

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LISA GRIBBLE, Complainant,

vs.

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

Case 69
No. 71799
MP-4740

DECISION NO. 34060-B

Appearances:

Attorney Nicholas E. Fairweather, Hawks Quindel, S.C., 222 West Washington Avenue, Suite 450, P.O. Box 2155, Madison, Wisconsin, appearing on behalf of Complainant Lisa Gribble.

Attorney Michael J. Scholke, Mow and Ceello P.C., P.O. Box 747, Iron Mountain, Michigan, appearing on behalf of The Labor Association of Wisconsin, Inc.

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

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On October 12, 2012, Complainant Lisa Gribble filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging that Respondent Florence County had violated the collective bargaining agreement when it laid her off, and that Respondent The Labor Association of Wisconsin, Inc. had violated its duty to fairly represent her and retaliated against her when it failed to pursue her layoff grievance.

On February 12, 2013, Lauri A. Millot, an Examiner on the Commission's staff was appointed to conduct a hearing and to make and issue appropriate Findings of Fact, Conclusions of Law and Orders. Notice of Hearing on Complaint, scheduling the hearing for March 20, 2013, was issued on February 12, 2013.

On March 6, 2013, Respondents Florence County and The Labor Association of Wisconsin, Inc. filed answers denying having committed prohibited practices and asserting affirmative defenses seeking dismissal. Florence County alleged, *inter alia*, that the complaint failed to state a claim upon which relief could be granted; that Complainant failed to properly request arbitration; that the complaint was barred by the doctrine of laches; and the Complainant failed to mitigate her damages. The Labor Association of Wisconsin, Inc. alleged, *inter alia*, that Complainant failed to state a claim upon which relief could be granted; that the Complainant failed to properly request arbitration; that the complaint was barred by the doctrines of estoppel, laches and waiver; that Complainant failed to mitigate her damages; that the claim was not made in good faith; and that a competent tribunal already decided the claims set forth in the complaint.

The Examiner canceled the hearing and requested briefing on the affirmative defenses, specifically, the issues of res judicata and estoppel. The Complainant and Respondents complied, with the last reply filed on April 28, 2013. The Examiner, on July 2, 2013, informed the parties that she was satisfied that the hearing should proceed.

Hearing on the complaint was scheduled for November 4, 2013, and later moved to November 5, 2013, in Florence, Wisconsin. Following hearing, the Complainant and Respondents filed briefs and reply briefs and the record was closed on March 3, 2014.

On May 5, 2014, the Commission amended its prior Order appointing the undersigned as Examiner to provide that the Examiner has final authority to issue a decision in this case on behalf of the Commission pursuant to §§ 111.07(5) and (6), § 111.70(4)(a), and § 227.46(3)(a), Stats.

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

FINDINGS OF FACT

1. Complainant Lisa Gribble (hereinafter “Complainant” or “Gribble”) was hired by Florence County. Gribble was initially employed full time in the capacity of appointed Deputy Treasurer, Property Listing Assistant and Tax Assessment Clerk. In January 2007, Complainant was relieved of her Deputy Treasurer appointment thereby reducing her employment to fourteen (14) hours per week. Appellant was laid off effective October 8, 2009.

2. Respondent Florence County (hereinafter “County”) is a municipal employer. At all times relevant herein, JoAnne Friberg served as the elected County Treasurer and Complainant's supervisor, and Jeanette Bomberg served as the Personnel Committee Chairperson.

3. Respondent The Labor Association of Wisconsin, Inc. (hereinafter “LAW” or “Association”) is a labor organization that since at least 2007 represented a collective bargaining

unit in Florence County which included Complainant. At all times relevant herein, Matt Dagostino was the Local President, Ben Barth was a Labor Consultant, and Pat Coraggio was the sole stockholder and President of LAW. Effective January 1, 2013, Coraggio retired and sold LAW to Barth.

4. The Association and the County were parties to a 2009-2010 collective bargaining agreement. The relevant contract language is as follows:

ARTICLE IV – SENIORITY

Section 4.01: Seniority is defined as the length of time that the employee has been hired by the County computed from the most recent hiring date.

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

Section 4.03: Seniority will cease upon:

- (1) Discharge for just cause.
- (2) Quitting.
- (3) Absence from work without prior notification or explanation.
- (4) Continuous layoff for one (1) year.
- (5) If after being laid off the employee does not return to work within five (5) days after receipt of a mailed certified notice to return to work.
- (6) Loss of State or Federal funding for funded positions.

Section 4.04: In the event of a permanent layoff, the County will give at least two (2) weeks notice to those to be released.

Section 4.05: The County will keep and maintain a seniority list of all employees having seniority rights. The list will be open for inspection by a properly designated Association representative at all reasonable times.

...

Section 4.10: The County shall maintain a current seniority list and provide a copy to the bargaining unit annually and/or at the time there is a change from the previous list.

...

ARTICLE XV – GRIEVANCE PROCEDURE

Section 15.01: Should any differences arise between the Employer and the Association as to the meaning and application of this Agreement, or as to any questions relating to wages, hours and conditions of employment, failure to negotiate in good faith, or discipline, they shall be settled under the provisions of this Article.

Section 15.02: All time limits hereinafter set forth in this Article, unless otherwise specified, are working days, and are exclusive of Saturdays, Sundays and any holiday. All time requirements set forth in this Article may be waived or extended by mutual agreement of the parties in writing.

Section 15.03: The Association and the Employer agree that all grievances should be settled at the earliest possible time, therefore, all grievances shall be processed in the following manner:

Step 1: The aggrieved employee, or the Association shall present the grievance in writing to the Department Head within twenty (20) days of knowledge of the incident, or the date of the incident. The Department Head shall give a written answer to the grievance within seven (7) days of receipt of the written grievance.

Step 2: If satisfactory settlement is not reached in Step 1 within seven (7) days of the receipt of the written response of the Department Head, the grievant or the Association shall present the grievance in writing to the Personnel Committee within seven (7) days. The Personnel Committee shall set a date and time for a meeting with all parties involved, said date and time shall be convenient to all parties, and shall give their answer to the grievance no later than fourteen (14) days from the date of the meeting. The Committee's response shall be in writing, and a copy shall be furnished to all parties involved.

Step 3: If satisfactory settlement is not reached in Step 2, within seven (7) days of the receipt of the written response of the Personnel Committee, either party may request that the Wisconsin Employment Relations Commission (WERC) appoint a panel of five (5) arbitrators. The party requesting an arbitrator shall supply a copy of said request

to the other party involved in the grievance. The parties shall alternately strike names until a single name is left on the list, who shall be appointed the Arbitrator. The first party to strike a name shall be determined by a flip of a coin. The decision of the Arbitrator shall be final and binding on all parties.

5. Conflict between Gribble and her supervisor developed in 2006. Gribble received a letter on November 6, 2006, which she viewed as disciplinary and the Association filed a grievance. Friberg denied it was disciplinary and, therefore, the Association concluded that Gribble was not disciplined and did not move the grievance to the next step. Effective January 1, 2007, Friberg removed Gribble from the Deputy Treasurer position. The Association filed another grievance, but ultimately decided it would not proceed to arbitration because there was no contractual violation, since the elected treasurer has the statutory authority to appoint and remove deputies.

After the Association decided it would not process either of Gribble's grievances to arbitration, Gribble filed a complaint, on May 11, 2007, alleging Gribble's November 2006 discipline lacked just cause and that the removal of the Deputy Treasurer duties from her and her reduced work hours violated §§ 111.70(3)(a)3 and (3)(a)5, Stats. Both the County and the Association refused to arbitrate the grievances. Gribble engaged the services of Attorney Nicholas E. Fairweather to represent her in her litigation.

Gribble's complaint was held in abeyance for almost one year pending resolution. The parties convened for the purpose of a hearing on the complaint on August 26, 2008, but, instead, engaged in settlement discussions. Those settlement efforts were unsuccessful. The hearing was rescheduled and postponed twice.

On January 5, 2009, Gribble filed an amended complaint wherein it added the claim that LAW had breached its duty of fair representation.

A second mediation session convened on April 23, 2009, following which time the Complainant advised the Examiner that the parties were unable to resolve the dispute and it should be scheduled for hearing.

On September 11, 2009, LAW filed an answer to the motion to amend complaint and amended complaint.

On November 11, 2009, the Examiner denied the motion to amend complaint.

On November 24, 2009, the Commission set aside the Examiner's order.

6. On October 8, 2009, Friberg issued Gribble a layoff notice which read as follows:

This is your official notice that you are being temporarily laid-off, due to lack of work, effective immediately.

As you are aware, partly due to the economy, the workload in this office has declined and can no longer support an assistant at this time. You may apply for unemployment benefits; and, there is a possibility that you may be called back to work if circumstances permit.

You will receive two weeks pay, in lieu of receiving a two-week notice. I am requesting that you turn in all keys that you possess for the courthouse building today, and that you remove all your personal effects from this office, too.

7. The County maintained a seniority list of all twenty-eight (28) employees, full and part-time, their dates of hire and their job titles. The last seven (7) names on the list were:

Lisa Gribble	04/11/2002	Deputy / Treasurer / Property Lister
Marilyn Dunkel*	10/16/2002	Deputy/Register of Deeds
Donna Trudell	11/08/2002	Deputy / County Clerk
Doris Smith*	11/19/2002	Cook / Aging
Jessica McCoy	07/31/2006	Deputy Clerk of Court / Child Support Assistant
Donna Liebergen*	07/01/2008	Deputy Treasurer
Sue Nelson*	09/16/2008	Parent Educator
Maureen Ferry	05/29/2009	Invasive Species Program Manager

*denotes part time

8. On October 12, 2009, Gribble's attorney, Nicholas Fairweather, sent a letter to Benjamin Barth, LAW Labor Consultant. The letter informed Barth that Gribble had been laid off and stated, "I trust that your labor organization will file the appropriate grievances."

9. Fairweather's letter was date-stamped as received by LAW on October 14, 2009. As a result of the letter, Coraggio telephoned Fairweather, first on October 14, 2009, and again the next day. In order to speak to Fairweather without delay, Coraggio misrepresented to Fairweather's office staff that Coraggio was an "old buddy of his [Fairweather's] from law

school. I want to surprise him.” Fairweather and Coraggio discussed the facts and circumstances surrounding Gribble's layoff on October 15, 2009.

10. On October 22, 2009, Coraggio memorialized the content of his conversation with Fairweather:

Dear Mr. Fairweather:

On October 14, 2009, we discussed the merits of filing a grievance for our mutual client Ms. Gribble. It was my understanding that you were going to contact her and get a seniority list so we could determine if there was someone with less seniority that she could possibly bump, assuming she was qualified to do the work. As you know the contract is silent on this issue. Also it was my understanding that you were going to identify areas of the contract that you believe were breached constituting a grievance. The contract has time limits and a grievance has to be filed not later than November 5, 2009. LAW is willing to process the grievance if Ms. Gribble wishes to proceed. However, as of this date I have not heard from her or you regarding this matter. Accordingly, if we do not hear from you or her we will conclude that the matter is over and there is no desire to proceed.

If there are any questions regarding this feel free to contact me or my associate Benjamin Barth.

Sincerely,

/s/

Patrick J. Coraggio
Labor Consultant

cc: Lisa Gribble
Matt Dagostino

11. On October 22, 2009, without the assistance or guidance from LAW, Gribble filed a grievance alleging:

Facts: the employer, through its agent, Department Head JoAnne Friberg, has violated the terms of the 2009-2010 Collective Bargaining Agreement between Florence County and the Florence County Courthouse Employees Association/Labor Association of Wisconsin (the “Agreement”), by executing a layoff of Ms. Gribble, without consideration of Ms. Gribble's seniority status.

Contractual Violation: the Employer has violated Article IV of the Contract and any other section of the Contract applicable to this matter.

Remedy: Ms. Gribble demands that her hours and job duties be reinstated and restored and that she is made whole for any and all violations of the Agreement. Ms. Gribble also demands any other relief deemed just and equitable under the Contract.

Gribble did not provide a copy of the grievance to LAW.

12. Friberg denied Gribble's grievance on October 28, 2009, taking the position that Gribble had "no standing" to pursue the grievance pursuant to the contractual grievance language. Gribble appealed the Step 1 denial to Step 2 when she forwarded it to Jeanette Bomberg, Personnel Committee Chairperson, on November 5, 2009. The County failed to convene a Step 2 meeting of the Personnel Committee to address the grievance. Instead, Bomberg responded individually, on November 10, 2009, denying the grievance and erroneously concluding that "only the union has the power to file a grievance."

13. On November 13, 2009, Coraggio sent a letter to Fairweather which read:

Dear Mr. Fairweather,

On October 14, 2009, we discussed Lisa Gribble being laid off by Florence County and the contents of your letter of October 12, 2009. On October 22, 2009, I sent you a letter in reference to our conversation (see enclosed). It was my understanding that we were going to work together to investigate this matter on behalf of Lisa Gribble.

Recently, I was advised that Ms. Gribble filed a grievance with the County. The facts surrounding this matter and a copy of the grievance have never been presented to my office, any of our labor consultants or our attorneys. You have elected to pursue this without the assistance of LAW.

The agreement in full force and effect identifies the parties to the agreement as the County of Florence and the Labor Association of Wisconsin (see page one of the agreement). The Grievance Procedure, Article 15, states that the grievance procedure is a method to resolve differences between the Association and the County.

Your failure to communicate with my office and unilaterally filing a grievance is another indication of your hostility towards LAW as an attorney representing the WPPA.

I have repeatedly indicated we were willing to investigate this matter on behalf of Ms. Gribble and file a grievance if she requested same.

This is to put you on notice that without LAW knowing the facts surrounding this matter, LAW will not support or pay for this matter going to arbitration.

Therefore, if my office does not hear from you regarding this matter, my office will notify the County that we do not intend to be a party to any proceedings, nor will we be responsible for costs attributed thereto.

Sincerely,

/s/

Patrick J. Coraggio, President
Labor Association of Wisconsin, Inc.

cc: Matt Dagostino
Ben Barth
Lisa Gribble

14. On November 16, 2009, Gribble's attorney responded to Coraggio:

Dear Mr. Coraggio:

I write regarding your November 13, 2009 letter.

Thank you for offering to support Lisa Gribble in her effort to enforce the terms of the contract. Enclosed for your reference is a copy of the seniority list for the Courthouse Employees' Union. Ms. Gribble has been laid off. Pursuant to Article IV of the 2009-2010 contract, layoffs and recall from layoff "will be determined on the basis of seniority" There are several employees less senior than Ms. Gribble.

Ms. Gribble's latest grievance, filed October 22, 2009, was denied by the County by letter dated November 10, 2009, and received by Ms. Gribble on November 13, 2009. We anticipate that you will advance this grievance to Step 3 in the process based on the clear

contractual violation described above. As you know, Article XV of the contract anticipates that an “aggrieved employee or the Association shall present the grievance” Ms. Gribble did just that.

Finally, you claim that my “failure to communicate with my office and unilaterally filing a grievance is another indication of [my] hostility towards LAW as an attorney representing the WPPA.” Your claim is baseless. Please refrain from personal attacks in the future.

Sincerely,

/s/

Nicholas E. Fairweather

15. After Coraggio received Fairweather's November 16, 2009 letter, he telephoned the County's Attorney, James Scott, and requested that the County waive the filing time limitations contained in Article XV – Grievance Procedure. Scott was not agreeable.

16. On or about November 30, 2009, LAW filed a petition for grievance arbitration. Inclusive to the petition, LAW requested a panel of Wisconsin Employment Relations Commission (hereinafter “Commission” or “WERC”) staff arbitrators. On or about December 3, 2009, the County objected to the use of Commission staff arbitrators, which halted the arbitration process, and the Commission returned the arbitration filing fee to the Association.

17. Complainant's layoff grievance could only proceed to arbitration if (a) LAW was successful litigating a prohibited practice complaint against the County over their refusal to use Commission staff arbitrators or (b) if LAW agreed to the use of non-Commission staff arbitrators.

18. Between October 8, 2009, and February 9, 2010, the Association did not request, inquire or obtain any documents, information, interviews or data to determine the facts and circumstances relative to Gribble's October 8, 2009 layoff.

19. On February 11, 2010, Coraggio sent Gribble a letter and provided a copy of that letter to Dagostino, Barth, Fairweather and Attorney Linda S. Vanden Heuvel. The letter read as follows:

RE: October 8, 2009, Layoff

Dear Ms. Gribble:

I am sending this letter as the President of the Labor Association of Wisconsin, Inc. The Labor Association of Wisconsin, Inc. (LAW,

Inc.) is the sole and exclusive bargaining representative of the Florence County Courthouse Employees Association. LAW, Inc., is the Association's lawful representative on questions, wages, hours and conditions of employment.

The following is my understanding of the facts surrounding your most recent grievance challenging your employment layoff by Florence County:

1. On October 8, 2009, Jo Anne Friberg, Florence County Treasurer, advised you that you were being laid off from your position as property lister due to a lack of work.
2. In a letter dated October 12, 2009, your attorney, Nicholas Fairweather, requested that LAW, Inc., file a grievance on your behalf relative to the layoff.
3. On October 13, 2009, I placed a call to Attorney Fairweather to discuss your potential grievance. I left a message on Attorney Fairweather's voice mail relative to the reason for my call.
4. On October 14, 2009, I placed another phone call to Attorney Fairweather, and we discussed the facts, circumstances, and merits of your potential grievance. I advised Attorney Fairweather that in order for your grievance to have a reasonable likelihood of success, LAW, Inc., would require a copy of the County's seniority list to make a determination whether or not any employees with less seniority remained employed. If that question was answered affirmatively, then a determination would have to be made whether or not you were able to do the work of the less senior employee that remained on the payroll. In that case, I advised Attorney Fairweather that you should file a bump request.

Attorney Fairweather agreed to immediately provide me with a copy of the seniority list. Attorney Fairweather also indicated that, in the event any employees with less seniority remained on the Florence County courthouse employee payroll, you would file a written request to bump one of these individuals out of his/her position. If the County denied your bump request for any reason, LAW, Inc., would review the denial with the intention of filing a grievance on your behalf. Attorney Fairweather agreed to discuss this plan of action with you and to contact me with your specific response and agreement to this procedure.

5. On October 22, 2009, I sent a letter to Attorney Fairweather advising that the deadline for filing a grievance on your behalf, November 5, 2009, was approaching, and that I had not received the seniority list nor any contact from you or Attorney Fairweather.

6. On October 22, 2009, without notice and without any involvement of the Labor Association of Wisconsin in drafting the grievance, you filed an individual grievance challenging your October 8, 2009, layoff as a Florence County property lister.

7. On October 28, 2009, Florence County Treasurer, Jo Anne Friberg, denied your grievance alleging that there was no breach of the collective bargaining agreement and that you had no individual standing to pursue your grievance under Article XV Grievance Procedure.

8. In a letter dated November 5, 2009, to Florence County Chair, Jeanette Bomberg, you requested that the grievance move to Step Two of the grievance procedure. LAW, Inc., was not notified that your Step One grievance was denied or that you had moved the grievance to the second step of the grievance procedure.

9. On November 10, 2009, Jeanette Bomberg, Florence County Chair, advised that Florence County would not act on your grievance because it was a nullity and only the Union had the authority to file a grievance, not an employee.

10. After receiving notice from Florence County Courthouse Employees Association Union President, Matt Dagostino, that you had filed a grievance individually, LAW, Inc., sent a letter on November 13, 2009, to Attorney Fairweather advising that LAW, Inc., was never included in any of the preparation or presentation of the grievance. This lack of cooperation and conformance to the collective bargaining agreement recognizing LAW, Inc., as the exclusive bargaining representative was not in your best interests. LAW, Inc., again reiterated its willingness to investigate and be involved in the grievance process. Additionally, Attorney Fairweather was advised that if LAW, Inc., was not involved in the grievance procedure as the exclusive bargaining representative of Florence County Courthouse Employees Association, and LAW, Inc., was not kept up to date regarding the facts surrounding the grievance, LAW, Inc., would not pay any costs incurred in processing the grievance. You received a copy of this November 13 letter.

11. On November 16, 2009, LAW, Inc., received a letter from Union President Matt Dagostino, which enclosed a copy of your individual grievance, Florence County's Step One denial of your grievance, and your written request to proceed to Step Two of the grievance procedure. The grievance alleged that your seniority rights were violated but made no mention of a request to bump a less senior employee who remained on the payroll in a job position you were able to fill.

12. In a letter dated November 16, 2009, Attorney Fairweather asked LAW, Inc., to process your individual grievance to Step Three of the grievance procedure.

13. On November 30, 2009, LAW, Inc., filed a request to proceed to grievance Arbitration with the WERC and requested a panel of WERC arbitrators.

14. On December 3, 2009, Florence County objected to the WERC staff arbitration panel, and the WERC returned the application and check to LAW, Inc., Attorney James Scott objected because the Union contract did not limit grievances to staff arbitrators from the WERC.

15. On December 21, 2009, LAW, Inc., sent a response to the WERC and again requested a panel of WERC arbitrators, basing its request on the past practice of the parties utilizing WERC staff arbitrators to resolve grievance disputes.

16. On December 29, 2009, Peter Davis of the WERC advised the parties that "when a party advises WERC that it does not agree to use a provided panel and/or refuses to arbitrate a grievance (for any reason), WERC makes no judgments as to whether the refusal is appropriate or not and simply refunds any filing fee and closes the file." Peter Davis advised LAW, Inc., that if it believed that Florence County's refusal to proceed with a WERC staff arbitrator was inappropriate, LAW, Inc., can file a prohibited practice complaint to litigate the propriety of the other party's refusal to proceed. A determination has yet to be made by LAW, Inc., whether to file a prohibited practice on this issue.

I have provided you with this chronology because throughout this process you have not personally contacted anyone from LAW, Inc., to discuss your grievance. I want to make sure that you and I are on the same page relative to all of the facts of your case. Attorney Fairweather only talked to me on one occasion, and then for

whatever reason, ignored my advice on how to proceed with the grievance, including the information needed to successfully support the grievance. In my opinion, the grievance, which was filed in your case, is flawed because, prior to filing the grievance, you did not make any effort to bump a less senior employee who remained employed by Florence County in a position you were able to fill. I conveyed the importance of this step to your attorney. Additionally, I advised Attorney Fairweather that your grievance should be filed by LAW, Inc., to avoid any question whether or not you have standing to individually file a grievance once you are no longer an “employee” of Florence County, and equally significant, pursuant to the terms of the collective bargaining agreement, which recognizes LAW, Inc., as the sole and exclusive bargaining agent of selected courthouse employees.

Florence County will now proceed to arbitration only if a prohibited practice is filed and successfully litigated to determine what type of arbitration panel is appropriate in your case.

I believe a conflict of interest exists because of your filing a breach of duty of fair representation complaint against the Labor Association of Wisconsin, Inc., in Case No. 55, No. 66969, MP-4344, before the Wisconsin Employment Relations Commission. On the one hand, you have filed a complaint against LAW, Inc., for breach of duty and (sic) fair representation; on the other hand, you are asking LAW, Inc., to represent you relative to this grievance and potential prohibited practice. LAW, Inc., believes that a conflict of interest exists which must be waived in writing by you in order to continue with the processing of this grievance and prohibited practice complaint.

Therefore, please confirm in writing the accuracy of paragraphs 1 through 15 (sic) above. If you believe that any portion of this letter is inaccurate for any reason, please let me know, in writing, so that I can address any outstanding issues. Also, please provide me with your written waiver of any conflict of interest relative to LAW, Inc.'s representation of you in this grievance procedure and potential prohibited practice, while at the same time you are processing the complaint in Case. No. 55 No. 66969 MP-4344 before the WERC. I request that you consult with Attorney Nicholas Fairweather relative to this issue, but am directing this letter to you, individually, because you are represented by LAW, Inc., as a member of the Florence County Courthouse Employees Association.

Please provide me with your written response no later than February 24, 2010, or I will advise the WERC in writing that it is your intention to exclusively proceed with the representation of Attorney Nicholas Fairweather in this grievance and potential prohibited practice, rather than the Labor Association of Wisconsin, Inc. If you request LAW, Inc.'s representation relative to this grievance and potential prohibited practice, and submit the written waiver of any conflict of interest, LAW, Inc., will proceed accordingly.

Thank you.

Sincerely,

/s/

Patrick J. Coraggio, President
Labor Association of Wisconsin, Inc.

cc: Matt Dagostino, Florence County Courthouse, Ee Union
President
Ben Barth, Labor Association of Wisconsin, Inc.
Attorney Nicholas Fairweather
Attorney Linda S. Vanden Heuvel

20. LAW did not provide Gribble a waiver of conflict of interest form to execute.
21. Gribble replied to Coraggio's February 11 correspondence on February 19, 2010:

Thank you for contacting me regarding my layoff from Florence County on October 8, 2009.

I feel the County violated my contract by not following Article IV, "Layoffs and recall from layoff will be determined on the basis of seniority provided the senior employee CAN (emphasis in original) qualify to do the work." Also, I feel the County did not follow Article XV at step 2 by not "scheduling a date and time for a meeting with all parties involved"

Please advise me of the union's position on these issues.

At this time I have not hired any attorney to represent me in this grievance. Do you still believe a conflict exists in order to continue with the processing of this grievance?

Please advise me as to your intentions of my grievance.

22. Coraggio responded to Gribble on March 1, 2010, although he did not provide the Association's "position" on whether Article IV or Article XV were violated and did not inform Gribble as to LAW's intentions relative to her grievance. Rather, he informed her that she had not responded to his questions and that he expected her to respond by March 19, 2010. He requested that she confirm the accuracy of the statement of facts that he recited in his original letter and, further, that she respond to:

Also, please provide me with your written waiver of any conflict of interest relative to L.A.W., Inc.'s representation of you in this grievance procedure and potential prohibited practice, while at the same time, you are processing the complaint in Case No. 55, No. 66969 MP-4344 before the WERC. You have not provided me with any waiver of the conflict of interest. This conflict of interest is not dependent on your representation or non-representation by Attorney Nicolas (sic) Fairweather. The conflict arises because you have alleged in Case No. 55, No. 66969 MP-4344 that the Labor Association of Wisconsin has breached its' (sic) duty of representation, but are now requesting that the Labor Association of Wisconsin represent you relative to the above matter.

23. Gribble responded to Coraggio's March 1 letter on March 15, 2010. She did not affirm or deny the content of the recitation of facts nor did she address the conflict of interest issue but rather stated:

I feel the County violated my contract by not following Article IV, "Layoffs and recall from layoff will be determined on the basis of seniority provided the senior employee CAN qualify to do the work". Also, I feel the County did not follow Article XV at step 2 by not "scheduling a date and time for a meeting with all parties involved ...".

Please advise me of the union's position on these issues.

Gribble's letter indicates that she provided a copy to Ben Barth and Attorney Linda Vanden Heuvel.

24. In response to Gribble's March 15 communication, Coraggio directed the following to Gribble on March 24, 2010:

RE: October 8, 2009, Layoff

Dear Ms. Gribble:

Thank you for your letter dated March 15, 2010, but your letter is not acceptable because it does not address the specific issues contained in my letters of February 11, 2010, and March 1, 2010.

I have given you every opportunity to respond to my letter of February 11, 2010, and my letter of March 1, 2010, requesting substantiation of facts which occurred since your layoff on October 8, 2009. You have not provided me, or any LAW, Inc., representative, with any response relative to the relevant facts and circumstances surrounding your layoff and requested grievance challenging such layoff. As you are well aware, processing a grievance requires communication and investigation so that all relevant facts can be ascertained. Without your cooperation in this effort, it is impossible to successfully process your grievance (which you filed without notice to or assistance of LAW, Inc.) and the potential prohibited practice complaint resulting from the response of Florence County to the steps of the grievance procedure.

Your failure to communicate relevant facts and to cooperate with LAW, Inc., has resulted in LAW, Inc.'s determination to close your file effective April 1, 2010, unless I receive a specific, paragraph by paragraph response to my letter of February 11, 2010, containing sixteen numbered paragraphs requiring your verification. Only after I receive your response to the factual outline contained in my February 11, 2010, will I be able to assess the merits of your position.

In addition, you have failed to submit a written waiver of any conflict of interest between you and the Labor Association of Wisconsin, Inc., which is addressed in both my letter of February 11, 2010, and my letter of March 1, 2010. This conflict of interest waiver must also be received by April 1, 2010.

Sincerely,

/s/

Patrick J. Coraggio, President
Labor Association of Wisconsin, Inc.

cc: Matt Dagostino, Florence County Courthouse Ee
Union President
Ben Barth, Labor Association of Wisconsin, Inc.
Attorney Nicholas Fairweather
Attorney Linda S. Vanden Heuvel

This was the last written communication sent by LAW to the Complainant or her attorney with regard to the October 22, 2009 grievance. Coraggio closed Complainant's October 22, 2009 layoff grievance file on March 29, 2010.

25. On March 31, 2010, Fairweather directed a letter to Vanden Heuvel:

Dear Ms. Vanden Heuvel:

As you know, your client, The Labor Association of Wisconsin, Inc. ("LAW, Inc.") has demanded that my client, Lisa Gribble, respond to its "understanding of the facts surrounding [Ms. Gribble's] employment layoff by Florence County." This letter comprises that response.

Ms. Gribble was laid off by Florence County and Joanne Freiberg (sic) on October 8, 2009. I sent the document memorializing this action to LAW, Inc. Labor Consultant Ben Barth, on October 12, 2009.

Mr. Barth is the individual who provided me and Ms. Gribble with a copy of the Seniority List referenced in Mr. Coraggio's letter. LAW, Inc. has (sic) this document in its possession at all times relevant to the current issue. In fact, Sections 4.05 and 4.10 of the 2009-2010 Collective Bargaining Agreement require Florence County to "keep and maintain a seniority list ... open for inspection by [the Association] ... and provide a copy annually and/or at the time there is a change from the previous list."

Mr. Coraggio also claims that he instructed Ms. Gribble, through me, to file a "bump request." Mr. Coraggio opines: "[t]he grievance, which was filed in your case, is flawed because, prior to filing the grievance, you did not make any effort to bump a less senior employee who remained employed by Florence County in a position you were able to fill." If LAW, Inc. chooses to enforce Section 4.02 of the contract by using "bump requests" it should do so; placing the onus on Ms. Gribble to take these steps is inappropriate. The contract requires the County to effectuate layoffs on the basis of seniority. The County failed to do so. This is a clear violation of the contract.

Mr. Coraggio also complains about Ms. Gribble's filing of a grievance with her "Department Head," Ms. Freiberg (sic). Section 15.03 of the contract expressly allows for an "aggrieved employee [to] ... present the grievance in writing to the Department Head"

It appears as though Law, Inc. agrees with Ms. Gribble's reading of the contract – it filed a grievance, subsequently disputed by the County on procedural grounds. I trust that LAW, Inc. will enforce the contract and protect Ms. Gribble's seniority rights.

Finally, Mr. Coraggio demands that Ms. Gribble execute a "written waiver of any conflict of interest" before it proceeds with a grievance or prohibited practice complaint. No such conflict does (or should) exist in this case. Ms. Gribble and LAW, Inc. are both interested in enforcing the terms of the 2009-2010 Collective Bargaining Agreement. Please explain your client's position on this matter.

Do not hesitate to contact me with any questions or concerns.

Very truly yours,

/s/

Nicholas E. Fairweather

26. Neither Vanden Heuvel nor any representative from LAW responded to Fairweather's March 31, 2010 letter.

27. The hearing in Florence County, Case 55, No. 66969 MP-4344, as referenced in Finding of Fact No. 5 (hereinafter "*Gribble I*") was convened on April 14, 2010 in Florence County, Wisconsin.

28. On April 19, 2011, the Commission issued Florence County, Dec. No. 32435-F (WERC, 4/11), wherein it affirmed the Examiner's conclusion that Respondent LAW had not breached its duty of fair representation when it declined to exercise jurisdiction and process to arbitration Gribble's January 19, 2007 grievance challenging her removal as part-time Deputy Treasurer and, further, that neither LAW nor Florence County had committed a prohibited practice.

29. Complainant unsuccessfully appealed the Commission's decision which was affirmed by the circuit court in January 2012.

30. After Respondent LAW became aware of Gribble's October 22, 2009 layoff grievance, it failed to investigate the facts and circumstances giving rise to the grievance. LAW did not request any information from Complainant relative to her qualifications or experience. LAW did not initiate any interviews and did not request any documents, including, but not limited to, job descriptions, resumes, employment applications, meeting minutes and/or budget documents from the County.

31. LAW's expectation that Gribble affirm the veracity of sixteen (16) procedural paragraphs in the processing of the layoff grievance and that she prepare and execute a conflict of interest waiver was arbitrary and discriminatory.

32. LAW's decision not to pursue Complainant's layoff grievance to arbitration was arbitrary and discriminatory.

33. The County did not consult the seniority list nor afford Gribble the opportunity "to qualify" for any of the positions held by the six (6) employees less senior than Gribble on the seniority list when it laid her off effective October 8, 2009, and, in doing so, violated the terms and conditions of the 2009-2010 collective bargaining agreement.

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

CONCLUSIONS OF LAW

1. Complainant was an "employee" within the meaning of § 111.70(7), Stats.
2. The County is an "employer" within the meaning of § 111.70(1)(j), Stats.
3. LAW is a "labor organization" within the meaning of § 111.70(1)(h), Stats., and, at all times material hereto, has been represented by Pat Coraggio.
4. Section 111.07(14), Stats., is a statute of limitation and may be waived by a party when not properly raised as an affirmative defense.
5. The County waived its right to assert § 111.07(14), Stats., by failing to raise the defense until it filed its post-hearing brief following hearing with the Examiner. The Commission has jurisdiction to address Complainant's alleged violations of §§ 111.70(3)(b)1, 111.70(3)(a)5 and 111.70(3)(a)1, Stats.
6. Complainant has established, by a clear and satisfactory preponderance of the evidence, that LAW violated its statutory duty of fair representation toward Complainant in the manner in which it processed Lisa Gribble's October 22, 2009 grievance relating to her October 8, 2009 layoff in violation of § 111.70(3)(b)1, Stats.

7. Because LAW breached its duty of fair representation toward Complainant, it is appropriate for the Commission to exercise jurisdiction over the allegation that the County violated the 2009-2010 collective bargaining agreement when it laid off Gribble on October 8, 2009.

8. The County, by laying off Lisa Gribble and not considering her seniority and right to qualify for a position held by less senior bargaining unit members, violated the collective bargaining agreement and thereby violated § 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 now makes and issues the following:

ORDER

1. Respondent The Labor Association of Wisconsin, Inc. shall cease and desist from failing to fairly represent bargaining unit members, including Lisa Gribble, in processing their grievances.

2. Respondent The Labor Association of Wisconsin, Inc. shall take the following affirmative action that will effectuate the purposes of the Municipal Employment Relations Act:

a. Reimburse Lisa Gribble for the costs, including reasonable attorney fees, incurred when litigating the merits of her layoff grievance in the prohibited practice proceeding. Reimbursement shall be made within thirty (30) days after Ms. Gribble supplies to the Association a copy of her receipt(s) evidencing payment for all or any portion of such costs.

b. Notify all employees represented by The Labor Association of Wisconsin, Inc. of the Commission's Order by posting copies of the notice attached hereto as Appendix A for thirty (30) days in conspicuous places where such employees work. This notice shall be signed by the President of the Local, immediately upon receipt of this Order.

c. The Labor Association of Wisconsin, Inc. shall notify the Wisconsin Employment Relations Commission and Lisa Gribble, in writing, within twenty (20) days of the date of this Order, as to what steps have been taken to comply with the Order.

3. Respondent Florence County shall cease and desist from violating the collective bargaining agreement by not taking into consideration seniority when laying off employees.

4. Respondent Florence County shall take the following affirmative action that will effectuate the purposes of the Municipal Employment Relations Act:

a. Place Lisa Gribble in a position she can qualify for, held by a less senior bargaining unit member, in compliance with Section 4.02 of the collective bargaining agreement, and make her whole, with the applicable statutory interest per year as set forth in § 814.04(4), Stats., for all wages and fringe benefits lost as a result of the County's violation on October 8, 2009.

b. Notify all employees of the Commission's Order by posting copies of the notice attached hereto as Appendix B for thirty (30) days in conspicuous places where such employees work. This notice shall be signed by the County Board Chair. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.

c. Florence County shall notify the Wisconsin Employment Relations Commission and Lisa Gribble, in writing, within twenty (20) days of the date of this Order, as to what steps have been taken to comply with the Order.

Dated at Rhinelander, Wisconsin, this 1st day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION



Lauri A. Millot , Examiner

APPENDIX A

**NOTICE TO FLORENCE COUNTY EMPLOYEES REPRESENTED BY
THE LABOR ASSOCIATION OF WISCONSIN, INC.**

Pursuant to an Order of the Wisconsin Employment Relations Commission issued on July 1, 2014, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our bargaining unit members that:

1. WE WILL fairly represent bargaining unit members in the processing of their grievances.

2. WE WILL NOT fail to fairly represent bargaining unit members by failing to adequately protect their interests while processing their grievances.

Dated this _____ day of July 2014.

THE LABOR ASSOCIATION OF WISCONSIN, INC.

President, Florence County Courthouse Employees Association

THIS NOTICE WILL BE POSTED FOR THIRTY (30) DAYS FROM THE DATE IT IS SIGNED AND SHALL NOT BE ALTERED, DEFACED OR COVERED IN ANY WAY.

APPENDIX B

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission issued on July 1, 2014, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notice our employees that:

We will not violate our collective bargaining agreement with the Florence County Courthouse Employees Association, affiliated with The Labor Association of Wisconsin, Inc., by failing to recognize seniority and failing to afford senior employees facing layoff the right to qualify for positions held by less senior employees as covered by Section 4.02 of the collective bargaining agreement.

Dated this _____ day of July 2014.

FLORENCE COUNTY BOARD OF SUPERVISORS

Florence County Board Chair

THIS NOTICE WILL BE POSTED FOR THIRTY (30) DAYS FROM THE DATE IT IS SIGNED AND SHALL NOT BE ALTERED, DEFACED OR COVERED IN ANY WAY.

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

The complaint contends that the Association violated § 111.70(3)(b)1, Stats., when it failed to process Gribble's October 22, 2009 grievance to arbitration and thereby breached its duty of fair representation, and that the County violated §§ 111.70(3)(a)5, Stats., and, derivatively, § 111.70(3)(a)1, Stats., when it laid off the Complainant on October 8, 2009.

Respondent LAW denies that it failed in its duty of fair representation. Respondent County argues that the complaint is untimely and, further, that the County did not violate the collective bargaining agreement.

Is the Complaint Time Barred by § 111.07(14), Stats.?

Respondent County argues in its post-hearing brief that the matter is untimely “in that it was filed beyond the statutory one year filing period and, in any event, is governed by the principle of laches.” Affirmative defenses are to be raised in the answer to the complaint. Wis. Admin. Code § ERC 12.03(3)(b). Although the County offered numerous affirmative defenses, at no time prior to hearing did either the County or the Association assert that the complaint was untimely. Moreover, in prehearing briefing ordered by the Examiner to address affirmative defenses and, specifically, the issues of res judicata and estoppel, neither the County nor the Association cited a challenge based on § 111.07(14), Stats.

Section 111.07(14), Stats., provides:

The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

Section 111.07(14), Stats., is a statute of limitation and therefore can be waived. State of Wisconsin, Dec. No. 28222-C (WERC, 7/98). *See also Stern v. Wisconsin Employment Relations Commission*, 2006 WI App 193, 296 Wis.2d 306, 722 N.W.2d 594, (Ct. App.). Respondent County failed to articulate a timeliness challenge until the filing of its post-hearing brief in December 2013. Issues should be set forth early and litigated prior to or during hearing. For these reasons, Respondent County waived its ability to raise a § 111.07(14), Stats., timeliness challenge.

As to the County's laches claim, the doctrine bars a claim when a party has sufficient knowledge of the events and unreasonably delays filing an action thereby prejudicing the other party. Yocherer v. Farmers Insurance Exchange, 252 Wis.2d 114, 130, 643 N.W.2d 457 (2002). In State ex rel Coleman v. McCaughtry, 2006 WI 49, 290 Wis.2d 352, 714 N.W.2d 900, *opinion clarified* 2006 WI 121, 297 Wis.2d 587, 723 N.W.2d 424, the Wisconsin Supreme Court adopted a three-part element analysis to assess a laches defense:

[T]he first element is unreasonable delay in bringing the claim and the other two elements apply to the party asserting laches: lack of knowledge (that the claim would be brought) and effect (prejudice).

Id. at ¶28. Laches is an affirmative defense and, as such, the County has the burden of proof in regard to all elements. Id. at ¶2. Assuming arguendo that the Complainant is guilty of unreasonable delay, Respondent County was fully aware of Gribble's desire to arbitrate her October 8, 2009 layoff, and it was the County that halted that timely process by objecting to the use of Commission staff arbitrators. As to the third element, Respondent County failed to make any argument as to how it was prejudiced. Respondent County has not proven its laches defense.

Alleged Violation of § 111.70(3)(b)1, Stats., Against 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, 225 N.W.2d 617 (1975) (adopting Vaca v. Sipes, 386 U.S. 171, 190 (1967)). 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, 2010 WI App. 126, ¶ 37, fn.11, 329 Wis.2d 447, 791 N.W.2d 662, *citing* Black v. Ryder/P.I.E Nationwide, Inc., 15 F.3d 573, 584 (6th Cir. 1994).

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 opinion also makes it clear that the union may exercise discretion in deciding whether a grievance warrants arbitration. Even if an employee claim has merit, an 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)). And further:

Vaca also requires the union to make decisions as to the merits of each grievance. It is submitted that such decision should take into account at least the monetary value of his claim, the effect of the breach on the employee and the likelihood of success in arbitration. Absent such a goodfaith (sic) determination, a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation.

This is not to suggest that every grievance must go to arbitration, but at least that the union must in good faith weigh the relevant factors before making such determination.

Id. at 534.

Gribble argues that the Association's refusal to arbitrate her grievance was not only an arbitrary decision but also one made in bad faith. Gribble maintains that the Association failed to analyze the merits of her grievance, that it processed the grievance in a perfunctory manner, and, instead of dutifully representing her interests, that the Association elected to utilize her layoff situation as a means to reinitiate its rivalry with its alleged “adversarial” union, the Wisconsin Professional Police Association. I start with the arbitrary prong of the duty of 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 that the actions rise to the level of irrational or arbitrary conduct.” SEIU Local No. 150 v WERC, *supra* at ¶ 22, *citing* Airline Pilots Ass’n v. O’Neill, 499 U.S. 65, 67 (1991). 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, 285 N.W.2d 631 (1979)). Omissions and unintentional acts may be considered arbitrary if they: (1) display reckless disregard for the rights 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.

[I]t 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.

Gribble was laid off on October 8, 2009. At the time of her layoff, she was engaged in protracted litigation with the Association and County after having charged that the Association violated its duty of fair representation and that the County had violated the collective bargaining agreement in 2007 when she was terminated from the Deputy Treasurer position. That litigation (*Gribble I*), included a complaint, an amended complaint, and various orders. The *Gribble I* case was scheduled for hearing in April 2010; and, therefore, at the time of Complainant's layoff and during the processing of her grievance, the parties were preparing for and engaged in the *Gribble I* hearing.

After Gribble received notice of her layoff, Fairweather, her attorney in *Gribble I*, directed a letter dated October 12, 2009 to LAW Labor Consultant Ben Barth. The letter provided Barth with a copy of her layoff notice and requested that the Association grieve her layoff. Barth forwarded the letter to Coraggio.

In response to Fairweather's letter of October 12, 2009, Coraggio initiated a telephone call to Fairweather. Coraggio documented the call as having occurred on October 13, but that could not have happened since the Association did not receive Fairweather's letter until October 14, 2009. After leaving a message for Fairweather on October 14, Coraggio called Fairweather again the following day. In order to speak to Fairweather, Coraggio surreptitiously misrepresented himself. Fairweather and Coraggio spoke on October 15, 2009 and discussed Gribble's layoff and the potential for a grievance.

Unbeknownst to the Association, the Complainant penned her layoff grievance and timely filed it with her supervisor on October 22, 2009. On that same day, October 22, 2009, Coraggio sent a letter to Fairweather asking for the seniority list and asking that Fairweather "identify areas of the contract that you [Fairweather] believe were breached constituting a grievance." Ex.A8. Barth provided the seniority list to Fairweather and Coraggio.

Gribble's layoff grievance was denied by Friberg. Gribble appealed and submitted her Step 2 grievance to Personnel Committee Chair Bomberg on November 5, 2009. The Personnel Committee did not address the grievance as required by the grievance process, but, instead, Bomberg responded, denied the grievance, and made reference to Gribble's inability to file a grievance individually. Bomberg's conclusion was in error – the parties' labor agreement allowed an individual to file a grievance. Gribble did not inform the Association that her Step 2 grievance was denied.

On either November 11 or November 12, 2009, Local President Matt Dagostino informed Barth that the Complainant had filed a grievance challenging her layoff and that it had been denied by the County at both Steps 1 and 2. With this information, Coraggio sent Fairweather a letter dated November 13, 2009, and put Fairweather on notice that Coraggio viewed Fairweather's lack of communication and Gribble's independent filing of the grievance as hostile to LAW and that LAW would not pay for Gribble's grievance if Fairweather did not communicate with LAW.

Fairweather sent a letter to Coraggio, dated November 16, 2009, wherein he provided the seniority list, denied any hostility to LAW and requested that LAW proceed to arbitration with Gribble's layoff grievance. With the last possible date to timely file for arbitration looming, Coraggio contacted the County's legal counsel, James Scott, and requested an extension of time. The request was denied. On November 30, 2009, the Association filed a petition for grievance arbitration and requested a panel of WERC staff arbitrators from which the parties would select one to hear and decide whether the Complainant's layoff violated the collective bargaining agreement.

The Association explains that when it filed for arbitration and requested a panel of arbitrators it did so solely to preserve its right to litigate the grievance, but that a final determination on proceeding to arbitration had not been made since Coraggio still wanted to speak with Gribble. That may have been the case, but in the context of evaluating the Association's actions to determine whether it breached its duty of fair representation by not

processing Gribble's grievance to arbitration, as of November 30, 2009, the Association had fulfilled its obligation since the case was on schedule to proceed to arbitration.

On or about December 3, 2009, the County objected to the use of WERC staff arbitrators which effectively halted the arbitration process. The Association did not inform the Complainant of the County's objection. The Association was then presented with the decision as to whether it would litigate the parties' past use of WERC staff arbitrators in a prohibited practice proceeding. It is from this point forward that it is appropriate to evaluate the Association's actions and ultimate decision to abandon Gribble's layoff grievance.

Six weeks after the County objected to the panel of arbitrators, Coraggio sent Gribble a letter dated February 11, 2010. That letter set forth a sixteen paragraph history of the layoff grievance and then established two conditions precedent which Gribble was expected to fulfill before the Association would pursue her grievance. First, Gribble was expected to confirm, in writing, that the Association's chronology of the events was accurate; and, second, Gribble was expected to prepare, execute, and submit a waiver of an alleged conflict of interest. The two conditions precedent were completely irrelevant to a determination as to whether or not to arbitrate Gribble's layoff grievance and serve, in part, as the basis for a finding that the Association's conduct was arbitrary and discriminatory.

The exclusive agent's "obligation to represent all members of an appropriate unit requires [it] to make an honest effort to serve the interests of all of those members, without hostility to any." Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338 (1953). "The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents." Id. at 338. And, its powers are "subject always to complete good faith and honesty of purpose in the exercise of its discretion." Id. "Arbitrary [a]nd [p]erfunctory are adjectives characterizing [i]ntentional conduct that is capricious or superficial." Ruzicka v. General Motors Corp. 523 F.2d 306, 315 (6th Cir. 1975) (*concurring opinion*). In the context of determining whether to process Gribble's grievance to arbitration, the sixteen paragraphs contained in the February 11, 2010 letter served no purpose. They had little to nothing to do with the actual merits of the grievance. Instead, they focused on the sequence of events after the layoff. At best, they were designed to communicate to the Complainant for the first time that her grievance had stalled out due to the County's objection to the WERC panel of arbitrators. At worst, the paragraphs were prepared in readiness to defend a second charge by the Complainant that the Association had violated its duty of fair representation.

With specific regard to the alleged conflict of interest in its February 11, 2010 letter, the Association attributed the conflict to Gribble because "[o]n the one hand, you have filed a complaint against LAW, Inc., for breach of duty and (sic) fair representation; on the other hand, you are asking LAW, Inc., to represent you relative to this grievance and potential prohibited practice." Ex.A15. While it may have been awkward for the Association, the duality of serving as Complainant's advocate in the layoff litigation while simultaneously defending itself in the adversarial litigation of *Gribble I* is the labor organization's statutory obligation, and Respondent LAW's request for an executed written waiver of conflict of interest would neither eliminate that

issue nor assist in determining whether to litigate the prohibited practice and/or to proceed to arbitration on Complainant's layoff grievance.

At hearing, Coraggio explained that Fairweather had the conflict of interest inasmuch as he was LAW's adversary in *Gribble I* and was working with LAW for the layoff grievance. November 5, 2013 Hearing Transcript (hereinafter "Tr.") at page 86. I note that this directly contradicts his statement in his March 1, 2010 letter that the "conflict of interest is not dependent on your representation or non-representation by Attorney Nicolas (sic) Fairweather" and is inconsistent with the explanation of the conflict he provided in his February 11, 2010 letter. Ex.A4. In any event, Fairweather's role never changed – he represented Gribble's interests in *Gribble I* and he was representing Gribble's interests in seeking to have the layoff grievance brought to arbitration.¹ If Fairweather had a conflict of interest, it was with respect to his client, Gribble, not LAW. A waiver provided to LAW would not affect that conflict. If Fairweather violated his professional standards, he would suffer the consequences and that would not impact Complainant's grievance. There is no question that Fairweather's involvement in Gribble's layoff grievance caused Coraggio consternation, but that in and of itself was totally unrelated to the merits of Complainant's grievance and should have no bearing on whether the Association arbitrated the layoff grievance.

This case bears a striking resemblance to Northwest General Hospital, (10599-B, 10600-C) (WERC, 2/73). In both cases the employee grievant, who had previously criticized the union, filed her own grievance and then met with resistance from the labor union processing the grievance to arbitration. In finding that the union had breached its duty of fair representation by acting with a discriminatory motive, the Commission found that "the Union, it is inferred, determined not to make a real effort on behalf of the grievant because of her posture as a critic of the Union and of its collective bargaining agreement with the Employer." *Id.* at p.18. Respondent LAW similarly superficially feigned effort on behalf of Complainant to take her grievance to arbitration. When the County challenged the arbitrator pool, it effectively afforded the Association a second chance to foreclose Gribble's grievance and the Association seized the opportunity. Respondent LAW erected two irrelevant and self-serving roadblocks to Complainant's layoff grievance proceeding to arbitration. The Association's motive was suspect given the Complainant's previous charge that the Association had violated its duty of fair representation in *Gribble I*. This taint is deepened by the spurious allegation of a conflict of interest and by insistence that Gribble agree to Coraggio's version of the timeline of the case before action would be taken. Viewing the record as a whole, the weight of the evidence persuades me that LAW's decision not to process the grievance to arbitration was discriminatory, based on Complainant's pending duty of fair representation claim.

The Association argues that it made a determination that Gribble's grievance lacked merit. There is no evidence to support this assertion. In order for the Association to have

¹Both Coraggio and Gribble took the position that they were not represented by legal counsel during the pendency of the layoff grievance. The evidence indicates otherwise. Letters regarding the layoff grievance were written on Gribble's behalf by Fairweather. Coraggio copied Vanden Heuvel on some of his letters, and he testified that he was in communication with Vanden Heuvel, that he consulted with her, and that he asked her to review his letter of February 11, 2009 to Gribble.

concluded that the grievance lacked merit, it would have had to have conducted an investigation which it failed to do. Coraggio testified as to the Association's normal process when investigating a grievance:

The very first thing on a grievance is an investigation of the facts. And once you accumulate the facts, you review the contract to see where the areas are that might have been violated or might constitute a grievance. Getting that information is vital in determining whether or not you have a valid grievance.

Tr.88.

At no time did Barth, Coraggio, Dagostino or any other representative of the Association speak to Gribble or request in writing the facts and circumstances giving rise to her grievance. The Association never requested the Complainant's resume or a listing of her qualifications. It did not request any documentation from the County regarding the layoff. It did not request job descriptions for the positions held by the six employees with less seniority than the Complainant. The Association did not request meeting minutes or any other records which substantiated Friberg's reason for layoff. The record does not support the conclusion that the Association investigated Complainant's grievance and, thus, any assessment of the merits was impossible.

The Association next argues that it did everything it could to process Gribble's grievance, but its efforts were thwarted by Gribble and her representative's lack of cooperation. The Association points to numerous unsuccessful attempts to communicate with the Complainant and her attorney and maintains that neither were responsive and that this lack of cooperation justified its decision to dispose of Complainant's grievance. It is disingenuous for the Association to characterize any communication attempts prior to November 30, 2009, as "uncooperative" since it still filed the necessary paperwork to proceed to arbitration. Yet, looking at the communication between the Association and the Complainant as a whole, while it is accurate to describe it as terse, the record fails to support a finding that the blame for this rests with the Complainant.

The first two communications followed Fairweather's October 12, 2009 letter to Barth informing the Association that Complainant had been laid off and asking that a grievance be filed. Coraggio testified that he called Fairweather on October 13 and left a message for Fairweather to return the call. Coraggio called again the following day and got through by misrepresenting himself. Coraggio's recollection of this is based in part on his notes and other documentation. The accuracy of his recollection is somewhat suspect in that Complainant's letter was date-stamped as received in the Association's offices on October 14, 2009, which is one day after he allegedly telephoned Fairweather. It is therefore likely that Coraggio's documentation regarding the telephone calls occurred at a later date and was not a contemporaneous record of events.

Ultimately, Coraggio followed up with these calls with correspondence dated October 22, 2009 to Fairweather memorializing their conversation. Coraggio requested that Fairweather obtain a seniority list and that he identify which areas of the contract were breached. Coraggio

already knew what clauses of the labor agreement the Complainant believed had been breached, and the Association already had access to the seniority list. Neither Fairweather nor Gribble responded to this communication. Association representative Ben Barth obtained and distributed the seniority list.

The next communication was a letter from Coraggio to Fairweather dated November 13, 2009, sent after Coraggio learned that Complainant had filed a grievance on her own. Coraggio's letter was not friendly and threatened to inform the County that LAW was not prosecuting the grievance if LAW did not "hear from" Fairweather. Fairweather responded three days later, on November 16, 2009, wherein he reviewed Complainant's view of the breach of contract and disputed the Association's characterization that Gribble's filing of the grievance on her own evidenced "hostility" to LAW.

Respondent LAW asserts the next correspondence was a letter dated December 8, 2009, sent to Fairweather with a copy to Gribble. Gribble denies having received the letter. Even if Gribble did not receive this letter, there is no evidence to indicate it was not received by Fairweather, her counsel. The letter reviewed Coraggio's view that the grievance was drafted improperly and that Fairweather failed to heed Coraggio's advice and have Gribble request a bump of a less senior employee. Coraggio accused Complainant of "lack of cooperation and lack of communication" and Coraggio requested that Fairweather withdraw as counsel for Gribble or "Ms. Gribble can retain you and your law firm and L.A.W., Inc. will withdraw from this case." Ex.A11. Coraggio's request was, on its face, unreasonable. Fairweather's role as an advisor to Gribble had not, to that point, materially interfered with the Association's representation of her in this matter. There was no valid reason for this ultimatum.

On February 11, 2010, Coraggio directed a letter to Gribble and asked her to review sixteen distinct paragraphs, each representing a procedural event in the processing of her grievance to arbitration. Coraggio further asked Complainant to provide a written waiver of conflict of interest. Gribble responded on February 19, 2010. She first offered her view of the grievance. She then asked Coraggio to update her on the status of her case. Gribble did not respond to the sixteen paragraph chronology nor did she offer a waiver of Fairweather's alleged conflict of interest.

Coraggio responded on March 1, 2010. He again requested affirmation of the chronological procedure of the grievance and the waiver of conflict. This correspondence did not respond to Gribble's February 19, 2010 request as to the Association's "intentions of my grievance" nor did it reference a telephone call that Coraggio allegedly made to Complainant on February 24, 2010. Ex.A3.

On March 15, 2010, Gribble sent Coraggio a written response, but again did not confirm the chronology, did not provide a waiver, and asked the "union's position on these issues." Ex.A5. Gribble specifically asked the Association's position with respect to her layoff grievance. Coraggio responded on March 24, 2010 and reaffirmed the Association's request for confirmation of the chronology of events and submission of a conflict of interest waiver, but did

not address Gribble's request for the Association's position. The March 24 letter set an April 1, 2010 deadline.

The final two attempts at communication were telephone calls Coraggio said he initiated on February 24, 2010 and March 22, 2010. Starting with the February 24 call, Coraggio made a notation on a five-by-seven sheet of lined paper, "2/24/10 left phone msg for Gribble to call me ref: her letter of 2/19/10." Ex.A12. Complainant denied receiving the telephone call and Coraggio's March 1 letter did not reference having placed the call or Complainant's failure to return the call.

Coraggio documented a second telephone call noting, "3/22/10 LEFT msg for Gribble to call Ben or me to discuss status of Her case." Ex.A13. Complainant also denied having received this call from Coraggio. This alleged telephone call occurred just two days before Coraggio drafted the previously addressed March 24 letter. Coraggio again did not reference the call or Gribble's failure to respond in his letter drafted two days later. Ultimately, it is possible that Coraggio telephoned Gribble on this date, but given his history of referencing prior communication in subsequent correspondence, his failure to reference both of these calls in subsequent letters draws his account into question.

The evidence establishes that after the first telephone conversation between Coraggio and Fairweather in October 2009 the Association and Complainant utilized letters to communicate.² At all junctures, each side responded to the other, but those replies were not responsive to the inquiries. Just as the Complainant failed to affirm or deny the sixteen paragraph chronology and submit a waiver of conflict of interest in her February 19 and March 15, 2010 letters, the Association failed to provide Gribble with information as to her grievance and the Association's position relative to her grievance as requested in those same February 19 and March 15 letters. As previously addressed, the chronology as to the processing of the layoff grievance and the waiver of conflict of interest are extraneous issues completely immaterial to the Association's evaluation of the merits of a grievance to determine whether to proceed to arbitration. Respondent LAW's attempt to lay blame on Complainant for failing to cooperate in misplaced. At no time did Complainant fail to provide LAW with information relevant to the investigation of her layoff grievance because LAW never asked. The evidence does not support LAW's assertion that Complainant was uncooperative and that her lack of cooperation resulted in its failure to process her layoff grievance to arbitration.

Moving to the bad faith prong, in order to establish that a union acted in bad faith there must be proof that the union's subjective motivation was the result of an act or failure to act due to an improper motive. SEIU Local No. 150 v. WERC, *supra* at ¶ 21, fn.5 (*citing Trnka v Local Union No. 688, United Auto., Aerospace Agric. Implement Workers of Am.*, 30 F.3d 60, 63 (7th Cir. 1994) and Neal v. Newspaper Holdings, Inc., 349 F.3d 363 (7th Cir. 2003)). Bad faith requires inquiry into the subjective motivation behind union activities. Id.

²While Local President Matt Dagostino testified that he sent letters and telephoned the Complainant. Complainant denies ever receiving any telephone calls or correspondence from Dagostino. Inasmuch as Dagostino was unable to provide a time period or copies of said correspondence, it is unlikely any correspondence or communication took place.

Complainant points to Coraggio's "rivalry" with Wisconsin Professional Police Association and argues that this animosity served as the genesis for the Association's failure to take her grievance to arbitration. While that animosity certainly may have fueled the dispute between Coraggio and Fairweather, the evidence establishes that it did not directly impact the Association's decision-making. Coraggio first identified his "concern" with Complainant's counsel in his November 13, 2009 letter, "[y]our failure to communicate with my office and unilaterally filing a grievance is another indication of your hostility towards LAW as an attorney representing the WPPA." Ex.A9. Coraggio reiterated his concern in a December 8, 2009 letter:

Previously, you attempted to file charges against L.A.W., Inc. for failing to represent Ms. Gribble. You previously worked for a law firm that represents WPPA, an adversary of L.A.W., Inc.

Ex.A11.

While it is likely that this ill-will gave rise to Coraggio's claim that Fairweather had a conflict of interest as previously addressed, the evidence does not support the finding that Coraggio's bad blood with the Wisconsin Professional Police Association and Fairweather resulted in Gribble's layoff grievance not proceeding to arbitration. Had that been the case, then the Association would never have filed the petition for arbitration on November 30, 2009.

In conclusion, the preponderance of the record evidence establishes that the decision not to process this grievance after the initial appeal to arbitration was unrelated to any judgment on the merits of Gribble's case, and LAW's conduct breached the arbitrary and discriminatory prongs of the duty of fair representation analysis. LAW arbitrarily failed to assess the merits of the grievance and therefore made no credible judgment on the merits. LAW's conduct was discriminatory in that it was motivated by LAW's hostility to Gribble as a result of her pending duty of fair representation claim against LAW. The evidence does not support a finding that LAW acted in bad faith due to its alleged rivalry with the Wisconsin Professional Police Association.

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

It is the Commission's practice not to exercise its jurisdiction over contract violations to any 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). Thus, 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. Milwaukee County, *supra*. Given the conclusion that the Association arbitrarily and discriminatorily abandoned the Complainant's grievance and failed in its duty of fair representation, we accept jurisdiction to address Complainant's layoff grievance.

The complaint alleges a violation of § 111.70(3)(a)5, Stats., and a derivative violation of § 111.70(3)(a)1, Stats. Section 111.70(3)(a)5, Stats., as it existed when LAW violated its duty of fair representation, made it a prohibited practice for an employer to violate the terms of a previously agreed upon collective bargaining agreement with respect to wages, hours and conditions of employment.

Complainant maintains that Respondent County violated the 2009-2010 collective bargaining agreement when it selected the more senior Gribble rather than less senior employees for layoff. Neither the Association nor Gribble challenged the County's management right to cause the layoff. The question is whether the County, when effectuating the layoff, complied with the terms of the collective bargaining agreement. Layoffs are governed by Article IV – Seniority, and the relevant provision states:

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

The language of Section 4.02 is clear and unambiguous. Layoffs shall occur by seniority if the employee can qualify to perform the job. While some labor agreements consider departmental seniority or similar sub-groupings of employees for purposes of layoffs, the agreement between the Association and the County does not contain such a provision and, therefore, County-wide seniority applies. Section 4.02 provides that the more senior employee is retained if he or she “can qualify to do the work.” Contract clauses which provide that a senior employee will be retained over a junior employee if the senior employee is capable of performing the job are called sufficient ability clauses. Bornstein, Gosline, Greenbaum, Labor and Employment Arbitration, 2nd ed., 28-8 (2006). The employer bears the burden of proving that an employee lacks the necessary qualifications. Id.

It is un rebutted that there were six employees with less seniority than Gribble. Of those, some are identified as deputies. The County is correct in that there are some deputies of elected officials that are excluded from consideration due to the elected officials' authority to appoint their own deputies, irrespective of the provisions of a collective bargaining agreement. *See Crawford County v. WERC*, 177 Wis.2d 66, 501 N.W.2d 836 (1993) and *Iowa County v. Iowa County Courthouse*, 166 Wis.2d. 614, 480 N.W.2d 499 (1992). Thus, those positions whose duties are aligned with the constitutional and/or statutorily deputized positions are excluded from some provisions of the labor agreement including layoff and recall.

The County has introduced no evidence to suggest it considered Gribble's county-wide seniority when it identified her for layoff or that it made any affirmative effort to allow her “to qualify” for any of the positions held by less senior bargaining unit members as dictated by Section 4.02. The record establishes that at the October 7, 2009 Planning and Zoning Committee meeting, under the agenda item, “Discussion/action regarding the Land Information/Property Lister 2010 proposed budget,” the Committee approved a “temporary” layoff of the Complainant which Friberg implemented immediately, i.e. during the 2009 budget. The next day, Gribble received her two-week notice of layoff and, instead of Gribble working the two weeks, Friberg

determined she would pay Complainant her two weeks' wages, but not expect her to work. Friberg explained that she "interpreted that [seniority] to mean that she [Gribble] was the only person in that position so, therefore, she would be the only one – there wasn't any other senior, or less senior people in that position, or even in that department, so that she would have to be the only one laid off, because that's the work that wasn't, the work that had fallen off." Tr.188. Friberg's interpretation was a manifest disregard of the actual contract language.

The employer bears the burden of showing probative evidence that Gribble could "not qualify" for any of the positions held by less senior employees who were retained. Semling-Menke Co., 81 LA 662, 666 (Johnson, 9/1/83). Further, as noted by Arbitrator Harry Schulman in Ford Motor Company, 2 LA 374, 375-6, in cases involving ability, management is obligated to "make a case to support its position" and it is not enough for management:

... to form and assert strongly the belief that one employee is superior to another. That is clearly not enough. They must be able to support this belief with specific concrete reasons ... (T)he agencies of the grievance process, including the umpire, are not expected merely to rubber stamp the assertions of one side or the other or to make decisions merely on the basis of the strength or positiveness of the assertions. To perform their tasks, they must be given adequate basis for judgment. A supervisor's testimony that he honestly believes one employee to be superior to another with respect to the promotion is certainly a factor to be considered. It is not, however, either conclusive or sufficient. The supervisor must be prepared to state the basis for his belief and to support it, not by repeated assertion but by specific and understandable evidence – evidence which relates to capacity for the job in question, not merely to the employee's general character.

Id. at 665.

The County points out that the labor agreement does not contain any reference or right to "bumping" by an employee affected by layoff. It further lauds Local President Dagostino's opinion that the bargaining unit did not want "bumping" rights. The non-existence of "bumping" rights in the labor agreement does not negate the County's obligation to lay off based on seniority when the plain language of the labor agreement directs that layoffs shall be by seniority. It is well settled that even in the absence of specific language granting bumping rights, there must be some effective means of protecting the interests of senior employees in a seniority-based layoff:

In the absence of contract language prohibiting [bumping], it is almost universally recognized that senior employees, under a plant-wide seniority system, have the right to bump junior employees from their jobs, in order to avoid their own layoff, provided they can perform the work of juniors.

Darin & Armstrong, 13 LA 843, 847 (Platt, 1/3/50). *See also* Cerro Gordo Care Facility, 80 LA 11, 13 (Loihl, 11/8/82); Bornstein, Gosline, Greenbaum, Labor and Employment Arbitration, 2d ed. 28.03[1], p.28-6 (2002); Elkouri & Elkouri, How Arbitration Works, 6th ed., p.787 (2003). Moreover, while the contract does not use the term “bumping,” it clearly contemplates the possibility of movement of a senior employee to another job: “[l]ayoffs and recall from layoff will be determined on the basis of seniority, provided the senior employee can qualify to do the work.” Ex.1. If there was no movement of employees under this provision, there would be no need to specify that the senior employee be able to qualify for the available work. The County violated the collective bargaining agreement when it failed to recognize seniority and afford Gribble the opportunity to qualify for positions held by less senior employees on the seniority list and, as such, the County violated § 111.70(3)(a)5, Stats., and, derivatively, § 111.70(3)(a)1, Stats.

Remedy.

The Commission issued a make-whole remedy including reasonable attorney fees in Local 82, Council 24, AFSCME, AFL-CIO and University of Wisconsin – Milwaukee Housing Department, Dec. No. 11457-H (WERC, 5/84), *aff'd sub nom. Guthrie v. WERC*, Dec. No. 86-0490 (Wis. Ct. App. 1987) (unpublished). In Guthrie, the Commission found that the union had breached its duty of fair representation, but that the contract claim against the University was meritless. *Id.* The union was ordered to pay reasonable attorney fees for that portion of the hearing that would have been the “functional equivalent” of an arbitration hearing. Local 82, Council 24, AFSCME, AFL-CIO and University of Wisconsin-Milwaukee Housing Department, Dec. No. 11457-E (WERC, 5/84).

Pursuant to the principles of Guthrie, LAW is ordered to reimburse Complainant for costs, including reasonable attorney fees, for that portion of the prohibited practice complaint proceeding in which Gribble litigated the contractual challenge to her layoff. *See also*, Milwaukee Public Schools, Dec. No. 31602-C (WERC, 01/2/07), *rev'd on other grounds by SEIU v. WERC*, 328 Wis.2d 447 (2010).

The County violated the terms and conditions of the 2009-2010 labor agreement when it failed to recognize Gribble's seniority and afford her the right “to qualify” for the position of a less senior bargaining unit member. The parties introduced little probative evidence as to Gribble's qualifications and the job qualifications of the positions held by the six less senior employees. The contractual wrong to be remedied is not the failure of the County to grant Gribble a position, but rather the failure of the County to allow Gribble “to qualify” for a position. The order is appropriately tailored to the contractual violation.

Dated at Rhinelander, Wisconsin, this 1st day of July 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot , Examiner