

Florence County Wisconsin, and  
Labor Association of Wisconsin, Inc,

Petitioners,

v.

Wisconsin Employment Relations  
Commission,

Respondent.

**DECISION**  
Case No. 14-CV-26  
(Administrative Agency Review)

[re: WERC Dec. No. 34060-B]

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MI DEPT OF JUSTICE

**DECISION**

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Florence County Wisconsin (“County”) and the Labor Association of Wisconsin, Inc. (“LAW”) have requested that this Court reverse the Findings of Fact, Conclusions of Law, and Order of the Wisconsin Employment Relations Commission (“Commission” or “WERC”) issued on July 1, 2014 pursuant to Wis. Stat. § 227.57.<sup>1</sup> They assert that that the Commission’s decision should be reversed because: 1) the Commission erroneously interpreted a provision of law and a correct interpretation compels a different result; 2) the Commission’s findings of fact are not supported by substantial evidence; and 3) the Commission acted outside the range of discretion delegated to it by law.<sup>2</sup>

**FACTS**

The majority of the facts in this case are not in dispute and many of the facts are provided in letters that were written and exchanged between various individuals. This case revolves

<sup>1</sup> This is a consolidated review of the Commission July 1, 2014 decision.

<sup>2</sup> Florence County (“County”) Brief, p. 1; Labor Association of Wisconsin, Inc. (“LAW”) Brief, p. 2; See also Wis. Stat. §§ 227.57(5), (6), & (8).

around the employment of Lisa Gribble (“Gribble”) by Florence County and a series of grievances that have been filed with the Commission over a period of several years regarding her layoffs, the collective bargaining agreement between the County and LAW, and claims that LAW breached its duty of fair representation to Gribble regarding her layoff grievances.<sup>3</sup>

In 2002, Gribble was employed by the County in two part time positions: Deputy Treasurer and Property Listing Assistant and Tax Assessment Clerk.<sup>4</sup> In 2007, Gribble was not reappointed to the position of deputy treasurer but remained in the position of property lister.<sup>5</sup> In 2009, the County decided to eliminate the position of property lister, effectively ending all employment between Gribble and the County.<sup>6</sup>

### **Gribble I**

After Gribble was not reappointed as deputy treasurer in 2007, Gribble contacted LAW regarding her layoff.<sup>7</sup> LAW investigated her layoff and determined that the treasurer had the statutory authority to appoint the deputy of his or her choice and that the collective bargaining agreement provided her no protections.<sup>8</sup> LAW did not feel that there was a grievance here to pursue, advised Gribble of such, but did indicate that they would be willing to pursue a grievance on her behalf if she really wanted to.<sup>9</sup> LAW never heard back from Gribble.<sup>10</sup> Gribble filed her

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<sup>3</sup> Gribble filed two different complaints with the Commission regarding her employment with Florence County. Her first complaint was filed on May 11, 2007 and will be referred to throughout this decision as Gribble I. In this complaint, Gribble asserted that her ‘layoff’ from the position of deputy treasurer was done in violation of the collective bargaining agreement and that LAW and the County failed to arbitrate her layoff as deputy treasurer. This complaint was later amended to include a breach of duty of fair representation count against LAW. While Gribble I was still in litigation, in 2009, Gribble was eliminated from her job as property lister with the county. This 2009 layoff is the underlying impetus for the Commission’s decision that this Court is reviewing here.

<sup>4</sup> Commission’s Decision No. 34060-B (“Gribble II”) Findings of Fact, No. 1.

<sup>5</sup> *Id.*

<sup>6</sup> Joint Ex. 2; County Ex. 4. (All exhibits referred to throughout this decision are exhibits provided by the various parties at the November 5, 2013 hearing. Joint exhibits are identified as J #. Complainant Gribble’s exhibits are identified as C #. LAW exhibits are identified as A #. County exhibits are identified as Cty #. ).

<sup>7</sup> Commission’s Decision No. 32435-F (“Gribble I”) Findings of Fact, No. 5.

<sup>8</sup> Gribble I, Finding of Fact, No. 18.

<sup>9</sup> *Id.* at No. 19.

<sup>10</sup> *Id.* at No. 20.

own grievance with the department head which was denied.<sup>11</sup> The County contacted LAW for their opinion regarding Gribble's grievance and LAW informed them that it was their opinion that her grievance had no merit because of the treasurer's statutory authority to appoint and remove his/ her deputies.<sup>12</sup> Gribble's grievance did not go to arbitration.<sup>13</sup> On May 11, 2007, Gribble filed a complaint with WERC, asserting the following: "1) that in November, 2006, the County disciplined Gribble without just cause and that a grievance challenging that discipline was filed by the Association; 2) that in January, 2007, Gribble's supervisor (the county treasurer) removed Gribble's deputy treasurer duties and reduced her work hours, whereupon Gribble filed a grievance challenging that action; and 3) that both Respondents had refused to arbitrate "this" grievance."<sup>14</sup> This complaint was later amended to include the claim that LAW breached its duty of fair representation to her.<sup>15</sup> WERC determined that LAW had not breached its duty of fair representation.<sup>16</sup> WERC found that LAW thoroughly investigated her layoff and determined that there was no basis to file a grievance.<sup>17</sup>

## **Gribble II**

While Gribble I was being litigated, Gribble was laid off from the position of property lister.<sup>18</sup> On October 8, 2009, Gribble received a notice informing her that she was being "temporarily laid-off, due to lack of work."<sup>19</sup> This notice went on to explain that she was being laid-off because the "workload in this office has declined and can no longer support an assistant

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<sup>11</sup> *Id.* at No. 21.

<sup>12</sup> *Id.* at Nos. 22, 24, 25.

<sup>13</sup> *Id.* at Nos. 27, 28.

<sup>14</sup> Gribble I, p. 1.

<sup>15</sup> *Id.* at p. 2.

<sup>16</sup> Gribble I, Findings of Fact, No. 29, Conclusions of Law, No. 1.

<sup>17</sup> Gribble I, Memorandum Accompanying Findings of Fact, Conclusions of Law and Order, p. 19-22.

<sup>18</sup> Gribble II, Findings of Fact Nos. 1, 27.

<sup>19</sup> Joint Ex. 2.

at this time.”<sup>20</sup> Gribble did not contact LAW directly regarding this layoff.<sup>21</sup> Gribble contacted her attorney, Attorney Nicholas E. Fairweather and her attorney sent LAW a letter informing them that Gribble had been laid off and stated: “I trust that your labor organization will file the appropriate grievances.”<sup>22</sup>

Shortly after receiving this letter, Patrick J. Coraggio<sup>23</sup> contacted Fairweather via telephone and discussed Gribble’s layoff and the merits of filing a grievance.<sup>24</sup> Coraggio believed that either Fairweather or Gribble would be getting back to him.<sup>25</sup> After a week went by and he had not heard from either of them, he sent a letter to Fairweather reviewing what they had discussed during their phone conversation and informing both Fairweather and Gribble that he was concerned about timelines and if they were going to file a grievance, the grievance needed to be filed shortly.<sup>26</sup> In this letter, Coraggio provided:

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 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 no 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. According, if we don not hear from you or her we will conclude that the matter is over and there is no desire to proceed.<sup>27</sup>

No response was received regarding this letter.<sup>28</sup>

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<sup>20</sup> *Id.*, See also County Ex 4 (meeting minutes).

<sup>21</sup> November 5, 2013, Hearing Transcript (“HT”) 30: 13-17.

<sup>22</sup> LAW Ex. 1.

<sup>23</sup> Patrick J. Coraggio was the president of LAW at the time that Gribble was laid-off from the property lister position. Coraggio had retired by the time the Commission heard his testimony during Gribble II. Gribble II, Findings of Fact No. 3.

<sup>24</sup> LAW Ex. 7; HT 64: 12-65:11.

<sup>25</sup> *Id.*

<sup>26</sup> LAW Ex. 8.

<sup>27</sup> *Id.*

<sup>28</sup> HT 66:11-67:9.

On October 22, 2009, the same day Coraggio sent the above-cited letter to Fairweather, cc'd to Gribble, Gribble filed her grievance with JoAnne Friberg, the County Treasurer and department head.<sup>29</sup> Friberg denied the grievance on October 28, 2009, stating that there was “no contract violation” and that the “employee had no standing to pursue a grievance under Article XV.”<sup>30</sup> Gribble did not provide LAW with a copy of her grievance nor did she inform them prior to filing the grievance that she was going to be filing her own grievance.<sup>31</sup>

After receiving the denial letter, Gribble requested that her grievance be moved on to Step 2 via a letter to Jeanette Bomberg, Florence County Board of Supervisors Chairwomen.<sup>32</sup> This request was also not provided to LAW and Gribble did not personally contact LAW before requesting to move to Step 2.<sup>33</sup> On November 10, 2009, Bomberg informed Gribble that the “Personnel Committee will not be acting [] on the grievance you filed on October 22, 2009. The grievance is a nullity because only the union has the power to file a grievance not an employee.”<sup>34</sup>

LAW did not learn about Gribble’s October 22, 2009 grievance until after she had already been denied at Step 2 of the grievance procedure.<sup>35</sup> On November 13, 2009, Coraggio sent a letter to Attorney Fairweather indicating that he had recently learned that Gribble had filed a grievance with the county.<sup>36</sup> In this letter, Coraggio stated:

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.*

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<sup>29</sup> Joint Ex. 3.

<sup>30</sup> Joint Ex. 4.

<sup>31</sup> *Id.*; Gribble II, Findings of Fact, No. 11; *See also* HT 30: 18-25.

<sup>32</sup> Joint Ex. 5.

<sup>33</sup> *Id.*; *See also* HT 31: 20-32:7.

<sup>34</sup> Joint Ex. 6.

<sup>35</sup> Gribble II, Memorandum Accompanying Findings of Fact, Conclusions of Law and Order, p. 29.

<sup>36</sup> LAW Ex. 9.

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.<sup>37</sup>

Attorney Fairweather responded to this letter and in order to not run afoul the time limits for requesting arbitration, LAW requested arbitration even though they had not fully investigated Gribble's layoff.<sup>38</sup> On or about December 3, 2009, the County objected to the use of the Commission staff arbitrators, effectively halting the arbitration process.<sup>39</sup>

On December 8, 2009, LAW sent a letter to Attorney Fairweather, providing:

I have represented public employees for 31 years and worked with numerous attorneys during that time, even some from the Law firm you are currently with. I have never experienced such a lack of cooperation we are getting from your office. Your lack of communication and cooperation is making it extremely difficult to work with you on this matter.

On October 13, 2009, we discussed Ms. Gribble's potential grievance. I advised you that to file a grievance, we needed a seniority list. We needed a list of less

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<sup>37</sup> LAW Ex. 9 (emphasis added).

<sup>38</sup> Gribble II, Findings of Fact, No. 14.

<sup>39</sup> Gribble II, Findings of Fact, No. 16.

senior employee's that Ms. Gribble was qualified to do their work and that Ms. Gribble should put in a written request to bump one of the less senior employee's.

Instead of complying with this, you proceeded to file a grievance and never notified my office that you were filing a grievance and did not have the professional courtesy to provide us with a copy. Nor did you provide us with a copy of the denial or the request to go to Step 2 until we requested same. You obviously did not want our input or assistance and did not keep us copied on any of the above paperwork.

On November 24, 2009, I received a letter from you dated November 16, 2009, requesting that we advance the grievance to Step 3. The letter indicated it was also faxed but was never received at my office. November 24<sup>th</sup> is the last day that the grievance can be advanced to Step 3. Due to the late date that I received your letter, I called the county to extend the time limits to file. The request was denied by Attorney James Scott. In order to preserve the grievance, I filed a request with the WERC for a panel of arbitrators.

In reviewing the grievance, it is my opinion that it is flawed and has little if any chance of success. You ignored my advice to have Ms. Gribble request to bump a less senior employee and had you have requested her job back with full pay and benefits. Management had the right to lay off, (See \_\_\_), Management has the right to eliminate jobs (See \_\_\_).

Your requested remedy flies in the face of prior WERC decision. Had you have done some research or discussed this with the undersigned the grievance would have been drafted properly.

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 the WPPA, an adversary of L.A.W., Inc.

Accordingly, your lack of cooperation and lack of communication in this matter is suspect. I believe that you have a conflict of interest and should withdraw from the case. Alternatively, Ms. Gribble can retain you and your law firm and L.A.W., Inc. will withdraw from the case.

If you do not take yourself off the case, I am also going to ask for an opinion as to whether or not to seek a review of your conduct with the Board of Professional Responsibility.

Your prompt attention to this matter is necessary.<sup>40</sup>

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<sup>40</sup> LAW Ex. 11. Gribble denies ever receiving this letter. Attorney Fairweather also noted in Complainant's Initial Post-Hearing Brief to the Commission prior to the Commission making its final ruling that he did not receive this letter. (Footnote 3). This letter was sent by fax on December 8, 2009 to some destination, as indicated by the notations on the top of the document.

On February 11, 2010, Coraggio sent Gribble a letter containing a chronology of facts, of which he requested that she affirm the accuracy of and also requested that she waive a conflict of interest.<sup>41</sup> Specifically, Coraggio wrote:

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 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 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 about 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.<sup>42</sup>

Gribble replied to Coraggio’s February 11, 2010 letter but did not respond to any of the issues Coraggio requested her to respond to.<sup>43</sup> She did indicate that she had not hired an attorney to represent her, though the Commission found that she was represented by an attorney throughout this grievance process.<sup>44</sup>

Coraggio replied on March 1, 2010 to Gribble’s February 19, 2010 letter, asking her again to review and confirm the accuracy of the 16 paragraphs and asked her to waive a conflict of interest.<sup>45</sup> Gribble replied to LAW’s March 1 letter on March 15, 2010, though this letter was unresponsive to the issues raised in LAW’s March 1, 2010 letter.<sup>46</sup> LAW replied to Gribble’s March 15, 2010 letter on March 24, 2010, indicating that LAW intended to close out her file

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<sup>41</sup> Association Ex. 2; LAW Ex. 15.

<sup>42</sup> LAW Ex. 15.

<sup>43</sup> LAW Ex. 3; Gribble II, Findings of Fact, No. 21, Memorandum Accompanying Findings of Fact, Conclusions of Law and Order p.35.

<sup>44</sup> LAW Ex. 3; Gribble II, Memorandum Accompanying Findings of Fact, Conclusions of Law and Order footnote 1.

<sup>45</sup> LAW Ex. 4.

<sup>46</sup> LAW Ex. 5; Gribble II, Findings of Fact, No. 23.



because of her unresponsiveness to LAW's requests unless she responds to 16 paragraphs and provides a conflict waiver by April 1, 2010.<sup>47</sup>

Attorney Fairweather sent a letter to Attorney Vanden Heuvel regarding Coraggio's March 24, 2010 letter on March 31, 2010.<sup>48</sup> No response was sent to Attorney Fairweather regarding his March 31, 2010 letter.<sup>49</sup>

The hearing for Gribble I occurred on April 14, 2010.<sup>50</sup>

### **Standard of Review**

This Court's review of the Commission's decision is governed by Wis. Stat. § 227.57. In reviewing agency actions, a court shall affirm the agency's action "unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief."<sup>51</sup> "The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion."<sup>52</sup> For issues of agency interpretations of law, "[t]he court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law."<sup>53</sup>

For issues of determinations of fact, "[i]f the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's

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<sup>47</sup> LAW Ex. 6; Gribble II, Findings of Fact, No. 24.

<sup>48</sup> LAW Ex. 14.

<sup>49</sup> Gribble II, Findings of Fact, No. 26.

<sup>50</sup> *Id.* at No. 27.

<sup>51</sup> Wis. Stat. § 227.57(2) (2013-14).

<sup>52</sup> Wis. Stat. § 227.57(3).

<sup>53</sup> Wis. Stat. § 227.57(5).

action depends on any finding that is not supported by substantial evidence in the record.”<sup>54</sup>

Substantial evidence is “such relevant evidence as a reasonable person might accept as adequate to support a conclusion.”<sup>55</sup>

For issues of an agency’s exercise of delegated discretion, “[t]he court shall reverse or remand the case to the agency if it finds that the agency’s exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent...but the court shall not substitute its judgment for that of the agency on an issue of discretion.”<sup>56</sup> “The court’s decision shall provide whatever relief is appropriate irrespective of the original form of the petition. If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as it finds necessary to preserve the interest of any party and the public pending further proceedings or agency action.”<sup>57</sup> “Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.”<sup>58</sup>

### Analysis

Both the County and LAW have petitioned the court for review of the Commission’s decision pursuant to Wis. Stat. § 227.57(5), (6), and (8). The County asserts that the Commission’s decision should be reversed because the Commission (1) misinterpreted the law; (2) relied on facts not supported by the record; and (3) exercised discretion beyond the range delegated to it by law.<sup>59</sup> LAW also requests that the Court overturn the Examiner’s Findings of Fact, Conclusions of Law and Order because the Commission (1) erroneously interpreted a provision of law; (2) the Commission’s Decision depends on findings of fact that are not

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<sup>54</sup> Wis. Stat. § 227.57(6).

<sup>55</sup> *Hamilton v. Department of Industry, Labor & Human Relations*, 94 Wis. 2d 611, 617, 228 N.W.2d 857 (1980).

<sup>56</sup> Wis. Stat. § 227.57(8).

<sup>57</sup> Wis. Stat. § 227.57(9).

<sup>58</sup> Wis. Stat. § 227.57(10).

<sup>59</sup> County Brief, p. 6.

supported by substantial evidence in the record; and (3) the Commission acted outside the range of discretion delegated to it by law.<sup>60</sup> In accordance with Wis. Stat. § 227.57(3), the Court will treat each of these disputes separately.<sup>61</sup>

### **I. Erroneous Interpretation Of The Law.**

The County asserts that the Commission articulated the correct legal standard regarding the duty of fair representation but did not apply the deferential standard, as articulated, to LAW's conduct. Specifically, the County asserts: "A court should only find that a union's action are arbitrary if an objective review of the facts establishes that the union acted so far outside a wide range of reasonableness that its actions rise to the level of irrational conduct."<sup>62</sup> The County argues that this deferential standard was not applied to LAW's conduct and that if this deferential standard had been applied to the facts, the Commission could not have reasonably concluded that LAW's decision regarding the arbitration of Gribble's grievance was arbitrary and discriminatory. The County asserts that the application of this deferential standard would have resulted in the conclusion that LAW's decision regarding Gribble's grievance was not arbitrary or discriminatory.

The Commission does not directly address this issue. Rather, the Commission jumps right into the issue of whether its determination that LAW breached its duty of fair representation to Gribble is reasonable and is supported by the facts after first asserting that the Commission's decision should be given great weight deference. The Commission provides:

The Commission decided that LAW breached its duty of fair representation to Gribble because its conduct was arbitrary when it refused to proceed unless Gribble provided both written confirmation of the accuracy of Coraggio's statement of facts, and a written waiver of an alleged conflict of interest. Those

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<sup>60</sup> LAW Brief, p. 1-2.

<sup>61</sup> The County and LAW assert very similar arguments and to the extent that these arguments address the same issue, they will be addressed together.

<sup>62</sup> County Brief, p. 7 (citing *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991)).

two conditions, the Commission reasoned, were completely irrelevant to LAW's determination whether to proceed with Gribble's grievance, and the allegation of a conflict of interest was spurious. In addition, the commission determined that LAW's refusal to pursue Gribble's grievance to arbitration was arbitrary because LAW never assessed the merits of Gribble's grievance and never requested information from the County or Gribble about the reasons for Gribble's layoff, about the positions held by less senior employees, or about Gribble's qualifications for those positions.<sup>63</sup>

Before this issue can be addressed, the Court must first address what level of deference should be given to an agency's decision regarding an agency's interpretation and application of law. The Commission asserts that its interpretation and application of MERA should be given "great weight" deference.<sup>64</sup> The Commission provides that "the Commission's determination must be affirmed if it is reasonable, even if another interpretation might be more reasonable."<sup>65</sup> The County asserts that the Commission's determination should receive de novo review and LAW asserts that the Commission's determination should receive "due weight" deference.

**A. The Amount Of Deference To Be Given To The Commission's Decision.**

An agency's legal conclusion is not treated in the same manner as its findings of fact are.<sup>66</sup> An agency's interpretation or application of a statute may be accorded great deference, due weight deference, or de novo review.<sup>67</sup> Which level of deference to provide to the agency's decision "depends on the comparative institutional capabilities and qualifications of the court and the administrative agency."<sup>68</sup>

Great deference is given to an agency's interpretation or application of a statute when: 1) the agency is charged by the legislature with the duty of administering the

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<sup>63</sup> Commission's Response Brief, p. 17.

<sup>64</sup> Wis. Stat. §§ 111.70-111.77, commonly known as the Municipal Employment Relations Act ("MERA").

<sup>65</sup> Commission's Response Brief, p. 14, (citing *Hutchinson Technology, Inc. v. LIRC*, 2004 WI 90, ¶ 24, 273 Wis. 2d 394, 682 N.W.2d 343.

<sup>66</sup> *West Bend. Educ. Ass'n v. WERC*, 121 Wis. 2d 1, 11, 357 N.W.2d 534 (1984).

<sup>67</sup> *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996).

<sup>68</sup> *State ex rel. Parker v. Sullivan*, 184 Wis. 2d 668, 699, 517 N.W.2d 499 (1994).

statute; 2) the interpretation of the agency is one of long standing; 3) the agency employed its expertise or specialized knowledge in forming the interpretation; and 4) the agency's interpretation will provide uniformity and consistency in the application of the statute.<sup>69</sup>

Under the great weight standard, an agency's interpretation will be upheld as long as it is reasonable and not contrary to the clear meaning of the statute, even if an alternative interpretation is more reasonable.<sup>70</sup>

“Due weight deference is appropriate when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court.”<sup>71</sup> Under the due weight standard, “a court need not defer to an agency's interpretation which, while reasonable, is not the interpretation which the court considers best and most reasonable.”<sup>72</sup> “The deference allowed an administrative agency under due weight is not so much based upon its knowledge or skill as it is on the fact that the legislature has charged the agency with the enforcement of the statute in question.”<sup>73</sup> “Since in such situations the agency has had at least one opportunity to analyze the issue and formulate a position, a court will not overturn a reasonable agency decision that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available.”<sup>74</sup>

De novo review is applied in situations “where the issue is one of first impression, where the agency has no special expertise, or where the agency's position has been so inconsistent that

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<sup>69</sup> *Mineral Point Unified School Dist. v. WERC*, 2002 WI App 48, ¶ 13, 251 Wis. 2d 325, 641 N.W.2d 701 (citation omitted).

<sup>70</sup> *UFE, Inc. v. Labor & Indus. Review Comm'n*, 201 Wis. 2d 274, 287, 548 N.W.2d 57, 62 (1996).

<sup>71</sup> *UFE, Inc. v. Labor & Indus. Review Comm'n*, 201 Wis. 2d 274, 286, 548 N.W.2d 57, 62 (1996).

<sup>72</sup> *Harnischfeger Corp. v. LIRC*, 196 Wis.2d 650, 660 n. 4, 539 N.W.2d 98 (1995).

<sup>73</sup> *UFE, Inc.* at 286.

<sup>74</sup> *Id.* at 286-287.

it provides no real guidance.”<sup>75</sup> De novo review is mandated “where an agency’s legal conclusion is based on [] a judicially-created doctrine, rather than on a judicial gloss of a statute or administrative rule.”<sup>76</sup>

The Commission asserts that they are entitled to great weight deference. LAW asserts that the Commission’s decision is entitled to only due weight deference and the County asserts that the Commission’s decision should receive de novo review. The Commission is not entitled to great weight deference because not all four requirements for great weight deference are met. The duty of fair representation is only implicit in the Municipal Employment Relations Act (“MERA”), Wis. Stat. §§ 111.70-111.77.<sup>77</sup> It is a judicially created federal common law doctrine.<sup>78</sup> In *Service Employees International Union v. WERC*, the Court of Appeals rejected WERC’s assertion that its decision should be given great weight deference because WERC could not claim that it has greater expertise than the courts since the duty of fair representation is a judicially created doctrine.<sup>79</sup> Therefore, the Commission’s decision is not entitled to great weight deference.

Since the Commission is not entitled to great weight deference, its decision should be given either due weight deference or de novo review. For purposes of this decision, regardless of the deference standard that is applied, the Commission’s decision cannot be affirmed if the Commission did not apply the law to the facts because not doing so would be unreasonable. Therefore, this Court will not need to determine between the remaining two deference standards which one applies.<sup>80</sup>

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<sup>75</sup> *Ellis v. State Dept. of Admin.*, 2011 WI App. 67, ¶ 24, 333 Wis. 2d 228, 800 N.W.2d 6.

<sup>76</sup> *Emmpak Foods, Inc. v. LIRC*, 2007 WI App. 164, ¶ 5, 303 Wis. 2d 771, 737 N.W.2d 60.

<sup>77</sup> *Service Employees International Union v. WERC*, 2010 WI App 126, ¶ 17, 329 Wis. 2d 447, 791 N.W.2d 662.

<sup>78</sup> *Daniel v. Pipefitters' Ass'n Local Union No. 597*, 945 F.2d 906 (7th Cir. 1991).

<sup>79</sup> *Service Employees International Union* at ¶ 18.

<sup>80</sup> There is little difference between due weight deference and no deference. *Service Employees International Union* at ¶ 19.

**B. The Commission's Decision That LAW Breached Its Duty Of Fair Representation Cannot Be Affirmed, Since Application Of The Deferential Standard Provided To A Union When Making Determinations Regarding Grievances Does Not Support Such A Decision.**

A finding that a union breached its duty of fair representation is a legal conclusion.

Therefore, the Court will review the Commission's determination that LAW breached its duty of fair representation as a question of law. Here, the Commission's determination that LAW breached its duty of fair representation is based on the Commission's determination that LAW acted arbitrarily and discriminatorily. Whether LAW acted arbitrarily or discriminatorily are also a legal conclusions, requiring the application of facts to law.

Unions have considerable latitude in handling union matters.<sup>81</sup> They can consider numerous factors when determining whether to pursue a grievance, including the employer's view of the employee organization's credibility, how members may react to differing interpretations of contract language, the employee organization's financial health, and the merits of the grievance.<sup>82</sup> A review of a union's decision is highly deferential and one is not to substitute its own view of the proper bargain for that of the union's.<sup>83</sup> "[N]ot even proof that a grievance was meritorious is sufficient by itself to prove breach of duty of fair representation."<sup>84</sup> Likewise, simple negligence, ineffectiveness, or poor judgment on the part of a union is insufficient to establish a breach.<sup>85</sup>

A breach of fair duty of representation occurs when a union's actions are either arbitrary, discriminatory, or done in bad faith.<sup>86</sup> A union's actions are arbitrary only if they are "so far outside the range of reasonableness that the actions rise to the level of irrational or arbitrary

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<sup>81</sup> *Mahnke v. WERC*, 66 Wis. 2d 524, 531, 225 N.W.2d 617 (1975).

<sup>82</sup> *Vaca v. Sipes*, 386 U.S. 171, 191-92 (1967).

<sup>83</sup> *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991).

<sup>84</sup> *Tully v. Fred Olson Motor Serv. Co.*, 37 Wis. 2d 80, 91, 154 N.W.2d 289 (1967).

<sup>85</sup> *Smith v. Local 7889, United States Steelworkers of Am.*, 834 F.2d 93, 96 (4th Cir. 1987).

<sup>86</sup> *Mahnke* at 531 (citing *Vaca* at 190). This decision only discusses the arbitrary and discriminatory aspect of the duty of fair representation because WERC specifically found that LAW's actions were not done in bad faith.

conduct.”<sup>87</sup> Whether a union’s actions are discriminatory requires a subjective inquiry and requires proof that the union acted due to improper motive.<sup>88</sup>

Here, the Commission found that LAW’s actions were arbitrary and discriminatory and for those reasons found that LAW breached its duty of fair representation. The Commission specifically found that LAW failed to investigate the facts and circumstances given rise to the grievance;<sup>89</sup> that LAW’s expectation that Gribble affirm 16 procedural paragraphs and execute a conflict waiver was arbitrary and discriminatory;<sup>90</sup> and that LAW’s decision not to pursue Gribble’s layoff grievance to arbitration was arbitrary and discriminatory.<sup>91</sup>

In concluding that LAW’s expectation that Gribble affirm the 16 paragraphs and execute a conflict waiver was arbitrary and discriminatory, the Commission failed to apply the highly deferential standard that the union is entitled to nor did the Commission find that there was improper motive. The Commission places a lot of emphasis on its belief that the 16 paragraphs have are “immaterial to the Association’s evaluation of the merits of a grievance to determine whether to proceed to arbitration.”<sup>92</sup> However, a union’s decision to pursue a grievance to arbitration involves more than just a determination of whether a grievance does or does not have merit.<sup>93</sup> Other considerations go into this decision and unless these other considerations are arbitrary, discriminatory, or are in bad faith, one cannot conclude that a union’s action are arbitrary, discriminatory, or are in bad faith. Here, the Commission specifically noted that “at all junctures, each side responded to the other, but those replies were not responsive to the

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<sup>87</sup> *Service Employee International Union* at ¶ 22 (citing *Airline Pilots Ass’n* at 67).

<sup>88</sup> *Neal v. Newspaper Holding Inc.*, 349 F.3d 363, 369 (7th Cir. 2003).

<sup>89</sup> Gribble II, Findings of Fact, No. 30. This finding is discussed in the findings of fact section of this decision for this is purely a finding of fact and not a legal conclusion.

<sup>90</sup> Gribble II, Findings of Fact No. 31.

<sup>91</sup> Gribble II, Findings of Fact No. 32.

<sup>92</sup> Gribble II, Memorandum Accompanying Findings of Fact, Conclusions of Law and Order p. 35.

<sup>93</sup> A union has wide latitude in determining whether to pursue a grievance and can consider many different factors when making its decision. *Mahnke* at 531; *Vaca* at 191-92.



inquires.”<sup>94</sup> This determination is important because LAW’s contention during this entire process was that there were communication issues and these communications were making it and ultimately did make it impossible for LAW to continue with the grievance because it is hard to work with someone who was not willing to work with LAW. The fact that Gribble’s replies to the LAW’s letters were unresponsive supports LAW’s contention. Furthermore, LAW’s letter does address LAW’s view of Gribble’s grievance, providing LAW’s view that the grievance is flawed.<sup>95</sup> LAW consulted with an attorney regarding the alleged conflict of interest and honestly, and perhaps mistakenly, believed that there was a conflict that needed to be waived.<sup>96</sup> This belief was not entirely unreasonable considering the litigation that was still occurring in Gribble I at the time.<sup>97</sup> The question the Commission should have been considering is not whether the paragraphs and conflict waiver go toward the merits of the grievance, but whether these conditions were entirely unreasonable when considering the evidence provided. Therefore, a correct application of law to the facts does not support a conclusion that the request to affirm the paragraphs and the request to waive a conflict were arbitrary, nor does it support a conclusion that the LAW’s decision to not pursue the layoff grievance was arbitrary.

Whether a union’s actions are discriminatory requires a subjective inquiry and requires proof that the union acted due to improper motive.<sup>98</sup> The bad faith prong also requires a subjective inquiry.<sup>99</sup> Here, the Commission specifically found that LAW did not act in bad faith

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<sup>94</sup> Gribble II, Memorandum Accompanying Findings of Fact, Conclusions of Law and Order, p. 35.

<sup>95</sup> LAW Ex. 15.

<sup>96</sup> LAW Brief, p. 15.

<sup>97</sup> The Commission does acknowledge that there might be a conflict of interest, though not the one that LAW believes exists. Gribble II, Memorandum Accompanying Findings of Fact, Conclusions of Law and Order, p. 31 (“If Fairweather had a conflict of interest, it was with respect to his client, Gribble, not LAW.”).

<sup>98</sup> *Neal v. Newspaper Holding Inc.*, 349 F.3d 363, 369 (7th Cir. 2003).

<sup>99</sup> Whether a union’s conduct was discriminatory or in bad faith “requires inquiry into the subjective motivation behind union action. *Trnka v. Local Union No. 688, United Auto, Aerospace Agric. Implement Workers of Am.*, 30 F.3d 60, 63, (7th Cir. 1994).

after having conducted a subjective inquiry into LAW's motivation<sup>100</sup> Without making such a subjective inquiry into LAW's motivations with regards to the discrimination prong, the Commission could not have found as a matter of law, that LAW's conduct was discriminatory.

Therefore, as a matter of law, LAW's request regarding the 16 paragraphs was neither arbitrary nor discriminatory. Likewise, LAW's request regarding the conflict waiver was neither arbitrary nor discriminatory. Therefore, as a matter of law, LAW did not breach its duty of fair in deciding not to process the grievance to arbitration.

## **II. Findings of Fact Not Supported By The Evidence.**

Both LAW and the County argue that several finding of facts made by the Commission are not supported by the evidence. They specifically assert that the finding the following findings are not supported by substantial evidence: 1) the finding that LAW's request for confirmation of the accuracy of 16 paragraphs related to procedural history of Gribble's grievance was arbitrary and discriminatory; 2) the finding that LAW's request for Gribble to waive a conflict of interest was spurious and thus arbitrary and discriminatory; and 3) the finding that LAW did nothing to investigate Gribble's grievance.

The Commission's determination that LAW's request for confirmation of the accuracy of 16 paragraphs related to the procedural history of Gribble's grievance was arbitrary and discriminatory and the findings that LAW's request for Gribble to waive a conflict of interest was arbitrary and discriminatory are legal conclusions that are addressed above, as erroneous interpretations of law.

The finding that LAW did nothing to investigate Gribble's grievance is a finding of fact that must be upheld if it is supported by substantial evidence in the record.<sup>101</sup> The Commission found:

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<sup>100</sup> Gribble II, Memorandum Accompanying Findings of Fact, Conclusions of Law and Order, p. 35.

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 documents, including, but not limited to, job descriptions, resumes, employment applications, meeting minutes and/ or budget documents from the County.<sup>102</sup>

The Court finds that there is not substantial evidence in the record to support this finding and is inconstant with previous findings by the Commission. The Commission acknowledged Gribble I.<sup>103</sup> In Gribble I, the Commission found that the LAW adequately investigated the collective bargaining agreement regarding the bump provision and found that there was no bumping.<sup>104</sup> Even though the Commission did not take a stance regarding the bump provision in Gribble I, the fact still remains that LAW did investigate this issue. Also, the Commission found that "Fairweather and Coraggio discussed the facts and circumstances surrounding Gribble's layoff on October 15, 2009."<sup>105</sup> If they did discuss the facts and circumstances surrounding the Gribble's layoff as the Commission found, when Gribble filed her grievance regarding the layoff, some investigation had already occurred. Furthermore, many of the letters that were sent from LAW do indicate that some investigation had to have occurred, otherwise, why would LAW have specifically mentioned the importance of knowing whether Gribble qualified for any of the positions held by those less senior than her.<sup>106</sup> Also, LAW repeatedly indicated that the grievance as written was highly problematic because of the relief that was being requested. Coraggio indicated that there was no merit to the relief requested, that in all of his years of working with unions, he has never seen an arbitrator force an employer to re-create a position

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<sup>101</sup> Wis. Stat. § 227.57(6).

<sup>102</sup> Gribble II, Findings of Fact, No. 30.

<sup>103</sup> Gribble II, Findings of Fact, No. 28.

<sup>104</sup> Gribble I.

<sup>105</sup> Gribble II, Findings of Fact, No. 9.

<sup>106</sup> LAW Ex. 2, 8, 9, 11, 15.

that they had the right to eliminate.<sup>107</sup> Therefore, the Commission's finding that LAW did nothing to investigate is not supported by substantial evidence in the record; rather, the evidence in the record supports a finding that LAW did investigate Gribble's layoff.

### **III. Agency Acted Outside Its Range Of Discretion.**

The County asserts that the Commission acted outside its range of discretion when it found that the collective bargaining agreement included the ability to bump and that there are county-wide bumping rights. LAW also asserts that the Commission acted outside its discretion when it found that the contract contained a bumping provision. Since the Commission could have only made these determinations having first found that the union breached its duty of fair representation, the Court will not need to address this issue, since the court will be ordering that the Commission's determination regarding LAW's breach of fair representation be reversed.<sup>108</sup> Even if this Court affirmed the Commission's findings and legal conclusions regarding LAW's breach of duty of fair representation, this Court agrees with both the County and LAW regarding the issue of whether there is bumping in the collective bargaining agreement.<sup>109</sup> The Court would find that there is no bumping in this contract, specifically because all parties understood that the contract contained no bumping.<sup>110</sup>

### **Conclusion**

The Commission's Findings of Fact, Conclusions of Law and Order issued by Examiner Lauri A. Millot on July 1, 2014 is overturned because the Commission erroneously applied the law and its decision depends on facts that are unsupported by substantial evidence in the record.

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<sup>107</sup> HT 68: 6-13,

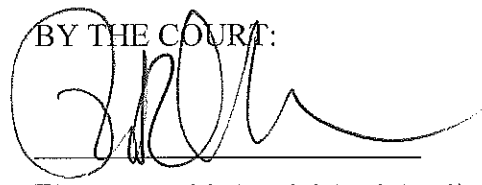
<sup>108</sup> In accordance with the Commission's practice, the Commission only decides the merits of a grievance if the complainant shows that his or her access to grievance procedure was prevented by the union's failure to fairly represent the complainant's interest on the subject throughout the procedure. Milwaukee County dec. No. 28525-B (Burns, 5/98) at 12, aff'd 28525-C (WERC, 8/98).

<sup>109</sup> See LAW Brief, p. 16-17, County Brief, p. 16-18.

<sup>110</sup> Even Gribble acknowledges during the hearing that she was aware that the county employees did not want bumping in their contract. HT 47:9-48:12.

Specifically, this Court finds that LAW did not breach its duty of fair representation during the handling of Gribble's grievance. It is hereby ordered that the Commission's Finding of Fact, Conclusions of Law and Order be reversed. Specifically, the Court reverses the Findings of Fact, Conclusions of Law and Order made by the Commission at Findings of Fact paragraphs 30, 31, and 32. The Court finds that LAW did perform at least some investigation into Gribble's grievance; that LAW's request to affirm the veracity of sixteen paragraphs and to execute a conflict waiver were not arbitrary or discriminatory; and that LAW's decision not to pursue Gribble's grievance to arbitration was not arbitrary or discriminatory. The Court also reverses the Commission's Conclusion of Law found at paragraph 6, concluding instead that the Complainant has not established by 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 Wis Stat. § 111.70(3)(b)1. It is therefore order that the Commission reverse above-reverenced paragraph and dismiss Complainant Gribble's complaint.

Dated at Rhineland, this 28 day of April, 2015.

BY THE COURT:  
  
The Honorable Patrick F. O'Melia  
Circuit Court Judge, Branch I  
Oneida County Circuit Court