STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CARMEN J. BERTELSEN, Complainant,

vs.

PIERCE COUNTY NURSES ASSOCIATION, LOCAL 901 OF THE LABOR ASSOCIATION OF WISCONSIN, INC. and PIERCE COUNTY, Respondents.

Case 155
No. 71700
MP-4728

DECISION NO. 33980-B

Appearances:

Attorney Jennifer A. Nodes, Best & Flanagan, LLP, 225 South Sixth Street, Suite 4000, Minneapolis, Minnesota 55402, appearing on behalf of the Complainant Carmen J. Bertelsen.

Attorney Carol Nolan Skinner, Skinner and Associates, 212 Commercial Street, Hudson, Wisconsin 54016, appearing on behalf of the Labor Association of Wisconsin, Inc. and its affiliate Pierce County Nurses Association, Local 901.

Attorney Mindy J. Dale, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Pierce County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 3, 2012, Complainant Carmen J. Bertelsen filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging that Pierce County had violated §§ 111.06(1)(f), 111.84(1)(e) and 111.70(3)(a)1 and 5, Stats., by discharging her without just cause and that the Labor Association of Wisconsin, Inc. and its affiliate Pierce County Nurses Association Local 901 (hereinafter collectively referred to as the "Union") had violated their duty to fairly represent her in her suspension grievance.

On November 2, 2012, Steve Morrison, an Examiner on the Commission's staff was appointed to conduct a hearing and to make and issue appropriate findings, conclusions and

orders. A notice of hearing on the complaint, which scheduled the hearing dates for January 15 and January 16, 2013, was issued on November 2, 2012.

On November 20, 2012, Pierce County and the Union both filed answers and motions to dismiss alleging, *inter alia,* that the complaint had failed to state a cause of action. Bertelsen filed her written response in opposition to the motions to dismiss on December 11, 2012. On January 2, 2013, Examiner Morrison converted the hearing date of January 15, 2013 to a prehearing conference for the purpose of allowing the parties to present arguments on their respective motions. The prehearing conference was transcribed. Following the prehearing conference, the parties filed briefs in support of their positions, the last of which was received on February 21, 2013. The filing of responsive briefs was reserved by the parties. On March 3, 2013, Examiner Morrison was notified of the parties' decisions not to file responsive briefs.

On April 8, 2013, Examiner Morrison issued an Order Granting In Part and Holding in Abeyance in Part Motions to Dismiss. Examiner Morrison dismissed Bertelsen's §§ 111.06(1)f and 111.87(1)e, Stats., claims, but allowed Bertelsen's claim that the Union had breached its duty of fair representation relative to her 3-day suspension grievance and her claim that the County had violated the just cause provisions of the collective bargaining agreement to proceed to hearing.

Due to the retirement of Examiner Morrison, the case was reassigned to Lauri A. Millot who, on June 12, 2013, was formally appointed to make and issue findings of fact, conclusions of law and order as provided in § 111.07(5), Stats. Hearing on the complaint was held on August 15, 2013 in Ellsworth, Wisconsin. Following hearing, Bertelsen filed a closing statement, Respondents filed a response to Bertelsen's statement and Bertelsen filed a reply statement whereupon the record was closed on October 9, 2013.

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

FINDINGS OF FACT

1. Complainant Carmen J. Bertelsen was employed by Respondent Pierce County as a public health nurse in the Public Health Department. She began her employment with the County in June, 2008, and continued until her employment was terminated effective February 24, 2012.

2. Respondent Labor Association of Wisconsin, Inc. and its affiliate Pierce County Nurses Association Local 901 (hereinafter collectively referred to as the "Union") served as a labor organization representing a collective bargaining unit which included Bertelsen. At all times relevant herein, Local 901 president was Diane Robinson; Labor Association of Wisconsin, Inc.

labor consultant was Dan Kraschnewski; and Labor Association of Wisconsin, Inc. president was Ben Barth.

3. Respondent Pierce County (hereinafter "County") is a municipal employer which operates a public health department in which Bertelsen was employed. At all times relevant herein, Sue Galoff held the position of Pierce County public health director / health office and was Bertelsen's supervisor. The County administrative coordinator was Jo Ann Miller and corporation counsel was Brad Lawrence.

4. The Union and the County were parties to a 2011-2012 collective bargaining agreement. The agreement provided in pertinent part that unresolved grievances could be appealed to arbitration. It further contained a discipline clause which stated that, "[n]o employee shall be terminated, suspended, demoted or otherwise disciplined except for just cause."

5. On December 27, 2011, Galoff met with Bertelsen and reviewed a list of concerns regarding Bertelsen's performance. Galoff reviewed 14 instances of performance deficiencies between November 6, 2011 and December 16, 2011. Galoff summarized that Bertelsen appeared distracted and required review of procedures, processes and directions for things that were familiar to other employees and had previously been explained to Bertelsen; appeared stressed; and had inaccurately and incompletely followed up on disease reporting which she had correctly completed in the past and had difficulty accurately recording appointments and events. Bertelsen was not disciplined for these concerns.

6. On January 26, 2012, Bertelsen was issued a 3-day disciplinary suspension for violation of work rules and / or protocols described as follows:

. . .

> This letter is notice that you are being issued a three day suspension for the following violations of work rules and/or protocols: a parent complaint related to Lyme Disease follow-up on 12/30/2011, a Reproductive Health client complaint on 1/12/2012, an unacceptable method of correcting three December 2011 billing logs giving the appearance of fraud, and an ongoing failure to follow established protocol for providing post-partum contraceptives to Prenatal Care Coordination clients. An investigation of these issues revealed that in each situation appropriate procedures, protocols, and/or professional practice standards were not followed. On Friday, January 20th, 2012, we met and you provided information in response to these violations. I have considered the information you provided.

> A written warning was previously issued on September 13, 2011, in part, for not completing work in an accurate manner. Yet, the ongoing pattern of not completing work in an accurate manner according to protocols has continued. Therefore, a three day suspension without pay is being imposed. This suspension will be served on January 31, February 1, and February 2, 2012.
>
> Further instances of failures to appropriately complete work in compliance with procedures, protocols, or professional practice standards will result in further disciplinary action up to and including termination. Pursuant to the *Pierce County Community Health Association* collective bargaining agreement, Art. XV, DISCIPLINE, a copy of this notice is being provided to the union.

. . .

7. Bertelsen communicated to the Union that she wanted to file a grievance concerning the January 26, 2012 3-day suspension. Kraschnewski telephoned Bertelsen on February 1, 2012, and asked that she provide him with background information and her view of the discipline. Bertelsen prepared a 12-page compilation of documents and forwarded them to Kraschnewski via facsimile on February 3, 2012. Included in that packet was a detailed rebuttal to each of the four charges contained in the January 26 discipline. Kraschnewski reviewed the documents from Bertelsen, contacted Barth and requested that Barth prepare the grievance. Kraschnewski requested assistance from Barth because this case was "more involved" than those Kraschnewski had dealt with in the past.

8. On February 3, 2012, Galoff issued Bertelsen the following letter:

. . .

> This letter is notice that disciplinary actions are a matter to be discussed between the employee and supervisor only. It is inappropriate for you to discuss these matters with other employees who may or may not have been involved in identifying the disciplinary issue. Thorough investigations of these incidents leading to disciplinary actions have been conducted.
>
> Further instances of discussing disciplinary matters with others will result in additional disciplinary actions up to and including termination.

. . .

9. On February 10, 2012, Bertelsen signed and filed grievance No. 2012-2D alleging that her January 26, 2012 3-day suspension was issued without cause and in violation of Article XIV of the collective bargaining agreement.

10. On February 17, 2012, at 10:00 a.m., a first step grievance meeting was convened to discuss grievance No. 2012-2D. Present at the meeting was Bertelsen, Galoff, Kraschnewski and County Public Health Department Business Manager Becky Johnson. At Kraschnewski's request, Galoff reviewed the specific incidents giving rise to the disciplinary action. Kraschnewski and Bertelsen asked questions and were provided copies of applicable County policies. Bertelsen admitted during the meeting to the behaviors giving rise to the 3-day disciplinary suspension, but justified her actions articulating her belief that the policies were inaccurate and / or that a different County policy guided her actions and therefore discipline was unwarranted. She further alleged differential treatment. This was the first time Kraschnewski had met Bertelsen.

11. During the February 17, 2012 meeting to address grievance No. 2012-2D, Galoff informed Kraschnewski that the County wanted to meet on another issue. Bertelsen and Kraschnewski caucused and they reconvened at 11:35 a.m. for a second meeting with Galoff and Johnson. Galoff reviewed four new performance concerns relating to Bertelsen and provided Bertelsen and Kraschnewski with documentation and policies. Bertelsen and Kraschnewski asked questions and discussed the merits of the new concerns. Galoff indicated to Bertelsen and Kraschnewski that she [Galoff] would be further investigating the four new performance concerns.

12. Galoff denied grievance No. 2012-2D on February 21, 2012.

13. On February 22, 2012 the County issued Bertelsen a letter informing her of a pre-disciplinary meeting to address the new performance concerns raised during the second February 17, 2012 meeting. The pre-disciplinary meeting was scheduled for February 24, 2012.

14. Following February 17, 2012 and before the February 24, 2012 pre-disciplinary meeting, Kraschnewski spoke with Local 901 President Robinson regarding Bertelsen's 3-day suspension grievance. This conversation occurred in person and was not scheduled in advance. Kraschnewski reviewed generally the County's concerns, including the County's assertion that complaints had been raised by other nurses regarding Bertelsen's work, and asked Robinson her opinion. Robinson, also a County nurse, affirmed the County's assertions as to Bertelsen's performance deficiencies and admitted that she [Robinson] had voiced concerns with Bertelsen's performance to supervision in the past. Present during that conversation was another County nursing employee who served on the negotiating team for Local 901 who concurred with Robinson's conclusions regarding Bertelsen.

15. At 7:22 a.m. on February 23, 2012 Kraschnewski responded to a letter from Bertelsen's husband, Alan Bertelsen. Mr. Bertelsen had alleged that Bertelsen had been subject to discrimination based on age and stated that she wanted to go to arbitration. Kraschnewski informed Mr. Bertelsen that he would "do his best to represent Carmen," that he "did speak to other members of the nurses group and they will not back Carmen as they have seen problems with her work as well," and that Bertelsen had admitted repeated mistakes. Kraschnewski concluded stating that "there was never any indication of age being an issue, only job performance and following policies and procedures."

16. On February 23, 2012, Kraschnewski and Galoff spoke by telephone, sometime between 7:00 a.m. and 3:00 p.m., regarding the new concerns raised by the County at the February 17, 2012 meeting. Kraschnewski asked Galoff what level of discipline the County was considering. Galoff told Kraschnewski that the County was considering termination. Because Kraschnewski believed that Bertelsen had admitted to the conduct identified in the January 26, 2012 discipline and the new issues to which the County was pursuing discipline, Kraschnewski did not believe there was a high probability that Bertelsen's grievance would be successful. Kraschnewski asked Galoff if the County would consider a release agreement in lieu of Bertelsen's termination. Galoff did not have the authority to respond, but indicated she would speak with Miller. At 4:29 p.m. Galoff sent Kraschnewski an email with a draft of the release and resignation agreement attached.

17. On February 24, 2012, at 1:04 a.m., Bertelsen sent Kraschnewski an email asking that he bring the policies that Galoff had given him during the February 17, 2012 meeting to the scheduled February 24, 2012 meeting. Bertelsen offered her view that "It looks like Sue is the judge, jury and executioner on the first grievance." In the same email, Bertelsen asked Kraschnewski, "[c]an't we file a grievance on these last issues? If not, why not? I would like to continue with the grievance on the first set of issues that Sue rejected as well."

18. When Kraschnewski arrived for the February 24, 2012 pre-disciplinary meeting, Galoff provided him copies of a Release and Resignation Agreement. Galoff had sent Kraschnewski the Agreement the preceding day, but he did not see it before he arrived that morning. Before the pre-disciplinary meeting, Kraschnewski met with Bertelsen and gave her a copy of the proposed release and resignation agreement. This was the first time the release and resignation agreement was discussed with Bertelsen. Kraschnewski explained the terms of the agreement to Bertelsen and informed her that it was his understanding that the County intended to terminate her if she did not agree to the release and resignation agreement.

19. The pre-disciplinary meeting was convened with Bertelsen, Kraschnewski, Galoff, County Administrative Coordinator Miller and County Corporation Counsel Brad Lawrence present. There was little discussion of the four new alleged disciplinable offenses raised by the County during the second February 17, 2012 meeting. Rather, the meeting focused on the content of the release and resignation agreement. After the agreement was reviewed in its entirety,

Bertelsen requested and was granted until 9:00 a.m. on Monday, February 27, 2012, to decide whether she would sign the agreement. Kraschnewski signed the agreement on February 24, 2012, and explained to Bertelsen that her signature was still required to validate the agreement. Bertelsen was placed on administrative leave with pay and her personal items were retrieved and given to her.

20. Bertelsen telephoned Kraschnewski at 5:30 p.m. on the evening of February 24, 2012 regarding the content of the release and resignation agreement. Bertelsen informed Kraschnewski that she wanted payment for her unused and accrued sick leave included in the agreement. Kraschnewski told Bertelsen he would telephone Miller on Monday, February 27, 2012, before the 9:00 a.m. deadline to discuss adding payment for sick leave to the agreement.

21. Bertelsen sent Kraschnewski two emails regarding the content of the release and resignation agreement before the February 27, 2012 signing deadline. On Sunday, February 26, 2012, at 9:33 p.m., Bertelsen emailed Kraschnewski pointing out that the agreement was missing her accumulated sick leave, one floating holiday and that some of her personal items were missing. She also asked Kraschnewski to contact Galoff and notify her [Galoff] how to document Bertelsen's activity with a client before the February 24, 2012 meeting; of an upcoming speakers schedule on September 27, 2012; to cancel use of the County car on March 1, 2012; and to send a membership list to a contact.

22. Bertelsen sent a second email, at 7:06 a.m. on Monday, February 27, 2012, which read in its entirety, "[a]lso, I will need all my files; especially my insurance information as well." Kraschnewski did not respond to Bertelsen's emails.

23. Kraschnewski telephoned Miller just after 8:00 a.m. on Monday, February 27, 2012, regarding Bertelsen's concerns and the additional items Bertelsen was requesting for inclusion into the Agreement.

24. Before 9:00 a.m. on February 27, 2012, Bertelsen and her husband met with Miller and Lawrence to review the revised release and resignation agreement. This was an impromptu meeting. Miller explained to Bertelsen that she was not eligible for a sick leave payout. Miller made handwritten modifications to the release and resignation agreement, she and Bertelsen initialed the new language, and Bertelsen signed the modified release and resignation agreement which provided in relevant part:

…

> This Release and Resignation Agreement is hereby entered into by and among Pierce County ("Employer"), Pierce County Nurses Association, Local 901 of the Labor Association of Wisconsin, Inc. ("Association"), and Carmen Bertelsen ("Employee"). This

Agreement is voluntarily entered into to resolve all issues arising out of the employment and separation from employment of Employee.

This Agreement is entered into by the parties in a mutual effort to avoid potential litigation for claims arising out of Employee's separation from employment that could be asserted under the Wisconsin Fair Employment Act, Title VII of the Civil Rights Act (42 U.S.C. 2000e) including rights arising under the Civil Rights Act Amendments of 1991, the Employee Retirement Income Act (ERISA), Sec. 102.35,Wis. Stats., the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the Fourteenth Amendment or any other provision of the United States Constitution, federal law, Wisconsin Statute, personnel policy, individual employment agreement or collective bargaining agreement.

This Agreement is not to be construed by any person, administrative agency or court of law to be an admission of liability for any claim released and discharged by its terms.

…

1. RESIGNATION. Employee hereby resigns her position with the Employer effective March 2, 2012. Employee agrees that, by resigning her employment, she is waiving any and all employment or re-employment rights with the Employer. Employee's personnel file shall reflect that she resigned.

2. COMPENSATION & BENEFIT ACCURALS. (sic) Parties agree that Employee is on paid administrative leave through her resignation date. Employer shall pay Employee for

7 floating holidays JM CB [handwritten insertions by parties initialed by Bertelsen and Miller]

28 hours vacation and 63 hours of accrued vacation on the next regular payroll date no later than two weeks after the Effective Date, less applicable taxes and withholdings. This payment constitutes a compromise figure and should be considered wages. This represents a full and complete settlement of all amounts due

and owing Employee and Employee shall receive no additional payouts for vacation, sick leave accrual, or other paid time.

7+28+63=98 [refers to total number of hours to be paid]

…

14. TIME TO EXECUTE AGREEMENT. Employee acknowledges and understands that she has been advised that, under the Older Workers Benefit Protection Act, she has twenty-one (21) days in which to consider this Release and Separation Agreement to determine whether to execute this Agreement. Employer encourages consultation with an attorney and / or advisors of Employee's choice regarding execution of this Agreement.

15. REVOCATION. Employee understands that she has the right to revoke this Agreement if she does so within seven (7) calendar days after execution.

16. REPRESENTATION BY ASSOCIATON.

a. The Employee and the Association agree not to file any grievances with respect to the Employee's employment with the Employer.

b. The Association signs this agreement only as to the extent this agreement discusses rights covered under the Collective Bargaining Agreement between Pierce County and the Association, and any related state or federal laws enforcing the same. The Association's signature does not indicate any opinion by its representatives, agents, or employees regarding the rights Association Employee may have under any state, federal or local law prohibiting discrimination on the basis of age, ancestry, sex, race, religion, disability, creed, national origin, marital status, sexual orientation, handicap, or other protected class, or which prohibit retaliation in any way related to the filing of such a claim. The Association nor its representatives, agents, or employees any representation by their signature of Employee's rights under any such claim. (sic)

> c. Employee acknowledges that the Association has met its Duty of Fair Representation to her in that the Association has represented her interests fairly, impartially and without discrimination.
>
> d. Employee further states and agrees that she has read this Resignation Agreement, that she has had the opportunity to have it fully explained to her by the Association or other representative or advisor of her choice, that she fully understands its final and binding effect, and that the only promises made to her to sign this agreement are those stated in this agreement, and that she is signing this agreement voluntarily.

…

[Handwritten insertions in italics.]

25. At the February 27, 2012 impromptu meeting, Bertelsen again questioned her termination commenting something to the effect, "I still don't know why all of this is happening to me." Miller produced a large file of documentation purporting to support the termination and told Bertelsen "here's everything" to which Bertelsen did not respond.

26. On March 5, 2012, Bertelsen sent the County a letter "revoking" the release and resignation agreement.

27. On March 6, 2012, Galoff terminated Bertelsen via the following letter:

…

> Pierce County has received your letter dated 3/5/12 to revoke the release and resignation agreement. On behalf of Pierce County, this letter is to inform you that your employment with the Public Health Department is being terminated effective February 24, 2012 as the result of your inability to satisfactorily and consistently perform the essential functions of your job as Public Health Nurse.
>
> You will receive payment for wages through February 24, 2012. This paycheck will be sent to you at the address above via US mail.

…

Kraschnewski was copied on this letter and received same after March 6, 2012. Kraschnewski did not initiate contact with Bertelsen nor did Bertelsen attempt to contact Kraschnewski after she received the March 6, 2012 termination letter.

28. Bertelsen did not inform Kraschnewski or the Union that she revoked the modified release and resignation agreement. Bertelsen did not contact Kraschnewski or the Union by telephone or email to advance grievance No. 2012-2D to the next step in the grievance process.

29. Bertelsen did not file a grievance or request that the Union file a grievance on her behalf relating to her termination.

30. Sometime between February 27, 2012 and March 5, 2012, Bertelsen engaged the services of a personal attorney. Pursuant to advice from this attorney, Bertelsen did not contact Kraschnewski or the Union.

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

CONCLUSIONS OF LAW

1. Complainant, Carmen Bertelsen, is a "municipal employee" within the meaning of § 111.70(1)(i), Stats.

2. Respondent Labor Association of Wisconsin, Inc., and its affiliate Pierce County Nurses Association Local 901 are "labor organizations" within the meaning of § 111.70(1)(h), Stats., and, at all times material hereto, have been represented by Dan Kraschnewski and Ben Barth.

3. Respondent Pierce County is a "municipal employer" within the meaning of § 111.70(1)(j), Stats.

4. Complainant Carmen J. Bertelsen has not established, by a clear and satisfactory preponderance of the evidence, that Respondent Labor Association of Wisconsin, Inc. and its affiliate Pierce County Nurses Association Local 901 violated their statutory duty of fair representation toward Bertelsen in the manner in which they processed grievance No. 2012-2D relating to her 3-day suspension and, therefore, Respondent Labor Association of Wisconsin, Inc. and its affiliate Pierce County Nurses Association Local 901 have not violated § 111.70(3)(b)1, Stats.

5. Inasmuch as the 2011-2012 collective bargaining agreement between the Union and the County provides for arbitration of disputes and that contractual procedure has not been exhausted, the Examiner will not assert the Commission's jurisdiction over the allegation that the

County violated the just cause provision of the 2011-2012 collective bargaining agreement when it terminated Complainant Carmen J. Bertelsen and thereby committed a prohibited practice within the meaning of § 111.70(3)(a)5, Stats., and derivatively § 111.70(3)(a)1, Stats.

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 Rhinelander, Wisconsin, this 27th day of December 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By:

Lauri A. Millot, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint contends that that Labor Association of Wisconsin, Inc. and its affiliate Pierce County Nurses Association Local 901 violated § 111.70(3)(b)1, Stats., when it failed to process grievance No. 2012-2D and therefore breached its duty of fair representation. The complaint does not allege a violation by the County as it relates to Bertelsen's 3-day suspension.

The complaint contends that the County violated §§ 111.70(3)(a)5 and 111.70(3)(a)1, Stats., by terminating Bertelsen on February 24, 2012. The complaint does not allege a violation of § 111.70(3)(b)1, Stats., by the Union as it relates to the Bertelsen's termination.

Alleged Violation of § 111.70(3)(b) 1, Stats., Against the Union

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)(adopting Vaca v. Sipes, 386 U.S. 171, 190 (1967)). A complainant carries the burden to prove a violation of the duty of fair representation and must do so by a "clear and satisfactory preponderance of the evidence." § 111.07(03), Stats. Discriminatory action, bad faith and arbitrary conduct form "three separate and distinct possible routes by which a union may be found to have breached its duty." SEIU Local No. 150 v. WERC, 328 Wis.2d 447, ¶37 (2010), citing Black v. Ryder/P.I.E Nationwide, Inc., 15 F.3d 573 (6th Cir. 1994).

Bertelsen does not argue that the Union acted in a discriminatory manner or was guilty of bad faith. Rather, Bertelsen asserts the Union acted arbitrarily in violation of the third prong of the fair representation analysis. A union's actions are arbitrary only if, after considering the facts of the case, they are "so far 'outside a wide range of reasonableness' as to be irrational." Id. at ¶22. Acts of omission not intended to harm a union member may be so egregious, so far short of minimum standards of fairness to the employee, and so unrelated to legitimate union interests as to be arbitrary. Id.at ¶21, *citing* Coleman v. Outboard Marine Corp., 92 Wis.2d 565 (1979). Omissions and unintentional acts may be considered arbitrary if they (1) display reckless disregard for the right of the individual employee, (2) severely prejudice the injured employee, and (3) the policies underlying the duty of fair representation – those being a union's need to be able to screen meritless grievances and to allocate resources – would not be served by shielding the union from liability in the circumstances of the particular case. Id. at ¶21.

> It is well established that 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.

Id. at ¶22.

A union has a great deal of latitude when deciding if it will file and process a grievance through arbitration. Mahnke, supra at 531. In Vaca, the Supreme Court "left no doubt that a union owes its members a duty of fair representation, but that option also makes it clear that the union may exercise discretion in deciding whether a grievance warrants arbitration. Even if an employee's claim has merit, a union may properly reject it unless its action is arbitrary or taken in bad faith … ." Id., *citing* Moore v. Sunbeam Corp., 459 F.2d 811, 820 (7th Cir. 1972).

I start by noting that Bertelsen executed the release and resignation agreement on February 27, 2012 and then revoked it on March 5, 2012. Bertelsen, upon the advice of her counsel, did not inform Kraschnewski by email, telephone or regular mail that she had revoked the agreement. The County provided Kraschnewski a copy of Bertelsen's termination letter of March 5, 2012. Since neither Kraschnewski nor the Union had the opportunity to assist Bertelsen post February 27, 2012, I will therefore focus solely on the Union's actions up to February 27, 2012.

The evidence establishes that when Kraschnewski first learned of Bertelsen's situation on or about February 3, 2012, he asked her to compile and forward background information. It is clear that Kraschnewski reviewed the 12 pages of materials she prepared because he then sought assistance from his supervisor asking Barth to prepare the grievance. Kraschnewski's request for assistance was reasonable given his limited experience and the multiple issues involved in Bertelsen's discipline.

Kraschnewski attended the February 17, 2012 step one grievance meeting with Bertelsen and solicited information from Galoff regarding Bertelsen's discipline. Kraschnewski attended the February 17, 2012 meeting with Bertelsen, listened to what was alleged, and listened to what the County had to offer as far as evidence in support of the allegations. Kraschnewski requested and reviewed copies of the policies that the County relied upon. Kraschnewski spoke to Bertelsen both before and after the meeting and listened to Bertelsen's defenses. The record establishes that Bertelsen and Kraschnewski left the February 17, 2012 meeting having reached vastly different conclusions. Kraschnewski believed the County's accusations had been validated:

> … because Carmen had basically – actually because she had admitted to every one of them. Went right down the list and she would admit to having done it the way the County said she had done, but then she would try to justify why she did it the way she did it, even though it was not in conformity with existing policy. And she – she at one point would – I have a master's degree or I have two

> master's degrees or whatever she said she had, and then she would go on and say I know better than everyone. She threw out the idea the other nurses didn't – wouldn't back her up because they were jealous of her education and it didn't surprise her that they wouldn't back her up.
>
> But the fact was that she admitted to what the County was alleging.
> …

Tr.81-82.

Complainant reached a different conclusion:

> Q: Ms. Bertelsen, you have been present during the testimony of Mr. Kraschnewski, and you heard him testify to the fact that you admitted violations on the 17th. Was that your understanding of what took place?
>
> A: No.
>
> Q: What's your understanding?
>
> A: I admitted that I did those things but I did them according to policy, and my impression was that the people in the room were unaware of the policies.

Tr.110-111.

After the February 17, 2012 meeting, Kraschnewski interviewed Local 901 President Robinson and another public health department employee who served on the Local's negotiating committee. Kraschnewski questioned Robinson generally and specifically asked her if the County's claims that other public health department employees had reported concerns to management was accurate. Robinson not only confirmed the County's assertion that coworkers had complained to management regarding Bertelsen's performance, but she disclosed that she herself had concerns with Bertelsen's performance and that she [Robinson] had reported those concerns to a supervisor. Kraschnewski reasonably inquired of the Local president to gain her perspective relative to Bertelsen's discipline, as well as to ascertain whether there was credibility in the County's assertion that Bertelsen's peers had complained about her performance.

Bertelsen asserts that Robinson was "not a good source" and that Kraschnewski would have obtained better information had he spoken with "Sue". There is no evidence in the record which suggests that Bertelsen ever informed Kraschnewski that "Sue" would be a good witness or

whether "Sue" had any beneficial information to relate to Kraschnewski to assist in his investigation. Moreover, her criticism of Robinson is understandable since she was critical of Bertelsen. A union's conduct is not arbitrary when it fails to conduct interviews that would have provided no beneficial information. SEIU Local No. 150 v. WERC, 328 Wis.2d. 447, ¶53 (2010). Further, when investigating a grievance and deciding whether or not to advance the grievance, SEIU does not have an absolute duty to interview all those who may have relevant information. Id. See, generally, City of Madison, Dec. No. 30789-A (Emery, 7/04); *aff'd in relevant part*, Dec. No. 30789-B (WERC, 10/04).

Grievance No. 2012-2D was denied by Galoff on February 21, 2012. To advance a grievance from step one to step two, the grievance "shall be presented to the Administrative Coordinator who shall meet with the grievant and Association."

There is no question that Bertelsen broached the subject of arbitration with Kraschnewski, but the evidence establishes that Bertelsen abandoned advancing grievance No. 2012-2D twice, first when the release and resignation agreement was presented and, second, when she elected to cut off communication with Kraschnewski. Bertelsen mentioned and / or discussed arbitration with Kraschnewski three times before February 24, 2012. The first time was in person on February 17, 2012, the second was in an email dated February 23, 2012, and the third was in an email sent at 1:06 a.m. on February 24, 2012, before the pre-disciplinary meeting wherein she indicated to Kraschnewski that she wanted to proceed in the grievance process with grievance No. 2012-2D and that she wanted to file a grievance over "the new issues." These communications preceded the presentation of the release and resignation agreement and the news that the County intended to terminate her employment. From that point on, the nature of the communications between Bertelsen and Kraschnewski changed and focused on the content of the release and resignation agreement.

Once Bertelsen learned that the County intended to terminate her, her attention shifted from defending the individual performance deficiencies and the processing of grievance No. 2012-2D to negotiating for better terms in the release and resignation agreement. Bertelsen communicated with Kraschnewski three times between the meeting on February 24, 2012 and February 27, 2012. Those communications were initiated by Bertelsen and addressed leave balances in the agreement, client and schedule information that Galoff would need to take care of due to Bertelsen's resignation, and collecting her personal files that were located in her County office. Bertelsen did not mention arbitration or her desire to pursue grievance No. 2012-2D to the next step in the grievance process after she was presented with the release and resignation agreement on February 24, 2012.

Kraschnewski reviewed the entire content of the release and resignation agreement with Bertelsen, and Kraschnewski and Bertelsen met with County officials. Bertelsen, Kraschnewski, Galoff, and Miller reviewed the release and resignation agreement and discussed its content. Little time was expended addressing the four performance deficiencies presented to Bertelsen and

Kraschnewski on February 17, 2012, since the release and resignation agreement was a settlement offer that included a clause prohibiting Bertelsen from filing any grievances with respect to her employment. Bertelsen understood the content of the agreement. Bertelsen requested time to discuss the agreement with her husband and was provided until Monday morning, February 27, 2012, at 9 a.m.

Bertelsen finds fault in Kraschnewski's decision to sign the agreement on February 24, 2012, claiming it is evidence he was refusing to represent her since he wasn't coming back for the "Monday meeting." When the February 24, 2012 meeting concluded, there was no meeting scheduled for Monday morning. Bertelsen had until Monday at 9 a.m. to decide if she was going to sign the settlement agreement. Kraschnewski testified that he signed the Agreement on the 24th because he didn't want the absence of his signature to cause Bertelsen to not receive the benefits and that it was a three hour drive for him to travel to Ellsworth. Kraschnewski explained further that he discussed with Bertelsen that his signature was not meaningful unless she signed the agreement. Bertelsen testified that Kraschnewski told her he was not driving back and therefore he signed it on that Friday. Neither Bertelsen's nor Kraschnewski's testimony in this regard is completely credible. Since there was no meeting scheduled for Monday morning, February 27, 2012, Kraschnewski's testimony regarding returning to Ellsworth to sign is suspect. And, while it is reasonable that Kraschnewski told Bertelsen he would not be traveling back on Monday to assist her in submitting the agreement, Bertelsen's interpretation that he was refusing to assist her is supposition.

"As the Vaca court recognized, an employee has no absolute right to arbitration and that the mere fact that a union settles a grievance short of arbitration does not, without more, mean that it has breached its duty of fair representation and thus permit the employee to sue." Mahnke at 532. A decision to abandon a grievance, even though the grievance is later found to have merit, can still be a "good decision" under the law. Id. at 531. Kraschnewski evaluated grievance No. 2012-2D and concluded that settlement was a good option. In reaching this conclusion, he evaluated the County's assertions in light of Bertelsen's admissions and defenses. The fact that Kraschnewski's opinion as to the merits of the grievance was in direct contradiction to Bertelsen's does not result in a finding that the Union's actions were arbitrary.

Bertelsen argues that Kraschnewski did not fulfill his obligation pursuant to Mahnke to take into account, "monetary value of the claim, the effect of the breach on the employee and the likelihood of success in arbitration …" and that his failure to engage in this analysis amounts to arbitrary behavior. Mahnke at 534. Kraschnewski was never in a position to make a recommendation as to whether Bertelsen's grievance No. 2012-2D should be submitted to arbitration. Bertelsen and Kraschnewski participated in a first step grievance meeting for grievance No. 2012-2D on February 17, 2012, and the grievance was denied on February 21, 2012. Thereafter, the release and resignation agreement was executed, and Bertelsen failed to inform Kraschnewski that she had revoked the agreement. Had she done so, Kraschnewski would have had to make a determination as to whether he would recommend that the grievance be

forwarded to arbitration, but that never occurred. Bertelsen elected to terminate communication with Kraschnewski and ceased all involvement with the Union. Bertelsen cannot reasonably claim that the Union failed to represent her when it was she that ended the representational relationship.

In conclusion, Kraschnewski determined that it was in Bertelsen's best interest to enter into the settlement agreement. The release and resignation agreement was negotiated. Bertelsen, the Union and the County executed the agreement and thereafter Bertelsen terminated communication with the Union. The record provides a reasonable basis to conclude that, in representing Bertelsen in grievance No. 2012-2D, Kraschnewski exercised his discretion as a representative of Labor Association of Wisconsin, Inc. in good faith and with honesty of purpose.

Alleged Violation of § 111.70(3)(a)5, Stats. Against the County

The complaint does not assert a statutory violation as it relates to the County's processing of the 3-day suspension grievance, but alleges that Bertelsen's termination, effective February 24, 2012, lacked just cause and therefore violated the parties' collective bargaining agreement. Bertelsen further maintains that given the Union's failed duty of representation it was reasonable for her to conclude that the Union would not process her grievance and as such the futility exception is met.

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' agreement. Milwaukee County, Dec. No. 28525-B (Burns, 5/98) at 12, *aff'd* 28525-C (WERC, 8/98). This means that the Commission will only decide the merits of a grievance if it can be shown that the complainant's access to the grievance procedure was prevented by the union's failure to fairly represent the complainant's interests on the subject through the grievance procedure. Id.

Bertelsen admits that she did not exhaust the grievance process, but claims that any efforts would have been futile and, therefore, consistent with the futility exception recognized in Widuk v. John Oster Manufacturing Co., 17 Wis.2d 367, 117 N.W.2d 245 (Wis. 1962), her claim against the County should survive. Futility is certainly a recognized exception to the obligation to exhaust the grievance procedure, but Bertelsen does not meet the exception. See Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324, 331 (1969). There is no evidence to support a finding that the Union would have refused to assist Bertelsen in filing a grievance challenging her termination had she contacted Kraschnewski or Barth after she revoked the release and resignation agreement.

Bertelsen has alleged violations of §§ 111.70(3)(a)5 and 111.70(3)(a)1, Stats. Inasmuch as there is no § 111.70(3)(a)5, Stats., violation there is no derivative § 111.70(3)(a)1, Stats., violation.

CONCLUSION

Since Bertelsen failed to establish that the Union breached its duty of fair representation, no violation of § 111.70(3)(b)(1), Stats., has been found. Given that finding, I have not exercised the Commission's jurisdiction under § 111.70(3)(a)5, Stats., to determine if the County violated its collective bargaining agreement with the Union by discharging Bertelsen. The complaint is therefore dismissed.

Dated at Rhinelander, Wisconsin, this 27th day of December 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By:

Lauri A. Millot, Examiner