STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KAREN BISHOP, Complainant,

vs.

MILWAUKEE PUBLIC SCHOOLS
AND
SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 150, Respondents.

Case 437
No. 65294
MP-4200

Decision No. 31602-B

Appearances:

Alan C. Olson, Alan C. Olson and Associates, S.C., 2880 South Moorland Road, New Berlin, Wisconsin 53151-3744, appearing on behalf of Complainant Karen Bishop.

Matthew R. Robbins, Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of Respondent Service Employees International Union Local 150.

Donald L. Schriefer, Office of City Attorney, City of Milwaukee, 200 East Wells Street, Room 800, City Hall, Milwaukee, Wisconsin 53202-3551, appearing on behalf of Respondent Milwaukee Public Schools.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

The complaint, as amended on January 4, 2006, alleges that Service Employees International Union Local 150 and Milwaukee Public Schools have committed prohibited practices within the meaning of MERA. Specifically, Complainant alleges that Service Employees International Union Local 150 has violated its statutory duty of fair representation in the manner in which it processed a grievance involving Complainant's discharge from employment and that Milwaukee Public Schools discharged Complainant without just cause in

violation of a collective bargaining agreement between Milwaukee Public Schools and Service Employees International Union Local 150. A hearing, which was transcribed, was held in Milwaukee, Wisconsin on March 30, 2006. The record was closed on May 24, 2006, following receipt of post-hearing written argument.

FINDINGS OF FACT

1. Karen Bishop, hereafter Complainant, is a resident of the State of Wisconsin and was employed by Milwaukee Public Schools from 1990 until her discharge from employment in March of 2004. From 2001 until the time of her discharge, Complainant was employed as a Handicapped Children's Assistant at the Milwaukee School of Languages.

2. Service Employees International Union Local 150, hereafter SEIU or Union, is a labor organization and the exclusive bargaining representative of a collective bargaining unit of employees of Milwaukee Public Schools, including food service managers, food service manager trainees, food service assistants, handicapped children's assistants, and school nursing assistants (MPS Unit). Between the years 2001 and 2005, Carmen Dickinson was the SEIU Representative with primary responsibility over the MPS Unit. SEIU Representative Michael Thomas succeeded Carmen Dickinson in this capacity. At the time of her discharge from employment with Milwaukee Public Schools, the Complainant was a member of the MPS Unit.

3. Milwaukee Public Schools, hereafter MPS, is a municipal employer. At all times material hereto, Michael Bellin, Deborah Ford, Cleo Rucker and Luiz Garza have been employed by MPS and have acted on behalf of MPS with respect to MPS' labor relations function, including the processing of grievances. At all times material hereto, Jerome Hamm has been employed by MPS as the Assistant Principal of the Milwaukee School of Languages and, in that capacity, was the direct supervisor of Complainant.

4. MPS and SEIU are parties to a collective bargaining agreement that includes the following:

PART VI

GRIEVANCE PROCEDURE

A. PURPOSE

> The purpose of the grievance procedure is to provide a method for quick and binding final determination of every question of interpretation and application of the provisions of this agreement, thus preventing the protracted continuation of misunderstandings which may arise from time to time concerning such questions.

B. DEFINITIONS

A grievance is defined to be an issue concerning the interpretation or application of provisions of this agreement or compliance therewith provided, however, that it shall not be deemed to apply to any order, action, or directive of the superintendent or of anyone acting on their behalf, or to any action of the Board which relates or pertains to their respective duties or obligations under the provisions of the state statutes.

C. RESOLUTION OF GRIEVANCE

If the grievance is not processed within the time limit at any step of the grievance procedure, it shall be considered to have been resolved by previous disposition. Any time limit in the procedure may be extended by mutual consent.

D. STEPS OF GRIEVANCE PROCEDURE

Grievances shall be processed as follows:

FIRST STEP – An employe shall, within five (5) workdays, submit his/her grievance directly to his/her next higher authority, but he/she may request next higher authority to send for a) a representative of the Union, or b) a fellow employe of his/her own choosing for the purpose of joint oral presentation and discussion of the grievance at a mutually convenient time. In the event a representative is brought in by the employe, a Union representative shall also be present. If the grievance is not resolved satisfactorily, it shall be reduced to writing and presented to the employe's next higher authority within five (5) workdays of the oral presentation. The next higher authority shall give a written answer within five (5) workdays of receipt of the written grievance.

The next higher authority shall advise Labor Relations in writing of his/her disposition of any grievance presented without the presence of a Union representative with copies for the department head and the Union. All written grievances shall be set forth on a form provided by Labor Relations.

SECOND STEP – If the grievance is not adjusted in a manner satisfactory to the employe or the Union within five (5) workdays after the presentation and discussion, then the grievance may be set forth in writing within five (5) workdays by a representative of the Union on a form provided by Labor Relations which is signed by the grievant, and presented to the department head. The department head shall, at the Union's request, set a mutually convenient time for discussion of the grievance. Such discussion should take place within ten (10) workdays of presentation of the written and signed grievance to the

department head. The department head shall advise the Union in writing of his/her disposition of the grievance within five (5) workdays following the discussion with a copy of the disposition being simultaneously delivered to Labor Relations.

THIRD STEP – If the written grievance is not adjusted in a manner satisfactory to the employe or the Union within five (5) workdays after the discussion with the department head, it may be presented within five (5) workdays by the Union to the superintendent or his/her designee for discussion. Such discussion shall be made within ten (10) workdays at a mutually convenient time fixed by the superintendent or his/her designee. The superintendent or his/her designee shall render a written disposition to the Union within ten (10) workdays from said hearing. If the grievance is not certified to the impartial referee in accordance with the impartial referee procedure within twenty (20) workdays after notification of the superintendent's or his/her designee's decision, such decision shall become final.

FOURTH STEP – The decision of the superintendent or his/her designee upon a grievance shall be subject to the impartial referee upon certification to him/her by the Union. The final decision of the impartial referee, made within the scope of his/her jurisdictional authority, shall be binding upon the parties and the employes covered by this agreement.

JURISDICTIONAL AUTHORITY. Jurisdictional authority is limited to consideration of grievances as herein above defined. The impartial referee procedure shall be subject to the following:

a. The Union (certifying party) shall notify the superintendent (other party) in writing of the certification of a grievance.

b. The certifying party shall forward to the impartial referee a copy of the grievance and the other party's answer and also send a copy of such communication to the other party.

c. Upon receipt of such documents, the impartial referee shall fix the time and place for a formal hearing of the issues raised in the grievance not later than thirty (30) days after receipt of such documents, unless a longer time is agreed to by the parties.

d. Upon the fixing of a referee hearing date, the parties may arrange mutually agreeable terms for a pre hearing conference to consider means of expediting the hearing by, for example, reducing the issues to writing, stipulating fact, outlining intended offers of proof, and authenticating proposed exhibits.

e. In those cases where either party deems it necessary, it may be arranged that a transcript of the hearing be made by a qualified court reporter. The party making such arrangements shall bear the full cost thereof. The other party may purchase a copy. If the impartial referee requests that he/she be furnished with a copy, the expense of the original copy and the reporter's attendance charge shall be borne equally by the parties except as provided in 3 below.

f. At the close of the hearing, the impartial referee shall afford the parties reasonable opportunity to submit briefs.

g. The impartial referee shall render his/her decision as soon as possible, preferably within twenty (20) workdays.

h. The impartial referee shall lay down the rules for orderly conduct of the hearing.

i. In rendering a decision, the impartial referee shall be bound by the terms of the collective bargaining agreement negotiated by the parties, past practices of the parties, and cited prior arbitration rulings to which the bargaining unit was a party. The arbitrator may give consideration to controlling legal and arbitral case law and must give recognition to the principles of law related to the interpretation of contracts followed by Wisconsin courts.

j. The expenses of the impartial referee shall be borne equally by the parties, except that the party requesting reconsideration or rehearing shall bear the full expenses of the impartial referee incurred in such reconsideration or rehearing except as provided in 3 below.

APPOINTMENT OF IMPARTIAL REFEREE. Impartial referee shall be selected as follows:

a. If the parties are unable to agree upon the selection of an impartial referee within two (2) weeks after desired certification of a grievance either party may initiate a request to the WERC to submit to them a list of the names of five (5) persons suitable for selection as impartial referee.

b. The parties shall strike a name alternately, beginning with the Union, until one (1) name remains. Such remaining person shall act as impartial referee. In subsequent selections, the parties will alternate the first choice to strike a name.

PAYMENT OF ARBITRATION COSTS. During each year of the contract, the Board shall pay the cost of the impartial referee's fees plus one (1) transcript for the Union and one (1) transcript for the Board for up to two (2) arbitrations.

E. PRESENCE OF GRIEVANT

1. The person taking the action may be present at every step of the procedure and shall be present at the request of the Union, the superintendent, his/her designee, or the department head, as the case may be.

2. Grievances at the second step and grievances at the third step may be processed during the day at the grievant's school. If impossible to schedule a meeting at the grievant's school, the employe may be released without loss of pay to meet with the appropriate party. Every effort shall be made to not absent an employe from his/her work.

3. The employer will recognize stewards selected by the Union to represent employes with their grievances, discipline, and other maters of contract enforcement after receiving notification from the Union of the names of such stewards.

F. GROUP GRIEVANCE

In order to prevent the filing of a multiplicity of grievances on the same question of interpretation or compliance, where the grievance covers a question common to a number of employes, it shall be processed as a single grievance, commencing with the party having jurisdictional authority thereof. Any group grievance shall set forth thereon the names of the persons or the group and the title and specific assignments of the people covered by the group grievance.

G. PROCEDURE FOR GRIEVANCES WHICH ARE NOT UNDER THE JURISDICTION OF FIRST AUTHORITY

Any grievance, based upon the action of authority higher than the first higher authority, shall be initiated directly with the person having such jurisdiction of the matter.

H. DISCIPLINARY MATTERS

1. Any regularly appointed employe who is reduced in status, suspended, removed, or discharged may, within five (5) workdays after receipt of such action, file a grievance as to the just cause of the discharge, suspension, or discipline imposed upon him/her.

. . .

5. In February 2004, MPS received written statements from two Educational Assistants employed by MPS at the Milwaukee School of Languages, *i.e.*, Diane McConnell and Annette Lopez, regarding Complainant's conduct towards H, a Special Education Needs Student with a cognitive disability, on February 13, 2004. Lopez' statement, dated February 13, 2004, is as follows:

> On February 13, 2004 at approximately 1:30 p.m. I was walking pass the gym (many of the students and a couple of staff members were standing by the door) and I witnessed Ms. Bishop pushing (H). (H) fell to the floor (in a sitting position) she was very upset and crying. As (H) got up from the floor she went towards Ms. Bishop (she was crying and shouting "You push me") and poked her on the shoulder with her finger.
>
> I asked Ms. Bishop "Why did you push (H)?" and she responded "I did not push her, several others did." And I said "You pushed her because I saw you." And Ms. Bishop said I don't have to listen to you." I said to Ms. Bishop "How would you like someone to treat your child like that?" She repeated again "I don't have to listen to you." And I responded "you are right you don't" but, you have to listen to Mr. Hamm. I proceeded to report it to Mr. Hamm immediately.

McConnell's statement, dated February 17, 2004 is as follows:

> On Friday, February 13, 2004, (H) was crying because another student had pinched her. She cannot speak very clearly, so it was hard to understand what she was saying. Karen Bishop came over to her and told her to stop crying and that she was always making a fuss about something. She then grabbed (H) by the arm and pulled her as if she was upset with her. When she did this, (H) became angry and started to yell at her. Karen Bishop started to push her away yelling get away from me. At this point, I intervened and took (H) out into the hallway. She got a drink of water and I talked with her to calm her down. We returned to the gym as I told her to get in line with the rest of the students. She went over to get in line and Karen turned around and told her to get away from her and then with both hands, she pushed her down. (H) fell to the floor crying and I went over to help her up.

In mid-February, 2004, Complainant contacted SEIU Representative Carol Vian to discuss the events of February 13, 2004. MPS received a written statement dated February 25, 2004 from MPS employee Jeremy Krutina that states as follows:

> On the date in question, Friday 13, 2004, (H) was in the gym and (K.H.) pushed (H) away from the basketball court where (H) was trying to shoot baskets. (H) got very upset and Ms. Bishop went to see what was wrong with

> (H). (H) said that (C.) pinched her. Ms. Bishop was trying to find out exactly what happened and then Mr. Zabala called out to put the balls away. Ms. Bishop took the ball away from (H) and then (H) got upset and went after Ms. Bishop. (H) was slapping and swinging at Ms. Bishop. Ms. Bishop stepped aside and was attempting to block (H) swings. (H) wasn't responding to Ms. Bishop and Ms. Bishop then put her hand on (H's) hip and gently pushed her to the side in order to prevent harm to herself and the other students. At this point, Ms. McConnell came over and took (H) out to get a drink of water. After this point, I did not see anything else that took place between (H) and Ms. Bishop.

MPS received a written statement dated February 26, 2004 from MPS Physical Education Teacher Aracelio Zabala that states as follows:

> On February 13, 2004 during the end of 7th hour I observed (H) trying to hit Ms. Bishop with her open hand. As (H) came towards Ms. Bishop I observed no physical contact by either of them. Ms. Bishop simply backed away as (H) attempted to hit her.

MPS received an undated written statement from MPS employee C. Pitchford that states as follows:

> On February 13, during the last ten minutes of seventh hour. I saw (H) go over to where Mrs. Bishop was standing two times. During those two times (H) was lashing out at Mrs. Bishop.

On or about February 13, 2004, Complainant filed with MPS a "Report of Assault Suffered by School Personnel" alleging battery in that, during 7th hour Gym Class on February 13, 2004:

> (H) approached me in tears saying one of the students had pushed her away from the basketball hoop. I urged her to calm down and go play at another basket. Some time later I saw (H) wandering around still angry. I approached her trying to calm her. She moved into my fact and hit both of her fists on my chest. I put my hands up to push her hands off my chest.
>
> I walked away to let someone else try to help (H). I took the basketball away from her because she was still carrying it and not playing.
>
> Ms. McConnell took (H) out in the hall-to get a drink & help calm her, I think.
>
> The next thing I knew, (H) came into the south door of the gym. She came over to me and began slapping her hands all around in front of my head and face. I instinctively pushed her hands away from me: I was afraid of being hit.

> My back was to the north open door of the gym. Ms. Lopez appeared there. She said, "Know why (H) is crying." "Someone pushed her." I said "who?" because I could not understand (H); who had said "yes" to 2 or 3 names of students that I just guessed from where (H) was gesturing.
>
> Ms. Lopez then stated that I had pushed (H).
>
> It was then after gym and I took our students to their classroom. Ms. Lopez, Ms. McConnell & (H) remained behind. Mr. Zabala and Mr. Pitchford were present at all times.

Vian represented the Complainant at a pre-disciplinary meeting held at the end of February 2004 in the office of Grace Thomsen, the Principal of the Milwaukee School of Languages, and spoke on behalf of the Complainant. At this meeting, Thomsen provided Vian and Complainant with copies of a packet of materials. This packet included a copy of Complainant's "Report of Assault Suffered by School Personnel;" Lopez' written statement of February 13, 2004; McConnell's written statement of February 17, 2004; Krutina's written statement of February 25, 2004; an August 5, 2003 letter from MPS Personnel Analyst D. Michael Bellin setting forth procedures that must be followed due to Complainant's continued record of excessive absences; and a letter from the Mrs. H, the mother of H, claiming, *inter alia*, that this student had stated that Complainant had grabbed her arm and pushed her down. This packet also included a written statement of "Certain Facts Meeting for Ms. Karen Bishop, Handicapped Children's Assistant" that includes the following:

> On Friday, February 13, 2004, adult Special Education Needs Student (H) was escorted to Mr. Hamm's office by Educational Assistant, Ms. Lopez, during hour seven gym class. The student was crying and sobbing. When questioned by Mr. Hamm, (H) said several times, "She pushed me!" "She pushed me!" When asked to tell who pushed her, (H) said that Ms. Bishop pushed her.
>
> Two Educational Assistants provided statements indicating that they saw Ms. Bishop push (H) during gym class on February 13, 2004.
>
> (H's) mother was notified via telephone by Mr. Hamm of (H's) allegation against Ms. Bishop on Friday, February 13, 2004. (Mrs. H) drove (H) to School on Monday, February 16, 2004 and indicated that (H) was upset about the February 13, 2004 gym situation the entire weekend. According to (Mrs. H), the student told "anyone who would listen to her" that Ms. Bishop pushed (H). (Mrs. H) came to school the afternoon of Wednesday, February 18, 2004 to pick up (H), who had missed her school bus. (Mrs. H) took the time to tell Mr. Hamm that (H) still seemed upset about the February 13th incident. (Mrs. H) indicated in a very strong manner that she did not want (H) and Ms. Bishop to have contact with one another, citing concern for (H's) safety as an issue.

> On February 16, 2004, Mr. Hamm left word with Mr. Fredricks, SEN Teacher, to have Ms. Bishop report to Mr. Hamm as soon as she arrived at work. Her start time is 8:15 AM. When Ms. Bishop had not reported to Mr. Hamm by 9:00 AM, Mr. Hamm called Mr. Fredrick's room, where he discovered Ms. Bishop was in attendance. Mr. Hamm directed Ms. Bishop to report to his office, room 145, immediately. When Ms. Bishop still had not reported to Mr. Hamm by 9:10 AM, Mr. Hamm walked over to Mr. Fredrick's classroom, where Ms. Bishop was still in attendance. Ms. Bishop did accompany Mr. Hamm to his office. In his office, she spoke with Ms. Vian, Union Steward, by telephone and Mr. Hamm also spoke to Ms. Vian to set up the February 25, 2004 meeting date. Ms. Bishop left school at 10:00 a.m. on February 16th, citing illness.
>
> II. Ms. Bishop received a letter from Human Resources, dated August 5, 2003 which indicated some expectations regarding her attendance pattern. There are several absence dates during the 2003-2004 school year that are of concern:
>
> 9-12-2003; 1020-2003;10-21-2003;12-12-2003;2-19-2004;2-20-2004.

At the conclusion of the pre-disciplinary meeting, Thomsen told the Complainant that she could return to work; that Thomsen would be making a report to the Central Office; and that Complainant should wait for the next decision. Complainant received a copy of the letter that Thomsen sent to the Central Office. Thereafter, Complainant received a letter dated March 8, 2004, from Bellin that includes the following:

> Dr. Grace Thomsen, Principal at Milwaukee School of Languages, has advised me that hearings were held on February 25, 2004 and February 26, 2004 to discuss allegations of your possible misconduct as a Handicapped Children's Assistant. Present at the hearings, beside you, were Ms. Jennifer Smith and Mr. Jerome Hamm, Assistant Principals, Ms. Thomsen, and Ms. Carol Vian, your Local 150 representative.
>
> Based on your record, the information presented at the hearing, and the recommendation of Dr. Thomsen, you are hereby discharged from Milwaukee Public Schools, effective at the start of business on Tuesday, March 9, 2004.
>
> The reason for this action is:
>
> (1) Pushing a child;
> (2) Failing to comply with attendance procedures, and Absence Without Approved Leave on February 18, 19, 20, and 24, 2004; and
> (3) Your overall record and history of absences.

> Your actions constituted prohibited conduct as defined in the "Employee Rules of Conduct" adopted by the Milwaukee Board of School Directors on September 29, 1999.
>
> You may file a grievance as to the just cause of this action within five (5) days of your receipt of this notice. (Your union representative, Ms. Carmen Dickinson, may be contacted at 355-5150, extension 16.)
>
> If you have any questions regarding this matter, you may contact me at 475-8509.
>
> . . .

SEIU Representatives Dickinson and Vian were cc'd on the letter. At the time of her discharge, Complainant was assigned to work with one specific Teacher, *i.e.*, Matthew Fredericks, and one specific Educational Assistant, *i.e.,* McConnell. After Complainant received the March 8th letter, she received a telephone call from Dickinson and was told that Dickinson would be proceeding with Complainant's grievance and that there would be a grievance step meeting at the Central Office. This was the first contact that Complainant had with Dickinson since 2002, when Dickinson defended Complainant against a student's charge that Complainant had physically abused another student; with the result that MPS did not pursue the charge. On or about March 18, 2004, Dickinson filed a written grievance with MPS alleging that the labor contract between MPS and SEIU had been violated by the "unjust termination" of Complainant and requesting "reinstatement and made whole." Complainant received a copy of this grievance at the second step grievance meeting; which was held on April 2, 2004. Prior to the second step grievance meeting, Complainant had two telephone conversations with Dickinson and, possibly, met with Dickinson at Dickinson's office. During their discussions, Complainant told Dickinson what had occurred on February 13, 2004 and Complainant, who had a copy of the collective bargaining agreement, questioned Dickinson about the grievance process. Prior to the second step grievance meeting, Vian and Dickinson had a conversation in which Vian informed Dickinson of the discussions that had occurred at the pre-disciplinary meeting with Thomsen and provided Dickinson with the packet of materials that had been provided to Vian by Thomsen. Dickinson also obtained information regarding Complainant's attendance during the 2003-04 school year. Prior to the second step grievance meeting, Dickinson reviewed the materials provided by MPS and concluded that, given the witness statements, SEIU would not arbitrate Complainant's grievance.

6. At or about the time of the second step grievance meeting, Complainant received a copy of the attendance information that had been obtained by Dickinson. At the second step grievance meeting, Dickinson and Complainant met with MPS Representatives Bellin and Thomsen. Shortly after the meeting had started, Dickinson interrupted Bellin while he was speaking; told Bellin that he had received SEIU's statement and complaint; that they would wait to hear from him and then left the meeting, accompanied by the Complainant. Complainant did not request to speak on her own behalf and did not speak on her own behalf. After they had left the meeting with Bellin, Dickinson told Complainant that a lot of time at

these meetings, she would lead her union member through a description of the grievance and what was wrong and then Bellin would be dismissive of that testimony and then speak about MPS accusations against the employee. Complainant did not make any statement to Dickinson regarding Dickinson's conduct at the second step meeting. By the time that Dickinson left the second step meeting, she had provided Bellin and Complainant with a "Statement of Facts" which had been prepared by Dickinson, as well as attachments referenced therein. This "Statement of Facts" is as follows:

STATEMENT OF FACTS
KAREN BISHOP

A. Employment History

- Ms. Bishop has been employed with MPS since 9-19-90.
- She has received above average evaluations with a rating of "Outstanding" in numerous categories including "Rapport with Students" (Attachment 1)
- In 2002, she received a letter of commendation for her "hard work with the students." The letter stated, "You are kind and patient, and you challenge our students on a daily basis!" (Attachment 2)
- On March 9, 2004, Ms. Bishop was discharged. (Attachment 3)

B. Alleged Charges

- Pushing a child

  1. The student involved in the alleged incident is (an adult) female.
  2. She has a documented history of violent and hostile behavior against students, teachers, and school personnel.
  3. The incident occurred on February 13, 2004, in which, Ms. Bishop filed an assault charge against the student for punching her in the chest. (Attachment 4)
  4. Statements were taken from Jeremy Krutina – HCA (Attachment 5) and C. Pitchford – teacher (Attachment 6) supporting Ms. Bishop's statement of the facts.
  5. The negative statement given by Diana McConnell was dismissed from the evidence file (Attachment 7). Ms. McConnell had a prior incident in which she threatened to physically harm Ms. Bishop (Attachment 8). In fact, her exact words to Ms. Bishop were, "beat your ass, if you lie on me again." This incident was witnessed by other staff.

- Attendance

1. Ms. Bishop is currently under the Family Medical Leave Act (Attachment 9)
2. Ms. Bishop followed the proper procedures for calling-off with the exception of February 24, 2004. This is documented in the secretaries notes (Attachment 10).
3. Ms. Bishop was under the care of a doctor from February 19 through the 24th. (Attachment 11). She provided the attached document to the District.

C. Conclusion

Ms. Bishop was the person that was attacked and abused in the February 13th incident. She lifted her hands to block the student's swings and attack on her person and tried to escape the student's attack. Again the student is (an adult) and of an adult stature. Additionally, Ms. Bishop followed the proper procedures in reporting and documenting the incident. Therefore, Ms. Bishop was the person in danger and under attack as supported by statements from other staff members. It is the Union's position and Ms. Bishop's that the student's violent nature should be addressed through the proper District procedures and that Ms. Bishop should not suffer for the actions of this student.

In regard to Ms. Bishop's attendance, she provided proof that she was under the care of a physician and also was eligible for FMLA. Therefore, her attendance or absences cannot be used for disciplinary purposes.

Therefore, Ms. Bishop should be reinstated with backpay and made whole. Additionally, Ms. Bishop is requesting a transfer to another building for safety concerns. Not only was Ms. Bishop attacked by the student, but she has also been threatened by another staff person, Ms. McConnell. In both instances, the Principal did nothing to insure Ms. Bishop's safety and we are asking that the District also address this concern. It is unfortunate that Ms. Bishop should suffer for the questionable management style of this Principal.

Shortly after the second step grievance meeting, Complainant received a copy of a "Grievance Disposition Form" dated April 6, 2004 that was issued by the Acting Director of the MPS Department of Human Resources, *i.e.*, Deborah Ford, in which the grievance was denied. The basis for the denial decision included the following:

Evidence supports the allegations of misconduct and the level of discipline was appropriate. While Ms. Dickinson was unwilling to discuss the allegations, she provided a "Statement of Facts" as she saw them. However, many of the points Ms. Dickinson was attempting to make were inaccurate or irrelevant, and she chose to ignore certain other facts.

The age of the student and her history of behavioral problems do not excuse Ms. Bishop for pushing the student. Neither does the fact that Ms. Bishop filed an assault charge against the student.

Statements taken from Jeremy Krutina and C. Pitchford do not support Ms. Bishop's statement, but only testify to the fact that they did not see the entire incident. In fact, Mr. Krutina stated that he did not see anything after Ms. McConnell took the student out for a drink of water, and the "pushing" incident took place after that. Ms. Dickinson ignores the statements of Ms. Annette Lopez who witnessed Ms. Bishop push the student, and the statement of the parent who stated that her daughter was obsessed for hours and even days later with the fact that Ms. Bishop had grabbed her arm and pushed her down.

Ms. Dickinson stated "the negative statement by Diana McConnell was dismissed from the evidence file" because Ms. McConnell had previously threatened Ms. Bishop. That statement, however, had been made a week earlier, and there is no evidence to show that Ms. McConnell was following through on her treat (sic) by lying about Ms. Bishop a week later. In addition, Ms. Dickinson's statement "the . . . statement was dismissed" is only wishful thinking on her part. (The school did address Ms. McConnell's threat in a misconduct hearing, and the matter was resolved.)

Regarding Ms. Bishop's attendance, Ms. Dickinson states that Ms. Bishop is currently under the Family and Medical Leave Act (FMLA), but she cited my letter of February 3, 2004 that authorized Ms. Bishop to be off from January 5, 2004 through January 23, 2004 for an entirely different medical condition. That letter does not give Ms. Bishop carte blanche permission to be off whenever she wants. Ms. Bishop did eventually provide a letter to the school, dated March 1, 2004, from a doctor who stated that Ms. Bishop was under stress from February 19 through 24, and was unable to function. That may have qualified for leave under the FMLA, but Ms. Bishop never mentioned this "stress" condition when she called the school on February 20, 2004 to say that she was waiting for her union to call, or on February 25, 2004 or February 26, 2004 when she attended disciplinary hearings on this matter.

Ms. Dickinson stated that Ms. Bishop followed the proper call-in procedures, except for February 24, 2004. However, she ignored an attachment to her own "Statement of Facts" which showed the following dates when she failed to follow the procedures:

9-12-03	No call to school. Did not provide medical documentation.
10-17-03	Claimed sick leave to meet father at airport who was coming from Florida.

10-20 & 21/03 Called in sick to take her pet to the veterinary clinic.
12-12-03 Called in sick but failed to provide medical excuse.
12-16-03 Left early for meeting with attorney.
1-29-04 Left early for doctor appointment. No medical excuse provided.
2-16-04 Left early due to illness. No medical excuse provided.
2-18-04 Left early due to illness. No medical excuse provided.
2-19-04 Off due to illness. Medical excuse provided March 1, 2004.
2-20-04 Told secretary that she was waiting for her union to call. (Ms. Carol Vian, a Local 150 representative, stated at the disciplinary hearing that Ms. Bishop should have reported to work, but Ms. Bishop was confused)
2-24-04 No Call/No Sub

. . .

This "Grievance Disposition Form" reported that this grievance had been discussed with supervisors Bellin, Thomsen, and Hamm. On April 22, 2004, Dickinson faxed a letter to Ford; which includes the following:

> I'm writing this letter in hopes of resolving several problems we are experiencing in the 2nd step of the grievance procedure. I've attached a response which is signed by you but from the content, I believe was written by Mr. Bellin. I've also attached a copy of the Union's "Statement of the Facts" for your information. There are a number of problems with the manner in which Mr. Bellin conducts himself in grievance hearings and in the manner in which he responds to the grievant.
>
> It is my understanding that the point of the 2nd step of the grievance procedure is to give the employee, the union, and management a chance to present their case to Human Resource. Then from the evidence presented, Human Resource will investigate the facts and render a decision. Unfortunately, Mr. Bellin has taken it upon himself to turn the 2nd step of the grievance procedure into the "Spanish Inquisition." Not only does he act in an extremely unprofessional manner, he treats the employees with disrespect. At times, his actions border on abusiveness and intimidation. I have had several complaints from my members regarding his rude and demeaning attitude and can no longer continue to let him treat the employees like second-class citizens.
>
> I believe in fostering a good labor/management relationship and in attempting to find resolution to the problems we deal with on a daily basis. This doesn't hold true for Mr. Bellin. I believe he would truly benefit from a course on anger management and/or some type of sensitivity training. Although that is your

> decision to make and to recommend, I'm respectfully asking that something be done before any further damage is caused. Finally, I'm asking for a meeting with you in order to find a resolution to this unfortunate circumstance.
>
> . . .

After Complainant received Ford's response to the grievance, Dickinson told Complainant that the second step was over and that they would now be waiting for the next step in the process. Subsequently, Dickinson telephoned Complainant to schedule a third step grievance meeting with Cleo Rucker of the MPS labor relations office. At some point, a hearing was held on Complainant's Unemployment Compensation (UC) claim against MPS. Dickinson assisted Complainant's UC attorney by faxing materials that Dickinson had put together during her investigation of Complainant's grievance. Complainant obtained CD's of the testimony at this hearing and, after listening to these CDs, went to Dickinson's office and gave the CDs to Dickinson. At a subsequent meeting, Dickinson made small talk to the Complainant while they were waiting for another individual. While making small talk, Dickinson told Complainant that she had listened to the CDs; remarked upon the tenacity of the UC Examiner in questioning Hamm in order to get the responses that the Examiner wanted; and agreed with Complainant that the UC Examiner had found that the MPS witnesses were not credible. On two occasions in July 2004, Dickinson and Complainant met with Rucker at the third step of the grievance procedure. During these meetings, Dickinson provided Rucker with the CDs provided by Complainant, as well as the written Statement of Facts, with supporting documents, and made statements in support of Complainant's grievance. At the second meeting, which lasted about ten minutes, Rucker stated that he had listened to a portion of the CDs; that he had been in his position for only one year; that he would not be making a decision; and that he would be passing the file up the line to higher management. Neither Rucker, nor Dickinson, stated a timeline for management's response.

7. In early November of 2004, Dickinson telephoned Complainant and left a message on her answering machine. In this message, Dickinson stated that MPS was ready to settle the grievance. Dickinson called again the next evening and told Complainant that Complainant could have her job back; that Complainant would be on 18 months probation; and that it was firm that there would be no back pay. Complainant responded that she could not accept the offer and discussed various concerns with Dickinson. Towards the end of November 2004, Complainant telephoned Rucker to discover the status of her grievance. Complainant then telephoned Dickinson and had a conversation. In February of 2005, Complainant called the SEIU office and left a voice mail message on all the voice mailboxes, including that of Dickinson. Complainant left messages in all the SEIU voice mailboxes over the Easter break in 2005 and again after school was out in June of 2005. Complainant did not receive a response to these voice mail messages until a few days after she had left the June messages. At that time, SEIU Representative Thomas called; indicated that he had received her messages; that he was sorry that no one had got back to her; and that she would be hearing from someone. Complainant had not had any prior contact with Thomas. On September 2, 2005, Complainant sent SEIU Local 150 President Debbie Timko a letter dated September 1, 2005, which includes the following:

> Today is the first day of school; and I am not there. I have worked for Milwaukee Public Schools as a Handicapped Children's Assistant since September, 1990. In March, 2004 I was wrongly terminated. Representatives of S.E.I.U. Local 150 have been helping me to Appeal. I am writing to ask for your help to re-start the Appeal process.
>
> I was successful in my appeal to receive Unemployment Benefits. When MPS appealed, my favorable decision was upheld.
>
> In March, 2004 Carol Vian was with me for the first meeting with administrators at my school. Later in Spring, Carmen Dickinson spoke for me at a meeting with Mike Bellin at Central Office. In July, Carmen and I met with Cleo Rucker from the office of Labor Relations. As the 2004-2005 school year was beginning, I was told that Mike Thomas would be handling my case. He has returned my phone calls, but we have never discussed my case.
>
> In November, 2004, Carmen called to report an offer from MPS to settle my case. I declined the offer because I thought that it almost totally favored MPS, and amounted to an admission of wrong-doing on my part. Since that time, repeated calls to Carmen, Mike Thomas, and eventually, Carol Vian, have not been returned.
>
> I have re-read the Union contract. The description there, and Carmen's answers to my questions, indicate an Appeal process that takes about one year, and that will eventually go to a formal Arbitration Hearing.
>
> I'm sure you can understand my frustration and disappointment at this time. Please help me to re-start a dialogue with MPS.
>
> I trust that you can confer with the S.E.I.U. Representatives within the next two weeks. Then I will be glad to hear from you to outline the next steps of my appeal.

Vian, Dickinson and Thomas were cc'd on this letter. Sometime after the date of this letter, Dickinson received a copy of this letter, but did not contact Complainant regarding this letter. Complainant sent a letter dated September 19, 2005 to Dian Palmer, President of Wisconsin Service Employees International Union that includes the following:

> I was given your name by Sheila Cochran of the Milwaukee Labor Council.
>
> Enclosed is a copy of a letter I sent to Ms. Debbie Timko, President of the Milwaukee S.E.I.U. Local 150. The letter explains the problem I have been having. The letter was delivered to the Union office on Tuesday, September 6, 2005.

> I would appreciate anything you can do to help re-start my Appeal. Ms. Cochran had only one other suggestion: to contact the Milwaukee office of the National Labor Relations Board.
>
> I am waiting for a response from my Union.
>
> Thank you.

On October 6, 2005, Dickinson received a copy of the third step "Grievance Disposition Form" that had been issued by MPS Superintendent of Schools. This form, which is dated January 5, 2005, denied the grievance. Normally, MPS would send a copy of this form to the Complainant. Complainant never received a copy of this form. Consistent with her practice at MPS, after receiving the third step response Dickinson reviewed the file one more time to determine if Complainant's grievance had merit to go to arbitration. With respect to Complainant's grievance, this review included a discussion with Thomas; who was then representing the MPS Unit. At the time of this discussion, Dickinson did not have any knowledge that Complainant intended to file a complaint with the WERC. Dickinson discussed with Thomas the fact that MPS had offered a last chance agreement; that SEIU did not have a written offer; and that they should see if they could obtain a written offer and settle the grievance. SEIU has settled other MPS grievances with last chance agreements. Dickinson recommended to Thomas that SEIU not arbitrate Complainant's grievance. Dickinson's recommendation was based upon her opinion that SEIU could not win in arbitration. Dickinson's opinion that SEIU could not win in arbitration was based upon her assessment that there were two witness statements from people who claimed to have viewed the event and observed Complainant push down an exceptional needs student and that no other witness statements were sufficient to rebut these claims.

8. In October of 2005, Complainant contacted the WERC by telephone. On November 8, 2005, the WERC received a complaint filed by Complainant. By letter dated January 20, 2006, the WERC notified MPS and SEIU that a complaint had been filed in this matter on November 8, 2004 and an amended complaint had been filed on January 4, 2006. In early November 2005, Thomas telephoned Complainant to schedule a meeting with Rucker to discuss an MPS settlement offer. At that time, Complainant repeatedly questioned why she had not had a response to her letter of September 1, 2005 and Thomas did not answer this question. Complainant told Thomas that she was considering filing a complaint with the WERC and that he might hear from the WERC. Complainant never provided Thomas with a copy of her complaint. Complainant cancelled one scheduled meeting because she had a conflict and the meeting was rescheduled to November 29, 2005. By letter dated November 14, 2005, Thomas advised Complainant of the following:

> Your grievance has been settled, Milwaukee Public Schools office of Labor Relations has offer (sic) you a Last Chance Agreement. Please make arrangements with Labor Relations to sign the Agreement, and return to work.

Complainant received this letter on November 17, 2005. On November 29, 2005, Complainant had a meeting with Rucker and Thomas and was given a copy of the written Last Chance Agreement prepared by MPS. Rucker went over the terms of the Agreement; which terms were not identical to those previously relayed by Dickinson. Complainant commented on the terms of the Last Chance Agreement, as did Thomas. Thomas discussed that Complainant was interested in going to another school and Rucker, Thomas and Complainant reviewed current openings. Thomas and Rucker discussed that this meeting was a step three meeting and that it should have happened a year ago, but did not explain why it had not happened a year ago. At the conclusion of the meeting, Rucker indicated that he would wait to hear from Thomas and Complainant told Thomas that she would get back to him that Friday. Complainant called Thomas the following Friday, but did not talk to him. Thomas returned her call the following Tuesday and expressed surprise that Complainant was not working and asked if she had not chosen a new school. Complainant responded no, she could not accept the Last Chance Agreement and explained why she could not accept the offer. Thomas tried to talk Complainant into reconsidering her decision. By letter dated November 29, 2005, Director of MPS Division of Labor Relations Luiz Garza advised SEIU President Debbie Timko of the following:

> Attached are three copies of a proposed Memorandum of Understanding concerning the following:
>
> Last Chance Agreement
> (Karen Bishop)
> Grievance 04/047
>
> After you have had a chance to review, and should you agree with it, please sign all copies and return one to this office.
>
> Should you have any questions, please feel free to contact me.

The attached Last Chance Agreement was the Agreement that had been reviewed by Rucker on November 29, 2005 and was signed by Garza and Ford. This Last Change Agreement included an offer to return Complainant to work, without back pay, as well as other terms and conditions. Complainant never received a copy of Garza's letter.

9. As reflected in SEIU's letter of November 14, 2005, SEIU decided to not appeal Complainant's discharge grievance to arbitration. SEIU's conduct in processing Complainant's discharge grievance, including SEIU's decision to not arbitrate this grievance, does not reflect arbitrary, discriminatory or bad faith conduct on its part toward Complainant.

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

CONCLUSIONS OF LAW

1. Respondent Service Employees International Union Local 150 is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. Respondent Milwaukee Public Schools is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. Complainant Karen Bishop, while employed by Milwaukee Public Schools, was a "Municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

4. Complainant Karen Bishop has not established, by a clear and satisfactory preponderance of the evidence, that Respondent Service Employees International Union Local 150, through its representation of Complainant, including its decision to not arbitrate her discharge grievance, has acted in an arbitrary, discriminatory or bad faith fashion, and, therefore, has not proven her allegation that Respondent Service Employees International Union Local 150 has violated Sec. 111.70(3)(b)1, Stats.

5. Inasmuch as Complainant Karen Bishop has not proven her allegation that Respondent Service Employees International Union Local 150 has violated its Sec. 111.70(3)(b)1 statutory duty of fair representation by deciding to not arbitrate her discharge grievance, the Wisconsin Employment Relations Commission will not exercise its Sec. 111.70(3)(a)5, Stats., jurisdiction over Respondent Milwaukee Public Schools to determine the merits of Complainant Karen Bishop's grievance claim that Respondent Milwaukee Public Schools violated the collective bargaining agreement between Respondent Milwaukee Public Schools and Respondent Service Employees International Union Local 150 when it discharged Complainant Karen Bishop in March, 2004.

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

ORDER

The complaint of Karen Bishop, as amended, is dismissed in its entirety.

Dated at Madison, Wisconsin, this 25th day of July, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

MILWAUKEE PUBLIC SCHOOLS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

As amended, the complaint alleges that SEIU and MPS have violated the Municipal Employment Relations Act. Specifically, Complainant alleges that SEIU has violated its statutory duty of fair representation in the manner in which it processed Complainant's discharge grievance and decided to not arbitrate this grievance and seeks adjudication of her grievance claim that MPS violated a collective bargaining agreement by discharging Complainant without just cause. Hearing in this matter was bifurcated, with the initial determination turning on whether SEIU has breached its duty to fairly represent Complainant. SEIU denies that it has breached its statutory duty of fair representation, as alleged by Complainant.

POSITIONS OF THE PARTIES

Complainant

Complainant maintains that SEIU violated its duty of fair representation in the manner in which SEIU handled the grievance involving Complainant's discharge from her MPS employment. Complainant argues:

> 1) that the Union has a duty of fair representation toward the Complainant;
>
> 2) that this duty may be violated in any of three ways: (1) if the union acted arbitrarily; (2) if the union acted discriminatorily; and (3) if the union acted in bad faith;
>
> 3) that a union acts arbitrarily when it ignores a meritorious grievance or processes the grievance in a perfunctory manner or fails to adequately investigate the merits of a grievance;
>
> 4) that a nonarbitrary decision must be (1) based upon relevant permissible union factors, (2) a rational result of the consideration of those factors, and (3) inclusive of a fair and impartial consideration of all employees' interests;
>
> 5) that a violation of the duty of fair representation can involve intentional conduct or, especially with regard to the arbitrariness component, unintentional Union conduct may violate the union's duty of fair representation if the union's performance or behavior was so poor that it falls outside the "wide range of reasonableness' afforded to the union;

6) that where an employee can show that the union breached its duty of fair representation and that there is reason to believe that breach effects the outcome of the arbitration, the grievant is entitled to relitigate his discharge against the employer even though the employer was not involved in the breach of the union's duty of fair representation;

7) that the relevant inquiry is not whether the union in fact pursues an employee's grievance, but rather whether the union has made a full investigation, has given the grievant notice and an opportunity to participate, has mustered colorable arguments and has refuted insubstantial arguments by the employer;

8) that the Union should have taken more "adequate measures to insure a fair resolution of the dispute" by affording Complainant notice and the opportunity for independent representation of her own interests in the proceeding;

9) that the duty of fair representation is of special importance when a grievance for wrongful discharge is involved;

10) that the duty of fair representation may be found where a union leader has purposefully concealed or misrepresented matters in dealing with members;

11) that the duty of fair representation includes the duty to investigate by interviewing the one witness who could have effectively and objectively corroborated a grievant's testimony on vital matters; the duty to present favorable evidence during the grievance process; and that the duty requires a good faith effort to plead a member's case.

Complainant argues that, absent justification or excuse, the union's failure to timely take basic steps in pursuit of a grievance appeal may constitute arbitrariness. Complainant further asserts that the SEIU representative's duty to timely advance the grievances through the contractual process and to communicate with the Complainant are ministerial acts and that the SEIU is liable for negligent conduct in performing ministerial acts.

Complainant asserts that the SEIU representative blew the grievance deadline and then secretly, and on her own, made the decision to not arbitrate. Complainant further asserts that SEIU breached its duty of fair representation by walking out of the Step 2 grievance without allowing Complainant to state her case; by refusing to communicate with Complainant for a year about the status of her grievance; by unilaterally deciding not to arbitrate Complainant's grievance without interviewing witnesses, investigating potential defenses, having a consensus or carefully deliberating; and by misrepresenting that Rucker had dropped the ball by not requesting arbitration and concealing the truth, *i.e.*, that SEIU had no intention of arbitrating her grievance.

Respondent SEIU

A labor organization satisfies its duty of fair representation, so long as its actions are not arbitrary, discriminatory or taken in bad faith. The duty of fair representation affords a labor organization a wide range of reasonableness to process grievances, including the right to decline to process grievances.

A decision to decline processing a grievance because it is likely a loser is not arbitrary and the fact that the decision may be a hard call does not give an Examiner the right to second guess the union's decision. A union that has legitimate concerns about the credibility of a grievant does not act arbitrarily when it decides to not advance a grievance to arbitration and a union's decision, even if negligent, does not breach its duty of fair representation.

The duty of fair representation requires the union to conduct a minimal, rather than a perfect investigation, and only an egregious disregard of the individual's right can breach that duty. A union's failure to interview witnesses is material to the duty of fair representation analysis, only if the interview would have produced new evidence.

A union's tactical decision on how to conduct a grievance meeting, even if erroneous, does not breach the union's duty of fair representation A union does not breach its duty of fair representation when, in good faith, it misinforms a member while handling a grievance. A union does not breach its duty of fair representation when a delay in processing the grievance does not affect the grievance's outcome or a delay in processing the grievance is, in part, the responsibility of management.

Even though the Union did not interview Pitchford, the union conducted a more than adequate investigation of Complainant's grievance. SEIU vigorously advocated on behalf of Complainant through each step of the grievance procedure. SEIU's obligation to invoke arbitration is not triggered until MPS provides SEIU with a written third step grievance answer.

By granting MPS an extension to provide the third step answer, SEIU Representative Dickinson hoped to produce a better settlement. By not providing a third step response until October 6, 2005, MPS was responsible for the delay in processing Complainant's grievance. Any delay in processing the grievance had no effect on the grievance's outcome.

SEIU negotiated a settlement agreement with MPS that would require MPS to reinstate the Complainant on a last chance basis. SEIU evaluated the grievance of Complainant; decided to not advance her grievance to arbitration; and, therefore, advised Complainant to accept the settlement agreement.

Since SEIU Representative Dickinson had no basis to know whether new information would come out, SEIU Representative Dickinson would have been misleading Complainant if, in November of 2004, she had told Complainant that SEIU definitely would not advance her

grievance to arbitration. Assuming *arguendo*, that, in November of 2004, SEIU Representative Dickinson was able to tell Complainant that SEIU was unlikely to advance her grievance to arbitration, there is no evidence that SEIU Representative Dickinson made the omission in bad faith.

In evaluating Complainant's grievance, SEIU was confronted with the statements of two witnesses, as well as the second statement of the victim, which all accused Complainant of pushing a child to the ground. Complainant's denial was not supported by any other reliable corroborating evidence. SEIU reasonably concluded that an arbitrator was likely to find that Complainant did push down an exceptional needs student.

Arbitral precedent provided SEIU with a reasonable basis to conclude that pushing down an exceptional needs student was a dischargeable offense. SEIU acted reasonably when it decided to accept MPS' proposed settlement offer, rather than to advance Complainant's grievance to arbitration, because it believed that it was unlikely to win the case at arbitration.

SEIU has not violated its duty of fair representation. The charges against SEIU must be dismissed in their entirety.

DISCUSSION

Complainant has filed a complaint with the Wisconsin Employment Relations Commission (WERC) against MPS and SEIU. Complainant seeks adjudication of a grievance alleging that Complainant has been wrongfully terminated in violation of the parties' collective bargaining agreement and asserts that SEIU has violated its duty of fair representation in the manner in which it has processed this grievance, including its decision to not arbitrate this grievance.

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. Where the parties have negotiated a collective bargaining agreement that includes a grievance procedure that culminates in final and binding arbitration, the Commission will not assert its Sec. 111.70(3)(a)5 jurisdiction to decide a claim of violation of a collective bargaining agreement, but rather, will defer to the parties' agreed upon mechanism for enforcing contractual rights, except where the parties waive reliance on the contractual grievance procedure or it has been established that the contractual grievance and arbitration procedures may not be relied upon to dispose of employee grievances. MUSKEGO-NORWAY SCHOOL DISTRICT, DEC. NO. 30871-D (Nielsen, 5/05); *aff'd by operation of law*, DEC. NO. 30871-E (WERC, 7/05).

Step Four of the collective bargaining agreement between MPS and SEIU provides SEIU with the sole right to certify grievances to the "impartial referee" and provides the "impartial referee" with authority to issue a final and binding decision on the grievance. The Examiner is satisfied that the parties have negotiated a collective bargaining agreement that culminates in final and binding arbitration of grievances and that SEIU, rather than the Complainant, has control over this arbitration process.

Complainant's complaint raises the allegation that the contractual grievance and arbitration provisions may not be relied upon to dispose of her grievance because SEIU has failed to fairly represent her, in violation of Sec. 111.70(3)(b)1, Stats. Prior to determining whether or not the Commission will assert its jurisdiction to adjudicate Complainant's Sec. 111.70(3)(a)5 breach of contract claim against MPS, the Examiner must first determine the merits of Complainant's Sec. 111.70(3)(b)1 claim against SEIU.

Applicable Legal Standards

In CITY OF MEDFORD, DEC. NO. 30537-C (8/04), the Commission concluded as follows:

. . .

> The duty of fair representation "is a purposefully limited check" on a union's considerable discretion in handling grievances, RAWSON, *supra*, and to establish a breach of the duty a complainant has the burden of establishing that the "union's conduct toward a member . . . is arbitrary, discriminatory, or in bad faith." MAHNKE, 66 WIS.2D AT 531 (quoting VACA V. SIPES, 386 U. S. 171, 190 (1967). "Bad faith" for this purpose "calls for a subjective inquiry and requires proof that the union acted (or failed to act) due to an improper motive." NEAL V. NEWSPAPER HOLDINGS, INC., 349 F.3D 363, 369 (7TH CIR. 2003). "Arbitrariness" generally focuses on whether the union has made a reasoned decision about proceeding with the grievance, MAHNKE, 66 WIS.2D AT 534, keeping in mind the "'wide range of reasonableness'" that the union must be allowed. MAHNKE, 66 WIS.2D 524, 531, quoting HUMPHRE V. MOORE, 375 U. S. 335, 349 (1964).

As Examiner Mawhinney stated in MILWAUKEE DISTRICT COUNCIL 48, DEC. NO. 30809-A (6/04), *aff'd by operation of law*, DEC. NO. 30809-B (WERC, 7/04)

> MAHNKE also requires that a union's exercise of discretion be put on the record in sufficient detail so as to enable the Commission and reviewing courts to determine whether the union has made a considered decision by review of relevant factors. The Commission has held that absent a showing of arbitrary, discriminatory or bad faith conduct, a union is not obligated to process grievances through all steps of the grievance procedure (CITY OF APPLETON, DEC. NO. 17541, (WERC, 1/80)), that the failure of a union to notify a grievant as to the disposition of his grievance is not an adequate basis for finding a breach of duty (UW-MILWAUKEE (HOUSING DEPARTMENT), SUB.NOM GUTHRIE V. WERC, DEC. NO. 11457-F, (WERC, 1977), that mere negligence in the processing of a grievance including the late filing of briefs is insufficient to constitute a violation (WISCONSIN COUNCIL 40, DEC. NO. 22051-A, (McLaughlin, 3/85), and that it is not for the Commission to judge the wisdom

> of union policies absent proof of perfunctory or bad faith grievance handling (MARINETTE COUNTY, DEC. NO. 19127-C, (Houlihan, 11/82), *aff'd*, DEC. NO. 19127-D, (WERC, 12/82).

Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

Alleged Unfair Representation

In 2002, SEIU Representative Dickinson represented Complainant at a pre-disciplinary meeting. MPS subsequently withdrew its charge against Complainant. Complainant acknowledges that, at this time, Dickinson did a good job of representing Complainant.

It is not evident that Complainant had any further interaction with SEIU until she contacted Carol Vian regarding the events of February 13, 2004. Vian represented Complainant at the February, 2004 pre-disciplinary meeting with Principal Thomsen. Complainant does not state that Vian exhibited any animosity toward Complainant or that Complainant was unsatisfied with Vian's representation.

Following the withdrawal of the 2002 charge, Complainant did not have any interaction with Dickinson until Dickinson contacted her in March, 2004. According to Complainant, Dickinson said that she would be processing Complainant's grievance regarding her March 2004 discharge. Complainant recalls that she and Dickinson had two telephone conversations and, possibly one meeting, prior to the second step grievance meeting and that Complainant told Dickinson what had actually occurred on February 13, 2004.

Complainant further recalls that she asked Dickinson what happened in the grievance process; what the steps were and how long it would take and that Dickinson responded that the grievance would culminate in the choosing of an impartial arbitrator and an arbitration hearing and that depending on the scheduling calendar, the process took approximately one year. When asked if there were discussions of how the procedure might relate to settlement, Complainant responded, "just that the process would go through all those steps, most likely would." When asked if Dickinson said the process could end in arbitration, Complainant responded, "I think she said it would." Complainant states that, based upon union meetings that she had attended, she thought arbitration was a standard procedure.

Dickinson does not deny that she discussed the grievance procedure with Complainant. Dickinson states that she never told the Complainant that SEIU would arbitrate her grievance or that SEIU would not arbitrate her grievance.

The most reasonable conclusion to be drawn from the record evidence is that Dickinson described the contractual grievance procedure to Complainant and stated that this procedure culminated in arbitration. It is not reasonable to conclude that Dickinson represented to Complainant that SEIU would arbitrate Complainant's grievance.

Complainant states that MPS' allegation that she had pushed a special needs student down was a serious matter that could warrant discharge. Dickinson states that, for a handicapped children's assistant to be physically abusive to a child, is extremely serious and is grounds for immediate discharge.

Dickinson recalls that, prior to the second step grievance meeting, Dickinson and Vian discussed what had happened during the pre-disciplinary meeting that had been held with Principal Thomsen. Dickinson further recalls that she obtained the materials that had been presented to Vian by Thomsen, gathered information on Complainant's absences during the 2003-04 school year and prepared a written Statement of Facts, with exhibits, setting forth SEIU's arguments in support of Complainant's grievance. Vian did not testify at hearing.

Complainant argues that Dickinson did not investigate potential defenses. Dickinson's written Statement of Facts, with exhibits, establishes otherwise.

It is not evident that Complainant advised Dickinson that there were witnesses other than the individuals who had submitted written statements to MPS; that Dickinson had any other reasonable basis to believe that there were such witnesses; or that Dickinson had any reasonable basis to believe that the witnesses who had provided a statement had omitted any relevant information. Although Complainant believes that there had been negative interactions between Complainant and witness Lopez, she acknowledges that she did not report this to Dickinson. Complainant recalls telling Dickinson that she had had problems with witness McConnell and Dickinson documented this problem in her written Statement of Facts.

Complainant's denial that she had pushed H down was not corroborated by any other witness statement. McConnell's statement was supported by that of Lopez. It is not evident that Dickinson was aware of any hostility on the part of Lopez toward Complainant.

When investigating a grievance and deciding whether or not to advance the grievance, SEIU does not have an absolute duty to interview all those who may have relevant information. (See generally: CITY OF MADISON, DEC. NO. 30789-A (Emery, 7/04); *aff'd in relevant part*, DEC. NO. 30789-B (WERC, 10/04). Notwithstanding Complainant's argument to the contrary, Dickinson's conduct in investigating the grievance without interviewing the witnesses who gave statements is within the 'wide range of reasonableness' that a union must be allowed in processing grievances.

Complainant does not state that, prior to the second step grievance meeting, Dickinson displayed any animosity toward Complainant. Dickinson's written Statement of Facts; her discussions with Vian and the Grievant; her conduct in obtaining information about the Complainant's absences and the lack of any evident hostility toward Complainant warrants the conclusion that, prior to the second step grievance meeting, Dickinson's investigation of Complainant's grievance was not perfunctory.

Dickinson states that, prior to the step two grievance meeting, she knew that the grievance would not be arbitrated because there were two eyewitness statements, *i.e.*, McConnell's and Lopez', claiming that Complainant had pushed the student down; as well as the statement from the parent. Dickinson's claim that she subsequently reviewed the case with Thomas prior to making her arbitration recommendation to Thomas indicates that her initial conclusion that the grievance would not be arbitrated was not set in stone, but rather, could be changed if she received additional relevant information.

It is not evident that Dickinson's initial conclusion that Complainant's grievance would not be arbitrated was due to an improper motive, or based upon any factor other than Dickinson's pragmatic assessment of the existing witness statements. A pragmatic assessment of the problems that a case would present in arbitration is not an arbitrary act. BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 28448-B, 28449-B (Nielsen, 7/97); *aff'd*, DEC. NO. 28448-C, 28449-C (WERC, 12/97).

On April 2, 2004, Complainant and Dickinson had a second step grievance meeting with MPS Representative Bellin. Complainant recalls that Principal Thomsen was also present at this meeting. Complainant and Dickinson agree that, upon conclusion of this meeting, Dickinson told MPS Representative Bellin that SEIU's case was set forth in the written Statement of Facts, with exhibits, and that SEIU would wait for MPS' decision. Complainant recalls that Dickinson provided her with a copy of this written material at the second step meeting.

According to Dickinson, she did not like the manner in which Bellin was questioning Complainant so she called a halt to the meeting. Although Complainant could not recall exactly what Bellin was saying, she recalled that Bellin said only a few words, of welcome or introduction, before Dickinson stopped the meeting. Complainant denies that Bellin had questioned her.

Complainant states that she was surprised, uncomfortable and embarrassed by the manner in which Dickinson handled the second step meeting. Complainant does not state that she told Dickinson that she was surprised, uncomfortable and embarrassed. Nor does she state that she made any statement to Dickinson regarding Dickinson's conduct at the step two meeting.

Complainant recalls that, after she and Dickinson had left the meeting, Dickinson indicated that, a lot of times, after Dickinson had lead the union employee through a description of the grievance and what was wrong, Bellin would be dismissive of this testimony and focus on the employer's accusations. Dickinson subsequently raised concerns about Bellin's conduct during grievance meetings to MPS Representative Ford in Dickinson's letter of April 22, 2004. In this letter, Dickinson does not specifically reference Complainant. Dickinson states that, when she forwarded this letter to Ford, she attached copies of the Statement of Facts, with exhibits, which had been presented to Bellin.

Given that the second step grievance meeting was unique to Complainant, but not to Dickinson, it is likely that Complainant has the more accurate recollection of her second step meeting. Under either recollection, however, it is not evident that Dickinson halted the meeting for any reason other than that her experience with Bellin had caused her to conclude that dialog with Bellin was unproductive.

Complainant states that she did not have an opportunity to give her side of the story at the second step meeting. Complainant does not state that she made a request to speak at the second step meeting. Nor is it evident that Complainant, in any way, indicated that Dickinson was not representing Complainant at the second step meeting.

Contrary to the belief of Complainant, she was provided with an opportunity to give her side of the story when Dickinson presented Bellin with the written materials that Dickinson had prepared in support of the grievance. These materials included Complainant's written statement of events, *i.e.*, "Report of Assault Suffered by School Personnel," as well as Dickinson's argument, with buttressing documents, in support of the grievance.

Complainant does not state that, during or immediately after the second step meeting, Dickinson displayed any animosity toward the Complainant. Dickinson's conduct in halting the second step meeting and relying upon the presented written materials were tactical decisions regarding information to be presented during the processing of a grievance, as well as the manner in which the information is to be presented. Contrary to the argument of Complainant, these tactical decisions are within the "wide range of reasonableness" that a union must be allowed in processing a grievance. Dickinson's representation at the second step grievance meeting was not perfunctory.

MPS' second step response was provided in a "Grievance Disposition Form" dated April 6, 2004 and issued under the name of MPS Representative Deborah Ford. After Complainant received a copy of this second step response, Dickinson contacted Complainant to schedule the third step grievance meeting with MPS Representative Rucker.

According to Complainant, she and Dickinson met with Rucker on two occasions in July of 2004. Complainant recalls that, at the first meeting, Rucker stated that he had read Complainant's file; Dickinson provided Rucker with the CDs of the UC hearing; and Dickinson and Complainant discussed the credibility of the witness testimony on the CDs. This testimony is inconsistent with Complainant's subsequent testimony that she did not speak at all at this meeting. Complainant further recalls that, at the second meeting, which lasted about ten minutes, Rucker stated that he had listened to a portion of the CDs; that he had been in his position for only one year; that he would not be making a decision; and that he would be passing the file up the line to higher management. Complainant recalls that, at some point, Dickinson talked in support of her grievance. Complainant does not state that Dickinson displayed any animosity toward Complainant when they met in July 2004.

Dickinson recalls one meeting with Rucker in which she presented the Statement of Facts, with supporting documents, to Rucker. Complainant does not deny that Dickinson made this presentation. According to Dickinson, Complainant made a statement on her behalf; Rucker asked a few questions; and then Rucker said he would get back with an answer. Dickinson recalls that the CDs were presented to Rucker after the meeting.

Given the importance that Complainant placed on the CDs, it is likely that she has the best recollection of how the CDs were handled by Rucker. Additionally, Dickinson's calendar has an entry for Complainant on more than one day in July 2004. The Examiner is satisfied that, in July 2004, there were two meetings at step three of the grievance procedure.

Complainant's testimony regarding the July, 2004 third step grievance meetings, as a whole, indicates that she is not certain of exactly what was said by whom and when. The most reasonable conclusion to be drawn from the record evidence is that Dickinson provided Rucker with the CDs provided by Complainant, as well as the written Statement of Facts, with supporting documents, and made statements in support of Complainant's grievance. Dickinson's representation at the third step of grievance procedure was not perfunctory.

According to Dickinson, she listened to the CDs but made no determination regarding witness credibility from the CDs. Complainant's testimony that Dickinson commented upon the persistence of the UC Examiner in questioning Vice Principal Hamm and that Dickinson "more or less agreed that the hearing examiner found that the two witnesses or the three witnesses were not credible" does not establish otherwise.

According to Complainant, neither Rucker, nor Dickinson, stated a timeline for management's third step response. Dickinson and Complainant agree that their next contact regarding the grievance occurred in November of 2004 when Dickinson contacted Complainant to advise her of a MPS settlement offer. Complainant recalls that Dickinson said that Complainant could have her job back; that Complainant would be on 18 months probation; and that it was firm that Complainant could not have back pay. Complainant states that she discussed her dissatisfaction with the probationary period and her wish to have the right to choose a different school. As Complainant recalls the discussion, Dickinson was pretty noncommittal, except to reiterate that there would be no back pay and to state that Complainant would not receive an apology. Complainant states that she never asked for any apology.

Complainant and Dickinson agree that Complainant rejected the settlement. Dickinson states that she did not make any commitment to arbitrate at that time. Complainant does not state otherwise.

Dickinson recalls that she contacted Rucker to get a change in the verbal settlement offer and an offer of some kind of back pay. According to Dickinson, Rucker had to discuss the matter with Ford and that Ford would make the final decision.

Complainant recalls that, toward the end of November 2004, she contacted Rucker because she had not heard from SEIU; questioned Rucker on the status of the grievance and where they were in terms of arbitration; and Rucker responded that he had not received a request for arbitration from SEIU. Complainant states that she immediately contacted Dickinson. According to Complainant, she told Dickinson that Rucker said he was waiting for the union to use a form and request the selection of an arbitrator and that Dickinson responded "oh, no, he knows better than that, I'm waiting for him to send me that request for the choosing of an arbitrator" and then said she would get back to Rucker and get him to send her the form for requesting arbitration.

Dickinson does not recall a telephone conversation where Complainant indicated that she had spoken with Rucker and then relayed what Rucker had said to Complainant. Dickinson states that she did not tell Complainant that it was Rucker's responsibility to send her the form for arbitration and states that it is the union's responsibility to fill out the form for arbitration. Dickinson states that she never told Complainant that she would process her grievance to arbitration.

Dickinson states that she did telephone Rucker to request the third step response, but does not recall how often or when; and that Rucker told her he was putting it together. According to Dickinson, she gave Rucker an unlimited extension of the time limit for responding because she was hoping that MPS would offer a better settlement or that the Complainant might change her mind.

Dickinson recalls that she did not receive MPS' third step response, dated January 5, 2005, until October 6, 2005. Complainant states that she received MPS' second step response shortly after it was issued, but that she never received a copy of MPS' third step response. The most reasonable conclusion to be drawn from the record evidence is that MPS did not provide SEIU with a copy of its third step response until October 6, 2005.

It is likely that, after rejecting the MPS settlement offer, Complainant would contact Rucker and Dickinson to discuss the status of her grievance. However, given that the third step response was not issued by MPS until January 5, 2005; that Dickinson did not receive the third step response until October, 2005; that, under the collective bargaining agreement, SEIU moves the grievance to arbitration after receipt of the third step response and Dickinson's knowledge of the same; Dickinson's denial that she ever told Complainant that she would process her grievance to arbitration; and Dickinson's consistent testimony that she had never decided to arbitrate the grievance; as well as the fact that, in her letter of September 1, 2005, Complainant describes her interaction with SEIU representatives in processing her grievance, but does not state, that, in November of 2004, Dickinson told her that she would contact Rucker to request arbitration, it is not likely that Dickinson advised Complainant that she was waiting for Rucker to send a request for choosing an arbitrator or that Dickinson said that she would contact Rucker to get the form requesting arbitration. It is likely that Dickinson was referencing the third step grievance response.

The Examiner is not persuaded that Complainant has an accurate recollection of the statements attributed to Dickinson in the November, 2004 telephone conversation. Complainant's claim that Dickinson misrepresented to Complainant that Rucker had dropped the ball by not requesting arbitration is rejected.

According to Dickinson, in 2005, she transitioned out of representing Complainant's bargaining unit and Mike Thomas transitioned into representing Complainant's bargaining unit. Thomas did not testify at hearing.

Complainant states that she left messages on all the SEIU voice mail boxes in February, 2005, over Easter break in 2005, and after school was out in June, 2005; and that she did not receive any response until Thomas telephoned her in June of 2005. Initially, Complainant recalled that when she talked to Thomas, he stated that he had received her message; that they were very busy; that he was sorry that no one had got back to Complainant and that Complainant would be hearing from someone. Subsequently, Complainant stated that Thomas did not state they were busy. Complainant states that she had not had any previous contact with Thomas.

Complainant states that, when she did not hear from SEIU, she issued her letter dated September 1, 2005 to SEIU Local 150 President Timko and her September 19, 2005 letter to State of Wisconsin SEIU President Palmer. Complainant further states that, sometime in October, she made several telephone calls to the WERC and, in early November, she filed a complaint with the WERC. The WERC provided MPS and SEIU with copies of this complaint in January of 2006.

Dickinson claims that, consistent with her practice at MPS, after receiving MPS' third step written response, she reviewed the file one more time to determine if Complainant's grievance had merit to go to arbitration. Dickinson recalls that, with respect to Complainant's grievance, this review included Thomas, the SEIU representative then in charge of the MPS Unit. Dickinson further recalls that she discussed with Thomas the fact that MPS had offered a last chance agreement; that SEIU did not have a written MPS offer; that they should see if they could obtain a written offer and settle the grievance; and that, at the time of this discussion, she did not have any knowledge that Complainant intended to file a complaint with the WERC.

Dickinson further claims that Thomas, as the SEIU representative in charge of Complainant's bargaining unit, had the authority to make the decision on whether or not to arbitrate Complainant's grievance and that Thomas made this decision by accepting Dickinson's recommendation that Complainant's grievance not be arbitrated. Dickinson's testimony indicates that this recommendation was based upon Dickinson's opinion that SEIU could not win in arbitration and her opinion that SEIU could not win in arbitration was based upon her evaluation of the evidence, *i.e.*, that there were two witness statements from people who claimed to have viewed the event and observed Complainant push down an exceptional needs student and that the other witness statements were not sufficient to rebut these claims.

According to Complainant, she did not hear from a SEIU representative until early November of 2005, when Thomas telephoned her to set up a meeting with Rucker. Complainant recalls that, during this telephone conversation, Thomas was confrontational in that he did not provide an answer when she repeatedly questioned Thomas about why he had not responded to her letter of September 1st but rather, focused his remarks on selecting a date for a meeting with Rucker; and by telling her that, the way she was arguing, it sounds like you don't really want your job back.

Complainant does not state that there were any discussions regarding arbitration. Complainant recalls that, during this conversation, she told Thomas that she was considering filing a complaint with the WERC and that Thomas may be hearing from the WERC. Complainant states that she never provided Thomas with a copy of any complaint.

Complainant's recollection of this conversation indicates that Thomas was defensive when questioned why SEIU failed to make a timely response to Complainant's letter of September 1st. Neither Complainant's recollection of this conversation, nor any other record evidence, provides a reasonable basis to infer, or conclude, that Thomas was hostile toward Complainant for contacting the WERC or for contemplating filing a complaint with the WERC.

Complainant's testimony establishes that, from November 2004 to November 2005, SEIU Representatives were unresponsive to many of Complainant's telephone calls and letters. As Examiner Mawhinney concluded in MILWAUKEE DISTRICT COUNCIL 48, *supra*:

> Certainly, someone from District Council 48 or one of its Local stewards should have returned Brzezinski's phone calls, since he was asking about representation in a grievance that involved him and was being settled. However, the failure to do so does not rise to the level of arbitrary, discriminatory or bad faith. A union's actions are arbitrary only if, in light of the factual and legal landscape at the time, the union's behavior is so far outside a wide range of reasonableness as to be irrational. AIR LINE PILOTS V. O'NEILL, 499 U.S. 65, 136 LRRM 2721 (1991).

It is not evident that, during the majority of the relevant time period, there had been any significant change in the status of Complainant's grievance. Dickinson's testimony indicates that, after she received MPS' third step response in October 2005, she and Thomas reviewed the grievance file and MPS was contacted to obtain a written offer of settlement. The record does not establish that there was any delay between the time that MPS responded to this contact and Thomas called the Complainant in November 2005. Under the circumstances, it would not be reasonable to conclude that SEIU's failure to return Complainant's phone calls and respond to Complainant's letters prior to November 2005 is irrational.

Neither Dickinson, nor any other SEIU representative, notified Complainant that SEIU did not intend to arbitrate the grievance until Thomas issued his letter of November 14, 2005. In this letter, Complainant was advised that her grievance had been settled. From this letter,

the Complainant knew, or should have known, that SEIU had made a decision to not arbitrate the grievance.

Complainant challenges SEIU's failure to communicate, until November 2005, that it had decided to not arbitrate the grievance. It is well settled that such communication failures do not, in and of themselves, violate a union's duty of fair representation. "Since only the union can arbitrate, any breach of duty in not arbitrating hangs on the reasons for not arbitrating, not whether it communicated its reasons or decision to the grievant." CITY OF MEDFORD, *supra*, CITING UNIVERSITY OF WISCONSIN-MILWAUKEE HOUSING DEPT. (GUTHRIE), DEC. NO. 11457-F (WERC, 12/77), at 34.

Complainant recalls that Rucker and Thomas agreed that the meeting of November 29, 2005 was a third step meeting and that it should have happened a year ago, but that neither explained why it had not. Dickinson claims that, at MPS, it happens that more than one year passes between steps in the grievance procedure and that it is quite common for MPS and SEIU to verbally agree to extend the contractual grievance and arbitration timelines.

As parties to the contract, SEIU and MPS may agree to abide by, or to not abide by, contractual grievance and arbitration timelines. Section C of the contractual grievance procedure specifically recognizes that time limits may be extended by mutual consent of MPS and SEIU. Had there not been a mutual understanding that the contractual timelines would not be applied to Complainant's grievance, Thomas and Rucker would not have agreed that the November 29, 2005 meeting was a third step grievance meeting.

Contrary to the argument of Complainant, the record does not establish that any SEIU representative "blew" a grievance deadline. Rather, the most reasonable conclusion to be drawn from the record evidence is that MPS and SEIU mutually agreed to extend contractual timelines for processing Complainant's grievance. It is not evident that any agreement to extend contractual timelines was arbitrary, discriminatory, or in bad faith.

Complainant recalls that, at the meeting on November 29, 2005, Rucker provided Complainant with a copy of a written Last Chance Agreement and reviewed this Agreement with Complainant. Complainant further recalls that the terms of the written agreement were not identical to the terms of the earlier verbal offer, *e.g.* there was no probationary agreement; that Complainant commented upon the terms as they were discussed by Rucker; that Complainant and Thomas expressed surprise that Rucker assumed that Complainant would be returning to the same school; that after discussion with Thomas, Rucker agreed that, at some point, Complainant would be given an opportunity to transfer; that Rucker and Thomas had discussions about how the anger management requirement would be implemented; that Rucker, Thomas and Complainant reviewed available openings; and that, at the conclusion of the meeting, Rucker said that he would wait to hear from Thomas and that Complainant said she would give Thomas her decision by Friday.

Complainant does not state that Thomas exhibited animosity toward Complainant at the meeting of November 29, 2005. Thomas' representation at the third step grievance step was not perfunctory.

Complainant states that she contacted Thomas on Friday, but did not talk to him; that he returned her call the following Tuesday; that Thomas expressed surprise that Complainant was not working; that she said how could that be; that Thomas said hadn't Complainant chosen a new school; Complainant said no; and that after Complainant told Thomas that she was not accepting MPS' offer and explained why, Thomas tried to talk her into reconsidering. Complainant considered Thomas' voice to be "gruff" and "affected crabby."

It is not evident, that, following Dickinson's initial conclusion that SEIU would not arbitrate Complainant's grievance, Complainant asked Dickinson or any other SEIU representative if SEIU intended to arbitrate Complainant's grievance. Dickinson's testimony indicates that the final decision regarding arbitration was not made until after October 6, 2005. Complainant's argument that SEIU concealed its decision to not arbitrate from Complainant is not persuasive.

Under the collective bargaining agreement between SEIU and MPS, SEIU, and not the grievant, has the right to decide whether or not to appeal a grievance to arbitration. SEIU's conduct in unilaterally deciding to not arbitrate Complainant's grievance is within the 'wide range of reasonableness' that a union must be allowed in processing grievances.

It is not evident that SEIU's decision to not appeal Complainant's grievance to arbitration was based upon any factor other than Dickinson's good faith assessment that SEIU would not win in arbitration. A reasonable union representative, acting in good faith, could have determined that the chances of prevailing in arbitration were not sufficient to justify appealing Complainant's grievance further. SEIU's decision to not arbitrate Complainant's grievance does not reflect arbitrary, discriminatory or bad faith conduct on its part toward Complainant.

Conclusion

The record does not warrant the conclusion that, in processing Complainant's grievance through the contractual grievance procedure, including deciding to not arbitrate Complainant's grievance, any SEIU representative acted, or failed to act, due to an improper motive. Between November 2004 and November 2005, SEIU's representatives could have been more responsive to Complainant's attempts to contact SEIU. Nonetheless, the evidence of SEIU's representation of Complainant during the processing of Complainant's grievance, including SEIU's decision to not arbitrate Complainant's grievance, does not reflect arbitrary, discriminatory or bad faith conduct on its part toward Complainant.

Complainant has not established, by a clear and satisfactory preponderance of the evidence, that SEIU violated its statutory duty of fair representation in the manner in which it

represented Complainant during the processing of Complainant's grievance through the contractual grievance procedure, including its decision to not arbitrate Complainant's grievance. Inasmuch as Complainant has failed to establish that SEIU has violated Sec. 111.70(3)(b)1, Stats., the Commission will not assert its jurisdiction to determine Complainant's Sec. 111.70(3)(a)5 breach of contract claim against Respondent MPS. Complainant's complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 25th day of July, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner