contain any bumping language that could assist Gribble. While some LAW contracts contain bumping language, this one did not. Bauer knew that when the parties had negotiated their first collective bargaining agreement in 2002, he had proposed to the local's membership that they try to get bumping language, but they had decided they did not want it. Fifth, Bauer spoke with Matt Dagostino, the local union president, several times about Gribble's case. Sixth, Bauer called the County's labor counsel, Robert Burns, to ascertain the County's position on Friberg's authority to remove Gribble from the deputy treasurer position. Burns told Bauer that the county treasurer could select whoever she wanted as her deputy. While Bauer and Coraggio were doing the foregoing, they shared their information with each other in about a half dozen phone calls. Afterwards, they both concluded that it was not a contractual violation for Gribble to be removed from the deputy treasurer position.

19. In late December, 2006 or early January, 2007, Bauer called Gribble and told her that LAW had completed its investigation into her claim and had concluded that it was not a contractual violation for her to be removed from the deputy treasurer position. Bauer then said that the basis for this conclusion was that state statutes gave county treasurers the authority to appoint and remove deputy treasurers, and since she (Gribble) was being removed at the end of the (county treasurer's) term, it was within the scope of the statute. Bauer then told Gribble that notwithstanding that opinion, if she wanted to proceed with a grievance, LAW would file a grievance on her behalf and pursue it. Gribble did not say anything in response, so Bauer assumed that Gribble would contact him if she wanted to file a grievance. Following this conversation, Bauer did not send Gribble a confirming letter.

20. Gribble never called Bauer back. Additionally, she never contacted the main LAW office in Germantown regarding this matter. Gribble never asked LAW to file a grievance on her behalf regarding her removal from the deputy county treasurer position.

21. On January 19, 2007, Gribble served a grievance on Friberg which contended that the County, through Friberg, had violated the collective bargaining agreement by reducing Gribble's hours of work from full-time to part-time. This grievance was drafted by her attorney. Gribble served the grievance without first informing anyone from LAW that she was filing it. The Association was not copied on the grievance. Friberg subsequently provided a copy of the grievance to local union president Dagostino.

22. After Dagostino received a copy of Gribble's grievance, he faxed a copy of it to Bauer and they subsequently discussed it in a phone call. Bauer was unaware of Gribble's grievance until Dagostino informed him of same. In their phone call, both agreed that Friberg,

as an elected official, had the statutory right to choose to not reappoint Gribble as her deputy. Dagostino said it was “common knowledge” that deputies did not receive all the protections under the contract that other employees receive. Dagostino further said that he thought Gribble’s grievance was “frivolous”.

23. On January 27, 2007, Friberg denied Gribble’s grievance. In her written response, Friberg acknowledged that she had decided to not reappoint Gribble to the deputy treasurer’s position for the 2007-08 term, but contended that Sec. 59.25 (of the state statutes) gave her the right “to appoint a person that I choose. . .”

24. Shortly afterwards, County labor counsel Robert Burns asked Bauer if LAW was supporting Gribble’s grievance. Bauer responded to Burns with the following letter dated February 27, 2007:

Per your inquiry regarding the matter of the pending grievance filed by Ms. Lisa Gribble, the Association is not supporting this grievance for the following reasons:

1. Ms. Gribble held a position consisting of two designations: Deputy County Treasurer and Property Listing Assistant. These positions were designated by the County as two separate part-time positions, but were consolidated to create a full-time position as designated in the Wage Schedule as a full-time position. The full-time designation was affected by the removal of Ms. Gribble from the Deputy County Treasurer position in January, 2007, leaving Ms. Gribble in a part-time job which she has continued to be employed in.
2. Section 17.10(6), Wis. Stats., Removal of appointive county officers, sets forth in pertinent part that “ . . . appointive county officers may be removed at pleasure by the officer or body that appointed them.” (Emphasis added) Ms. Gribble was so removed and another employee was appointed to the Deputy County Treasurer position leaving Ms. Gribble in the position of Property Listing Assistant, a part-time position.
3. Finally, there is no layoff impact since Ms. Gribble continues to be employed in the part-time position of Property Listing Assistant that she originally bid for.

. . .

25. On March 6, 2007, Burns sent the following letter to both Friberg and Gribble:

Please be advised that after deliberation with respect to the grievance presentations of March 1, 2007, the Personnel Committee authorized me to advise that it decided to deny the grievance on the basis that no contractual provision appears to have been violated in the actions taken to date. It would appear the elected official exercised statutory authority as to the deputy treasurer position, and the other part-time position has remained status quo. Enclosed is a copy of a letter setting forth the position of the bargaining unit representative, Tom Bauer of LAW, with respect to this matter. Inasmuch as the Association, which is party to this contract, does not contend a collective bargaining violation exists, the Committee finds no issue which would require Committee action.

As there is a continuing working relationship with respect to the non-statutory part-time position in which Ms. Gribble continues to work, the Committee encourages both of you to make every effort to work together in a cooperative fashion going forward.

26. On March 13, 2007, Gribble's attorney, Nicholas Fairweather, sent a letter to the WERC regarding Gribble's grievance. That letter is not included in the record.

27. On March 16, 2007, Bauer sent a letter to Gribble in response to the letter referenced in Finding 26. Bauer's letter provided thus:

I am in receipt of a letter, dated March 13, 2007 advising that you, through your attorney, have requested to process your grievance regarding your revocation of the deputy clerk treasurer position to arbitration.

Previously when we discussed the revocation of your deputy clerk treasurer position by the Florence County Treasurer you did not discuss or advise that you wanted to file a grievance in this matter. It is my understanding that you filed a written grievance on January 19, 2007, and did not provide a copy to the undersigned or to Association President Matt Dagostino.

The Labor Association of Wisconsin, Inc. is the sole and exclusive bargaining representative for the Florence County Courthouse Employees' Association of which you are a member. LAW, Inc. is more than willing to discuss the merits of your grievance and process it through the grievance procedure up to and including arbitration; provided that the grievance has merit and the backing of the Florence County Courthouse Employees' Association. [See Article XV – Grievance Procedure, Section 15.01 and Section 15.04, which provides that only the Association or the County may proceed to arbitration.]

Additionally, you should be aware of the fact that LAW, Inc. will only pay for attorneys that have been authorized by LAW, Inc. Should you process

the grievance using an attorney not authorized by LAW, Inc., you will be responsible for any costs and fees incurred.

Accordingly, please contact me as soon as possible to discuss the facts surrounding this matter. Should you have any questions please feel free to contact the undersigned at (920) 738-0668.

28. Gribble never contacted Bauer in response, and never requested that LAW represent her in her reduction grievance. Instead, she filed the instant complaint against the County and the Association with the WERC.

29. The Association's conduct in processing either of Complainant's grievances, including its decision to not support and/or arbitrate her reduction grievance, does not reflect arbitrary, discriminatory or bad faith conduct on its part toward Complainant.

Based on the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Complainant Gribble has not established, by a clear and satisfactory preponderance of the evidence, that Respondent Labor Association of Wisconsin, Inc. (LAW), through its representation of Gribble on two grievances, including its decision to not support and/or arbitrate her reduction grievance, has acted in an arbitrary, discriminatory or bad faith fashion toward Gribble and therefore has not proven her allegation that the Labor Association of Wisconsin has violated Sec. 111.70(3)(b)1, Stats..

2. Inasmuch as Complainant Gribble has not proven her allegation that Respondent LAW has violated its Sec. 111.70(3)(b)1 duty of fair representation to Gribble by its conduct herein, the Wisconsin Employment Relations Commission will not exercise its Sec. 111.70(3)(a)5, Stats., jurisdiction over Respondent Florence County and Respondent LAW to determine the merits of Complainant Gribble's reduction grievance that Respondents Florence County and LAW violated their collective bargaining agreement by their actions herein.

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

ORDER

The complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 11th day of August, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

FLORENCE COUNTY (Lisa Gribble)

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

The complaint alleged that both Respondents violated the applicable collective bargaining agreement by their actions relative to the Complainant. Additionally, the amended complaint alleged that the Association violated its statutory duty of fair representation to the Complainant by its actions herein. Both Respondents deny the allegations made against them.

POSITIONS OF THE PARTIES

Complainant Gribble

The Complainant contends that the Association breached its duty of fair representation to Gribble when it failed to grieve her reduction from full time to part time status which occurred effective January 1, 2007. As the Complainant sees it, her reduction was a layoff which was covered by the layoff provision in the collective bargaining agreement. Building on that premise, the Complainant further alleges that both the County and the Association breached the collective bargaining agreement when the County “failed to execute Gribble’s layoff by seniority” (meaning failed to implement the layoff via seniority). It elaborates on these two basic contentions as follows.

The Complainant first addresses its duty of fair representation claim against the Association. The Complainant acknowledges at the outset that it has a high burden to prove a duty of fair representation violation. As the Complainant sees it, she met that burden for the following reasons.

First, at the hearing, the Complainant used Gribble’s discipline grievance from November, 2006 (i.e. her first grievance) as context for her second grievance (i.e. the “reduction” grievance which she seeks remedied here). For background purposes, the Complainant noted that on November 6, 2006, Friberg gave her a letter wherein Friberg identified what she considered to be the correct procedure for preparing bank deposits. Gribble considered this letter to be a letter of reprimand and grieved it. After the grievance was filed, Friberg responded. Bauer accepted Friberg’s assertion that her (Friberg’s) letter of November 6, 2006 did not constitute a letter of discipline. The Complainant contended at the hearing that because Bauer accepted Friberg’s assertion that her November 6, 2006 letter was not a letter of discipline, she (Gribble) did not feel “comfortable” working with Bauer after that. Gribble also testified that she still considered her discipline grievance to be unresolved. While the Complainant does not want the Examiner to rule on the merits of her discipline grievance, she believes that it shows a pattern of the Association breaching its duty of fair representation.

Second, turning now to the second grievance (i.e. Gribble's "reduction" grievance), the Complainant avers that Bauer's "version of events preceding and immediately following Gribble's layoff is not worthy of any credence." The Complainant calls his testimony "self-serving" and notes that he produced no evidence to support his claimed research or investigation. It also points out that the Association failed to produce any notes of his conversations with Gribble, Dagostino or Coraggio. The Complainant asks the examiner to draw a negative inference from the Association's "failure to produce what would, presumably, be the best evidence of Bauer's impressions and perceptions during his communication with Gribble." Building on the foregoing, the Complainant maintains that "Bauer and LAW's purported investigation and research did not occur at all. . ."

Third, as already noted, it's the Complainant's position that her reduction in hours was a layoff which implicated Article 4 of the collective bargaining agreement, specifically Section 4.02 dealing with layoffs. The Complainant reads that provision to require the "execution" of layoffs to be "on the basis of seniority." According to the Complainant, that didn't happen to her, so she had a legitimate claim to replace (i.e. bump) a less senior employee in a full time position. With regard to the Association's claim that there is no bumping provision in the collective bargaining agreement, the Complainant implies that bumping is nonetheless necessary and required to "ensure that employees with seniority maintain job security through the mandated order of layoff." It argues that were it otherwise, and a laid off employee were not allowed to replace an employee with less seniority, Section 4.02 "would be rendered superfluous." The Complainant also points out that while there was supposedly bumping language in the collective bargaining agreement years ago which the members voted to remove, neither Respondent showed what that language said.

Fourth, the Complainant argues that the Association's "unquestioning deference" to the county treasurer's supposed statutory right to hire, fire and layoff her deputy ignores what the Complainant calls "clear Commission precedent". The precedent the Complainant references is an arbitration award, specifically JACKSON COUNTY, No. 48918 (Mawhinney, 1993). In that case, the arbitrator found that a laid off employee had a contractual right to displace a less senior employee in order to maintain full time employment with the County.

Fifth, the Complainant addresses the Association's contention that Gribble never sought assistance prior to filing her reduction grievance. According to the Complainant, she was not required to seek or obtain union assistance because the collective bargaining agreement expressly authorizes an employee to file a grievance on his or her own behalf. The Complainant contends that after Gribble filed her grievance, the Association could have accepted contractual responsibility for pursuing the grievance. The Association failed to do so though. As the Complainant sees it, that constituted a breach of its duty of fair representation.

As noted previously, the Complainant's second basic contention is that both the County and the Association breached the collective bargaining agreement when the parties made no effort to comply with the contractual layoff provision and "execute the layoff pursuant to seniority." Instead, neither side did anything. According to the Complainant, this was a

“clear breach” of the collective bargaining agreement which must be remedied by the examiner.

The Complainant asks the examiner to reinstate her to a full time position and make her whole retroactive to January 1, 2007. She also seeks attorney’s fees.

Respondent County

The County first asserts that its actions were within the scope of the statutory authority governing the position of deputy treasurer and were actions pursuant to statutory authority vested exclusively in the elected position of county treasurer. Second, the County contends that the WERC lacks jurisdiction to consider violations of the collective bargaining agreement alleged by the Complainant because the Complainant failed to establish that her exclusive bargaining representative (the Association), breached its duty of fair representation by wrongfully refusing to process her reduction grievance due to an arbitrary and discriminatory motivation. Third, even if the Complainant can establish a breach of her bargaining unit’s duty of fair representation, the County asserts that arbitration was never requested on her behalf. Building on that premise, it’s the County’s view that she cannot sustain a claim for refusal to arbitrate against the County. It elaborates on these contentions as follows.

With regard to its first claim, the County notes that while Gribble was working full time for the County in December, 2006, she actually filled two distinct part time positions (i.e. deputy treasurer and property listing assistant). According to the County, the former position was the product of statutory law, while her latter position was governed exclusively by the collective bargaining agreement. The County asserts that Friberg had appointed Gribble as her deputy pursuant to Sec. 59.25(2). When Friberg lost confidence in Gribble’s ability to perform the deputy treasurer job duties in December, 2006, she exercised her authority under the statute and decided to not reappoint Gribble deputy treasurer for the 2007-08 term. Instead, she decided to appoint someone else to the position. The Employer asserts there was no bargaining obligation associated with Friberg’s decision to not reappoint Gribble as deputy treasurer, and therefore Friberg’s decision did not implicate the collective bargaining agreement. Building on the foregoing, it’s the County’s position that the WERC does not have jurisdiction over the county treasurer’s exercise of her statutory authority, and the complaint should be dismissed on that basis alone.

Next, it’s the County’s position that the Complainant failed to establish that the Association breached its duty of fair representation to her by not processing her grievance. It cites the following to support that proposition. First, the County maintains that the Association conducted a thorough and effective investigation which included reviewing the relevant statutes, the WERC caselaw and the collective bargaining agreement. Additionally, it notes that multiple conversations were had between union representatives Bauer and Coraggio about the nature of the deputy treasurer position. Afterwards, the Association ultimately agreed with the County that Friberg’s failure to reappoint Gribble as deputy treasurer did not violate the collective bargaining agreement. Second, building on that point, the County avers that “the

material facts reveal that the Union listened to Complainant, discussed the merits of her grievance, and elected not to pursue it.” The Employer submits that while the Complainant obviously disagreed with the Association’s decision not to advance her grievance, that is not the standard for determining if a union has fairly represented its members. According to the County, the standard is whether the union’s decision not to pursue her grievance was arbitrary, discriminatory, or in bad faith. The County argues that the Complainant “can come nowhere close to establishing that the Union breached its duty of fair representation.” Third, the County submits that Bauer’s February 27, 2007 letter “evidences a reasoned analysis of the issues and a non-arbitrary decision not to support Complainant’s grievance.” Additionally, that letter also stated that the Association “did not have a difference of opinion with the County with respect to application of the contractual terms in this matter.” The County’s written response also reflected “a lack of dispute between the County and the Union as the basis for denying Complainant’s grievance.” Fourth, the County disputes the contention the Complainant made at the hearing that the resolution of her November 9, 2006 grievance (i.e. her discipline grievance) “somehow evidences a pattern or practice by the Union of breaching the duty of fair representation.” As the County sees it, the Complainant did not offer any insight as to how that grievance demonstrates an improper motive on the Association’s part. According to the County, “the ‘discipline’ grievance only serves as a distraction and proof that Complainant is grasping at straws in the hopes that anything might help her baseless claim survive.” The County argues that since the Complainant did not prove that the Association acted arbitrarily and capriciously in the way it dealt with her, the Complainant’s complaint should be dismissed.

Finally, the County addresses what it calls the Complainant’s refusal to arbitrate claim against the County. As the County sees it, the Complainant cannot sustain that particular claim because arbitration was never requested. It avers in this regard that the Union owns the grievance. In this case, after conducting a reasoned and comprehensive investigation, the Association decided not to advance the grievance to arbitration. While the Complainant disagrees with that decision, the County maintains that the Association had the authority to make that choice. Since the grievance was never advanced to the arbitration step, the County points out that it never had the opportunity to refuse to arbitrate the grievance. The County argues in the alternative that even if the Complainant had the authority to demand arbitration, the claim should nonetheless fail because she did not file a proper request for arbitration with the WERC and did not submit the WERC filing fee. It notes in this regard that an arbitration request is not considered filed with the WERC until the filing fee is paid.

Based on the foregoing, the County asks that the complaint be dismissed.

Respondent Association

It’s the Association’s position that it did not violate either Sec. 111.70(3)(a)5 or breach its duty of fair representation to Complainant Gribble. It elaborates on these contentions as follows.

With regard to Gribble's Sec. 111.70(3)(a)5 claim, the Association contends that (3)(a)5 only applies to municipal employers. The Association maintains it is not a municipal employer and, as a result, it could not violate (3)(a)5. The Association argues in the alternative that if the examiner does address Gribble's (3)(a)5 claim, the claim should fail because LAW did not violate any provision in the collective bargaining agreement. Here's why. Addressing Gribble's claim that her removal as deputy treasurer violated the collective bargaining agreement, the Association cites statutory Sections 17.10(6) and 59.25(2) for the proposition that county treasurers have the "clear statutory authority and power" to appoint and remove deputy treasurers "without being subject to the collective bargaining agreement." According to the Association, "Section 17.10 applies at the end of each elected term of the county treasurer while Section 59.25 applies during the elected term of the county treasurer." As the Association sees it, "this interpretation makes sense as a newly-elected county treasurer may prefer to have a new deputy county treasurer." Building on the premise that the deputy treasurer position is subject to the provisions of Secs. 17.10 and 59.25, the Association maintains that the county treasurer can appoint and remove the deputy county treasurer and, as a result, the deputy county treasurer position "is not protected by the collective bargaining agreement." The Association emphasizes that Gribble held two part-time positions, one of which was the deputy county treasurer position. While the county treasurer removed Gribble from the deputy county treasurer position, it notes that action did not affect Gribble's other part-time position of property listing assistant; Gribble retained that position.

With regard to Gribble's duty of fair representation claim, the Association notes at the outset that Gribble never asked it (i.e. the Association) to file a grievance on her behalf regarding her removal from the deputy county treasurer position. According to the Association, it is "contrary to logic" that the Association could have violated its duty of fair representation to Gribble because Gribble never requested that LAW represent her in her reduction grievance, nor did she respond to LAW's request to meet and discuss the grievance's merits. Instead, Gribble filed a grievance on her own, without ever notifying LAW of same. It's the Association's position that after Gribble filed her grievance, it "still took immediate action to review, research and evaluate Gribble's case." To support that premise, it cites the following: 1) that Bauer and Coraggio gathered the facts; 2) researched WERC and Wisconsin caselaw; 3) researched the relevant state statutes; 4) spoke with LAW's attorney's law clerk; 5) reviewed the applicable collective bargaining agreement; and 6) reviewed the matter with the local union president. The Association maintains that after it completed this "thorough" evaluation, it made a good faith decision that Gribble's reduction grievance had no merit. The Association further notes that although it concluded that Gribble's grievance had no merit, it nevertheless informed her that it would pursue her grievance if she wanted. However, in response, Gribble never contacted LAW and requested it to file a grievance. The Association notes that after Gribble filed a grievance on her own, the Association tried again to contact Gribble to discuss the grievance, but Gribble never responded to LAW's request. As the Association sees it, "it is logical that a union member should not be able to claim that his/her union acted arbitrarily in representing her, when the union was never asked to act at all."

As part of its defense on this topic, the Association goes through each of the three factors which a complainant must show to prove a duty of fair representation violation (i.e. arbitrary, in bad faith and discriminatory). With regard to the first factor (i.e. arbitrary), the Association emphasizes that after Bauer and Coraggio conducted a thorough evaluation of Gribble's case, they concluded that Gribble's reduction grievance had no merit. According to the Association, their decision had a "sound labor relations basis." To buttress that conclusion, it points out that both Bauer and Coraggio "have substantial experience and expertise in evaluating grievances." The Association argues that even if the examiner holds that Gribble's reduction grievance had merit, or that Bauer failed to return Gribble's phone calls, or that LAW's conclusions were incorrect, those facts alone cannot prove that LAW's actions were arbitrary. Building on the foregoing, it's the Association's view that Gribble cannot demonstrate that the Association's actions and conclusions are so far outside a "wide range of reasonableness" that it was wholly "irrational" or "arbitrary". With regard to the second factor (i.e. in bad faith), the Association opines that a union's actions are in bad faith "only where there is evidence of dishonesty, fraud or deceitful conduct." According to the Association, Gribble presented no evidence that LAW's actions were dishonest, fraudulent or deceitful, or that LAW was improperly motivated in deciding that Gribble's reduction grievance had no merit. The Association argues that even if the examiner finds the Association's conclusions were "careless or boneheaded", that would still not support a finding of bad faith. With regard to the third factor (i.e. discriminatory), the Association repeats the contention that it made regarding the second factor, namely that its actions were not dishonest, fraudulent or deceitful. According to the Association, the record is void of any evidence that LAW discriminated against Gribble, and it specifically notes that at the hearing, Gribble conceded she was not discriminated against within the meaning of Sec. 111.70(3)(a)3. Based on the above, it's the Association's position that Gribble did not meet her high evidentiary burden to prove a duty of fair representation violation.

It therefore asks that the complaint be dismissed.

DISCUSSION

As previously noted, the complaint contends that both Respondents violated Sec. 111.70(3)(a)5 by their actions herein. Additionally, the amended complaint raised a duty of fair representation claim against the Association. As will be noted below, such claims are covered by Sec. 111.70(3)(b)1. Both these claims will be reviewed separately below. The discussion on each section is essentially divided into two parts: in the first part, I identify the applicable legal standards and in the second part, I apply those legal standards to the facts. I will address the Complainant's (3)(b)1 claim against the Association first.

Alleged Violation of Sec. 111.70(3)(b)1

Section 111.70(3)(b)1, Stats. states that it is a prohibited practice for a municipal employee, individually or in concert with others "[t]o coerce or intimidate a municipal employee in the enjoyment of the employee's legal rights, including those guaranteed in

sub. (2).” The reference in Sec. 111.70(3)(b)1, Stats., to “a municipal employee. . .in concert with others” has historically been interpreted to extend the prohibitions in Sec. 111.70(3)(b)1, to labor organizations. RACINE UNIFIED SCHOOL DISTRICT, DEC. NOS. 14308-D, 14389-D, 14390-D (WERC, 6/77). Section (3)(b)1 has also been held to incorporate a labor organization’s duty to fairly represent those in the bargaining unit for which it serves as the exclusive collective bargaining representative. See MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 31602-C (WERC, 1/07). In order to prove a violation of the duty of fair representation, it is necessary for the complainant to show, by a clear and satisfactory preponderance of the evidence, that the “union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.” MAHNKE V. WERC, 66 Wis. 2D 524, 531 (1975) (quoting VACA V. SIPES, 386 U.S. 171, 190 (1967)). Under this standard, a union does not breach its duty of fair representation simply by negligently processing a grievance, simply by failing to communicate with a grievant, simply by making unwise or improvident decisions about the merits of a grievance, or simply by settling a grievance against the wishes of the grievant. Imperfections in representation are permitted the union, with one important caveat: “. . .subject always to complete good faith and honesty of purpose in the exercise of its discretion.” HUMPHREY V. MOORE, 375 U.S. 335, 349 (1964). Additionally, the standard just referenced does not require the union to arbitrate all grievances because “a union has considerable latitude in deciding whether to pursue a grievance through arbitration.” E.g., MAHNKE, *supra*, 66 Wis. 2D at 531 (quoting HUMPHREY V. MOORE, 375 U.S. 335, 349 (1964)).

Having identified the legal standards applicable to duty of fair representation cases, I’ve decided to preface my discussion on the application of those standards to the facts involved here with the following quote from one of the Commission cases cited above:

It is exceedingly difficult for an individual bargaining unit member to establish a breach of the duty of fair representation, and properly so. Decades of experience under federal and state labor relations laws have demonstrated the wisdom and necessity of maintaining this exceptionally high bar. It acknowledges that unions have limited resources, that grievances may be handled by relatively unsophisticated fellow employees or union staff, who as human beings sometimes make mistakes of judgment or are negligent, that a union’s resources come from dues and fees paid by employees, that the union is a collective enterprise that must serve the interests of the overall group, that serving those collective interests frequently comes at the cost of a particular individual’s real or perceived interests, and that a union must have discretion to make these decisions without being subjected to expensive second-guessing by agencies or courts.

MILWAUKEE PUBLIC SCHOOLS, *supra*, at page 13.

In this case, Gribble contends that the Association breached its duty of fair representation to her in several respects.

First, although it did not mention the matter in its brief, at the hearing the Complainant used her first grievance (i.e. her discipline grievance) as context for her second grievance (i.e. her reduction grievance). She implied that the Association's conduct in the first grievance violated the duty of fair representation and that the Association repeated its (bad) conduct in her second grievance. It would be one thing if the record evidence in the first grievance established a union breach of the duty of fair representation. If it did, that case could certainly be used to show a pattern of conduct. However, the evidence in the first grievance does not come close to showing a duty of fair representation violation. Here's why. What happened there can fairly be summarized thus: After Gribble got what she considered a letter of reprimand from Friberg, Bauer drafted a grievance which contended there was not just cause for the "letter of reprimand". When Friberg responded to the grievance, she specifically denied that she had issued any form of discipline to Gribble. When Bauer spoke to Gribble about Friberg's response, he told her that he was satisfied with Friberg's response, so he felt that Gribble had not been disciplined. Gribble disagreed with Bauer on this point; as previously noted, she considered the letter disciplinary in nature. That's not surprising. Employees often feel that any letter they get from their supervisor that says anything negative about them or their work performance is disciplinary in nature. However, in labor relations, the definition of what constitutes a letter of discipline is more objective than simply whether the letter in question hurts the recipient's feelings. A true letter of discipline contains words along the lines of "this letter constitutes a letter of discipline." No such words were contained in Friberg's letter, so Bauer's opinion that Friberg's letter did not constitute a letter of discipline had a sound basis in labor relations. In any event, Bauer told Gribble that if she wanted to appeal the grievance further, she could. This put the proverbial ball in Gribble's court. She did not appeal it further. As a practical matter, that ended the grievance. When Gribble was asked at the hearing what relief she wanted from the County relative to her discipline grievance, she replied that she wanted a "dialogue" with Friberg about what happened. I'm persuaded that happened because she later admitted that she did indeed talk to Friberg about it. As she put it at the hearing, she talked with Friberg every day. In that sense, Gribble got the "dialogue" with Friberg that she wanted.

Next, the Complainant contends that the Association's conduct relative to Friberg's removing Gribble as deputy treasurer violated the duty of fair representation. In addressing that claim, I'm first going to review the Association's conduct which occurred prior to Gribble filing her grievance.

After Friberg told Gribble that she was not going to be reappointed deputy treasurer, Gribble called Bauer and told him that. He responded that he would investigate the matter and get back to her.

The Complainant contends that Bauer's version of what happened next – namely, his investigation – "is not worthy of any evidence." The Examiner finds otherwise for the following reason. Bauer's testimony about his grievance investigation was supported by Coraggio's testimony. In contrast, no one – not even Gribble – challenged any aspect of their testimony. Thus, their testimony about their grievance investigation was un rebutted.

Bauer and Coraggio testified that they took the following actions to investigate and evaluate a possible grievance against the County over Friberg's failure to reappoint Gribble as deputy treasurer. First, they reviewed the relevant facts. Second, they reviewed the state statutes dealing with deputy positions, namely Sections 17.10 and 59.25. Their reading of those sections was that county treasurers have the statutory authority and power to appoint and remove deputy treasurers. Third, Coraggio spoke with one of LAW's attorney's law clerks regarding the matter. Fourth, Bauer researched the WERC's database for any applicable case law. Fifth, both Bauer and Coraggio reviewed the collective bargaining agreement to determine if there was any pertinent language relating to deputy positions. After doing so, they concluded it had no provisions that addressed either of the statutes just referenced or offered any protections for Gribble relative to the deputy county treasurer position. They also concluded that an arbitrator would not have standing to overrule the statutory authority of the county treasurer. Additionally, they also knew that Gribble wanted to bump a less senior employee so she could keep a full time position with the County. They concluded that the collective bargaining agreement did not contain any bumping language that would allow Gribble to do that. While some LAW contracts contain bumping language, this one did not. Bauer knew that when the parties had negotiated their first collective bargaining agreement in 2002, he had proposed to the local's membership that they try to get bumping language, but the membership had decided they did not want it. Sixth, Bauer spoke with Matt Dagostino, the local union president, several times about Gribble's case. Seventh, Bauer called the County's labor counsel, Robert Burns, to ascertain the County's position on Friberg's authority to remove Gribble from the deputy treasurer position, and Burns told Bauer that the county treasurer could select whoever she wanted as her deputy. While Bauer and Coraggio were doing the foregoing, they shared their information with each other in about a half dozen phone calls. Afterwards, they both concurred with the County that Friberg's failure to reappoint Gribble as deputy treasurer did not violate the collective bargaining agreement.

The Complainant contends that LAW's "purported investigation did not occur at all . . ." The record facts, specifically the testimony of Bauer and Coraggio, belie that assertion. The Complainant also points out that at the hearing, the Association did not produce any written notes which Bauer and Coraggio made during the course of their investigation. The Complainant asks the Examiner to draw a negative inference from that. I decline to do so. While Bauer and Coraggio made written notes during their grievance investigation, the fact that their notes were not offered into evidence herein does not justify a negative inference about their investigation. As already noted, their testimony about their investigation was un rebutted. Additionally, insofar as the Examiner can determine, there is no requirement under the applicable duty of fair representation caselaw that a union has to introduce the written notes from its grievance investigation at a subsequent hearing. That being so, the caselaw simply does not require it.

The testimony referenced above persuades the Examiner that the Association conducted a thorough investigation which covered all the bases, so to speak. After considering the merits of a potential grievance, Bauer and Coraggio elected not to pursue it.

Next, Gribble testified that Bauer never called her and told her that the Association was not going to pursue a grievance on her behalf. I credit Bauer's testimony that he did, in fact, call Gribble and tell her that LAW had completed its investigation into her claim and had concluded that it was not a contract violation for her to be removed from the deputy treasurer position. I further credit Bauer's testimony that he told Gribble that the basis for this conclusion was that state statutes gave county treasurers the authority to appoint and remove deputy treasurers, and since she (Gribble) was being removed at the end of the (county treasurer's) term, it was within the scope of the statute. I further credit Bauer's testimony that he told Gribble that notwithstanding that opinion, if she wanted to proceed with a grievance over her removal from the deputy treasurer position, the Association would file one on her behalf and pursue it. The reason I credited Bauer's testimony on the foregoing was this: what happened next was that Gribble filed her reduction grievance on her own without any Association involvement. Her doing that (i.e. filing a grievance on her own) makes perfect sense **if** she had already gotten "bad news" from Bauer (meaning news she didn't want to hear and disagreed with). Conversely, her filing a grievance on her own makes less sense if she had not heard back yet from Bauer about the status of her possible grievance. Rhetorically speaking, why would she file a grievance on her own if there was still a chance the Association would file a grievance on her behalf and do all the heavy lifting?

The focus now turns to a review of the Association's conduct which occurred after Gribble filed her grievance.

After Gribble filed her grievance, County labor counsel Burns asked Bauer if the Association was supporting it (i.e. Gribble's grievance). Bauer replied in writing that the Association was not supporting her grievance.

In the Examiner's view, Bauer's letter of February 27, 2007 identified a reasoned analysis of the issues and gave a non-arbitrary basis for the Association's decision to not support her grievance. Building on that, the Examiner further finds that the Association's decision to not support Gribble's grievance considered the MAHNKE factors, was made in good faith, and was based on the Association's conclusion that the grievance lacked merit. In so finding, it is specifically noted that the Association's position was supported by ONEIDA COUNTY v. WERC, 238 Wis. 2d. 763, 618 N.W. 2d 891, wherein the Wisconsin Court of Appeals determined that chief deputy [treasurers] are subject to collective bargaining under MERA, except to the elected officials' power to appoint and discharge them. Conversely, notwithstanding the Complainant's contention, there is no "clear Commission precedent" which supports her position. While the Complainant cites a single arbitration award to support her position that she should be allowed to bump another less senior employee, that award is distinguishable from the situation here for the following reason. The arbitrator in that award (JACKSON COUNTY, No. 48918, (Mawhinney, 1993)), found that the grievant therein could bump another employee per the contractual bumping provision. Here, though, as previously noted, there is no bumping provision in the collective bargaining agreement. Since the contract language in JACKSON COUNTY differs from the contract language involved here, the holding in JACKSON COUNTY is not dispositive here.

The finding reached above also applies to the Association's decision to not appeal Gribble's grievance to arbitration. As noted in the caselaw cited earlier, unions do not have to arbitrate all grievances. They are given considerable latitude and discretion in making that decision. In this case, the basis for the Association's decision to not appeal Gribble's grievance to arbitration was the same as the basis for their not supporting her grievance in the first place. As previously noted, after evaluating the case, they decided that it was not a contract violation for Friberg to not reappoint Gribble to deputy treasurer. That conclusion was a reasoned, non-arbitrary decision for the reasons identified in the preceding paragraph. The Examiner therefore finds that the Association's decision to not appeal Gribble's grievance to arbitration was made in good faith and was based on the Association's conclusion that the grievance lacked merit.

Finally, in the context of this case, the legal standards identified above require Gribble to show with objective evidence that her union representatives acted unlawfully. Here, the record contains no evidence that would cast doubt on the Union's "good faith and honesty of purpose" in exercising its wide discretion. See MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 31602-C, at 13, citing HUMPHREY V. MOORE, 375 U.S. 335, 349 (1964). The record evidence does not show any improper or perfunctory conduct or wrongdoing by Bauer or Coraggio toward Gribble. In so finding, it is specifically noted that there is nothing in the record establishing that either Bauer or Coraggio had any bias, negative feelings or predisposition against Gribble. Additionally, there is nothing in the record showing that Bauer and Coraggio somehow disregarded the merits of Gribble's situation or grievance.

Based on the foregoing, it is held that the Association's conduct toward Gribble was not arbitrary, discriminatory or in bad faith, and therefore the Association did not violate its duty of fair representation to Gribble. Accordingly, no violation of Sec. 111.70(3)(b)1, Stats., has been found.

Alleged Violation of Sec. 111.70(3)(a)5

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer "to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees. . . ." This provision makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. The traditional mechanism for enforcing a collective bargaining agreement is grievance arbitration. Where a collective bargaining 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, *supra*. If 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 fair representation when deciding not to take the grievance to arbitration. MAHNKE, *supra*.

At the hearing, the Complainant's counsel indicated that the Complainant was not asking the Examiner to review the merits of her first grievance (i.e. the discipline grievance). The Complainant did ask the Examiner to review the merits of her second grievance (i.e. the reduction grievance).

There is a basic jurisdictional problem with my doing so and deciding the merits of the Complainant's reduction grievance. It is this. It has long been the Commission's practice not to exercise its collective bargaining agreement enforcement jurisdiction regarding a dispute that is subject to resolution under an agreed-upon and presumptively-exclusive grievance procedure like the one contained in the parties' 2006-08 collective bargaining agreement. See, for example, MILWAUKEE COUNTY, DEC. NO. 28525-B (Burns, 5/98) at 12, aff'd -C (WERC, 8/98). This means that the Commission will only decide the merits of a grievance if it is shown that the complainant's access to the applicable grievance procedure is being prevented by a union failure to fairly represent the employees' interests on the subject through the grievance procedure. MILWAUKEE COUNTY, supra. In other words, in order for a contract claim to be addressed in this type of case, a complainant must first show that the union violated its duty of fair representation to the employee.

The Examiner has already concluded, above, that the Association's conduct toward Gribble was not arbitrary, discriminatory or in bad faith and that the Association did not violate its duty of fair representation to her. This finding, in turn, precludes the Examiner from addressing the Complainant's contract claim against the County and the Association. Accordingly, the Examiner declines to exercise the Commission's MERA collective bargaining agreement enforcement jurisdiction to decide the merits of the Complainant's second grievance (i.e. the reduction grievance).

...

In summary then, it is concluded that the Association did not violate Secs. 111.70(3)(b)1, Stats., by its conduct herein. Given that finding, I have not exercised the Commission's jurisdiction under Sec. 111.70(3)(a)5, Stats., to determine if the County and/or the Association violated the parties' collective bargaining agreement by its actions relative to Gribble's reduction grievance. The complaint has therefore been dismissed. Given that action, the Complainant's request for attorney's fees is denied.

Dated at Madison, Wisconsin, this 11th day of August, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

REJ/gjc
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