

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-E

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.

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.

Ying Tao Ho, 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.

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

The Complainant, Karen Bishop, filed a complaint of prohibited practices alleging that the Milwaukee Public Schools had terminated her without just cause, and that her exclusive bargaining representative, Local 150 of the Service Employees International Union, had failed to provide fair representation to her in her attempts to challenge the discharge. On July 26, 2006, the Commission's Examiner determined

Dec. No. 31602-E

that Local 150 had not failed in its duty of fair representation, and dismissed the complaint (Dec. No. 31602-B). On review, the Commission reversed the Examiner, concluded that Local 150 had failed to fairly represent the Complainant, and ordered that the complaint be reinstated, that Local 150 reimburse the Complainant for her legal expenses in prosecuting the case, and that the merits of her claim be adjudicated before a different Examiner (Dec. No. 31602-C (WERC, 1/02/07)).

On March 21, 2007, the undersigned was appointed as Examiner with final authority on behalf of the Commission to make and issue Findings of Fact, Conclusions of Law and Orders, as appropriate, related to the merits of the Complainant's claim that she had been terminated without just cause. The Commission retained jurisdiction over all issues connected with the duty of fair representation aspects of the case, including its Order that Local 150 reimburse the costs of litigation.

Hearings were held on May 7, June 18 and June 29, 2007 at the District offices in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, stipulations and other evidence as were relevant to the issue of just cause. Stenographic records were made of the hearings, and the last transcript was received on September 3, 2007. The parties submitted briefs and replies, the last of which was received on November 21, 2007, whereupon the record was closed.

Now, having reviewed the testimony, the exhibits, the arguments of the parties, and the record as a whole, and being fully advised in the premises, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT¹

1. Karen Bishop, hereafter Complainant or Bishop, 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

¹ As indicated by the prefatory paragraphs, this matter has been the subject of a prior Examiner decision (Dec. No. 31602-B) and a Commission review (Dec. No. 31602-C). Some of the Findings of Fact from those prior proceedings are set forth in these Findings, for the purpose of providing background and context. All of the Findings of Fact as determined by the Commission in Dec. No. 31602-C, without regard to whether they are reproduced below, are incorporated herein by reference.

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 employees 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 employee may be released without loss of pay to meet with the appropriate party. Every effort shall be made to not absent an employee from his/her work.

3. The employer will recognize stewards selected by the Union to represent employees with their grievances, discipline, and other matters 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 employees, 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 employee 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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 face 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.

11. A pre-disciplinary meeting was held at the end of February 2004 in the office of Grace Thomsen, the Principal of the Milwaukee School of Languages. At this meeting, Thomsen provided the Complainant and SEIU Steward Carol Vian 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 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; 10-20-2003; 10-21-2003; 2-12-2003; 2-19-2004; 2-20-2004.

12. 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 [***-***], extension 16.)

If you have any questions regarding this matter, you may contact me at [***-***]

13. On or about March 18, 2004, SEIU Representative Carmen 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.

14. As detailed in the Commission’s earlier ruling (Dec. No. 31602-C), the grievance was processed further, but was not resolved to the Complainant’s satisfaction, nor submitted to arbitration. The Union’s handling of the matter violated its duty of fair representation to the Complainant.

15. On Friday, February 6, 2004, the Complainant accompanied Diane McConnell and a group of approximately ten disabled students to the gymnasium for the seventh hour gym class. About ten minutes before the end of the class period, McConnell left the gym without seeking permission or telling anyone where she was going. When the period ended, Bishop was left to escort the students back to the classroom alone. Assistant Principal Hamm saw her with the students in the hallway, and asked what she was doing. She explained that the other aide, Ms. McConnell, had left the gymnasium and not come back. Hamm had her bring the children into his office, and paged McConnell. When McConnell arrived, she said she had permission to go check her mailbox. She then started berating Hamm in a loud voice. He directed her to help Bishop return the children to the classroom. Hamm checked with the gym teacher, Mr. Zabala, who said he had not given McConnell permission to leave the gym, and did not even know she was gone until the end of the class.

McConnell and Bishop took the children back to the classroom, where McConnell loudly confronted Bishop, telling her that if she caught her “lying on her” to Hamm again, she was going to “kick her ass.” Fredricks saw that Bishop was frightened by McConnell’s outburst, and stepped between them. Bishop and Fredricks went to the Principal’s office later that day, and Bishop made a formal complaint about McConnell’s threats against her.

16. On Friday, February 13, 2004, the Complainant and McConnell again took the students, including [H] to the gymnasium for the seventh hour gym class. During the course of the class period, [H] was shooting baskets, when another student pushed her and pinched her. She became very upset, and Bishop sought to calm her and redirect her to another basket.

17. Several minutes later, Bishop saw [H] pacing back and forth near some other students who were jumping rope. [H] still seemed upset, and was holding a basketball. She went over and asked [H] to come with her to a quieter part of the gym. [H] advanced on her and swung her arms at her. Bishop backed up, pushing her hands away, and took the basketball from her. She put the basketball away in the equipment area, and walked over to the other side of the gym. As she did, she heard McConnell tell [H] to come with her to the hallway for a drink of water. McConnell then went into the hallway with [H].

18. As the gym class came to an end, the Complainant lined a group of students up for leaving gym. [H] came up at her again, slapping at her head and face. Bishop ducked and swiveled away from her, and pushed her hands away.

19. Annette Lopez was not assigned to any of the classes having the seventh hour gym, but was in the doorway observing the Complainant and [H]. Lopez accused the Complainant of pushing [H], and the Complainant replied that she had not, although others had. Lopez then announced that she intended to report the Complainant to Assistant Principal Hamm, and left the gym.

20. After the Complainant led her group of students out of the gym, Diane McConnell took [H] to Hamm's office. Before entering, she told [H] to tell Hamm what Bishop had done to her.

21. The attendance complaints against the Complainant set forth in Findings of Fact Nos. 11 and 12 would not, under the normal policies of the District, have resulted in serious discipline.

22. The preponderance of the evidence does not establish that the Complainant, Karen Bishop, intentionally pushed [H] to the floor during the gym class on February 13, 2004.

23. The District lacked just cause to terminate the Complainant, Karen Bishop, for intentionally pushing [H] to the floor during the gym class on February 13, 2004.

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)0), 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. As determined by the Wisconsin Employment Relations Commission in Dec. No. 31602-C, Complainant Karen Bishop has established, by a clear and satisfactory preponderance of the evidence, that 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.

6. The clear and satisfactory preponderance of the evidence establishes that the Milwaukee Public Schools did not have just cause to terminate the Complainant Karen Bishop, and therefore violated Section 111.70(3)(a)5, Stats.

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

ORDER

The Respondent Milwaukee Public Schools shall take the following affirmative actions that will effectuate the purposes of the Municipal Employment Relations Act:

- a. Reinstatement Karen Bishop to the payroll at the appropriate pay and benefits for her former position, with no loss of seniority;
- b. Make her whole for her losses by virtue of the discharge;
- c. Remove all reference to the discharge from her personnel record; and
- d. Subject to the District's right to first provide reorientation and retraining in light of the time elapsed since her last active service, reinstate her to her former position.
- e. Notify the Wisconsin Employment Relations Commission and the 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.

Dated at Racine, Wisconsin, this 20th day of May, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/

Daniel J. Nielsen, Examiner

MILWAUKEE PUBLIC SCHOOLS

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

The issue here is just cause for discharge, and this is purely a credibility case. The Complainant was terminated from her position as an aide with the Milwaukee Public Schools based on accusations of having intentionally pushed a disabled student to the floor during a gym class.² The student was not able to testify. The Complainant testified on her own behalf, and denied pushing the student. Her two accusers testified that she did. There are problems with the testimony of all three witnesses, but on balance, I find the Complainant more credible.

I. Just Cause for Discharge

A. The Complainant's Version of Events

On the day of this incident, [H] was upset, and specifically upset with the Complainant. According to the Complainant's testimony, at the middle of the period, [H] approached her in tears and speaking incoherently. The only words she could understand were "pushed me." [H] had been shooting baskets and Bishop told her that it was probably an accident and she could shoot baskets at another hoop. About five minutes later, Bishop saw [H] pacing back and forth near some other students who were jumping rope. [H] still seemed upset, and was holding a basketball. She went over and asked [H] to come with her to a quieter part of the gym. [H] advanced on her and repeatedly punched at her chest, repeating "you, you, you". Bishop pushed her hands away, and took the basketball from her. She put the basketball away in the equipment area, and walked over to the other side of the gym. As she did, she heard McConnell tell [H] to come with her to the hallway for a drink of water.

As related by the Complainant, she then lined a group of students up for leaving gym. [H] suddenly came up at her, slapping at her head and face. Bishop ducked and swiveled away from her, and pushed her hands away. As she did so, she saw Lopez standing in the door, looking at her. After a moment, Lopez said someone had been pushing [H]. Bishop asked who had done that, and Lopez said "you." Bishop replied that she had not pushed [H], but perhaps some other students had. At the time, Bishop thought Lopez might be talking about the earlier incident when [H] was pushed away while shooting baskets. Lopez then left, and Bishop took the children back to the

² The letter terminating her also alleged a number of alleged attendance related violations. After hearing testimony from District officials about these incidents and the treatment of such incident in the normal course of the District's employment policies, the Examiner advised the parties during the hearing that the alleged attendance violations could not support a discharge for an employee with the Complainant's work record, and directed them to focus their evidence and arguments on the allegation that she had intentionally pushed [H] to the floor.

classroom. According to Bishop, she never saw [H] on the floor during that period, and believed that she would have seen it if it had happened. If [H] had been on the floor, the normal protocol would have been for staff members present to rush over and help her up, and no one took any such action.

B. Annette Lopez's Version of Events

Lopez testified on direct examination at the complaint hearing that she was walking past the gym and stopped to hug one of the children. The children were lined up to leave the gym at the end of the period. She observed [H] standing behind Ms. Bishop. Neither [H] nor Bishop said anything. Ms. Bishop then twisted around and gave [H] a two handed push in the abdomen. [H] fell backwards to the floor, up against a gate enclosing the equipment. [H] immediately began to cry and repeat over and over, "Ms. Bishop pushed me, Ms. Bishop pushed me." Lopez confronted Bishop asking why she had pushed [H], and Bishop said she had not, although ten others had. Lopez said she was going to report the incident, and immediately went to the assistant principal's office. Although there were a fair number of other staff members present, none of them came over to assist [H] in getting up or to check on her, and [H] remained on the ground for about three minutes.

On cross-examination Lopez was shown a copy of her statement from the time of the incident. It included a reference to [H] getting up from the floor and shouting and poking at Ms. Bishop, and Lopez conceded that [H] had not remained on the floor. Lopez testified that she and McConnell were not friends, beyond eating lunch at the same table in the lounge with the other assistants.

C. Diane McConnell's Version of Events

Diane McConnell testified that on February 13, [H] was upset about someone having pinched her, and kept repeating that someone had pinched her. Bishop grabbed her by the arm, and said to her "[H], you're always making a fuss over something", which upset her even more. At that point, McConnell felt she had to intervene, so she walked over and took [H] into the hall for a drink of water, to calm her down. [H] did calm down, and she brought her back into the gym, where the other students were lining up to go back to class. [H] walked over to get in line, and Bishop turned toward her, said "get away from me" and pushed her with both hands, causing [H] to fall to the floor in a sitting position. [H] started to cry. McConnell saw Lopez in the doorway, and was relieved that someone else had witnessed this, because she had witnessed perhaps 50 other incidents when she thought that Bishop had been too rough with children, but the teacher had never done anything. She helped [H] up from the ground, and when the other children were taken back to class, she accompanied [H] to Mr. Hamm's office, where [H] told Hamm that Bishop had pushed her.

D. Jeremy Krutina's Version of Events

Jeremy Krutina testified that [H] was capable of being aggressive towards staff. On February 13th, towards the end of phys ed class, he observed another child push [H] away from the basket as she was trying to shoot baskets. [H] became quite upset and claimed the other girl had pinched her. At that point, the teacher Mr. Zabala called out that it was time to put the balls away. Ms. Bishop took the ball away. [H] again became upset, and started to advance on Ms. Bishop, trying to hit and shove her. Bishop deflected [H] to the side. Ms. McConnell then took [H] out into the hall for a drink of water. Krutina turned his attention to the other children, but a short time later observed [H] on the floor, seemingly very upset and having a tantrum. He did not know how she came to be on the floor. Krutina agreed that he had previously provided a statement saying he hadn't seen anything after [H] left for a drink of water, but nonetheless was sure that he later saw her sitting on the floor.

E. Aracelio Zabala's Version of Events

Aracelio Zabala testified that on February 13th, during the seventh hour gym class, he heard a commotion and observed [H] advancing upon Bishop trying to strike her, and Bishop backing away from her. He did not observe any physical contact between the two, and turned his attention elsewhere. At some point he saw Annette Lopez near the doors, and heard her say something to the effect that Ms. Bishop had done something to [H].

F. Vicky Rodriguez's Version of Events

Vicky Rodriguez testified that she had been acquainted with [H] for a number of years. During the second semester of the 2003-2004 school year, her students and Ms. Bishop's had two common class periods per day. The second of these was gym during seventh hour. Rodriguez left at 1:30 during that semester. On February 13, 2004, she was walking past the office on her way out of the building, and she saw Ms. McConnell in the doorway to the office with [H]. [H] seemed upset, and McConnell was telling her to go tell Mr. Hamm what Ms. Bishop had done to her. Rodriguez expressed the opinion that [H] was not capable of initiating this course of action, and that McConnell was "enticing" her to tell a story to Hamm.

Rodriguez recalled that [H] was having a bad day on the 13th, and had had some trouble with misbehavior on the bus in the morning.

G. Jerome Hamm's Version of Events

Hamm testified that Lopez came to his office on February 13, very upset, and said she had seen Bishop push a student to the floor. McConnell then appeared with [H], who also seemed quite upset. [H] kept repeating "she pushed me" and when he asked who had pushed her, she said it was Ms. Bishop. He told the two women to prepare statements describing what they had witnessed.³

H. Discussion

There is nothing external to the testimony that compels a finding in favor of one version or another. No party's testimony is physically impossible. Everyone that was physically positioned have seen what he or she claimed to have seen, and done what he or she claimed to have done. None of the witnesses' testimony perfectly gibes with the others, but some things are clear. The testimony of Krutina is consistent with that of Zabala and the Complainant as to the fact that there was an incident in which [H] became very upset with Bishop and attempted to physically assault her, at around the time the 10 minute warning bell rang signaling that the equipment was to be put away. Although the District argues that Zabala and Krutina were actually seeing the aftermath of the push, when [H] became understandably angry and went after Bishop, that interpretation does not comport with Krutina's recollection that this took place when Zabala called for the balls to be put away. Krutina's testimony and statement have persuasive value in this respect because he also tied it to another student having pushed [H] away from the basket and pinching her, and was clear that this occurred before McConnell took her out for a drink of water. Thus it is reasonably clear from the record that [H] was pushed at least once during the course of the period, albeit by another student, was very upset about it, and was very upset with the Complainant personally prior to any of the abuse alleged by McConnell or Lopez.

In assessing the credibility of the principal witnesses – Bishop, Lopez and McConnell - I note that the Complainant was a veteran assistant with the District, who had exemplary evaluations in the two years preceding this incident, and was highly regarded by the administration and the teacher she was assigned to work with. She had a good rapport with the students, and particularly with [H]. It goes without saying that she had no prior history of any physical abuse to students, since she remained in the District's employ. She was used to the challenges of dealing with developmentally disabled children, and has a developmentally disabled son at home. On the face of it, she is not a likely candidate for a sudden and unexplained outburst of physical aggression to a student.

³ Another MPS employee, the late C. Pitchford, provided a written statement to Hamm at about the time of the incident to the effect that he had seen [H] approach Bishop twice during the last ten minutes of the class period, lashing out at her both times. This is consistent with Bishop's recounting.

On the other hand, there are elements of the Complainant's version of events that do not make a great deal of sense, most notably her position that [H] was never on the floor on February 13th. Not only McConnell and Lopez, but also Krutina saw [H] on the floor towards the end of the class. All three of them said that she was crying and having a tantrum of sorts. It seems very unlikely that the Complainant, standing in the immediate vicinity, could have missed that, and that draws her credibility into question.

As for Lopez, I must observe that, solely on the basis of demeanor, she was one of the least persuasive witnesses I have ever encountered. Her appearance on the stand was combative, and her answers were by turns self aggrandizing, evasive, exaggerated and argumentative. Her basic narrative was the same as it had been in her initial statement, apart from her belief at the hearing that [H] had remained on the ground after the alleged shove, until she was shown her statement, which stated that [H] got up and went after the Complainant physically. That is a fairly vivid scene, and not one which would easily escape one's memory if it had actually been witnessed. I note that Lopez's version of [H] getting up from the ground and assailing Bishop is not consistent with McConnell's statement and testimony, which had McConnell helping [H] up, and no reference to any further interaction with Bishop. Lopez also parts company with McConnell in her description of what happened in conjunction with the pushing, with Lopez describing a wordless turning and pushing, and McConnell claiming that the Complainant turned, cried "get away from me", and shoved [H] to the ground. They agree on the central issue of the pushing, but if the story were concocted, one would expect consistency on the central point and deviations on the surrounding events. That is what appears in their statements and testimony.

McConnell was also a witness with a combative and argumentative demeanor. More significantly, for purposes of credibility assessment, she was someone with a clear motive for wanting to harm the Complainant, whom she blamed for getting her in trouble one week earlier when she had been caught leaving her post without permission, and whom she had threatened with physical violence. It also bears remembering that in the course of the incident one week earlier, McConnell lied to Hamm by claiming she had permission to leave the gym, a claim that Zabala flatly denied when Hamm asked him about it. In short, McConnell is someone who has been shown to lie in the recent past, and who had a strong motive to lie about the Complainant in this case. Her credibility as a witness is very low. Her account of events before and after the alleged push deviates from Lopez's, and her version of the interaction between [H] and Bishop right before she took [H] out for a drink of water has Bishop roughly grabbing [H's] arm and worsening the situation, whereas Krutina saw [H] attacking Bishop, and Bishop gently deflecting her. McConnell's recounting of the incident seems quite deliberately slanted to cast Bishop as something of a brute.

Concluding, as I do, that the credibility of the two accusers is quite shaky, there is still the question of how likely it is that someone could have coordinated their actions to take advantage of the situation as it evolved in the gym class that day.⁴ Lopez was, after all, not assigned to that class. By her telling, she was simply walking by, and no one reported seeing McConnell and her speaking in the gym before she made the accusation. This concern is reduced somewhat by the fact that McConnell took [H] into the hall for a drink of water, and if the two were already of a mind to take revenge on the Complainant for having, in McConnell's mind, lied about her to Hamm, she might have had an opportunity to speak with Lopez at that time.

The District argues, and I agree, that the evidence of a motive for Lopez to lie is rather scant. Both she and McConnell say that their relationship is cordial but casual, based on working in the same building and taking lunch at the same time at the single lunch table in the lounge. The evidence of the extent of their personal friendship, of course, turns entirely on the truthfulness of their descriptions of it, and their truthfulness is what is in issue here.

In the end, this decision turns on a choice between a generally credible witness, with a strong motive to lie to save her job, and a story that excludes [H] being on the floor, and two generally incredible witnesses, whose stories do not gibe well with one another or with the testimony of others, but who agree on the central point of a push having taken place. It is possible, of course, that there is truth in all three versions. The Complainant said in her original written statement and in her testimony that she pushed [H's] hands away from her when she was slapping at her, which would have been at the same time the alleged push took place. If [H] went to the ground after Bishop had pushed her arms away, one could speculate that this is a case of differing perspectives on the same events, heavily colored by the self-interests of the observers – McConnell painting Bishop as abusive to take revenge for her own problems a week earlier; Lopez as a friend to McConnell, predisposed to think ill of Bishop; and Bishop, seeking to minimize the incident because Lopez had announced her intention to report to Hamm.

Whatever actually occurred on February 13, 2004, the preponderance of the evidence in this record does not establish that the Complainant engaged in the intentional and unprovoked assault that formed the basis of the discharge. The

⁴ In making my credibility assessments, I have not assigned weight to [H's] reported statement to Hamm that Bishop had pushed her, and her mother's statement that [H] repeatedly said over the weekend that a teacher had pushed her. I do not doubt that [H] said this. The evidence is that she functions at about a two year old level. She was upset with having been pushed during gym, she was upset with Bishop, and by Bishop's own account, Bishop did push her, when she was deflecting her arms as [H] tried to slap her. Vicky Rodriguez testified credibly that she saw McConnell basically prepping [H] before she spoke with Hamm, to tell him what Mrs. Bishop had done to her. It is difficult to say whether McConnell was telling [H] to relate what happened to her, or was telling [H] McConnell's take on what had happened to her, so she could repeat it to Hamm.

collective bargaining agreement requires just cause for discipline, and the employer bears the burden of proof on the merits. As it has not carried that burden, I conclude that the Complainant was not discharged for just cause.

II. The Appropriate Remedy

The traditional remedy in a case of a discharge found not to be for just cause is an Order reinstating the employee, and making her whole for all losses due to the improper termination. That portion of the remedy is not really in issue. The dispute over remedy centers on whether the cost of backpay and other economic liability should be borne solely by the District, or whether by virtue of Local 150's failure in its duty of fair representation, the costs should be apportioned between the District and the labor organization.

The District argues for an apportionment, based upon federal case law cited in two leading treatises, Higgins, THE DEVELOPING LABOR LAW, 5TH ED. (BNA 2006) AT PAGES 2075-2095, and Gorman, BASIC TEXT ON LABOR LAW, (WEST, 2004), at pages 1002-1016. I note that many of the cases in those texts premise a make whole remedy to the Union on the lack of recourse against the employer, owing to the Union's breach of its duty. That is not the case here, where the Complainant has the right, under MERA, to pursue both the Union for its breach of the duty and the District for its breach of the contract. Putting that distinction aside, this case arises under state law, and it is not a case of first impression on remedies for breaching the duty of fair representation. From SAM GUTHRIE V. UWM AND AFSCME LOCAL 82, DEC. NO. 11457-E (SCHURKE, 12/23/75) to GARRY VAN OUSE V. CITY OF WAUSAU AND AFSCME LOCAL 1287, DEC. NO. 30272-B (WERC, 10/22/02) to this case, KAREN BISHOP V. MILWAUKEE PUBLIC SCHOOLS AND SEIU LOCAL 150, DEC. NO. 31602-C (WERC, 1/02/07), the Commission has dealt with the question of appropriate remedies for breaches of the duty of fair representation. Despite three decades of DFR cases, there is no Wisconsin case in which the labor organization has been held liable for more than the employee's costs of litigation – for example, filing fees in Van Ouse, and attorneys fees and costs in Guthrie and in the first phase of this case. Nor did the Commission, in its decision on the question of fair representation in this case, make any provision for a remedy against the Union beyond attorneys fees and costs, despite being fully aware of the federal precedent cited by the District.⁵ This is consistent with the general notions that the employee's loss by virtue of the Union's duty of fair representation violation is the loss of an opportunity for a cost free arbitration hearing,⁶ while her losses by virtue of the Employer's contract violation are the wages and benefits that she was denied.⁷

⁵ See Bishop, Dec. No. 31602-C at page 20.

⁶ See Guthrie, Dec. No. 11457-E at pages 37-39.

⁷ While it is undoubtedly true that the Union's failure of its duty of fair representation extended the resolution of this matter, the District knew at all times that Bishop actively disputed the termination, and at all times it retained the sole ability to reinstate her and thereby limit its liability.

The Commission's prior order addressed the remedy for the Union's breach, and limited it to the costs of litigation. I find no basis in that decision, in state law, or in the specific facts of this case, for the apportionment urged by the District. Accordingly, I conclude that the appropriate remedy is for the District to immediately:

- a. Reinstatement Karen Bishop to the payroll at the appropriate pay and benefits for her former position, with no loss of seniority;
- b. Make her whole for her losses by virtue of the discharge;
- c. Remove all reference to the discharge from her personnel record; and
- d. Subject to the District's right to first provide reorientation and retraining in light of the time elapsed since her last active service, reinstate her to her former position.

Dated at Racine, Wisconsin, this 20th day of May, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/

Daniel J. Nielsen, Examiner