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-C

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.

ORDER ON REVIEW OF EXAMINER'S DECISION

On July 25, 2006, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law, and Order dismissing the amended complaint of Karen Bishop (Ms. Bishop). The Examiner concluded that Ms. Bishop had not established that the Respondent Service Employees International Union, Local 150 (Union) had failed to fairly represent Ms. Bishop in connection with her grievance challenging the decision of the Respondent Milwaukee Public Schools (MPS) to discharge her from her employment in March 2004. The Examiner had deferred hearing on the violation of contract allegation against MPS, pending the outcome of Ms. Bishop's duty of fair representation claim against the Union. Having concluded that the Union did not violate the law, the Examiner dismissed Ms. Bishop's claims against MPS as well.

On August 14, 2006, Ms. Bishop filed a timely petition seeking review of the Examiner's decision, pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. As of September 29, 2006, the parties declined to submit additional argument in support of their respective positions regarding the petition for review and the record was closed.

The Commission has reviewed the entire record in this matter, including the arguments submitted by the parties to the Examiner, and, on October 16, 2006, heard the Examiner's impressions as to witness demeanor. For the reasons explained in the Memorandum that follows, the Commission reverses the Examiner, concludes that the Union did not fulfill its duty of fair representation in connection with Ms. Bishop's discharge grievance, and orders a hearing regarding Ms. Bishop's allegation that MPS lacked just cause for her discharge.

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

ORDER

A. The Examiner's Findings of Fact 1 through 4 are affirmed.

B. The Examiner's Finding of Fact 5 is amended by setting aside the last sentence, and, as amended, is affirmed.[1]

C. The Examiner's Finding of Fact 6 is affirmed.

D. The following Finding of Fact 7 is made:

> Between July 2004 and November 2004, the Union did not communicate with Ms. Bishop about her grievance or its status. In the fall of 2004, Ms. Bishop telephoned both Rucker and Dickinson about the status of her grievance. In these conversations, Ms. Bishop asked both Rucker and Dickinson about the procedures for reaching the arbitration step of the grievance procedure.

E. The Examiner's Finding of Fact 7 is renumbered Finding of Fact 8 and is amended by setting aside the last two sentences.[2] As amended, the Finding is affirmed.

F. The Examiner's Finding of Fact 8 is renumbered Finding of Fact 9 and is affirmed.

G. The Examiner's Finding of Fact 9 is set aside.

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[1] See discussion in footnote 3, below.

[2] See discussion in footnotes 5 and 7, below.

H. The following Findings of Fact are made:

10. The "Last Chance Agreement" that MPS offered and the Union agreed would resolve Ms. Bishop's discharge grievance provided in pertinent part as follows:

. . .

3. Karen Bishop will voluntarily and regularly participate in approved anger management treatment, counseling support group, and/or any other activities prescribed by a qualified health care provider for treatment of anger management. Ms. Bishop will provide the designated Board representative with a copy of the anger management treatment plan prescribed by her health care provider. Ms. Bishop's health care provider shall furnish the Board's designated representative with monthly reports on her adherence to the prescribed treatment plan. These requirements shall remain in effect for one full year following Ms. Bishop's return to work.

4. Karen Bishop and Local 150-FS understand and agree that if she has any inappropriate conduct toward a student or Board employee, including, but not limited to, physical contact, threats, or use of profanity toward a student or Board employee substantiated by a pre-disciplinary investigation and hearing, she is subject to summary discharge as the consequence. . . . This provision will be in effect for two full calendar years following the date of the grievant's return to work.

5. Karen Bishop's absence as a result of the discharge shall be recorded as a 'disciplinary suspension' from March 9, 2004, until Ms. Bishop's actual return to work. Ms. Bishop shall not receive any back pay for the period March 9, 2004, until her return to work from the disciplinary suspension. . . .

. . .

11. Ms. Bishop decided not to accept the foregoing settlement of her grievance because she did not wish to accept what she perceived as an implication that she had engaged in wrongdoing and/or needed "anger management" counseling, because she was concerned about the privacy of her communications with her counselor, and because she believed she was entitled to some back pay for the one and one-half years that her grievance had been pending.

12. At no time between the date of her discharge (March 9, 2004) and November 14, 2005, did the Union inform Ms. Bishop that her grievance lacked merit, that her evidence was less credible than the evidence against her, or that the Union was considering or had decided not to advance her grievance to arbitration.

13. The Union's conduct in processing Ms. Bishop's discharge grievance between November 2004 and November 2005, taken as a whole, did not adequately protect Ms. Bishop's interests and resulted in a disposition that was arbitrary.

I. The Examiner's Conclusions of Law 1, 2, and 3 are affirmed.

J. The Examiner's Conclusions of Law 4 and 5 are reversed and the following Conclusions of Law are made:

4. Complainant Karen Bishop has established that the Respondent Service Employees International Union Local 150, has failed to fulfill its duty of fair representation by the manner in which it processed her discharge grievance in violation of Sec. 111.70(3)(b)1, Stats.

5. Given Conclusion of Law 4, above, the Wisconsin Employment Relations Commission will exercise its jurisdiction pursuant to Sec. 111.70(3)(a)5, Stats., to determine the merits of Complainant Karen Bishop's discharge grievance.

K. The Examiner's Order is reversed and the following Order is made:

1. The Respondent Service Employees International Union Local 150 shall cease and desist from failing to fairly represent bargaining unit members, including Karen Bishop, in processing their grievances.

2. The Respondent Service Employees International Union Local 150 shall take the following affirmative action that will effectuate the purposes of the Municipal Employment Relations Act:

   a. Reimburse Ms. Bishop for the costs, including reasonable attorney's fees, if any, that she incurs when litigating the merits of her discharge grievance in a prohibited practice proceeding. Reimbursement shall be made within thirty (30) days after Ms. Bishop supplies to the Union a copy of her receipt(s) evidencing payment for all or any portion of such costs.

b. Notify all MPS employees represented by Respondent Service Employees International Union Local 150 of the Commission's Order by posting copies of the Notice attached hereto as Appendix A for thirty days in conspicuous places where such employees work. This Notice shall be signed by the President of Respondent Service Employees International Union Local 150, immediately upon receipt of this Order.

c. Notify the Wisconsin Employment Relations Commission and Complainant, in writing, within twenty (20) days of the date of this Order as to what steps have been taken to comply with the Order.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of January, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

APPENDIX "A"

NOTICE TO ALL MPS EMPLOYEES REPRESENTED BY SERVICE EMPLOYEES INTERNATINAL UNION LOCAL 150

Pursuant to the Order of the Wisconsin Employment Relations Commission issued on January 2, 2007, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify you that:

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

2. WE WILL NOT fail to fairly represent bargaining unit members by failing to adequately protect their interests while processing their grievances and/or reaching an arbitrary decision to settle their grievances.

Dated this _____ day of _____, 2007.

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 150

_____
President

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

Milwaukee Public Schools

MEMORANDUM ACCOMPANYING ORDER

Facts

Karen Bishop had worked as a special education assistant for approximately 14 years when she was discharged from her employment on March 9, 2004. Prior to the events giving rise to this case, Ms. Bishop had not been disciplined by MPS. She had experienced one prior incident, in 2002, in which one student accused her of inappropriate physical contact with another student. Upon investigating this incident, in which Ms. Bishop had Union representation, MPS decided it was not substantiated and did not pursue discipline against Ms. Bishop.

On February 13, 2004, an incident occurred in the gymnasium of the school in which Ms. Bishop worked, involving an adult (20-year old) special needs student ("H") with cognitive disabilities. H's disabilities include speech that is difficult to decipher. The facts regarding this incident are in substantial dispute. In Ms. Bishop's view, the following occurred. While several students were playing basketball, H approached her in tears saying that one of the students had pushed her away from the hoop. Later, as Ms. Bishop approached H to try to calm her down, H moved into Ms. Bishop's face and hit her on the chest with both fists. Ms. Bishop responded by pushing H's hands off her chest. Another assistant, Ms. McConnell, then took H into the hall for a drink. Shortly after that, H returned through the south door of the gym, approached Ms. Bishop, and began slapping her hands around Ms. Bishop's head and face. Ms. Bishop then "instinctively" pushed H's hands away, as Bishop was afraid of being hit. Another assistant, Ms. Lopez, then appeared at the north door of the gym and stated to Ms. Bishop that H was crying because Ms. Bishop had pushed her. Ms. Bishop filed an MPS assault report form regarding H's conduct towards her.

Two other staff members, Ms. McConnell and Ms. Lopez, submitted statements indicating that they had seen Ms. Bishop push H down to the floor, causing her to cry. Ms. McConnell's statement was that this occurred after McConnell had taken H out into the hall for a drink of water, and that H essentially did not provoke the incident. Some two weeks earlier, Ms. Bishop had accused Ms. McConnell of failing to fulfill her responsibilities, and, according to Bishop, Ms. McConnell had then threatened to "beat my ass" if Ms. Bishop "lied on her again." Ms. Bishop testified that she also had a less than friendly working relationship with Ms. Lopez.

Two other staff members submitted written reports to MPS. The first, from staff member Jeremy Krutina, stated that he had observed H "slapping and swinging at Ms. Bishop," and that, "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." The other, from physical education teacher Aracelio Zabala stated, "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." A third statement from MPS employee Pitchford stated that he "saw (H) go over to where Mrs. Bishop was standing two times. During those two times (H) was lashing out at Mrs. Bishop."

H's mother also wrote a letter to MPS officials, accusing Ms. Bishop of having pushed H down and asking that Ms. Bishop not have further contact with H.

Shortly after the incident, MPS conducted an investigation based upon the allegations made by Ms. McConnell and Ms. Lopez. Union building representative Carol Vian assisted Ms. Bishop in connection with the pre-disciplinary investigation. During the pre-disciplinary investigation, MPS also brought up allegations about Ms. Bishop's attendance record. Ms. Bishop was allowed to continue working during the investigation. On March 8, 2004, MPS informed Ms. Bishop in writing that she was being discharged effective the following date for (1) pushing a child; (2) failing to comply with attendance procedures and being absent without approved leave; and (3) overall attendance record.

On March 18, 2004, Union staff representative Carmen Dickinson filed a written grievance with MPS alleging that Ms. Bishop had been terminated unjustly and seeking reinstatement and back pay. The Union arranged a meeting with MPS officials, to take place on April 2, 2004, at Step 2 of the contractual grievance procedure, i.e., the "department head" level. Prior to the Step 2 meeting, Ms. Dickinson spoke with Ms. Bishop at least twice to prepare for the hearing and review the packet of materials, including attendance documents, that MPS had supplied to support the discharge. During these conversations and subsequent conversations, Ms. Bishop asked Ms. Dickinson how the grievance procedure worked and how long it would take to get to arbitration. Dickinson indicated that delays were not uncommon and that the process could take as long as a year and half to complete. Dickinson did not indicate that the Union might decide not to arbitrate the grievance nor did she commit the Union to arbitrating the grievance. She was aware, however, that Bishop wanted to have her grievance arbitrated.[3]

At the Step 2 meeting on April 2, 2004, Dickinson presented a written factual summary and written arguments to MPS officials on behalf of Ms. Bishop. However, Dickinson cut short the meeting without engaging in any verbal presentation, and without having Ms. Bishop

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[3] At the hearing, Dickinson testified that she had determined nearly from the outset of Ms. Bishop's grievance that the Union would not take it to arbitration. The Examiner accepted this contention, which was incorporated into the last sentence of her Finding of Fact 5. The Commission has set aside this portion of the Examiner's Finding, as indicated in Paragraph B of the Order, above, as it is not necessary to the outcome of the case and there is some disagreement among the Commissioners as to its validity. Commissioner Gordon would find Dickinson's assertion to be accurate, while Commissioners Neumann and Bauman have reservations about its accuracy. Commissioners Neumann and Bauman find it unlikely that a union representative at so early a point would have accepted the written accounts of Ms. Bishop's co-workers, including at least one with animosity towards Ms. Bishop, rather than Bishop herself and her supporting witnesses, without personally interviewing any of the witnesses. This seems especially unlikely in a case involving directly divergent views of the operative facts and a student who was unable to communicate clearly. Also, if Dickinson had reached a negative decision so early in the proceedings, it is likely that she would expressed some reservations to Ms. Bishop about the chances of proceeding to arbitration, especially since Bishop had brought up the subject of arbitration early on. It is improbable that Dickinson would have kept her reservations to herself at least by November 2004, when she first conveyed the MPS settlement offer to Bishop and Bishop first turned it down. Finally, it is troubling that the only evidence supporting Ms. Dickinson's recollection on this crucial fact, i.e., that she had reached these early and firm negative decisions about the merits of Bishop's grievance, is Dickinson's own testimony about what was in her mind. The Union did not offer corroboration from other union representatives with whom Dickinson might have shared her views. For example, Thomas did not mention any flaws in the merits of Bishop's grievance when he returned her telephone calls. Ultimately, however, resolving this factual issue is not necessary, as it is not crucial to the unanimous holding that the Union mishandled Bishop's grievance between November 2004 and November 2005 for no apparent legitimate reason, and this mishandling contributed to the Union reaching an abrupt and arbitrary disposition of the grievance in November 2005. Therefore we have simply set aside that portion of the Examiner's Finding.

speak in her own behalf, because (as evidenced by her contemporaneous letter to MPS Labor Relations Director Deborah Ford) Dickinson had formed an opinion that Michael Bellin, the MPS official from Central Office who conducted the Step 2 meeting, had a tendency to interrogate grievants, such as Ms. Bishop, with undue harshness. Ms. Bishop was surprised that the meeting ended so abruptly and felt she had not had an opportunity to present her case adequately. However, Ms. Bishop apparently did not mention those concerns to Dickinson. After the meeting ended, Dickinson and Bishop spent some time discussing with each other what was likely to happen next regarding the grievance. In this conversation, Dickinson did not indicate that Bishop's grievance lacked merit or that it might not proceed to arbitration. On April 6, 2004, MPS issued a written denial of the grievance at Step 2. The Union advanced the grievance to Step 3 (the Superintendent or his designee), apparently in a timely manner.

Sometime between April and July 2004, Ms. Bishop applied for Unemployment Compensation, which was denied initially based upon MPS's assertions about the incident. Ms. Bishop appealed that denial, and, after an evidentiary hearing, was awarded unemployment benefits. At the request of Ms. Bishop's attorney, the Union supplied documents to assist in the appeal. Ms. Bishop in turn provided a compact disc (CD) recording of the unemployment hearing to Ms. Dickinson, who listened to the CDs and, in discussions with Ms. Bishop, agreed that the hearing examiner had questioned the MPS witnesses assertively and had not found them credible.

For purposes of hearing Ms. Bishop's grievance at Step 3, the Superintendent was represented by Cleo Rucker. Mr. Rucker convened a Step 3 grievance hearing on two occasions in July 2004, at which Dickinson represented Bishop. Dickinson presented the written materials she had prepared for the Step 2 meeting on Bishop's behalf and otherwise advocated for Bishop at this meeting, albeit the meetings apparently were not lengthy. Dickinson also provided Rucker with copies of the unemployment compensation CDs either at these meetings or shortly thereafter. At the conclusion of the second meeting, Rucker indicated that, since he was relatively new on the job, the Step 3 decision probably would be made at a higher level in the MPS organization. There was no explicit discussion about time limits for receiving the Step 3 response. However, it was not uncommon for MPS officials to exceed the contractual time limits for responding to grievances, with the unwritten but express or tacit acquiescence of the Union.

The record is unclear about what, if anything, occurred during the approximately four months between July and November 2004. Ms. Bishop testified that she thinks she would have contacted Dickinson about the status of her Step 3 grievance but could not recall any specifics. In early November 2004, Dickinson telephoned Bishop to inform her that Rucker, on behalf of MPS, had offered to settle the grievance by returning Bishop to work with 18 months probation and no back pay. Ms. Bishop told Dickinson the offer was not acceptable. Dickinson did not express any reservations about the merits of the grievance in this conversation nor did she indicate that the Union might choose not to arbitrate should Bishop turn down the settlement.

Somewhere in the same time frame, Bishop telephoned MPS Step 3 grievance official Rucker to ask about the status of her grievance and Rucker told her that it was up to the Union to submit a request for arbitration. According to Bishop, she then telephoned Dickinson who said it was up to Rucker, not the Union, to complete the form selecting an arbitrator. Dickinson does not recall this conversation, but points out that, since it is the Union that submits the request for arbitration and does so only after receiving a Step 3 response from MPS, it is unlikely she would have made the comments as Bishop recalled them. The Examiner resolved this discrepancy by concluding that this conversation likely occurred, but that Dickinson likely was referring to Rucker's duty to supply a written Step 3 response to the grievance before the Union could advance to arbitration. We agree with the Examiner that the conversation occurred and that Bishop most likely misunderstood Dickinson's remarks. However, there is no dispute that Dickinson did not indicate in this conversation that Bishop's grievance lacked merit or might not proceed to arbitration. Just as importantly, we have no trouble inferring, despite Dickinson's uncorroborated and improbable testimony to the contrary, that she was aware at this point, if not earlier, that Bishop wanted to proceed to arbitration regarding her discharge.[4]

We also agree with the Examiner that, during the processing of Ms. Bishop's grievance up through November 2004, the record does not reflect any hostility or bias on the part of the Union, including Ms. Dickinson, toward Bishop, or that her grievance was handled in an arbitrary or questionable manner.

Between November 2004 and November 2005, the Union did not initiate any communications with Bishop about the status of her grievance. Dickinson's explanation for this was that the Union had acquiesced in an informal and unwritten extension of time for MPS to convey its written Step 3 response, partly because she hoped a more acceptable settlement might be offered. However, the record supplies no indication that the Union was engaged in any action or effort regarding Ms. Bishop's grievance during this time frame, at least not before October 2005. At some point during 2005, Dickinson changed jobs within the organization and grievance representation for Bishop's bargaining unit was assumed by a different staff member, Mike Thomas. Thomas did not testify at the instant hearing.

During this approximately one-year time frame (November 2004 to November 2005), Ms. Bishop contacted the Union on several occasions seeking information about the status of her grievance. She specifically recalls leaving telephone messages for Dickinson, Thomas, and other Union officials at least once during February 2005, once over Easter break in 2005, and at least once after the school year ended in June 2005. Thomas returned at least one of Bishop's calls, apologizing for the delay and indicating that someone from the Union would be in touch with Bishop soon, but he provided no information about the status of the grievance. No other Union official, including Dickinson, returned any of Bishop's calls during this period.

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[4] The Examiner made no finding on the issue of whether Dickinson was aware that Bishop wanted to submit her discharge grievance to arbitration. Given Bishop's persistent inquiries about the grievance process and how long it takes to get to arbitration and Bishop's rejection of the settlement offer, we do find that Dickinson was aware that Bishop wanted to arbitrate her discharge from employment.

The record contains a written Step 3 response from MPS, dated January 5, 2005, denying Bishop's grievance. It is clear from the Step 3 response that MPS was no longer relying upon its previous allegations regarding Ms. Bishop's absence record, and states that "just cause" is based upon Ms. Bishop having allegedly "used excessive physical contact on a special education student." Union official Dickinson testified that she first received a copy of this Step 3 response in October 2005, after she telephoned MPS and asked for a copy. Contrary to the Union's argument in its brief to the Examiner, the record does not establish that October 2005 was the first time the Union received a copy of the MPS response dated the previous January. While Dickinson testified that she herself did not receive a copy of the response until October, when she called MPS and asked for it, it is not clear on this record whether Thomas or another Union official may have received the response at or about the time frame in which it was dated.

Even assuming that the Union did not receive the Step 3 response in or about early January 2005, the record contains no evidence that any Union official sought such a response prior to October 2005. Nor does the record evidence that the Union took action of any other kind regarding Ms. Bishop's grievance between November 2004 and October 2005, when Dickinson telephoned MPS for a copy of the Step 3 response. In particular, there is no credible evidence that, during this period of time, the Union reached a decision to withdraw the grievance, withhold it from arbitration, or settle it on terms that were not acceptable to Ms. Bishop.

On September 1, 2005, Ms. Bishop sent the following letter by registered mail, addressed to the President of the Union, with copies to Dickinson and Thomas:

> 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.

On September 19, 2005, having received no response from the Union to the September 1 letter, Ms. Bishop wrote to the president of the Union's parent organization in Madison, Wisconsin, stating as follows:

> 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.

As noted above, Ms. Dickinson contacted MPS to obtain a copy of the Step 3 grievance settlement in early October 2005. During late October or early November, Dickinson discussed the case with Thomas and, according to Dickinson, she recommended to Thomas that the grievance not be advanced to arbitration, based upon lack of merit. Her assessment that the grievance lacked merit, according to Dickinson, was based upon the seriousness of the charge (physical abuse) and the existence of the McConnell and Lopez eye witness statements. Dickinson claimed that the statements supporting Bishop from other eye witnesses were not as persuasive as McConnell's and Lopez's, because it was not clear that the other individuals had been in a position to observe the entire event. Dickinson offered no explanation about why McConnell's and Lopez's statements were more persuasive than Bishop's. Dickinson acknowledged that she had not interviewed any of the witnesses other than Bishop before concluding that the grievance lacked merit.[5] On November 14, 2005, Thomas sent a certified

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[5] In the last two sentences of her Finding of Fact 7, the Examiner accepted the accuracy of Dickinson's testimony that, in November 2005, she recommended to Thomas that the Union not arbitrate Bishop's grievance on the ground that it lacked merit, chiefly because of the two witness statements supporting MPS' allegations. As indicated in Paragraph E of the Order, above, we have set aside this portion of the Examiner's Findings. While there is some disagreement among us as to the accuracy of Dickinson's account, ultimately it is not necessary to resolve that disagreement as it does not affect the ultimate disposition of the case. See further discussion in footnote 7, below.

letter to Ms. Bishop stating, "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."

Thomas arranged with Bishop to attend a meeting with Rucker on Tuesday, November 29, 2005, in which they reviewed the details of the "Last Chance Agreement." Ms. Bishop objected to the language in paragraphs 3 and 4 (set forth in Finding of Fact 10, above) that seemed to imply wrongdoing on her part, the "anger management" provision that, in her view, erroneously implied that she had an anger problem and also, in her view, impinged upon her confidential relationship with her counselor, and the lack of back pay for any of the approximately 21 months since her discharge. The anger management counseling had not been included in the earlier (November 2004) proposed settlement. Ms. Bishop also expressed concern about returning to work at the same school in which the incident had occurred, and both Thomas and Rucker were helpful in suggesting alternative work sites. At the conclusion of the meeting, Bishop indicated she would need to think about the settlement and would let Thomas know her decision by Friday, December 2. She left Thomas a message on that date. Thomas returned her call the following Tuesday, December 6, and Bishop informed him that she had decided not to accept the settlement.

The Union did not seek arbitration of Ms. Bishop's discharge grievance. At no time, up to and including November 2006, did either Dickinson or Thomas inform Bishop that the Union viewed the grievance as lacking merit or that Bishop's version of events lacked credibility. Until the implicit message in Thomas' letter of November 14, 2005, the Union also did not inform Bishop that the Union would not arbitrate if she rejected a settlement.

Discussion

It is exceedingly difficult for an individual bargaining unit member to establish a breach of the duty of fair representation, and properly so. Decades of experience under federal and state labor relations laws have demonstrated the wisdom and necessity of maintaining this exceptionally high bar. It acknowledges that unions have limited resources, that grievances may be handled by relatively unsophisticated fellow employees or union staff, who as human beings sometimes make mistakes of judgment or are negligent, that a union's resources come from dues and fees paid by employees, that the union is a collective enterprise that must serve the interests of the overall group, that serving those collective interests frequently comes at the cost of a particular individual's real or perceived interests, and that a union must have discretion to make these decisions without being subjected to expensive second-guessing by agencies or courts.

Thus, as the Examiner and the Union have pointed out, it is well-established that a union does not breach its duty of fair representation simply by negligently processing a grievance, simply by failing to communicate with a grievant, simply by making unwise or improvident decisions about the merits of a grievance, or simply by settling a grievance against the wishes of the grievant. Imperfections in representation are permitted the union, with one important caveat: " … *subject always to complete good faith and honesty of purpose in the exercise of its discretion*." HUMPHREY V. MOORE, 375 U. S. 335, 349 (1964) (emphasis added).

The seminal articulation of the Union's duty of fair representation remains that set forth in VACA V. SIPES, 386 U. S. 171, 190 (1967), i.e., avoiding conduct toward a member of the bargaining unit that is "arbitrary, discriminatory, or in bad faith." In the context of an employee grievance, the essence of the analysis of the union's conduct under each of these three prongs is whether the union has abused its considerable discretion in handling the grievance. The inquiry is not a piecemeal analysis of how a grievance was handled at any particular stage, but rather a judgment based on the total picture. As Judge (now Justice) Kennedy described the duty in his concurring opinion in ROBESKY V. QANTAS EMPIRE AIRWAYS, 593 F. 2D 1082 (9TH CIR. 1978):

> [W]e should inquire whether the union decisions lacked a rational basis, or whether by perfunctorily processing a grievance so that a reasoned decision was not made, the union foredoomed the grievance. In determining whether a union's handling of a grievance is arbitrary or perfunctory, the trial court should consider whether the grievance lacked merit, ..., as well as the importance of the grievance to the employee. These factors may bear upon whether or not there was a rational basis for the failure to advise the employee of the status of the claim, and whether or not the procedures followed in the particular case were adequate and fair to protect the interests at stake.

573 F.2d at 1092 (citations omitted).

The Wisconsin Supreme Court used similar language in suggesting the factors that, if weighed in good faith by a Union, would indicate that the Union properly exercised its discretion in deciding whether or not to arbitrate a grievance: "It is submitted that such decision should take into account at least the monetary value of [the employee's] claim, the effect of the breach on the employee, and the likelihood of success in arbitration." MAHNKE V. WERC, 66 WIS. 2D 524, 534 (1975). The inquiry is intensively factual and the burden of production is on the complaining employee. MAHNKE, 66 WIS. 2D at 535.

In this case, Ms. Bishop has challenged several discrete aspects of the Union's handling of her grievance. As discussed below, we agree with Bishop that the Union's handling of her grievance was deficient. However, in our view, none of the specific defects in itself would necessarily exceed the wide deference a union appropriately has. Taken as a whole, however, they paint a picture of a grievance procedure in default with regard to Bishop's situation, at least after November 2004.

In Bishop's view, the Union's representation was flawed nearly from its outset. She challenges Dickinson's failure to interview personally the witnesses who had provided written statements and the ineffectiveness of Dickinson abruptly terminating the Step 2 grievance meeting. However, we, like the Examiner, are not particularly troubled by the Union's initial efforts. We see no reason to doubt Dickinson's "good faith and honesty of purpose" in proceeding as she did in those initial steps. Dickinson had no negative feelings about Bishop and Bishop herself acknowledged a positive relationship with Dickinson in their previous encounter in 2002. While Dickinson did not conduct the grievance meetings as Bishop may have wished and did not give Bishop an opportunity to speak, Dickinson did prepare a somewhat extensive written presentation to accompany the grievance, which put forward

Bishop's view of events and advocated adequately on her behalf. The delays between meetings and responses in the early portions of the grievance process, even as late as November 2004, were not so lengthy or willfully unresponsive to Ms. Bishop's situation as to call into question the Union's "honesty of purpose" in representing Bishop's interests.

Indeed, the Union obtained a settlement proposal from MPS in November 2004 that, though not to Bishop's liking, might have passed muster as a good faith alternative to arbitration *at that time*. At that time, Ms. Bishop had accrued no more than eight months' back pay, and it is possible that the maximum back pay entitlement at that time would have been significantly reduced by the unemployment compensation she had received. While the 2004 settlement proposal included an 18 month probationary period, it apparently did not include the "anger management" or "last chance" language that Ms. Bishop reasonably found distressing in the 2005 settlement proposal.

The Union's handling of the November 2004 settlement proposal is where its conduct begins to deviate from a minimally adequate handling of Ms. Bishop's grievance. Dickinson informed Bishop of the settlement proposal, but said nothing to Bishop to suggest that her grievance lacked merit, that other witnesses would have more credibility than she would, or that the Union might for any other reason choose not to arbitrate if Bishop declined the settlement. Indeed, after Ms. Bishop rejected the proposed settlement, she inquired about the next step to arbitration and Dickinson informed her that the Union would need a response from MPS before it could proceed. While there is no reason to conclude that Dickinson was intentionally misleading Bishop with this response, the response certainly gave Bishop no inkling that the Union had reservations about the grievance. Therefore, even if the Union had actually reached a good faith decision in November 2004 to accept the settlement over Ms. Bishop's objection, its failure to provide this information in a timely fashion (i.e., before Bishop rejected the settlement) would be questionable in itself. ROBESKY, SUPRA; COLEMAN V. OUTBOARD MARINE CORP., 92 WIS.2D 565, 580-81 (1979).[6]

This state of affairs continued for nearly a year, until Bishop's letters to higher level labor officials prompted some activity. During this year, Ms. Bishop regularly contacted the Union, leaving voice messages for many if not all staff members. At some point during this year, Dickinson changed jobs within the Union and responsibility for handling Bishop's grievance was transferred to another staff representative, Michael Thomas. Thomas returned at least one of Bishop's messages, informing her about the switch in representatives and apologizing for the delay, but offering no information about the status of her grievance. While the Union tries to claim that this year-long delay was a routine, tacit agreement to extend the time limit for the MPS Step 3 response, this explanation is not persuasive in the circumstances present here. First, the record includes a Step 3 response from MPS dated January 5, 2005. Absent credible evidence to the contrary, it is reasonable to infer, and we do infer, that MPS sent that document to the Union in the regular course of business at or around the dates stated on the document. While Dickinson herself may not have seen the response until October 2005, when she called and asked for a copy, Dickinson had relinquished responsibility for Bishop's grievance to Thomas and presumably Thomas, rather than Dickinson, would have been

[6] In COLEMAN, the Wisconsin Supreme Court characterized the ROBESKY court as having held that "the union's failure to inform [the grievant] of its position [i.e., no arbitration], if intentional, had no rational basis and was arbitrary, or if unintentional was so egregious as to be arbitrary." 92 Wis.2d at 580.

responsible for following up on the Step 3 denial. Second, even if the record established that the Union did not receive the Step 3 response until October 2005, the record supplies no reasonable explanation for the Union's failure to seek the long overdue response until that late date. Third, while Dickinson claims that the delay would have given the Union time to obtain a better settlement offer from MPS or to persuade Bishop to accept the first offer, the record contains no evidence of any such activity on the part of the Union between November 2004 and November 2005. For example, when Thomas returned Bishop's phone call(s), he neither mentioned settlement discussions with MPS nor tried to urge Bishop to compromise, as would have been likely (if true) if only to mollify her about the delays.

Accordingly, we conclude that the Union knowingly let Bishop's discharge grievance languish for nearly a year with no action whatsoever, despite Bishop's repeated efforts to move it forward. This conduct was not merely forgetful, inadvertent, or negligent, but instead, in light of this being a discharge grievance, Bishop's frequent reminders, and the lack of any plausible explanation for the delay, crossed the line from negligence to intentional disregard. As such, it cannot be reconciled with the Union's duty to conduct itself "with complete good faith and honesty of purpose." In our view, this behavior, under all the circumstances present here, goes a long way toward establishing a breach of the Union's duty of fair representation. As the Court stated in VACA, SUPRA, "a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion ... ." VACA V. SIPES, 386 U. S. at 191.

The question remains whether the Union rehabilitated itself with its belated settlement efforts in November 2005 and at that point met its duty to make a reasoned and good faith decision about the merits of Bishop's grievance. In approaching this question, we are mindful that Ms. Bishop bears the ultimate burden of persuasion, that a union has a great deal of discretion in settling grievances, and that our role must not amount to "second-guessing" a union's good faith decision. Despite all these reservations, the confluence of facts in this case compels the conclusion that the Union's ultimate disposition of Bishop's grievance was affected, among other things, by the Union's prior mishandling of the grievance, and does not pass muster.

At some point in 2005, Thomas became the staff representative responsible for Bishop's grievance. Bishop's September 2005 letters to higher level Union officials apparently triggered some action at the local level. On November 14, without having contacted Bishop, Thomas sent her a letter stating simply, "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." The letter was not accompanied by a copy of the settlement itself. Despite the finality implicit in Thomas' letter, Thomas acquiesced in Bishop's subsequent request for a meeting with her and Rucker to discuss the proposed settlement.

The settlement is described in more detail in the Commission's Order and in the Facts section of this decision. In essence, it returned Bishop to work in a different school building, but with no back pay, and included provisions regarding "last chance," "anger management," and documentation of counseling. During the late November 2005 meeting with Rucker and Thomas, it was agreed that Bishop could return to a different school building than the one

where the grievance had arisen. However, the settlement was not otherwise modified to respond to Bishop's other concerns. As related in the Summary of the Facts, above, Bishop found the settlement unacceptable because it included no back pay for the 21 months since her discharge, seemed to imply an admission that she had abused a student, which she found particularly offensive, and included counseling provisions that seemed to violate her privacy. Bishop told the officials that she would let them know whether she would accept the settlement Friday of that week. That Friday she attempted unsuccessfully to reach Thomas by telephone and left him a voice message. She did not hear back from Thomas and called him again the following week, at which time he expressed surprise that she was not "at work." She told him again that the terms were not acceptable. This terminated the Union's efforts on her behalf.

The Union essentially defends the abrupt 2005 settlement, after a year of knowing and intentional inaction, on the ground that the underlying discharge grievance lacked merit. Dickinson contends that, while Thomas made the decision not to arbitrate, he followed her recommendation. Dickinson further testified that her recommendation was based upon the facts that the misconduct alleged, if established, was sufficient to warrant discharge and that there were two eye witness statements indicating that the misconduct had occurred. She testified that, in her opinion, the witnesses who offered statements favoring Bishop's version of events were not as well-situated to observe the event.

In some situations, Dickinson's explanation, while depicting a less than ideal approach to a discharge grievance, might be cloaked with sufficient good faith to survive the minimal scrutiny demanded by the law. The circumstances here, however, dispel the presumption of good faith that might otherwise prevail.

First, we note that, in evaluating the MPS settlement offer, the Union does not even claim to have considered Ms. Bishop's prior lengthy and apparently clear employment record, the effect on her of the lack of back pay spanning 21 months, or, perhaps more importantly, the effect of signing a Last Chance Agreement that implied that she had anger management problems and had physically abused a student. Any reasonable employee who works with special needs students would be disturbed by such an implication, especially an individual, like Ms. Bishop, who believed the allegation was demonstrably untrue. Thus, even if we credited Dickinson's testimony regarding her recommendation to Thomas in November 2005, the Union's apparent failure to consider the effects upon Ms. Bishop is troubling under MAHNKE.[7]

[7] Commissioner Gordon would accept at face value Dickinson's assertions about the Union's decision-making process in November 2005, i.e., that the Union truly believed that the grievance lacked merit because of the statements of McConnell and Lopez. Accordingly, Commissioner Gordon does not agree with Paragraph D of the Commission's Order, above, setting aside the last two sentences in the Examiner's Finding of Fact 7. However, because the Union (primarily Dickinson) reached that conclusion without meeting with any of the witnesses or otherwise thoughtfully examining the competing versions of events, and because of the other circumstances described in the remainder of this opinion, Commissioner Gordon ultimately agrees with the Commission's conclusion that the decision-making process in November 2005 was not adequate to satisfy the Union's duty of fair representation.

Second, the decision-making process asserted by the Union did not include a discussion about the facts or other merits of the case with Bishop herself, let alone with any of the other witnesses. This in itself is not necessarily a prerequisite to a reasoned decision on the merits. Rather, given the intensely factual and controverted nature of the allegations against Bishop, such a discussion is so likely to have been part of an authentic union decision-making process that its absence in this case adds further doubt that such a bona fide decision was made. Determining which divergent version of events would prevail in arbitration would be especially difficult where the student herself has trouble communicating and/or might be suggestible to repeating what others have said. It strains credulity that a union would decide to believe the complaining witnesses over the grievant, without having interviewed any of the witnesses and/or giving Ms. Bishop an opportunity to respond to any doubts genuinely raised by those witnesses. Again, these deficits do not inherently rule out a bona fide determination about the merits, but rather they – in combination with all the other circumstances – make it more likely than not that the Union did not do so here.

Third, we believe that the passage of time between November 2004 and November 2005 and Bishop's repeated attempts during that time to elicit action, affected the Union's judgment about whether to proceed to arbitration. This passage of time was not related to a strategic decision that, whether or not misguided was still within the Union's discretion, nor was the passage of time the result of simple human forgetfulness. Instead, given Ms. Bishop's several reminders and the Union's repeated failures to respond in any meaningful way for nearly a year, we have concluded that the Union was knowingly and deliberately heedless of Bishop's interests during this period of time. It is reasonable to infer, and we do infer, that the Union's action in Bishop's case in October/November 2005 was not a spontaneous or routine renewal of interest in her grievance, but instead was prompted by Bishop's complaints to outside/superior union officials. These factors raise suspicion about the "honesty of purpose" in the Union's consideration of her case.

Fourth, it is clear from both VACA and MAHNKE that the relative merits of the case, and the fact that it is a discharge case, do play a role in evaluating the bona fides of the Union's decision. See also, ROBESKY, concurring opinion of Justice Kennedy, quoted above at page 14. In our considerable experience, the information in this record about the underlying incident make Bishop's grievance reasonably strong. The incident itself, including when and how it occurred, is ambiguous in the witness statements. If it occurred as McConnell and Lopez recount it, then it is possible (but by no means certain) that Bishop's favorable witnesses were not in a position to see the event. However, Bishop's recounting of the incident shows that whatever occurred may have been the result of a defensive posture on her part reacting to the 20-year old cognitively-impaired student's aggressive behavior toward Bishop. This may have been the same incident recounted by McConnell and Lopez or a different incident in a similar time frame. Bishop's account is supported by at least two other witnesses. In addition, there is evidence that McConnell and Lopez may both have been predisposed unfavorably toward Bishop. McConnell, for example, had stated some two weeks earlier that she would "beat [Bishop's] ass." A situation involving such directly controverted facts, opposing

ostensible eye witnesses (including Bishop herself, who had no history of abuse), at least one witness with a possible ax to grind, and an event that, if it occurred at all, could have been an accidental outcome of appropriate defensive behavior on Bishop's part, would appear to be a relatively strong case in arbitration, where MPS would bear the burden of establishing "just cause." In contrast, Dickinson's explanation for concluding the case lacked merit is weak. While a weak or foolish but good faith determination might very well be beyond challenge in a duty of fair representation case, here the surrounding circumstances, including the inexplicable and intentional ignoring of her grievance for a year, are not sufficient indicia of a good faith consideration of the merits to pass muster.

It bears emphasis that our conclusion in this case does not rest upon the wisdom or lack of wisdom in the Union's decision not to arbitrate. If we believed that the Union had "in complete good faith and honesty of purpose" processed the grievance, weighed the merits of the case, and expressly or implicitly evaluated the other MAHNKE factors, it would not be appropriate for us to second-guess the Union's decision or its methodology. For example, interviewing witnesses and/or giving the grievant an opportunity to respond to doubts about the merits of the grievance, are not necessarily prerequisites for a good faith decision about settling a grievance. Rather, those deficits, taken together with the several other circumstances specific to this case, lead us to conclude that the Union did not engage in an adequate and good faith handling of Bishop's grievance. While it is crucial to the collective bargaining system to respect a union's properly-exercised discretion, it is just as important for the integrity and survival of that same system that a union is held to account when its discretion has not been properly exercised.

For the foregoing reasons, the Union has acted in an arbitrary manner in handling Ms. Bishop's grievance and she is entitled to pursue the merits of her contract claim against MPS.

Remedy

The Commission has only once been required to consider what the "make whole" portion of a remedy should be where a union has failed to fairly represent an employee in processing a grievance. In LOCAL 82, COUNCIL 24, AFSCME, AFL-CIO AND UNIVERSITY OF WISCONSIN-MILWAUKEE HOUSING DEPARTMENT, DEC. NO. 11457-H (WERC, 5/84) ("GUTHRIE"), AFF'D SUB NOM. GUTHRIE V. WERC, DEC. NO. 86-0490 (WIS. CT. APP. 1987) (unpublished), the Commission directed that the union should pay the grievant's costs, including reasonable attorney's fees, in connection with enforcing his or her contract claim in the related prohibited practice proceeding before the Commission. In the GUTHRIE case, the contract violation claim (also a just cause discharge grievance) had been litigated in the same proceeding as the duty of fair representation claim. Ultimately, the Commission concluded that no fees were available to Guthrie because he was unsuccessful on his contract claim and had had a contingency fee arrangement with his attorney (i.e., Guthrie received no monetary relief and hence neither owed or paid any attorney's fees in connection with his contract claim). LOCAL 82, COUNCIL 24, AFSCME, AND UNIVERSITY OF WISCONSIN-MILWAUKEE HOUSING DEPARTMENT, DEC. NO. 11457-I (GUTHRIE) (WERC, 12/88).

Other jurisdictions have varied in determining remedies in cases like this one, sometimes directing the union itself to proceed to arbitration and, more often of late, directing the union to fund the grievant's separate pursuit of his contract claim. See, e.g., BENNET V. LOCAL UNION NO. 66, 958 F.2D 1429, 1440 (7TH CIR. 1992) ("'When there is a legal duty to provide representation ... if the representation is wrongfully withheld, the cost of substitute representation should be recoverable damages.'" (citation omitted). See generally, THE DEVELOPING LABOR LAW (5TH ED.) (BNA 2006) at 2075-2095. After considering these authorities, it seems appropriate in the instant case to follow the GUTHRIE model and require the Union to reimburse Ms. Bishop for the costs, including reasonable attorney's fees, that she incurs in advancing her just cause discharge claim in the companion prohibited practice proceeding. This decision is largely prophylactic. As discussed above, the Union has claimed that Ms. Bishop's grievance lacked merit. Therefore, Ms. Bishop could reasonably be concerned that the Union might have an institutional interest in a less than ardent pursuit of her grievance. Whether or not that concern is valid, it is reasonable, and we prefer to insulate the next phase of the Commission's prohibited practice proceeding from any such concern.

In this case, unlike GUTHRIE, the proceedings were bifurcated in order to determine first whether the Union had breached its duty, which is a prerequisite to the Commission asserting jurisdiction over the related breach of contract claim against MPS. Hence, the claim against MPS has not yet been heard and Ms. Bishop's costs related to pursuing that claim are not yet known. Accordingly, we have fashioned our order to require the Union to reimburse those costs as Ms. Bishop incurs them, within thirty (30) days after she submits to the Union a receipt reflecting that she has been billed and paid for all or a portion of such costs.

Dated at Madison, Wisconsin, this 2nd day of January, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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