STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WINNEBAGO COUNTY HIGHWAY DEPARTMENT EMPLOYEES' UNION, LOCAL 1903, AFSCME, AFL-CIO, Complainant,

vs.

WINNEBAGO COUNTY, Respondent

Case 403
No. 68059
MP-4433

Decision No. 32468-C

Appearances:

Bruce F. Ehlke, Ehlke, Gartzke, Bero-Lehmann, and Lounsbury, S.C., 6502 Grand Teton Plaza, Suite 202, Madison, Wisconsin 53719, appearing on behalf of Winnebago County Highway Department Employees' Union, Local 1903, AFSCME, AFL-CIO.

Mark F. Yokom, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Winnebago County.

ORDER ON REVIEW OF EXAMINER'S DECISION

On February 10, 2009, Examiner John R. Emery issued Findings of Fact, Conclusions of Law, and Order in the above-captioned matter, holding that the Respondent Winnebago County (County) had refused to bargain collectively with the Complainant Winnebago County Highway Department Employees' Union, Local 1903, AFSCME, AFL-CIO (Union) and had bargained individually with a bargaining unit member, both in violation of Secs. 111.70(3)(a)4 and 1, Stats., by offering a "Last Chance Agreement" (LCA) to an individual employee in the absence of a Union representative and subsequently by entering into that LCA with a Union steward rather than providing an opportunity to negotiate the terms of that LCA with the AFSCME business representative who customarily negotiates for the Union.

On February 27, 2009, the County filed with the Wisconsin Employment Relations Commission (Commission) a timely petition seeking review of the Examiner's Findings of Fact, Conclusions of Law, and Order, pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. Both parties submitted briefs in support of their respective positions, the last of which was

received on April 21, 2009. For the reasons set forth in the Memorandum that follows, we affirm the Examiner's conclusion that the County unlawfully attempted to enter into an LCA with an individual employee, without notifying the Union and providing the Union an opportunity to participate. However, contrary to the Examiner, we hold that, under the circumstances of record here, the Union steward, who signed the LCA on behalf of the Union once he was invited into the situation, had actual or apparent authority to enter into the LCA on behalf of the Union. Accordingly, we dismiss the Union's allegation that the County refused to bargain in good faith by entering into the LCA with the union steward. We further conclude, contrary to the Examiner, that the County's conduct did not violate the bargaining unit member's rights under Sec. 111.70(2), Stats.

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

ORDER

A. The Examiner's Findings of Fact 1 through 6 are affirmed.

B. The Examiner's Findings of Fact 7 and 8 are modified as italicized below, and as modified are affirmed: [1]

> 7. On September 11, *after declining Union representation,* Besaw was issued a written warning by Human Resources Labor Relations Specialist Ron Montgomery for leaving work early on September 10 without permission.
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> 8. On the morning of September 12, 2007, Montgomery met with Besaw again to discuss an allegation that Besaw had falsified his timecard on September 10, by indicating he had worked a full eight hours when, in fact, he had not. *At the outset of this meeting, Besaw was offered and declined Union representation.* As a result of the meeting, Besaw was issued another written warning.

C. The Examiner's Findings of Fact 9 through 12 are affirmed.

D. The Examiner's Finding of Fact 13 is modified by adding the phrase "including AFSCME business representative Mary Scoon" at the end of the Finding, and as modified is affirmed. [2]

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[1] The County challenged the Examiner's failure to include expressly the information in the italicized portions of these findings. The record supports adding this information, which we view as material to the legal issues raised in the case.

[2] The County challenged the Examiner's failure to include in Finding of Fact 13 that Besaw and Carpenter were

E. The Examiner's Findings of Fact 14 and 15 are affirmed.

F. The Examiner's Finding of Fact 16 is modified as italicized below, and as modified is affirmed:

> 16. The requirements of just cause for discipline and access to the grievance procedure are *contained in* the collective bargaining agreement.

G. The Examiner's Finding of Fact 17 is affirmed.

H. The Examiner's Findings of Fact 18 and 19 are set aside.

I. The following Findings of Fact 18 through 21 are made: [3]

> 18. At the time of the events giving rise to this case, the County was aware that Mary Scoon, who is employed by the Union's parent affiliate, AFSCME, Council 40, as the staff representative for the Union, represented the Union at the bargaining table for purposes of contract negotiations.
>
> 19. The County had experience with Union Steward Ed Carpenter in representing bargaining unit members in connection with disciplinary matters. Prior to the Besaw situation, the County had offered LCAs to other employees. The County had never been advised by any Union officials that only the Union's AFSCME Staff Representative had authority to sign LCAs.
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> 20. Before expressly agreeing to the LCA on behalf of the Union on August 13, 2009, Union Steward Carpenter did not give any indication to County officials that he might lack authority to enter into the LCA on behalf of the Union.
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> 21. The County was not informed that the Union might challenge the validity of the LCA, based upon Carpenter's lack of authority, until some point after the LCA was implemented, Besaw returned to work, and Besaw was thereafter terminated from employment.

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specifically told they could contact Mary Scoon using the telephone in the conference room. The record supports adding this information, which is material to the legal issues raised in the case.

[3] The County has challenged the Examiner's failure to include information about its prior experience with Carpenter handling disciplinary situations. The record supports amending the Examiner's findings in that respect as set forth above, which is material to the legal issues involved in the case. The remaining information in Findings of Fact 18 through 21, while not necessarily raised by the County, conforms to the record in this matter and is material to the legal issues raised in the case.

J. The Examiner's Conclusions of Law 1 and 2 and his first Conclusion of Law 3 are affirmed.

K. The Examiner's second Conclusion of Law 3 is set aside and the following Conclusions of Law 4, 5, and 6 are made:

4. The County refused to bargain in good faith with the Union, in violation of Sec. 111.70(3)(a)4 and 1, Stats., by attempting to obtain a Last Chance Agreement from an individual employee, which by its terms would preclude enforcement of certain aspects of the collective bargaining agreement, without the Union's knowledge and acquiescence.

5. Under the circumstances present in this case, the County reasonably believed that Union steward Carpenter had authority to enter into a Last Chance Agreement on behalf of the Union, and the County reasonably relied upon that belief by returning the individual employee to his employment under the terms of the Last Chance Agreement. Therefore the County did not refuse to bargain in good faith with the Union in violation of Secs. 111.70(3)(a)4 and 1, Stats. by entering into the Last Chance Agreement.

6. Under the circumstances present here, the County did not independently interfere with, restrain, or coerce municipal employees in the exercise of their rights guaranteed in Sec. 111.70(2) and therefore did not independently violate Sec. 111.70(3)(a)1, Stats.

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

1. The Complaint is dismissed as to the allegations referenced in Conclusions of Law 5 and 6, above.

2. Winnebago County, its officers, and agents shall immediately:

a. Cease and desist from refusing to bargain in good faith with the Union by attempting to enter into Last Chance Agreements with individual bargaining unit members without the Union's knowledge and acquiescence.

b. Take the following affirmative action which will effectuate the purposes of the Municipal Employment Relations Act:

(1) Notify all employees of Winnebago County who are in the bargaining unit represented by the Union by posting the Notice attached hereto as "Appendix A" in conspicuous places where said employees are employed. The Notice shall be signed by a representative of the County and shall be posted immediately upon receipt of this Order and shall remain posted for thirty (30) days. Reasonable steps shall be taken to insure that the Notice is not altered, defaced or covered by other material.

(2) Notify the Wisconsin Employment Relations Commission and the Union within twenty (20) days following the date of this Order of the steps taken to comply herewith.

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

APPENDIX "A"

NOTICE TO ALL EMPLOYEES REPRESENTED BY WINNEBAGO COUNTY HIGHWAY DEPARTMENT EMPLOYEES' UNION, LOCAL 1903, AFSCME, AFL-CIO

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees represented by Winnebago County Highway Department Employees' Union, Local 1903 that:

WE WILL NOT violate Sections 111.70(3)(a)4 and 1 of the Municipal Employment Relations Act by refusing to bargain collectively with Local 1903 over the wages, hours and conditions of employment of its bargaining unit members, by attempting to enter into a Last Chance Agreement with individual bargaining unit members without the knowledge and acquiescence of Local 1903.

_____
ON BEHALF OF WINNEBAGO COUNTY

_____
Date

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED OR COVRED BY ANY OTHER MATERIAL.

WINNEBAGO COUNTY

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

The facts as found by the Examiner and amended in the Order, above, can be summarized in pertinent part as follows. [4]

At all material times, Randy Besaw was employed by the County in its Solid Waste Department and as such was a member of the collective bargaining unit represented by the Union. The collective bargaining agreement (CBA) between the County and the Union included a provision regarding "discipline" that stated, "An employee may be suspended, discharged, demoted, or otherwise disciplined for just cause …." The CBA also contained a grievance procedure allowing the Union to challenge a bargaining unit member's discipline up to and including binding arbitration.

On August 16, 2007, the County (in the person of Ron Montgomery, Human Resources/Labor Relations Specialist) gave Besaw a written warning for what Montgomery characterized as a "serious safety violation." On September 11, 2007, Montgomery summoned Besaw to a meeting concerning a charge that he had left work early the previous day without permission. After being offered and declining Union representation, Besaw was issued a written warning for the infraction. The next morning, September 12, 2007, Montgomery again called Besaw into a meeting to discuss an allegation that he had falsified his timecard on September 10 by failing to record that he had left early. He was again offered, and again declined, Union representation and at the conclusion of the meeting was issued another written warning.

After the meeting, Montgomery decided that Besaw should be discharged unless he would enter into a "Last Chance Agreement" (LCA), by which Besaw would agree, among other things, not to "contest, via the contractual grievance process, any suspension or termination of your employment or other disciplinary action that may result from your violation of this agreement." During the day, Montgomery composed an LCA and had it reviewed by the County's Human Resources Director, Karon Kraft, who had begun employment just a few days earlier. Later in the day on September 12, after Kraft had reviewed and approved the draft LCA, Montgomery called Besaw into a meeting along with the Landfill Manager. Montgomery encouraged Besaw to seek Union representation, but Besaw declined. Montgomery then informed Besaw that the County had decided to terminate his employment but was willing to enter into a last chance agreement instead, and presented Besaw with the document that had been drafted. The document contained a notation at the

[4] As noted in the Order, the Commission has amended certain findings of fact partially in response to challenges raised by the County in its petition for review. The County raised a number of other challenges to the Examiner's Findings which, after due consideration of the record, do not warrant amending the Examiner's Findings of Fact.

end, "The following signatures signify agreement to the terms of this last-chance agreement,"

which was followed by separate signature lines for Besaw and for the Union, as well as for Besaw's immediate supervisor and the Landfill Manager. Besaw was not presented with any alternative but to sign the document or be terminated. He indicated he did not understand and refused to sign, whereupon Montgomery contacted Kraft and they agreed to give Besaw until 8:30 the following morning to make his decision.

The next morning, September 13, 2007, the meeting reconvened, but Besaw had requested and obtained representation by Union Steward Ed Carpenter for purposes of this meeting. Montgomery was accompanied by Kraft. Montgomery and Kraft explained the situation to Carpenter and Besaw and gave them copies of documentation regarding Besaw's disciplinary history as well as the LCA that had been prepared. Montgomery and Kraft made it clear that the County's position was that they had two alternatives, termination or signing the LCA. Neither Besaw nor Carpenter asked whether there were other alternatives, sought any further clarification, or suggested any changes in the LCA. Kraft then told Besaw and Carpenter that they would be left alone in a room with a telephone which they could use to contact anyone they wished, including (specifically) Mary Scoon, the AFSCME staff representative who was assigned to negotiate for and otherwise assist the local Union. Besaw and Carpenter met together for about 35 minutes. When Besaw and Carpenter were ready, the meeting reconvened. Without seeking further clarification or time, and without indicating that his authority might be limited, Carpenter signed the LCA on behalf of the Union and Besaw signed as well. Besaw returned to work but, after some period of time, was terminated from employment for subsequent alleged misconduct.

The record does not indicate when Union officials, other than Carpenter, became aware of the Besaw LCA. The County was not informed that the Union would challenge Carpenter's authority to sign the LCA until some point after Besaw returned to work and was subsequently terminated.

During the relevant period of time, Mary Scoon, AFSCME staff representative, has represented the Union for purposes of contract negotiations and the County was aware of her role in that capacity. The record does not contain any evidence about the role or authority (actual or implied) of particular Union agents, including Scoon and Carpenter, in connection with matters that arise during the course of a collective bargaining agreement, such as grievances, disciplinary situations, and LCA's.

The Examiner's Decision

The Examiner concluded that the County violated both Secs. 111.70(3)(a)1 and 111.70(3)(a)4, Stats., in its conduct regarding the Besaw LCA. As to the (3)(a)1 violation, the Examiner found that "The County's action in presenting the last-chance agreement to Besaw as a 'take it or leave' alternative to termination, without first informing the designated representative of Local 1903, had a tendency to interfere with, coerce, or restrain him in the exercise of his protected rights" in violation of Sec. 111.70(3)(a)1. The Examiner reasoned that this "placed [Besaw] in an untenable position and impermissibly interfered with his rights

under Sec. 111.70(3)(a)1." (Examiner's Decision at 15).

As to the (3)(a)4 violation, the Examiner concluded that an LCA was a mandatory subject of bargaining, because it affected "the circumstances under which an employee may be disciplined and his ability to grieve alleged violations of his contractual rights." To the Examiner, the LCA was tantamount to altering the terms of the collective bargaining agreement, and as such must be done "through designated representatives of the Union." In the Examiner's view, "Union Stewards are not the bargaining representatives of the Union for the purposes of negotiating or modifying collective bargaining agreements. Those are the functions of the locals' professional Union representatives and their elected bargaining committees." The Examiner held that, "it is the Union's prerogative, not the employee's, to decide who it wishes to participate in negotiations over modifications of the contract." Therefore, by not notifying the Union "before presenting Besaw with the agreement," the County failed to bargain in good faith with the Union. Examiner's Decision at 16.

The Positions of the Parties

In connection with its petition for review, the County challenges the Examiner's legal conclusions on several grounds. First, the County contends that the Examiner erred in holding that Besaw was entitled to select a staff representative rather than a union steward to represent him for purposes of the disciplinary meeting on September 13, 2007. Second, the County argues that Union steward Carpenter had actual authority to enter into the LCA on behalf of the Union, in that "Carpenter had been an effective Union representative for Union employees in the past and the County had recognized that and had no reason to believe otherwise regarding the LCA." County Brief at 14. Alternatively, the County contends that Carpenter had apparent authority to enter into the LCA, since the Union had permitted Carpenter to act as its agent for "labor related discipline issues" and had never told the County that Carpenter lacked authority to act "regarding discipline matters calling for last chance agreements." Id. at 15. According to the County, this conclusion is enhanced by the fact that, "[a]lthough the Union knew about the LCA, the Union made no complaint about the LCA from the time it was signed until Besaw was terminated later by its terms." Id. at 16. Finally, the County contends that the steward's actions constituted a waiver by the Union of any right to bargain the LCA, since the steward was offered an opportunity to consult with the Union's staff representative and did not indicate that he needed more time in order to do so or more information before signing the LCA. "The County cannot be placed in a position of determining whether or not an employee is receiving adequate representation." Id. at 17.

In response the Union argues that, by contending that Besaw was not entitled to select a particular representative, the County has "conflated the representation required in a pre-disciplinary interview and the representation that is required where a last chance agreement modifying a collectively bargained agreement must be 'fairly' bargained." Union Brief at 15. The Union further argues that an LCA is a mandatory subject of bargaining and, as such, must be bargained "fairly" with the Union, a determination that "turns on the peculiar facts and circumstances of the particular case." Id. at 14. The Union distinguishes certain arbitration awards that the County had cited in support of a steward's authority to negotiate an LCA by

pointing out that the steward's competency was either not at issue in those cases or was

established by record evidence of past practice. In contrast, according to the Union, the County in this situation "knew full well that Mary Scoon was AFSCME Local 1903's bargaining agent and that Carpenter's 'presence on September 13th was restricted to his duties as a local union steward,' ... and did not expect that Carpenter would bargain regarding the terms of the last chance agreement that they were offering Besaw." Id. at 17, citing the transcript at page 23. The Union urges that the LCA was a collective bargaining situation, and that the County had the burden therefore of notifying the person it knew to be the "authorized union bargaining agent," i.e., Scoon rather than Carpenter. Id. at 19.

In reply, the County contends that the Union's effort to distinguish a pre-disciplinary interview from a last chance agreement is a distinction without a difference, since any form of discipline – including an LCA – alters the terms and conditions of employment. As to the Union's argument that only staff representative Scoon had authority to negotiate the LCA, the County contends that the Union had the burden to establish the "defense" that Carpenter lacked authority and the record lacks any evidence to that effect. In fact, "The Union does admit ... that the record 'tells us nothing about Carpenter's authority' or ability to address the LCA." County Reply Brief at 9, quoting Union Brief at 10-11. The County further argues that neither Besaw nor Carpenter were "forced" into signing the LCA, but were given sufficient opportunity to consider and consult before signing. Since Carpenter failed to request more time to consult with Scoon and did not ask to negotiate or otherwise delay signing the LCA, the Union has waived any right it had to bargain over the terms of the LCA. County Reply Brief at 12.

DISCUSSION

The Examiner concluded that the County had violated the law in two separate ways by its actions concerning the Besaw LCA: first, by interfering or coercing Besaw in the exercise of his contractual rights, which the Examiner saw as an independent violation of Sec. 111.70(3)(a)1, Stats., and second, in bypassing the authorized Union bargaining representative and dealing directly with bargaining unit employees, in violation of Sec. 111.70(3)(a)4, Stats.

Contrary to the Examiner, we do not view the County's conduct as interfering or coercing Besaw, as an individual employee, in the exercise of lawful, concerted activity in a manner that would violate Sec. 111.70(3)(a)1, Stats. In compliance with its duties under that section of the law, the County clearly and repeatedly advised Besaw of his so-called "Weingarten" rights to Union representation before engaging him in discussion about his alleged misconduct and before offering him the LCA. [5] As we recently explained, Weingarten

[5] As part of an employee's right to engage in concerted activities for mutual aid and protection, employees have a right to the assistance of a union representative in investigatory interviews, when they have a reasonable belief that the interview may lead to discipline. STATE OF WISCONSIN (UWM), DEC. NO. 31527-B (WERC, 2/08) at 8, and cases cited therein. This right is named after the U. S. Supreme Court decision establishing the analogous right under the National Labor Relations Act, NLRB V. WEINGARTEN, INC. 420 U. S. 251 (1975).

rights do not arise out of an employer's duty to bargain with the union, but rather arise out of individual rights to engage in mutual protection. UNIVERSITY OF WISCONSIN SYSTEM, DEC. NO. 32239-B (WERC, 8/09) at 12. Besaw had an individual right to representation in the situation, which he was afforded and eventually accepted. However, any duty to bargain over the LCA belonged to the Union, not Besaw. Nor do we see that the County coerced or pressured Besaw into abandoning his contractual rights simply by virtue of the fact that the County offered him an LCA without the Union present, after Besaw had expressly declined representation. To the contrary, when Besaw eventually expressed discomfort and requested more time, the County readily acquiesced. Accordingly, the circumstances present here do not give rise to an independent violation of Section (3)(a)1 of MERA. [6]

We agree with the Examiner, however, that the County had a duty to negotiate the LCA with the Union and not with Besaw as an individual employee, whether or not Besaw waived his right to representation under the WEINGARTEN doctrine. Inherent in an LCA is some degree of surrender of contractual protection that might otherwise apply to an employee's future loss of employment, in exchange for the employee being permitted to continue employment at the present time. In that sense, an LCA, properly viewed, creates an exception to or limitation upon existing contractual provisions. It is well established, and neither party disputes, that it is the Union, and not an individual employee like Besaw, who is a party to the collective bargaining agreement. See generally, MAHNKE V. WERC, 66 WIS. 2D 524 (SUP. CT. 1975); MILWAUKEE BOARD OF SCHOOL DIRECTORS (MURILLO), DEC. NO. 30980-B (WERC, 3/09). When an employee is terminated, it is up to the Union to decide whether, how far, and upon what contractual grounds to pursue a grievance challenging the termination, provided the Union acts in consistence with its duty of fair representation. MILWAUKEE PUBLIC SCHOOLS AND SEIU (BISHOP), DEC. NO. 31602-C (WERC, 1/07), and cases cited therein. The Union's interest in enforcement of contractual provisions extends beyond the needs of an individual employee to "the overall fairness and equity of the [employer's[investigatory and disciplinary procedure." UNIVERSITY OF WISCONSIN SYSTEM, *supra*, at 11. Here, for example, the Union would have an interest and a duty to ensure that Besaw's situation was appropriate for the concessions involved in an LCA, not only since it would be the Union whose ability would be compromised insofar as challenging any future discipline involving Besaw, but also since Besaw's LCA could set a precedent for future disciplinary situations involving other employees. Thus, in a similar situation, the Commission has concluded that an employer violated the law by negotiating directly with an individual about extending her probation beyond the contractually established period of time. NORTH CENTRAL TECHNICAL COLLEGE, DEC. NO. 31117-C (WERC, 2/06).

For the foregoing reasons, the County's duty to bargain in good faith with the Union required the County to approach the Union directly about negotiating an LCA involving

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[6] It is well settled, however, that a failure to bargain in good faith in violation of Sec. 111.70(3)(a)4, Stats., generally also constitutes what is traditionally referred to as a "derivative" violation of Sec. 111.70(3)1, Stats. Following this tradition, our Conclusions of Law and Order in the instant case reflect such a derivative violation of Section (3)(a)1 accompanying the violation of Section (3)(a)4.

approached Besaw and left it to Besaw whether or not to involve the Union. This conduct violated the law and we have directed the County to comply with this duty in the future.

Had the matter ended at that point, with Besaw declining Union representation and entering into the LCA on his own behalf, it is possible (depending upon any mitigating circumstances) that the LCA might be held void as the fruit of unlawful conduct. As it happened, however, Besaw, confronted with the LCA, decided to request Union assistance. Union steward Carpenter thereafter accompanied Besaw to the meeting which resulted in the LCA and actually signed the LCA on behalf of the Union. As a result, the central dispute in this case is whether Carpenter had actual or apparent authority to bind the Union to the LCA. Contrary to the Examiner and the Union, we conclude – on the specific circumstances revealed in this record – that he did.

As a steward, there is no dispute that Carpenter was a duly elected or appointed agent of the Union. He was not merely another bargaining unit member similar in status to Besaw. Depending upon the facts and circumstances reflected in the record, Carpenter, as an agent, may be found to have had either actual or apparent authority to act on any particular matter on behalf of the Union. As to actual authority, the court explained in SKRUPKY V. ELBERT, 189 WIS.2D 31, 44(CT. APP. 1994):

> Actual authority may be express or implied … Actual authority is express when found within the explicit agency agreement itself… . Actual authority is implied when the agent, not the third party, reasonably believes he or she has authority as a result of the action of the principal… An agent has the implied authority to do such acts as are usual, appropriate, necessary or proper to accomplish the purpose and objects of the agency.

The court footnoted the above text with a quote from the RESTATEMENT (SECOND) OF AGENCY § 7 cmt.c:

> It is possible for a principal to specify minutely what the agent is to do. To the extent that he does this, the agent may be said to have express authority. But most authority is created by implication … These powers are all implied or inferred from the words used, from customs and from the relations of the parties. They are described as "implied authority." Both adjectives [express and implied] are to be distinguished sharply from "apparent" ….

ID. at 44 n. 5. In contrast to actual authority, apparent authority has been described as follows:

> Did the third person, because of appearances for which the principal was responsible, believe and have reasonable ground to believe the agent possessed power to act for the principal in the particular transaction? If such third person was, in the exercise of reasonable prudence, justified in believing that the agent

> possessed the necessary authority, the principal is responsible to the third person the same as if the agent possessed all the power he assumed to possess.

DEBYLE V. ROBERTS, 273 WIS. 648, 652-53 (1957). See also, METCO PRODUCTS, INC. V. NLRB, 884 F.2D 156, 160 N.2 (4TH CIR. 1989): "[A]pparent authority can be created by appointing a person to a position … which carries with it generally recognized duties; to those who know of the appointment there is apparent authority to do the things ordinarily entrusted to one occupying such a position… ."

In this case, the record reflects nothing about the reach of Carpenter's express authority and little specific information about his implied authority. As the County points out, the Union presented no direct evidence about Carpenter's (or any steward's) authority when handling individual discipline situations. Instead the Union relies heavily upon the acknowledgement by County Human Resources/Labor Relations Specialist Montgomery, during cross examination, that the Union has a bargaining committee for purposes of negotiations, that AFSCME staff representative Scoon is the chief spokesperson for the Union during collective bargaining negotiations, that he would not have expected Carpenter, "even in this instance," to "have negotiated on behalf of Local 1903," and that Carpenter's presence at the meeting with Besaw was "restricted to his duties as the local Union steward." We are not persuaded from this evidence, all elicited in response to leading questions, that Carpenter lacked actual authority to bind the Union to the LCA or that the County did not reasonably believe Carpenter had that authority. Instead, it appears in context, that Montgomery viewed the term "negotiations" to refer to full scale successor contract collective bargaining, at which Scoon was the chief spokesperson. Montgomery's responses are also consistent with his (erroneous) view that the LCA was not subject to "negotiations." What this testimony does not reveal is anything about what either party considered to be within Carpenter's "duties as the local Union steward."

We conclude from an examination of all the circumstances here that Carpenter probably had actual authority to enter into the LCA on behalf of the Union, and in any event that the County reasonably believed that Carpenter had such authority. As to Carpenter's actual (implied) authority, we note that Carpenter himself believed he had authority to enter into the LCA on behalf of the Union, as he participated fully in the meeting at which the LCA was presented, had every opportunity to contact other Union officials if he was in doubt as to his authority, and signed the LCA above a typewritten line indicating that it was on behalf of the Union. Further, since this record is devoid of any indication to the contrary, Carpenter's view of his authority in situations involving individual discipline is consistent with the general role of a union steward who is handling disciplinary matters. Moreover, the County's experience was that Carpenter commonly and competently represented the Union in disciplinary situations of the nature presented here. These circumstances fall reasonably within the parameters the court laid out in SKRUPKY, *supra*, for concluding that Carpenter had authority to enter into the LCA.

In reaching this conclusion, we do not accept the Union's assumption that an LCA, which resolves an individual situation by carving out a limited exception to one or more

contractual provisions, is tantamount to or indistinguishable from successor contract negotiations, nor is it the same as negotiating a modification to an existing agreement that will apply generally to everyone in the bargaining unit. While a steward may very well lack actual or apparent authority to negotiate for the Union in those broad terms, it would not be uncommon or unreasonable for the steward to have authority to settle an individual issue such as the LCA here. For example, it is well-established that the grievance procedure is part and parcel of the ongoing collective bargaining relationship. SCHOOL DIST. NO. 6, CITY OF GREENFIELD, DEC. NO. 14026-B (WERC, 11/77). It is not uncommon for stewards to represent the Union during the initial steps of a grievance procedure, where a settlement, in effect, may amount to authorizing a singular deviation of some sort from the contract language. If the Union here does not, in fact, grant its stewards that kind of commonplace authority, then it was incumbent upon the Union to make than known at least to Carpenter, if not to the County, and also to include that information in the record.

We also take into consideration that the County acted in reliance upon Carpenter's authority by fulfilling the County's end of the LCA bargain, i.e., returning Besaw to his job instead of terminating him. It was not until some time after Besaw had returned to work and was subsequently terminated for later alleged misconduct that the Union gave the County any reason to doubt the validity of the LCA – another factor that militates in favor of the County here. See ABC OUTDOOR ADVERTISING V. DOLHUN'S MARINE, 38 WIS.2D 457, 461 (1968) ("[I]t is well settled that a principal's failure to repudiate the transaction raises an inference of affirmance of the agent's unauthorized transaction.") [7]

In reaching this conclusion, we have considered but rejected the Union's argument that the County failed to bargain in good faith over the LCA by presenting it and treating it as non-negotiable or as a "take it or leave it" proposition. While Montgomery testified that he viewed the LCA as Besaw's only alternative to termination, and may have presented it that way to Besaw and Carpenter, presenting a proposal as take-it-or-leave-it is not uncommon in labor relations negotiations. The Commission has long held that "good faith" in the conduct of negotiations is a "fact-intensive, highly circumstantial inquiry," in which the Commission examines the "totality of the circumstances" in each case. WASHINGTON COUNTY, DEC. NO. 32185-B (WERC, 1/09) at 15, citing EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05) and CITY OF GREEN BAY, DEC. NO. 18731-B (WERC, 6/83). A statement that a proposal is non-negotiable is certainly one circumstance that would be considered in determining whether or not the party was entering into negotiations in good faith. However, absent further evidence of an actual unwillingness to discuss counter-proposals, such a statement in and of itself would seldom be sufficient to establish a violation of the law. Here it is clear that Carpenter was given an adequate opportunity to reflect upon the LCA's terms and to discuss them with anyone he wished. He did not suggest any changes to the terms or otherwise attempt to negotiate them. The record is therefore insufficient to conclude that the County truly took an intransigent attitude towards the terms of the LCA.

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[7] The record contains no evidence as to when Union officials other than Carpenter learned about the Besaw LCA, nor does the record reveal how long Besaw returned to work before again being terminated. To the extent such evidence might have assisted the Union, we note that it would have been in the Union's possession and incumbent upon the Union to produce it.

We also emphasize that, contrary to the County's arguments, our conclusion in this case is not premised upon Besaw's right or lack of right to select his own representative for purposes of a WEINGARTEN meeting. Our holding that Carpenter had actual or apparent authority to enter into the LCA on behalf of the Union does not rest in any part upon the fact that Besaw selected Carpenter, rather than Scoon or any other Union representative, to accompany him to the meeting. We would have reached the same conclusion if it had been the County rather than Besaw who had chosen to include Carpenter in the situation from the outset.

For the foregoing reasons, the Commission dismisses the allegation that the County committed an independent violation of Sec. 111.70(3)(a)1, Stats., by the manner in which treated Besaw. The Commission holds that the County failed to bargain in good faith by failing to contact the Union about the LCA before offering the LCA to an individual bargaining unit member. However, we also hold that the County did not refuse to bargain in good faith with the Union by entering into the LCA with the Union steward on behalf of the Union, under the facts and circumstances of this case.

Dated at Madison, Wisconsin, this 6th day of October, 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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