

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**JANICE BORKENHAGEN**, Complainant

vs.

**UNIVERSITY OF WISCONSIN SYSTEM and AFSCME COUNCIL 24**, Respondents.

Case 70  
No. 70821  
PP(S)-417

**Decision No. 33334-A**

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**Appearances:**

**Janice Borkenhagen**, 1760 Chapman Street, Beloit, Wisconsin, 53511-3708, appearing on her own behalf.

**Peggy A. Lautenschlager**, Attorney, Bauer & Bach, L.L.C., 123 East Main Street, Madison, Wisconsin 53703, appearing on behalf of Respondent AFSCME Council 24.

**William H. Ramsey**, Chief Legal Counsel, Wisconsin Office of State Employment Relations, 101 East Wilson Street, 4<sup>th</sup> Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of Respondent University of Wisconsin System.

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

On June 16, 2011, Janice Borkenhagen filed a complaint with the Wisconsin Employment Relations Commission (Commission) asserting that her union, Wisconsin State Employees Union, AFSCME Council 24 (Union), violated its duty to fairly represent her and that her employer, University of Wisconsin System (University), violated the collective bargaining agreement between the University and the Union when it imposed discipline on her, including ultimately terminating her employment with the University. On August 18, 2011, the Commission appointed Matthew Greer, a member of its staff, to serve as hearing examiner. On September 8, 2011, Respondents filed their answers and affirmative defenses.

An evidentiary hearing was held on November 3, 2011 at the Commission's offices in Madison, Wisconsin. The proceedings were bifurcated, with the first phase limited to the issue of whether the Union violated its duty of fair representation to Borkenhagen. Borkenhagen and the Union submitted post-hearing written arguments in support of their positions, the last of which was received on February 5, 2012. The University did not submit written arguments.

No. 33334-A

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

### FINDINGS OF FACT

1. Complainant Janice Borkenhagen was employed by Respondent University as a bookstore manager at the University's Rock County campus. She began working in the bookstore in August 2000 and continued until her employment was terminated on June 17, 2010.

2. At all times relevant, Respondent Council 24 and its affiliate Local 2412 (collectively referred to as the Union), served as a labor organization representing a collective bargaining unit that included Borkenhagen. Local 2412's president was Gary Mitchell. Borkenhagen's supervisor was Michael Pierick, the University's Assistant Campus Dean for Administrative Services. Pierick and Mitchell were good friends and each had served as best man at a wedding of the other.

3. At all times relevant, the University and the Union were parties to a collective bargaining agreement containing a grievance procedure culminating in final and binding arbitration. Council 24 staff make the decision as to whether to proceed to arbitration on any particular grievance.

4. Local 2412 represents unit employees in their employment with the University. When a potential employment dispute is raised, Local 2412 assigns a steward to represent the interests of the employee and the Union in the dispute. Stewards are University employees and Union members who are authorized by the Union to represent unit employees in grievance proceedings. As part of their duties, stewards evaluate employee complaints for possible violations of the collective bargaining agreement, draft grievances when a violation is determined to have occurred, and accompany employees in meetings with management.

5. Council 24 employs a staff of field representatives who, as part of their duties, work with local stewards when grievances remain unresolved at the second step of the grievance procedure. Jana Weaver is Council 24's assistant director who evaluates the merits of grievances at later stages of the grievance procedure and decides whether the Union will proceed to arbitration. Decisions not to proceed to arbitration are appealable to Martin Biel, Council 24's executive director.

6. In 2005, Borkenhagen called Local 2412 regarding employment concerns and worked her way through the list of stewards until she reached Local 2412 president Mitchell, who also serves as a steward. Mitchell agreed to meet with Borkenhagen and address her concerns with the University. As part of this representation, Mitchell informed Borkenhagen that he was friends with Pierick.

7. In March 2006, Borkenhagen requested union representation related to various employment complaints she had, including issues related to workplace safety and allegations that Pierick was engaging in workplace harassment against her. Local 2412 vice president Mary Czyszczak-Lyne was assigned to serve as Borkenhagen's steward. Czyszczak-Lyne was Local 2412's most experienced steward and had a car that allowed her to more easily travel from Madison to the Rock County campus to represent Borkenhagen. Czyszczak-Lyne negotiated a potential resolution of the concerns related to workplace safety, but did not to file a grievance related to the alleged harassment by Pierick.

8. Because no grievance was filed related to Borkenhagen's complaint that Pierick was harassing her, Borkenhagen concluded that Mitchell and Czyszczak-Lyne were not fairly representing her and instead were undermining her complaints for the purpose of benefiting Pierick. She also perceived that Czyszczak-Lyne was showing animus towards her by making aggressive and rude comments towards her and misrepresenting her Weingarten rights. In July 2006, Borkenhagen informed Czyszczak-Lyne that Borkenhagen no longer accepted her as steward of her grievances. She also requested that a different steward represent her. The Union declined the request and Czyszczak-Lyne continued to serve as Borkenhagen's steward through Borkenhagen's termination from employment with the University.

9. In June and July of 2006, Borkenhagen complained to Union leaders regarding her concerns with Czyszczak-Lyne's representation and demanded a change of stewards. In response, as a measure to ensure Borkenhagen was receiving fair representation, Council 24 assigned one of its employees, Maggie Merdler, to serve as field representative. In part because Merdler also did not file the harassment grievance or substitute a steward other than Czyszczak-Lyne to represent her, Borkenhagen concluded that Merdler also was not adequately representing her interests.

10. On June 15, 2006, Pierick issued Borkenhagen a written reprimand for not calling in to report that she would be absent for a shift on May 22, 2006; on October 7, 2006, she was issued a one-day suspension for violating a work rule related to document handling; and on November 30, 2006, she was issued a three-day suspension for violating a work rule when she left work to return art supplies to a store in Madison. The Union represented Borkenhagen in each of these disciplines and filed grievances regarding the written reprimand and three-day suspension. The Union negotiated with the University that the three-day suspension would be held in abeyance for one year and, as a result, Borkenhagen did not serve the three-day suspension. Borkenhagen requested that the Union proceed to arbitration on the written reprimand and three-day suspension grievances. In a letter dated January 28, 2008, Jana Weaver informed Borkenhagen that the grievances would not be pursued to arbitration because no wages were lost and because the disciplines were over a year old and eligible to be removed from her personnel file. In a letter dated February 8, 2008, Borkenhagen asked for reconsideration of Weaver's decision and cited her concerns related to the Local's representation and her allegations that Pierick was engaging in workplace harassment against her. In a letter dated February 27, 2008, Biel informed Borkenhagen that he concurred with Weaver's decision not to arbitrate the grievances. Biel's letter also informed Borkenhagen that

the collective bargaining agreement did not contain a grievance process for workplace harassment. The letter directed her to the University's harassment appeal process and the Equal Rights Division of the State's Department of Workforce Development as avenues to pursue a harassment complaint.

11. At all times leading up to her discharge, Borkenhagen continued to request that a harassment grievance be filed on her behalf against Pierick and that a steward other than Czyszczak-Lyne be assigned to represent her.

12. On August 20, 2009, Borkenhagen e-mailed Mitchell complaining that Pierick had breached the collective bargaining agreement by changing her schedule, eliminating overtime, and assigning her work to limited term employees. On August 30, 2009, Mitchell responded that he had "read the facts of your email" but was "unable to find a violation of the Contract to support a grievance." Mitchell also referred Borkenhagen to the Local's website containing the procedure for requesting a steward.

13. On October 7, 2009, Borkenhagen received a one-day suspension<sup>1</sup>; on November 25, 2009, she received a three-day suspension for multiple absences and abuse of sick leave; on March 25, 2010, she received a five-day suspension for violating work rules related to her duties as bookstore manager; and on June 17, 2010, she was terminated from employment with the University for sending an e-mail that violated work rules (collectively referred to below as the "disciplinary grievances"). Czyszczak-Lyne filed grievances on Borkenhagen's behalf alleging that the University lacked just cause to impose any of these disciplines and requesting that Borkenhagen be made whole. The Union offered representation to Borkenhagen in each grievance, but declined to assign a steward other than Czyszczak-Lyne or a field representative other than Merdler to represent Borkenhagen.

14. A grievance meeting with the University regarding Borkenhagen's termination was scheduled for September 7, 2010. In an e-mail dated August 26, 2010, Merdler informed Borkenhagen that she would "represent you to the extent that you will allow." Due to illness, Borkenhagen did not attend the meeting on September 7, 2010 and Merdler offered to reschedule the hearing. The meeting was subsequently rescheduled to October 15, 2010 and in an e-mail dated September 28, 2010, Merdler offered to meet with Borkenhagen prior to the meeting. Borkenhagen responded on the same date requesting a change of stewards, which was again denied by the Union.

15. Each disciplinary grievance identified in Finding of Fact 13 was denied by the University. The denial of the termination grievance was made on January 20, 2011.

16. Jana Weaver evaluated the merits of the grievances identified in Finding of Fact 13 with Merdler as part of the process to determine whether to pursue the grievances to arbitration. Weaver did not discuss with Merdler the friendship between Mitchell and Pierick

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<sup>1</sup> The Record provides no indication of the factual background for the one-day suspension.

and the existence of the friendship did not affect Weaver's decision regarding proceeding to arbitration on Borkenhagen's grievances.

17. In a letter to Borkenhagen dated April 27, 2011, Weaver informed Borkenhagen that the Union concluded that the University had sufficient evidence to support the disciplines imposed and that the Union would not proceed to arbitration over the grievances. The letter informed Borkenhagen of her right to challenge the decision through the Union appeal process which gives employees the right to have the Union's executive director review the decision not to arbitrate. Borkenhagen did not appeal the decision.

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

### CONCLUSIONS OF LAW

1. Unless the Union violated its duty to fairly represent Borkenhagen by refusing to arbitrate her disciplinary grievances, the collective bargaining agreement's grievance procedure culminating in final and binding arbitration is presumed to be the exclusive method for resolving alleged violations of the agreement and the Commission will not exercise its jurisdiction to decide the merits of the alleged contract violation.

2. The Union did not violate its duty of fair representation when it decided not to arbitrate Borkenhagen's disciplinary grievances and thus did not commit an unfair labor practice within the meaning of Sec. 111.84(2)(a), Stats.

3. The Commission will not exercise its jurisdiction pursuant to Sec. 111.84(1)(e), Stats. to decide the merits of the alleged contract violations.

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

### ORDER

The complaint is dismissed.

Dated at Madison, Wisconsin this 27th day of June, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Matthew Greer /s/

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Matthew Greer, Examiner

UNIVERSITY OF WISCONSIN SYSTEM (Borkenhagen)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

The complaint alleges that the University violated the collective bargaining agreement between it and the Union when it disciplined Borkenhagen, including terminating her employment. As part of its jurisdiction over alleged unfair labor practices, the Commission has authority to determine whether a collective bargaining agreement has been violated. *See* Section 111.84(1)(e), Stats. However, where there is a collective bargaining agreement in effect containing a grievance procedure culminating in final and binding arbitration, the grievance procedure is presumed to be the exclusive method for remedying alleged violations of the collective bargaining agreement. University of Wisconsin-Milwaukee (Guthrie), Dec. No. 11457-H (WERC, 5/84), (applying the analysis of Mahnke v. WERC, 66 Wis. 2d 524 (1974)). In such cases, the Commission will not exercise its Sec. 111.84(1)(e), Stats., jurisdiction in favor of the contractual grievance procedure agreed upon by the parties. In this case, there is no dispute that a collective bargaining agreement containing a grievance procedure culminating in final and binding arbitration was in effect at all times relevant. Therefore, under usual circumstances, the Commission would not assert its jurisdiction over the merits of Borkenhagen's contract violation allegations.

However, the complaint also alleges that the Union failed to fairly represent Borkenhagen by not pursuing the disciplinary grievances to arbitration, the final step of the grievance procedure. If the Union violated its duty to fairly represent Borkenhagen in the grievance procedure, there is a sound public policy basis for the Commission to assert its unfair labor practice jurisdiction to decide the merits of the alleged contract violations. Mahnke, *supra*. Therefore, in order for the Commission to proceed to exercise jurisdiction over the contract violations alleged by Borkenhagen, it must first be established that the Union failed to fairly represent her.

A union breaches its duty to fairly represent an employee when its "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Mahnke, *supra*, (adopting and explaining the standard established in Vaca v. Sipes, 386 U.S. 171 (1967)). Such a breach constitutes an unfair labor practice in violation of Sec. 111.84(2)(a), Stats. A complainant carries the burden to establish that the duty was violated and is "required to sustain such burden by a clear and satisfactory preponderance of the evidence." Section 111.07(3), Stats., made applicable to this SELRA proceeding by Sec. 111.84(4), Stats.

The action that is within the statute of limitations and therefore forms the basis of the complaint is the Union's decision not to arbitrate Borkenhagen's disciplinary grievances

referenced in Finding of Fact 13.<sup>2</sup> The last of those disciplines, resulting in Borkenhagen's termination, was effective June 17, 2010 and the Union's decision not to arbitrate the disciplinary grievances was communicated to Borkenhagen in a letter dated April 27, 2011. In her written arguments, Borkenhagen contends that the Union breached its duty of fair representation by acting in both an arbitrary manner and in bad faith when representing her.

### Arbitrary

Where it is alleged that a union acted in an arbitrary manner by not taking a grievance to arbitration, the union does not act arbitrarily so long as it takes into account at least the monetary value of the grievance, the effect of the contract breach on the grievant, and the likelihood of success on the merits of the grievance in arbitration. *Mahnke, supra*. Although no direct evidence was submitted that the Union considered the first two factors, the significant monetary value of the grievances and the adverse effect of the alleged contract breaches on Borkenhagen were obvious. In the absence of contrary evidence, I conclude that the Union inevitably did take those factors into account when determining whether to pursue arbitration and turn to the question of whether the Union appropriately considered the likelihood of success on the merits of the grievances.

Jana Weaver, Council 24's assistant director, made the decision not to arbitrate the grievances identified in Finding of Fact 13, and it is her actions and motivations in making that decision that would constitute a breach of the duty of fair representation. Weaver testified that the "biggest part" of her job involves reviewing grievances to determine whether the Union will proceed to arbitration. As part of that process in discipline grievances like the one at issue here, she reviews the entire disciplinary file including "the discipline letter, any notes, any investigatory notes, statements, et cetera" to determine whether the employer's imposition of discipline met the just cause standard established by the collective bargaining agreement. She also reviews arbitration decisional history to determine whether pursuing arbitration would be fruitful. As it related to the decision not to arbitrate Borkenhagen's disciplinary grievances, Weaver testified that she

reviewed the cases [the grievances referenced in Finding of Fact 13] and I reviewed under the seven tests of just cause and progressive discipline and found that the Employer had cause for these and that due to just cause and, you know, other arbitrations and past experience, that we would not be successful at arbitration, so we would not pursue them.

After reaching this conclusion, Weaver reported to Borkenhagen in the April 27, 2011 letter that she had "found that the employer had sufficient evidence to up hold all the disciplinary actions, including termination due to your willful disregard for the employer's policies, procedures and work rules." This record satisfies me that Weaver properly

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<sup>2</sup> As will be discussed below, many of the facts cited by Borkenhagen to support her complaint occurred outside the one-year statute of limitations applicable to SELRA unfair labor practice complaints.

considered the likelihood of success on the merits of the grievance when deciding not to pursue arbitration. I therefore conclude that the decision not to arbitrate Borkenhagen's disciplinary grievances was not made in an arbitrary manner.

### **Bad Faith**

Many of the facts cited by Borkenhagen to support her conclusion that the Union acted in bad faith occurred more than one year prior to the unfair labor practice alleged in the instant complaint. Section 111.07(14), Stats., provides that the right of any person to proceed on a complaint of unfair labor practices "shall not extend beyond one year from the date of the specific act or unfair labor practice alleged." However, "where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices" evidence of "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period." Local Lodge No. 1424 v. NLRB (Bryan Mfg. Co.) 362 US 411 (1960), adopted by the Commission in CESA No. 4, Dec. No. 13100-E (Yaffe, 12/77), *aff'd* Dec. No. 13100-G (WERC, 5/79), *aff'd* Dec. No. 79 CV 316 (Cir. Ct. Barron 3/81). For the purpose of this decision, facts outside the limitations period will be considered for the limited purpose of shedding light on whether the Union acted in bad faith when it decided not to arbitrate Borkenhagen's disciplinary grievances referenced in Finding of Fact 13 – the unfair labor practice alleged to have occurred within the limitations period.

Establishing that a union acted in bad faith involves an inquiry into the subjective motivation underlying the action at question and requires proof that the union acted or failed to act due to an improper motive. *See* SEIU Local No. 150 v. WERC, 329 Wis.2d 447 (Ct App, 8/10) AT FN. 5, *citing* Trnka v. Local Union No. 688, United Auto., Aerospace Agric. Implement Workers of Am., 30 F.3d 60, 63 (7<sup>th</sup> Cir. 1994) and Neal v. Newspaper Holdings, Inc., 349 F.3d 363 (7<sup>th</sup> Cir. 2003). Borkenhagen argues that the Union acted out of an improper motivation to help her supervisor in a way that undermined her rights under the collective bargaining agreement.

Underlying Borkenhagen's theory that the Union acted in bad faith is the undisputed fact that her supervisor, Pierick, and the president of her local, Mitchell, were good friends. From this fact, Borkenhagen infers that Mitchell was motivated to undermine her complaints against Pierick and, as a result of this motivation, did not fairly represent her by not filing grievances on her behalf and ensured that future representation would be similarly biased against her interests and in favor of Pierick. Specifically, she concludes that this improper motive extended to later representation by Czyszak-Lyne and Merdler. Essentially, Borkenhagen contends that this improper motive extended to all levels of the Union organization at both the Local and Council 24 levels and ultimately influenced Weaver's decision not to arbitrate her disciplinary grievances. For the reasons that follow, I reject Borkenhagen's contention.

Borkenhagen's inference that Mitchell was motivated by his friendship with Pierick to undermine her interests is not supported by the record. Mitchell testified that he did not



recommend to the Union that Borkenhagen's grievances should not be taken seriously in an effort to continue his friendship with Pierick. He also testified that he never spoke to Pierick regarding Borkenhagen's complaints against him. Given this un rebutted evidence, I conclude that Mitchell was not motivated to undermine Borkenhagen's interests out of a motivation to help Pierick.

I am also unable to conclude that Czyszak-Lyne was motivated to undermine Borkenhagen's interests in favor of Pierick. Borkenhagen infers from her observations that Czyszak-Lyne undermined her interests and acted in favor of Pierick at the request of Mitchell. Borkenhagen testified that Czyszak-Lyne's demeanor changed between two grievance meetings in 2006. During the first meeting, Borkenhagen thought that Czyszak-Lyne was "forceful and rude even" to Pierick. Subsequent to that meeting, Borkenhagen perceived that Czyszak-Lyne's aggressive advocacy diminished to the point that Borkenhagen believed that Czyszak-Lyne "accepted all the terms that Mr. Pierick proposed for the settlement of my complaints, even though they were the most oppressive and punitive and wasteful measures imaginable." Borkenhagen also testified that, in her view, Czyszak-Lyne misrepresented her Weingarten right to representation and forcefully told her to "shut up and sit down" and answer Pierick's questions. Borkenhagen concluded that Czyszak-Lyne had spoken to Mitchell and inferred that she had received instructions to support Pierick's position and undermine Borkenhagen's complaints against him. However, other than Borkenhagen's perception of Czyszak-Lyne's change in attitude, there is no evidence that Czyszak-Lyne was motivated to undermine Borkenhagen's complaints in furtherance of an improper motive to assist Pierick. I therefore conclude that she was not so motivated.

Merdler is further removed from the source of the alleged improper motive. Merdler was an employee of Council 24 and not part of the Local. She was brought in to ensure the adequacy of the Local representation after Borkenhagen complained to Council 24 regarding Mitchell and Czyszak-Lyne. Despite Merdler's independence from the Local, Borkenhagen concluded that because Merdler did not insist on filing the grievances Borkenhagen requested and did not substitute a different steward for Czyszak-Lyne, she had been improperly influenced by Mitchell and Czyszak-Lyne to undermine her interests. However, Merdler testified that because of Borkenhagen's allegations regarding the improper motive, she went "above and beyond" the Union's rules in representing Borkenhagen. Based on this testimony and the absence of contrary evidence, I conclude that Merdler was not improperly motivated to undermine Borkenhagen's interests.

Finally, even assuming that Mitchell or Czyszak-Lyne or Merdler were motivated to undermine Borkenhagen's grievances in an effort to help Pierick, there is no evidence that they had any influence on Weaver's ultimate decision not to arbitrate the grievances. When considering that decision, Weaver met with Merdler to evaluate the case file. Merdler testified that she did not have any conversation with Weaver regarding the friendship between Mitchell and Pierick. She further testified that because of Borkenhagen's complaints regarding the relationship between Mitchell and Pierick, Merdler treated the situation as if "you're coaching your own kid...making sure you're following the steps, making sure you're going and

doing...the right thing.” Weaver also testified that she did not talk to Mitchell about Borkenhagen’s disciplinary grievances and that she and Merdler did not discuss the friendship between Mitchell and Pierick when deciding not to arbitrate. These facts support a conclusion that the decision not to arbitrate Borkenhagen’s disciplinary grievances was not made in furtherance of an improper motivation to undermine Borkenhagen’s interests in favor of Pierick.

**Conclusion**

Because Borkenhagen failed to establish that the Union breached its duty of fair representation, I have dismissed the complaint against the Union. Because the Commission will not assert jurisdiction over a breach of contract claim when that claim is covered by a grievance procedure culminating in arbitration when and the Union does not breach its duty of fair representation as to said claims, I dismiss the complaint as to the University as well.

Dated at Madison, Wisconsin this 27th day of June, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Matthew Greer /s/

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Matthew Greer, Examiner