STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS, INC., Complainant,

vs.

MADISON METROPOLITAN SCHOOL DISTRICT, Respondent.

Case 303
No. 66610
MP-4322

Decision No. 32065-A

Appearances:

Linda Harfst, Cullen, Weston, Pines & Bach, Attorneys at Law, 122 West Washington Avenue, Suite 900, Madison, Wisconsin 53703, appearing on behalf of Madison Teachers, Inc.

Malina Piontek, Assistant Director of Labor Relations, and **Heidi Tepp**, Labor Relations Attorney, Madison Metropolitan School District, 545 West Dayton Street, Madison, Wisconsin 53703-1995, appearing on behalf of the Madison Metropolitan School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 10, 2007, Madison Teachers Inc. filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the Madison Metropolitan School District. The complaint alleged that the District committed prohibited practices by denying teacher Janet Danielson union representation during a meeting with her principal on November 27, 2006. Madison Teachers Inc. contended that this action, in turn, violated Secs. 111.70(3)(a)1, 2, 3 and 5, Secs. (3)(b)1, 3, 4, and Sec. 111.70(c), Stats. After the complaint was filed, it was held in abeyance pending efforts to resolve the dispute. Those efforts were unsuccessful. On April 5, 2007, the Commission appointed Raleigh Jones, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided for in Secs. 111.07(5) and 111.70(4)(a), Stats. On May 21, 2007, the District filed an answer denying the allegations. Hearing on the complaint was held on May 30, 2007 in Madison, Wisconsin. Following the hearing, the parties filed briefs and reply briefs by

July 27, 2007. Having considered the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Madison Teachers, Inc., hereinafter referred to as MTI or the Union, is a labor organization which maintains offices at 821 Williamson Street, Madison, Wisconsin. John Matthews is its Executive Director.

2. Madison Metropolitan School District, hereinafter referred to as the District, is a municipal employer which operates a public school system in Madison, Wisconsin. Its offices are located at 545 West Dayton Street, Madison, Wisconsin.

3. MTI is the exclusive collective bargaining representative for the District's regular full-time and regular part-time "certificated teaching personnel."

4. Among the members of the bargaining unit referenced in Finding 3 is Janet Danielson. She is the teacher involved in this case and teaches at Schenk Elementary School.

5. Sheila Briggs is the principal at Schenk Elementary School. In that capacity she is Danielson's direct supervisor.

6. Danielson taught Grades 4/5 at Schenk Elementary School during the 2006-2007 school year. She has been employed by the District for about 11 years. She has about 15 total years of teaching experience. Prior to the incident involved here, she had never been disciplined before.

7. On November 15, 2006, an incident occurred in Danielson's classroom. What happened was that Danielson became very upset with some of her students because of their behavior. She yelled and screamed at them and in doing so, used the words "hell" and "crap". Immediately after this incident occurred, Danielson called another staff member and asked her to watch the class while Danielson left and composed herself. Danielson then left her classroom and went outside and sat in her car for about 15 minutes and composed herself. Danielson then went back into the building and went to Principal Briggs' office to see her. Briggs was out of the building at a meeting at the time, so Danielson waited in Briggs' office for Briggs to return. When Briggs arrived back at school, Danielson attempted to tell her what had happened in her classroom, but Briggs stopped Danielson from telling her, and said she was stopping her (from talking about it) for her own protection. Briggs then told Danielson to take the rest of the day off, which she did.

8. The next day, November 16, 2006, the District held an investigatory interview at Schenk regarding the incident referenced in Finding 7. Those present at the meeting were Danielson, Briggs, MTI Executive Director John Matthews, MTI Attorney Linda Harfst, and District Labor Relations Attorney Heidi Tepp. During that meeting, those present discussed what happened in Danielson's classroom the day before, and some related matters.

With regard to the November 15 incident itself, Briggs indicated she had interviewed seven of Danielson's co-workers and they had told her (i.e. Briggs) what they heard that day (namely, that Danielson screamed at her students). In response, Danielson admitted she had lost her temper with some of her students that day. She further admitted that she yelled and screamed at them (i.e. her students) and, in doing so, used the words "hell" and "crap". Danielson apologized for her conduct. Briggs told Danielson that her conduct was unacceptable, and Briggs' expectation was that the incident would not be repeated.

Aside from the incident itself, some related matters were also discussed. First, they discussed the escalating behavior of the parent of a student in Danielson's room who had become increasingly threatening toward Danielson. The parent was described as mentally ill and not medicated. The parent apparently believed that Danielson had reported his interactions with his daughter to Dane County Social Services. On the morning of November 15, Danielson received a written letter from this parent which threatened her with civil legal action. Danielson said that this letter threatening her with legal action put her over the edge, so to speak. Briggs responded that she had not realized Danielson was so stressed out by the parent. Briggs indicated that henceforth, she would take over communications with the parent, and told Danielson to send the parent's communications to her. Second, just before Danielson lost her temper with her students, she had been called to the art room because of misbehavior by her students there. On the way, she broke up a fight between two middle school students who were in the elementary school building. Third, Briggs indicated that when she interviewed Danielson's co-workers about Danielson's behavior on November 15, the co-workers had also raised various concerns about Danielson's interactions with them. Briggs alluded to the concerns, but did not identify them. No discussion was held regarding same.

At the end of the meeting, Briggs stated that she believed that Danielson's behavior the previous day warranted a letter of reprimand. In response, Matthews argued that a letter of reprimand was not warranted given the circumstances which had led up to the incident in Danielson's room, and that the District had just counseled/admonished Danielson about their expectations. Briggs and Tepp responded that they would consider Matthews' comments/request.

9. After the meeting ended, Briggs and Tepp discussed the matter among themselves and decided that a letter of reprimand would be issued. Briggs subsequently wrote the letter of reprimand which she finished on November 21, 2006. This was the first written reprimand she had written. After she finished writing it, Briggs asked Tepp how to issue it (i.e. the letter of reprimand), and Tepp told Briggs to put it (i.e. the letter of reprimand) in the employee's mailbox. Briggs did not follow Tepp's advice because she thought it would be cold to do that (i.e. put the letter in her mailbox). Instead, she decided to give the letter of reprimand to Danielson in person (on a date to be determined).

10. On November 17, 2006, Briggs sent an e-mail to the parent who had been discussed during the investigative interview the previous day. The e-mail indicated that she (Briggs) had taken over communications with him and he was to communicate only with her.

11. On November 22, 2006, Briggs sent Danielson an e-mail wherein Briggs asked Danielson to schedule "an hour meeting with me to follow up with our meeting the other day." Danielson inferred that the meeting that Briggs was referring to was the meeting held November 16 (i.e. the one referenced in Finding 8). Danielson did as directed and a meeting was set up for November 27, 2006 at 4:00 p.m.

12. When Danielson received the e-mail referenced in Finding 11, she still did not know if she was going to be formally disciplined for the November 15 incident because she had not heard anything further regarding the matter. She interpreted the statement in that e-mail that the upcoming meeting was to "follow up" with the November 16 meeting to mean that she would learn at that time whether she was going to be formally disciplined. She also expected that Briggs might want to discuss the discipline or the facts surrounding it. Danielson notified MTI of the upcoming meeting with Briggs. MTI Executive Director John Matthews authorized union representation for Danielson for this upcoming meeting because of the content of Briggs' e-mail, and because he, like Danielson, did not know if Danielson was going to be formally disciplined for the November 15 incident. Matthews subsequently authorized union attorney Linda Harfst to attend the November 27 meeting as MTI's representative.

13. On November 27, 2006, Harfst went to Schenk Elementary School for the 4:00 p.m. meeting involving Danielson. She had not received any documentation or communication about the meeting from the District, so earlier that day she tried unsuccessfully to reach Tepp. Since she could not reach Tepp, Harfst left a message for Tepp with the office secretary which said that she would be at the meeting at Schenk. When Harfst went into the office at Schenk, Briggs happened to be behind the counter and Harfst told her she was there for the 4:00 p.m. meeting with Danielson. Briggs was surprised that Harfst was there because she did not know Harfst was going to be present at the meeting and she had not arranged for Tepp to be there. Briggs told Harfst that she (Briggs) had not even told Tepp about the meeting. Harfst said that she had called Tepp herself and left a message for her, so Tepp probably knew about the meeting by now. Briggs then told Harfst that the meeting's purpose was not to discuss the November 15 incident; instead, the meeting's purpose was to discuss what Briggs characterized as employee/employer stuff or normal teacher stuff, so Harfst did not need to attend the meeting. Harfst then went into the hall and waited for Danielson to arrive for the meeting.

14. After Danielson arrived for the meeting, Harfst told her that Briggs had just said that the meeting was going to be about ordinary employer-employee stuff, and asked Danielson if she was sure the meeting was going to be about the same topics that were discussed at the November 16 meeting. Danielson said yes they were and cited the e-mail from Briggs which stated that the meeting was "to follow up with our meeting the other day." Harfst wanted to see the e-mail, but Danielson did not have a copy of it with her, so she went back to her classroom and got a copy of same.

15. While Harfst was in the hallway, Briggs called Tepp and told her that Harfst was there for the meeting with Danielson. By then, Tepp had gotten Harfst's phone message

that Harfst was going to Schenk for the meeting, but Tepp did no know, prior to getting that message, that there was going to be a meeting that day at Schenk regarding Danielson. Tepp asked Briggs what the purpose of the meeting was going to be, and Briggs said it was to inform Danielson that she (Briggs) was not going to move the student from her classroom (whose parent had been discussed during the November 16 meeting), and to talk about the concerns Danielson's fellow teachers had expressed about her well being when Briggs had interviewed them about the November 15 incident. After being told by Briggs that those were the only topics which were going to be addressed at the meeting, Tepp concluded that it was going to be a routine principal/teacher conversation, and that neither she nor Harfst needed to be at the meeting. When Tepp and Briggs had this phone conversation, Tepp did no know that Briggs had not yet given the letter of reprimand to Danielson, nor did she know that Briggs intended to give the letter of reprimand to Danielson at that meeting and offer to discuss it.

16. When Harfst and Danielson entered Briggs' office, Briggs told them she had just spoken to Tepp, and that Tepp indicated she would not be coming to the meeting because only routine supervisory matters were going to be discussed. Briggs then repeated that the meeting's purpose was to discuss what Briggs characterized as routine employer/employee stuff or teacher/principal stuff. Harfst then conferred with Danielson and told her that given the assurances that Briggs had just made about the meeting's purpose – specifically that the meeting was going to be about teacher stuff – Harfst would not attend the meeting. Briggs then told Harfst that the meeting with Danielson was going to take awhile. Harfst replied that she would stay, and sat down on a small couch in the outer office. Briggs and Danielson then went into Briggs' private office, and Briggs closed the door. The meeting lasted about 40 minutes and Harfst waited in the outer office the entire time.

17. This finding deals with what happened at that meeting.

At the start of the meeting, Briggs told Danielson that Human Resources had told her to simply put the letter of reprimand in Danielson's mailbox, but she felt that that was cold and heartless and preferred to hand it to her in person. She then handed Danielson the following letter of reprimand:

November 21, 2006

TO: Janet Danielson

FROM: Sheila Briggs, Principal /s/

RE: **Letter of Reprimand**

This letter of reprimand is a follow-up to our meeting on November 16, 2006 which was also attended by Labor Relations Attorney Heidi Tepp, MTI Executive Director John Matthews, and Attorney Linda Harfst. At the meeting

> we discussed an incident which occurred in your classroom on November 15. Based upon our discussion, as well as my discussions with several staff members who witnessed the incident, it is clear to me that you were screaming at the students in your classroom, as well as a particular student who had been sent out into the hallway. In addition, you directed profanity at your students during this time. This was very upsetting to the students, many of whom reported being frightened by your behavior. While I understand that you may have been feeling stressed, this type of conduct is unacceptable under any circumstances and simply cannot happen. If you are feeling stressed, you need to call for assistance in order to remove yourself from the situation so that outbursts such as this do not occur.
>
> I appreciate your candor in discussing this incident. Based on our conversation, I am confident you understand my expectations and you will take appropriate measures to avoid this type of conduct in the future. However, please be advised that any future incidents of this nature will result in further disciplinary action, up to and including termination.
>
> cc: Heidi Tepp
> John Matthews

Upon getting the letter, Danielson asked if they were going to discuss it, and Briggs responded in the negative (meaning they were not going to discuss it). At that point, Danielson put the letter away without reading it. Briggs then asked Danielson if she (Danielson) had any questions about it (i.e. the letter of reprimand) and Danielson responded she did not.

Next, Briggs raised the topic of the parent who had been discussed extensively on November 16 during the investigatory interview. Briggs had indicated on November 16 that she would be taking over all communications with the parent and she reiterated that point. As this discussion progressed, Briggs told Danielson to send documents to the parent in the child's backpack. Danielson indicated she was uncomfortable doing that because it would bring her into contact with the parent once again and he would know it came from Danielson's room. She told Briggs that she thought doing that (i.e. sending documents to the parent in the child's backpack) would cause the parent to contact her again. During the course of this discussion, they also addressed the topic of removing the parent's child from Danielson's classroom. Briggs told Danielson that she did not want to transfer/move the child to a different classroom because the child was doing well in Danielson's classroom. Danielson did not request union representation during this discussion.

Next, Briggs said that when she interviewed Danielson's team members about the November 15 incident, they raised various concerns about Danielson's interactions with them which Briggs wanted to discuss. At that point, Danielson requested that her union

representative be present. Briggs responded that they did not want to get MTI involved in this and did not need to get MTI involved because her relationship with her colleagues was not a matter for which representation was needed. Danielson understood Briggs' denial of her request for her union representative to be present to be a direct order. Briggs then proceeded to discuss Danielson's co-workers' concerns about Danielson's interactions with them. In doing so, Briggs told Danielson that her co-workers were worried about her and felt she was disengaged. Danielson responded to these stated concerns and explained some of her interactions with her colleagues. At that point, the meeting ended.

18. No discipline arose out of the meeting held November 27, 2006.

19. MTI grieved Danielson's written reprimand. The grievance was processed through the contractual grievance procedure and was at the arbitration step as of the date of the hearing herein.

20. MTI did not file a grievance over Briggs' refusal to let Danielson have a union representative present at the November 27, 2006 meeting with Briggs. Instead, MTI filed the instant complaint with the Wisconsin Employment Relations Commission alleging that the District's conduct at the November 27, 2006 meeting violated the Municipal Employment Relations Act (MERA).

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

CONCLUSIONS OF LAW

1. By denying Danielson union representation during the November 27, 2006 meeting between Danielson and Briggs, the District interfered with Danielson's protected employee rights under Sec. 111.70(2), Stats. The District thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats. by its actions here.

2. Except as noted above, the District did not violate Secs. 111.70(3)(a)2 and 3, (3)(b)1, 3, 4 and (c), Stats., by its conduct in denying Danielson union representation during the November 27, 2006 meeting.

3. The Commission will not assert its jurisdiction to determine whether the District violated Sec. 111.70(3)(a)5, Stats., by its actions here.

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

ORDER

In order to remedy its violation of Sec. 111.70(3)(a)1, Stats., the District shall take the following affirmative action which will effectuate the purposes of the Municipal Employment Relations Act:

1. Cease and desist from refusing to allow union representation during investigatory meetings involving possible employee discipline.

2. Post the Notice attached hereto as Appendix "A" in conspicuous places in the workplace. The notice shall be signed by a representative from the Madison Metropolitan School District and shall remain posted for a period of 30 days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

3. Notify the Wisconsin Employment Relations Commission within 20 days of this Order what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 29th day of November, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

APPENDIX "A"

**NOTICE TO ALL EMPLOYEES OF THE
MADISON METROPOLITAN SCHOOL DISTRICT
REPRESENTED BY MADISON TEACHERS, INC.**

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL allow employees, upon request, to have union representation during investigatory meetings which may reasonably lead to employee discipline.

WE WILL cease and desist from interfering with the rights of any of our employees to have union representation during investigatory meetings which may reasonably lead to employee discipline.

Dated at Madison, Wisconsin this_____ day of _____2007.

MADISON METROPOLITAN SCHOOL DISTRICT

By_____

Date _____

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES FOR APERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.

MADISON METROPOLITAN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

MTI

MTI's Initial Brief

The Union's position is that Danielson had a right to union representation at the November 27, 2006 meeting with Briggs. The Union contends that the District's insistence on proceeding with that meeting without union representation constituted interference with Danielson's rights under MERA. It makes the following arguments to support that contention.

It begins by reviewing what it considers to be the applicable case law. For the purpose of context, it notes that MERA does not give municipal employees an absolute right to be represented in every conference they have with their employer about questions on wages, hours and conditions of employment. It cites WAUKESHA COUNTY, DEC. NO. 14662-A (WERC, 1/78), for the proposition that the right to union representation depends on the purpose of the employer-employee interaction, and whether protected rights could reasonably be impaired by denying representation in such circumstances. It avers that this differs from the rights set forth in WEINGARTEN to the extent that the right in Wisconsin is not limited simply to investigatory interviews. It maintains that in Wisconsin, an employer's refusal to permit representation is considered interference with protected employee rights if the employee has requested representation and the scheduled interaction could reasonably affect a decision to discipline or discharge, or if the meeting's purpose is to determine if the employee should be retained.

Next, MTI contends that Danielson's belief that the decision to discipline her might be based on the meeting to be held November 27, 2006 was objectively reasonable. Here's why. The investigative interview on November 16 ended as follows: Briggs announced at the end of that meeting that she intended to issue a written reprimand whereupon Matthews asked her to reconsider and the District's representatives indicated they would consider Matthews' suggestion. Insofar as Danielson and the Union knew, that was the status of the matter when Danielson got the e-mail from Briggs asking her to schedule an hour to "follow up with our meeting the other day." MTI submits that if Briggs merely intended to just give Danielson her discipline at this upcoming meeting, she would not have needed an hour to do that. As MTI sees it, the more likely conclusion is that at the upcoming meeting, Briggs intended to do more than simply hand Danielson the discipline; specifically, Briggs intended to investigate the matter further. That's what Danielson thought, and that's also what Matthews and Harfst (two experienced union representatives) thought. MTI argues that under these circumstances, a reasonable person would request union representation, and that's what Danielson did.

MTI elaborates further on the last point just made (i.e. that Danielson exercised her right to union representation). For the purpose of context, MTI acknowledges that a public

employee in Wisconsin must request union representation if he/she believes that discipline may result from a contact with management. Such a request puts the municipal employer on notice that the employee is asserting the right to union representation in an employee-supervisor contact. MTI avers that Danielson asserted her right to union representation through MTI when her MTI-provided union representative – Harfst – called the District's Labor Relations office and told them she would be coming to the meeting on November 27. Aside from that, MTI emphasizes that Danielson herself requested a union representative as soon as Briggs handed her the discipline at the outset of their meeting. While Briggs testified that Danielson did not ask for union representation at that time, it is MTI's view that her testimony on that point is not reliable. To support that premise, it notes that at the hearing, Briggs had a poor recall of when she told Danielson she would take over direct communication with the parent. She first testified on direct exam that she told Danielson she would do that during the November 27 meeting; then on cross-examination, Briggs admitted she had her facts wrong, because she told Danielson that at the November 16 meeting. MTI avers that Briggs' admission of inaccuracy on this point renders it more likely that her memory of the request for union representation was not reliable either. MTI submits that, by contrast, Danielson's testimony that she asked for a union representative when Briggs handed her the discipline was clear and consistent. MTI therefore asks the Examiner to credit Danielson as reliable.

Next, MTI acknowledges that when a supervisor-employee meeting is called for the purpose of imposing an already decided-upon penalty, the interests at stake, such as the employee's interests, and the value of the union representation to the employee, may be of significantly lower magnitude. However, in balancing the interests in this case, it is MTI's view that the scales must tip in favor of Danielson's obtaining union representation. Here's why. First, while the District attempts to characterize Briggs' actions on November 27 as simply tendering the discipline to Danielson, it was more than that, because Briggs knew what her (disciplinary) decision was while Danielson and the Union did not. Upon tendering the discipline, Briggs immediately asked Danielson if she had any questions. According to MTI, this query invited a continuation of the investigative interview, and had the potential to become a coercive situation. MTI notes that at the hearing, when Briggs was asked why she asked Danielson if she had any questions, Briggs responded: "Because I wanted to make sure she was clear about my expectations and what she needed to do in the future." MTI then contrasts that statement to what Briggs wrote in the letter of discipline: "Based on our conversation, I am confident you understand my expectations and you will take appropriate measures to avoid this type of conduct in the future." As MTI sees it, these explanations are contradictory. MTI also submits that Briggs' assertion that she would have limited her responses (to whatever questions Danielson raised) to just her expectation is simply speculation.

Next, MTI contends that the topics discussed at the November 27 meeting (i.e. the parent who had threatened Danielson and the parent's child, and the statements from co-workers which Briggs had gathered) were the same topics as those covered in the November 16 investigative interview, and as a result, constituted a continuation of that interview. Here's why. With regard to the first matter that was discussed (i.e. the parent who had threatened Danielson and the parent's child), MTI acknowledges that union representatives

are not usually

involved when student issues are discussed in meetings. However, in this particular instance, during the November 16 investigatory interview, this student's placement arose in the context of discussing Danielson's reaction to the parent's behavior and her fear for her own safety. This situation was discussed thoroughly on November 16 because that placement required Danielson to have contact with the parent. MTI notes that at the November 27 meeting, Briggs told Danielson that the child would continue in Danielson's room. After telling her that, Briggs turned to the issue of communication with the child's parent. Specifically, Briggs directed Danielson to send documents to him in the child's backpack. With regard to the second matter that was discussed (i.e. the statements from Danielson's co-workers which Briggs had gathered while investigating the November 15 incident), MTI avers that this topic was not a different topic than was addressed at the November 16 investigative interview. Building on the foregoing, MTI maintains that the two topics that were addressed during the November 27 meeting were the same topics that were discussed at the November 16 investigative interview. Since no new issues arose, MTI maintains there was no reason to exclude MTI from the November 27 meeting because MTI had already raised these issues with Briggs at the November 16 meeting.

Elaborating further on the premise that the two topics which Briggs discussed with Danielson at the November 27 meeting were the same topics that were discussed at the November 16 investigative interview, MTI also argues that the information which Briggs gathered at the November 27 meeting had the potential to influence the matters being investigated or positions taken in the upcoming grievance arbitration (on the discipline).

Next, MTI avers that in addition to misleading the union about the purpose of the November 27 meeting, Briggs also misled the District's own labor counsel when she told her what she intended to do at the November 27 meeting. MTI notes in this regard that Briggs failed to tell Tepp that she had not yet tendered the discipline to Danielson, but would be doing so that day. MTI asserts these significant omissions may have skewed counsel's perception of what might be likely to occur in the meeting. Building on the foregoing, MTI contends that Briggs' mischaracterization of her intentions during the November 27 meeting violated the good faith element of MERA and, in turn, Danielson's right to union representation.

Finally, MTI argues that the District's affirmative defenses of waiver and failure to exhaust procedural remedies do not prevent the WERC from finding interference with Danielson's right to union representation. It maintains it has a separate statutory right to proceed with this complaint in addition to filing a grievance under the collective bargaining agreement challenging the discipline. It notes that even if the arbitrator finds the discipline to be without just cause, and imposes a remedy, the arbitrator could not resolve the issue of whether her rights under the statute had been interfered with on November 27. It submits that is the issue before the WERC here.

In sum, MTI asks that the complaint be sustained. It seeks an order finding the District violated Secs. 111.70(3)(a)1, 2, 3 and 5, Secs. (3)(b)1, 3, 4 and Sec. 111.70(c), Stats. It also

seeks a cease and desist order and a notice posted.

MTI's Reply Brief

MTI notes at the outset that Wisconsin municipal employees have the right to have a union representative present at a meeting with the employer when the employee reasonably believes that the meeting might lead to discipline or might threaten the employee's employment security, citing VILLAGE OF BROWN DEER, DEC. NO. 28896-A (WERC, 8/97). It avers that Danielson's belief that the meeting on November 27, 2006 might result in disciplinary action was a reasonable belief. Here's why. The e-mail which asked her to set up the meeting said it was to "follow up with our meeting the other day." According to MTI, the phrase, "our meeting the other day" referenced the investigative interview, which had been held on November 16, 2006. MTI notes that that meeting ended without a decision being made on discipline. Although the District claimed it had already decided during the week of November 21 to discipline Danielson, neither Danielson nor her union representatives knew that. That being so, MTI maintains that Danielson's belief that the November 27 meeting was going to be a continuation of the investigative interview was reasonable.

MTI responds as follows to the District's assertion that at the start of the November 27 meeting, Briggs made it clear that the meeting was not going to be a continuation of the investigative interview. MTI asserts that claim is wrong. While Briggs told Danielson and Harfst that the purpose of the meeting was to discuss principal/teacher matters, that assertion turned out not to be true because as soon as the meeting started, Briggs handed Danielson the discipline and initiated a continued discussion of the very matters discussed during the investigatory interview. Danielson immediately reacted by requesting union representation, but Briggs denied her request.

MTI responds as follows to the District's assertion that if Danielson faced some risk of discipline on November 27, then Briggs herself would have ensured that union representation was present. MTI characterizes this as "a fox guarding the chicken house" argument that lacks merit. Additionally, MTI contends that what matters under Wisconsin law is whether Danielson, not Briggs, had a reasonable belief that the meeting might lead to discipline of her or threaten her employment security.

Next, MTI avers that the District's assertion that no union representation was required in order for Briggs to hand Danielson the written discipline misses the point. Here's why. The meeting involved more than just handing Danielson the disciplinary notice. Specifically, Briggs initiated discussion on the following two matters: 1) the same parent and student who were discussed during the initial investigatory interview, and 2) information Briggs claimed to have obtained from Danielson's colleagues when she interviewed them as witnesses to the events of November 15. As MTI sees it, this case is different from those Commission cases where the employer just tendered a previously-made disciplinary decision to an employee at a meeting. In this case, the Employer did more than that. Specifically, Briggs attempted to engage in conversation about the discipline itself. When Danielson declined to engage, Briggs initiated a discussion – which ultimately lasted about 40 minutes – about facts which are likely to be evidence in the subsequent grievance arbitration hearing. As MTI sees it, those facts

alone are enough to require union representation.

Next, MTI elaborates on why union representation was required when Briggs resumed the discussion with Danielson of the parent and child. It notes in this regard that the parent's actions were a part of the entire context of the incident for which Danielson was disciplined. That's why the parties engaged in an extensive discussion during the November 16 investigative interview about what to do. They concluded that Briggs would take over communications with the parent. That's what subsequently happened and Briggs drafted communications to the parent which may have fueled his bizarre behavior toward Danielson. MTI characterizes the situation with the parent as complex, and avers that Briggs had a part in it. Given the foregoing, MTI contends that no further discussion of that topic should have taken place on November 27 without union representation.

Next, MTI elaborates on why union representation was required when Briggs initiated the discussion with Danielson about her co-workers' personal concerns. It notes in this regard that Briggs claimed that Danielson's co-workers were worried about her. MTI avers that such observations, if true, could be evidence in an arbitration hearing about the stress Danielson was experiencing at the time of the November 15 incident. Thus, it could be exculpatory. As such, this is the kind of information that must be discussed with the labor representative.

Finally, MTI argues that the District's failure to be candid in its interactions with Danielson and her union regarding its reason for demanding a meeting on November 27, 2006, and what topics were to be discussed, impeded Danielson's ability to respond completely and defend herself. Therefore, the meeting violated her due process rights.

In sum, the Union maintains it has met its burden of proof. It asks the Examiner to find a violation of MERA.

District

District's Initial Brief

It is the District's position that it did not commit any prohibited practices by its actions here. It makes the following arguments to support that contention.

The District notes at the outset that the Union bears the burden of proof in this matter. According to the District, the Union did not meet its burden and failed to prove its case.

Since the Union contends that the District violated MERA by denying Danielson's request for representation during the November 27, 2006 meeting, the District begins its defense by disputing that contention. It argues that at no time was Danielson entitled to union representation during the November 27 meeting with Briggs. To support that premise, it notes that under MERA, a municipal employee does not have an absolute right to union representation whenever he or she wants it. It depends on the purpose of the interaction. The District avers that the Commission has held in various cases that there is no right to

representation in the following circumstances: 1) if the employee is under no compulsion to

appear before the employer; 2) if there is no reasonable cause to believe the meeting may result in discipline; and 3) if the meeting is to impose discipline that has already been decided. Conversely, it asserts that the Commission has held in various cases that there is a right to representation in the following circumstances: 1) if the employee requests representation and the scheduled interaction could reasonably affect a decision to discharge or discipline; or 2) if the meeting's purpose is to determine whether an employee should be retained. Reading all these decisions together, the District maintains that an employee does not have a right to representation unless the employee reasonably believes that the meeting might lead to discipline.

Building on this last point, the District avers that the perceived threat to employment security must be a reasonable belief that is measured by objective standards and not the subjective motivations of the employee. It maintains that when looking at this issue, one needs to determine (1) whether there was a meeting between the employer and the employee; (2) whether the employee reasonably perceived that meeting as threatening her employment security; (3) whether the employee requested representation from her union; and (4) was that representation by the union interfered with by the employer. The District focuses most of its attention on the second point just referenced and argues that Danielson could not have had a reasonable fear about potential discipline relating to the matters discussed at the November 27 meeting for the following reasons.

First, the District concedes that given the wording of Briggs' e-mail, Danielson could have assumed that the purpose of the meeting was a continuation of the investigatory interview from November 16, 2006, and thus could involve potential discipline. However, Briggs specifically told both Danielson and Harfst before the meeting started that the meeting was not going to be disciplinary in nature; instead, Briggs told them that the purpose of the meeting was to discuss general supervisory matters. That being so, the District believes that Danielson and Harfst were specifically told that the meeting was not going to be disciplinary in nature. The District also avers that if the meeting was going to be disciplinary in nature, Briggs herself would have arranged for union representation to be present. To support that premise, it notes that when Danielson tried to tell her about the facts involved in the November 15 incident, Briggs stopped Danielson from speaking to her about it until a union representative was present.

Second, the District argues that union representation was not required in order for Briggs to hand Danielson the letter of reprimand. According to the District, what Briggs did at the outset of the November 27 meeting was simply hand Danielson the November 21 letter of reprimand. The District asserts that since Briggs gave Danielson the letter of reprimand before she began any discussions with Danielson at that meeting, the discussions which subsequently occurred had absolutely no bearing whatsoever on whether discipline was appropriate for her November 15 conduct, or the nature of the penalty to be imposed for her November 15 conduct; those decisions had already been made. Said another way, nothing that was discussed afterwards impacted upon, or had any connection with, the decision to discipline Danielson,

since the reprimand was completed and given to Danielson before there was any discussion on

the other matters. The District cites CITY OF BELOIT (FIRE DEPARTMENT), DEC. NO. 27990-B (WERC, 1/95) aff'd. DEC. NO. 27990-C (WERC, 7/96) for the proposition that there is no violation of MERA when a supervisor unilaterally imposes discipline and merely informs the employee of the conditions that the employee would be required to meet to continue employment. The District claims that Principal Briggs did nothing more here. With regard to the fact that Briggs, after giving Danielson the letter of reprimand, asked if she had any questions, the District notes that Danielson replied no. According to the District, such exchange does not constitute a discussion.

Third, the District maintains that while Briggs and Danielson next discussed a particular student and that student's parent in the November 27 meeting, that did not form a basis for its discipline of Danielson, so discussion on that topic did not warrant union representation. As the District sees it, under the Union's theory, since Danielson mentioned the student and parent in the November 16 meeting, that meant that if Briggs ever wanted to discuss that particular student and parent with Danielson in the future, Danielson would be entitled to union representation. The District reasons that under the same theory, if Danielson mentioned something about her curriculum during the November 16 meeting, then Briggs could never again discuss curriculum with Danielson without union representation being arranged. The District submits that such a contention is nonsensical and would severely interfere with the District's day-to-day operations. Additionally, the District notes that Briggs routinely has discussions with teachers about the possibility of removing students from their classrooms and communications with parents. The District contends that Briggs' discussion with Danielson on November 27 about the student and parent had nothing to do with what occurred on November 15. Instead, the discussion which occurred was about how things would be handled with this particular student and parent in the future. Finally, the District notes that during this part of the meeting, Danielson never requested representation when discussing this issue.

Fourth, the District argues that while Briggs and Danielson next discussed Danielson's co-workers' concerns about Danielson in the November 27 meeting, a reasonable person could not conclude that a discussion about co-workers' concerns could result in disciplinary action. According to the District, when this topic arose Briggs told Danielson that the disciplinary issue was over, that they were simply talking about her relationship with her colleagues and their personal concerns, and the concerns were unrelated to the disciplinary matter. The District notes that principals regularly meet with staff to share information or concerns that may be raised by other co-workers. It avers that to require union representation at all such meetings would drastically impact upon a principal's ability to perform basic supervisory duties. In addition, the District notes that the co-workers' concerns were not addressed in the November 16 meeting. It submits that if they were relevant to the disciplinary action, they would have been discussed at that time. They were not. That being so, it is the District's view that Danielson had no right to union representation during this portion of the November 27 meeting.

Finally, notwithstanding the arguments just made, the District claims that if Danielson did fear discipline was likely to result from her conversations with Briggs, she could have left the office and gone out and conferred with Harfst. She did not. According to the District, this was most likely due to the fact that she did not have a fear that discipline was going to result from her conversations with Briggs.

In sum, it is the District's position that it did not commit any prohibited practices by its conduct here. With regard to the claimed (3)(a)5 violation, the District specifically avers that the Union should have brought its claim of violation of the labor agreement through a grievance. It therefore asks that the complaint be dismissed.

District's Reply Brief

First, the District addresses the parties' disagreement as to whether Danielson requested representation when Briggs handed her the letter of reprimand. Danielson claims that she did while Briggs says she did not. The Union asserts that Danielson's recollection should be given more weight because Briggs was mistaken as to when she first contacted the parent to advise him that he should no longer communicate directly with Danielson. The District argues the Union's assertion should fail for several reasons. First, it asserts these were two distinct issues. It notes that Briggs had numerous communications with this parent. According to the District, the fact that she did not recall the timing of a specific communication with a parent does not mean she does not recall whether Danielson asked for representation during the November 27 meeting. It submits that since Briggs had just had a discussion with Harfst before the meeting started about whether Danielson needed representation at the meeting and that Harfst was waiting in the outer office, it is the District's view that Briggs' sensitivity to this issue would be heightened, thus increasing the likelihood that she accurately remembered whether representation was requested. Second, the District maintains that Danielson's testimony is suspect. Here's why. It notes that when Danielson was asked about the topics discussed at the November 16 investigatory interview, the only two topics which she mentioned were the student's parent and the interview with her colleagues. The District emphasizes that the purpose of the November 16 meeting was to discuss Danielson's conduct on November 15. The District avers that since Danielson could not even recall that topic being discussed at the November 16 meeting, her account of events should not be entitled to any presumption of credibility.

Second, the District addresses the Union's assertion that the November 27 meeting could reasonably affect a decision to discipline Danielson before that decision was made. It maintains that this argument is nonsensical. It avers that the discipline was completed before any discussion even commenced on November 27. It asks rhetorically how there can be a continuation of the investigatory interview which may affect a decision to discipline when the decision to discipline has already been made and the discipline issued. It answers that question by saying that it can't.

Third, the District addresses the Union's claim that the same topics were discussed on November 27 that were discussed in the November 16 investigatory interview. It contends that assertion is not supported by the facts. With regard to the fact that Briggs asked Danielson if she had any questions when she got the letter of reprimand, the District emphasizes that there was no discussion. Building on that point, the District argues that there was no continuation of the investigatory interview. It asserts that the potential "coercion" referenced by the Union is non-existent. With regard to the discussion about the parent, the District argues that the fact that the parent was discussed at the November 16 meeting does not mean all conversations regarding that parent are now suddenly a continuation of the investigatory interview. The District contends that the Union claim that conversations regarding interactions with that parent could somehow lead to discipline based on the fact that the parent had been discussed earlier are without merit. The District also submits that it is of no import that Danielson did not like Briggs' directive that Danielson was to send documents to the parent in the child's backpack. With regard to the discussion about Danielson's co-workers' concerns, it notes that on November 27, they did not discuss what her colleagues saw or heard in relation to Danielson's treatment of her class on November 15; rather, they discussed her colleagues' concerns about Danielson's interactions with them. As the District sees it, that was a different topic. Building on that premise, the District argues that the Union's claim that this discussion of a totally unrelated matter is a continuation of the investigatory interview is absurd. When the topics just referenced are considered together, it is the District's view that the November 27 meeting covered general supervisor/employee issues as Briggs said it would. It emphasizes that the placement of a student in a teacher's class, as well as colleagues' concerns about co-teaching issues are normal conversations principals have with their staff on a daily basis at which union representation is not present. It contends there was no possibility that discipline could result from these conversations, and Briggs told Danielson that prior to the meeting. Thus, Danielson had no right to union representation at the November 27 meeting.

Fourth, the District addresses the Union's assertion that the information gathered at the November 27 meeting had the potential to influence matters being investigated or positions taken in the upcoming grievance arbitration. It contends that assertion is without merit, and notes that the Union cites absolutely no authority for this broad assertion. The District notes that the discipline which it imposed was based on the information that the District had at the time the discipline was issued. It submits that any subsequent conversations could not be used to form the basis for the discipline that had already been issued. Aside from that, the District disputes the Union's assertion that during the November 27 meeting, Briggs was probing for information that could be used in a subsequent arbitration hearing. It avers that Briggs' advising Danielson of her colleagues' concerns about her interactions with them cannot by any stretch of the imagination be "probing" on the matter of discipline. That being so, the District believes this argument should fail.

Fifth, the District addresses the Union's claim that Briggs did not act in good faith. It contends that assertion is untrue. To support that premise, it notes that prior to meeting with Danielson on November 27, Briggs contacted Tepp and conferred with her about the topics that could be discussed with Danielson without representation.

In sum, the District's view is that the Union failed to prove any MERA violation. It therefore asks that the complaint be dismissed.

DISCUSSION

Since the complaint alleged that the District violated MERA by denying Danielson union representation at the November 27, 2006 meeting with Principal Briggs, the logical starting point for the discussion is to review the applicable legal framework dealing with same.

The Legal Framework

The legal basis for a Wisconsin municipal employee's right to union representation in an employer-employee interaction is found in Sec. 111.70(2) of the Municipal Employment Relations Act (MERA). The pertinent portion of the statute is the part which says that "municipal employees shall have the right. . .to engage in lawful, concerted activities for the purpose of . . .mutual aid or protection." The Commission has held that a municipal employer interferes with a municipal employee's rights under Sec. 111.70(2), Stats., when it compels a municipal employee to appear at a pre-discipline investigatory meeting, which the employee reasonably believes could result in his being disciplined, without union representation where the employee has expressly requested such representation at the meeting. CITY OF MILWAUKEE, DEC. NO. 14873-B, 14875-B, 14899-B (WERC, 8/80); WAUKESHA COUNTY, DEC. NO. 14662-A (Gratz, 1/78), AFF'D DEC. NO. 14662-B (WERC, 3/78). In its decision in CITY OF MILWAUKEE, the Commission cited with approval the examiner's discussion in WAUKESHA COUNTY of the balancing of interests analysis that is to be applied in determining whether there is "interference" with the rights provided under Sec. 111.70(2) of MERA in these types of cases:

> Rather, the traditional mode of analyzing whether a violation of those quoted terms. . .[whether in MERA or in the National Labor Relations Act] has occurred has involved a balancing of the interests at stake of the affected municipal employees and of the municipal employer to determine whether, under the circumstances, application of the protections of the interference and restraint prohibitions would serve the underlying purposes of the act. . ." [Citations omitted.]
>
> It is the balancing analysis described above that must be applied on a case-by-case basis and issue-by-issue basis to determine whether, in any given set of circumstances, the municipal employer conduct involved interferes with or restrains employees in the exercise of their MERA rights. While the results of that balancing analysis may leave employees with lesser protections than they consider necessary, it should be noted that additional protections may be

> negotiated contractually. The Commission's determinations herein relate to the requirements of, and limitations on, the right to representation under MERA.
>
> CITY OF MILWAUKEE, Ibid., p. 31.

These cases establish that whether a right to representation exists for a Wisconsin municipal employee depends upon the purpose of the employer-employee interaction, and whether protected rights could reasonably be impaired by denying representation in such circumstances. The Commission has held that there is no statutory right to representation if an employee is under no compulsion to appear before the employer (CITY OF MILWAUKEE, DEC. NO. 17117-A (Davis, 1/80) AFF'D BY OPERATION OF LAW, DEC. NO. 17117-B (WERC, 2/80), or if there is no reasonable basis to believe that an employer-employee meeting may result in discipline (CITY OF MADISON (POLICE DEPARTMENT), DEC. NO. 17645 (Davis, 3/80), AFF'D BY OPERATION OF LAW, DEC. NO. 17645-A (WERC, 4/80), or if the meeting is to impose discipline that has already been decided on (WAUKESHA COUNTY, DEC. NO. 18402-C (Crowley, 1/82), AFF'D, DEC. NO. 18402-D (WERC, 9/82). However, an employer's refusal to permit representation is considered interference with protected employee rights if an employee has requested representation and the scheduled interaction could reasonably affect a decision to discharge or discipline (CITY OF MILWAUKEE, Supra), or if the meeting's purpose is to determine whether an employee should be retained (BOSCOBEL AREA SCHOOL DISTRICT, DEC. NO. 18891-B (WERC, 12/83).

Application of the Legal Framework to the Facts

At issue herein is whether Danielson was statutorily entitled to union representation at the meeting she had with Principal Briggs on November 27, 2006. As the above cases show, the answer to that question depends on whether Danielson's belief that the matters discussed at that meeting might lead to discipline was objectively reasonable.

Prior to the time that meeting convened, Danielson certainly had an objective reasonable basis for assuming that the meeting was going to be a continuation of the investigatory interview from November 16, 2006 and thus could involve potential discipline. Here's why. First, she was still waiting to hear from the District whether she was going to be disciplined for the November 15 incident. At the November 16 meeting Briggs had announced that she believed that Danielson's behavior warranted a written reprimand and Matthews had asked her to reconsider. Second, while Briggs and Tepp decided after the meeting ended to impose a written reprimand, Danielson and the Union did not know that when Briggs sent her e-mail on November 22 which asked Danielson to schedule an hour "to follow up with our meeting the other day." Given its context, the reference therein to "our meeting the other day" had to be a reference to the investigatory interview held November 16, 2006. Danielson reasonably inferred from this wording that if all Briggs intended to do at this second meeting was inform her of the disciplinary decision, that would not take an hour. Instead, given the amount of time which Briggs requested for the meeting, it was likely that Briggs intended to use the meeting to investigate the matter further. That's what Danielson thought, and that's

also what union representatives Matthews and Harfst thought. That's why Danielson requested union representation at the upcoming meeting, and why her MTI-provided union representative – Harfst – called the District and informed them she would be at the upcoming meeting.

The District contends that notwithstanding the foregoing, Briggs essentially wiped the slate clean when she told Danielson and Harfst, before the meeting started, that the meeting was not going to be disciplinary in nature; instead, it was to discuss general supervisory matters. As Briggs put it, the meeting's purpose was routine principal/teacher or employer/employee stuff. According to the District, her saying that should have ended any reasonable belief on Danielson's part that the purpose of the meeting was a continuation of the investigatory interview from November 16.

Unfortunately though, Briggs' statements that the meeting was not going to be disciplinary in nature turned out not to be completely accurate. The following discussion shows that some of what was addressed at that meeting was disciplinary in nature.

My discussion begins with a review of how the meeting started. At the outset, Briggs handed Danielson a written reprimand. While Briggs knew before the meeting started that she was going to formally discipline Danielson for the November 15 incident, and what the level of discipline was going to be, Danielson did not know that until she was handed the written reprimand. While the District attempts to characterize what happened here as Briggs simply tendering the discipline to Danielson, the following discussion shows it was more than that. After being handed the written reprimand, Danielson asked Briggs if they were going to discuss it, and Briggs responded in the negative. Briggs then contradicted what she had just said (i.e. that they were not going to discuss it) and asked Danielson if she had any questions about it (i.e. the written reprimand). That was a broad and open-ended inquiry. By asking if there were any questions about the discipline, Briggs was inviting and/or trying to initiate a discussion on the same topic(s) that had been discussed at the November 16 investigative interview. While no discussion occurred, that was only because Danielson declined Briggs' express invitation to discuss the matter. Danielson had the right to do that (i.e. decline her supervisor's request to be drawn into a discussion on the topic). However, the fact that Danielson declined Briggs' invitation to discuss the matter does not let the District off the hook, so to speak. In other words, the fact that Danielson did not accept Briggs' invitation to discuss the discipline is not dispositive. Instead, what is dispositive is that by asking if Danielson had any questions, Briggs invited a discussion about the November 15 incident and the discipline Briggs had just imposed for it. Not only that, Briggs did not set any limits on what could be discussed. This signaled to Danielson that if she wanted to, she could revisit the November 15 incident itself and the topics that were addressed at the November 16 investigative interview. In the Examiner's view, that point is of great significance to the outcome herein. Here's why. For the purpose of context, it is noted that there is no question that the November 16 investigative interview was a meeting that might lead to discipline; that's why union representation was allowed at that meeting. By telling Danielson that if she wanted to, she could discuss the same topic(s) that had been discussed at the November 16 meeting – this time though with no union representation present - Briggs was telling Danielson that this

part of the meeting was a continuation of the November 16 investigative interview. Additionally, notwithstanding the District's contention to the contrary, the fact that Briggs had handed the written warning to Danielson at the outset did not preclude Briggs from subsequently changing the level of discipline she had imposed. That being so, the Examiner finds that this first part of the November 27 meeting was also a meeting – like the November 16 meeting – that might lead to discipline.

The focus now turns to the parties' disagreement about whether Danielson requested representation when Briggs handed her the letter of reprimand. Danielson claims that she did, while Briggs said she did not. Although I certainly could make a credibility finding on this matter, I have decided not to do so for the following reason. While an employee who wants union representation present during a contact with management has to request it, in this case that happened before the meeting started. The following shows this. First, prior to the meeting, Harfst called the District's labor relations office and left a message that she would be at the meeting with Danielson. By doing that, the Union put the District on notice that the Union wanted to attend the meeting because it viewed the meeting – for the reasons already noted – as a disciplinary meeting. Second, before the meeting started, Harfst told Briggs she was there for the meeting with Danielson. It was implicit from Harfst's presence at the school that the Union thought the meeting with Danielson was going to be disciplinary in nature. That's when Briggs told Harfst she did not need to attend the meeting because it was not going to be a disciplinary meeting. Third, when the meeting started, Harfst did not leave the premises. Instead, she stayed at the school and waited in the outer office for the duration of the meeting. Briggs knew Harfst was there. Given Harfst's close proximity to the meeting, she could have been summoned into the meeting at any time. Her close proximity served as a reminder that the Union was making a continuing request – notwithstanding the District's denial – for the Union to be present during that meeting. Under these circumstances, where the request for union representation to be present at the meeting had been made before the meeting started, and continued during the meeting itself via Harfst's close proximity to the meeting, it was unnecessary for Danielson to request union representation during the meeting because it had already been requested and denied.

Putting the foregoing points together, it is held that: 1) the first subject addressed at the November 27 meeting involved discipline; and 2) Danielson had asserted her right to request union representation to be present before the meeting started. That being so, Danielson had a right to union representation during this part of the meeting.

Technically, my discussion about the meeting could end at this point because I just found that Danielson had a right to union representation during this part of the meeting which the District denied. That was unlawful interference regardless of what else happened in the meeting. However, for the purpose of completing the record, I will address the other topics which were raised at the meeting.

The District contends that the two topics that were addressed subsequently in the meeting did not impact on, or have any connection with, the decision to discipline Danielson.

Those two topics are characterized here as the parent/student matter and the co-workers' concerns matter. Based on the discussion which follows, the Examiner finds that the first topic was a continuation of what was discussed at the November 16 investigative interview, while the second topic was a new matter which was not discussed at the November 16 investigative interview.

As was just noted, the topic which Briggs addressed next at the meeting involved two people: the parent whose behavior had become increasingly threatening toward Danielson, and the parent's child. Normally, a union representative is not involved in meetings which deal with parent/student matters because those meetings don't involve employee discipline. However, this particular parent, and that parent's child, were discussed in detail at the November 16 investigative interview because the Union viewed that topic as part of the overall context for the November 15 incident. As the Union saw it, the parent's conduct toward Danielson triggered her conduct on November 15. That's why during the November 16 meeting, Danielson told District officials she feared for her safety from the parent and that the morning of November 15, he had threatened her with legal action. Thus, during the November 16 meeting, the Union indicated it considered the parent's conduct to be a defense/mitigating circumstance to any possible discipline for Danielson. Given the discussion of same on November 16, it would be one thing if new matters relating to this topic were raised during the November 27 meeting that had not been discussed at the November 16 investigative interview. If that had happened, and new matters related to this topic arose which required confidentiality, union representative Harfst could have been excluded from the meeting at that point. However, no new matters relating to this topic were raised during the November 27 meeting. The topic of communicating with the parent was discussed on November 27 just like it was at the November 16 meeting. So was the topic of the student's placement (i.e. whether the parent's child would remain in Danielson's classroom). Thus, the matters which Briggs raised during the November 27 meeting relative to the topic of parent and child were not new. Building on that premise, I find that since the Union had already been involved in the discussion on this topic which occurred November 16, and no new matters arose during the November 27 meeting relative to same, there was no justifiable basis for excluding the Union from this part of the meeting.

Putting the foregoing together with the previous finding, it is held that: 1) the parent/student topic addressed at the November 27 meeting was a continuation of what was discussed at the November 16 investigative interview; and 2) Danielson had asserted her right to request union representation to be present before the meeting started. That being so, Danielson had a right to union representation during this part of the meeting.

In so finding, I am not saying that Danielson is henceforth entitled to union representation in every meeting that involves this particular parent and student. My finding is much more limited than that. Instead, I am simply finding that since no new matters arose during the November 27 meeting relative to the topic of parent and student, the discussion on that topic was a continuation of what was discussed at the November 16 investigative interview. Given these specific facts, union representation was required.

The next topic which Briggs addressed at the meeting involved the concerns which Danielson's co-workers had raised to Briggs about Danielson's interactions with them. While the Union contends that was the same topic as was addressed at the November 16 investigative interview, I find that what Briggs discussed with Danielson on November 27 was a different topic from what was addressed at the November 16 investigative interview. The following shows this. As noted in Finding 8, the topic that was discussed at the November 16 investigative interview was that Briggs had indicated she had interviewed seven of Danielson's co-workers and they had told Briggs what they heard on November 15. While Briggs also indicated during the November 16 meeting that Danielson's co-workers had raised various concerns to her about Danielson's interactions with them, Briggs did not identify what those concerns were during the November 16 meeting and no discussion was held regarding same. In contrast, that was the topic that was addressed during the November 27 meeting (i.e. Danielson's co-workers' concerns about Danielson's interactions with them). That being so, the topic of Danielson's co-workers' concerns – and what they were – was a new topic from what had been discussed at the November 16 investigative interview. This new topic covered a general supervisor/employee issue – just like Briggs said was going to be covered in the meeting. Principals routinely have discussions with their staff about various concerns. When they have these discussions, union representation is not present because those meetings don't normally involve employee discipline. Application of that principle here means that Danielson did not have a right to union representation during the portion of the November 27 meeting wherein Briggs addressed Danielson's co-workers' concerns about Danielson's interactions with them.

In sum, after balancing the interests in this case, it has been held that the scales tip in favor of Danielson's having union representation for part of the meeting (namely, the first two parts of the meeting). Since that did not happen, the District interfered with Danielson's right to union representation during that part of the meeting. Accordingly, the Examiner has found an interference violation occurred.

. . .

Aside from the interference claim addressed above, the complaint also alleged a violation of Secs. 111.70(3)(a)2 and 3, (3)(b)1, 3 and 4 and (c). I find that those claimed violations have not been proven. As a result, the portion of the complaint alleging a violation of Secs. 111.70(3)(a)2 and 3, (3)(b)1, 3 and 4 and (c) has been dismissed.

Finally, the complaint also alleged that the District violated Secs. 111.70(3)(a)5, Stats. by its conduct here. That section makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. It is unclear whether the Union intended its breach of contract claim to cover Danielson's discipline, or Briggs' denial of union representation at the November 27 meeting. Either way, the Sec. 111.70(3)(a)5 breach of contract claim will not be adjudicated here. Here's why. The Commission does not generally exercise its jurisdiction to determine the merits of breach of contract allegations in violation of Sec. 111.70(3)(a)5, Stats., where the parties' collective bargaining agreement provides for

final and binding arbitration. See JOINT SCHOOL DISTRICT NO. 1, CITY OF GREEN BAY, ET. AL, DEC. NO. 16753-A & B (WERC, 12/79); BOARD OF SCHOOL DIRECTORS OF MILWAUKEE, DEC. NO. 15825-B (WERC, 6/79); OOSTBURG JOINT SCHOOL DISTRICT, DEC. NO. 11196-A & B (WERC, 12/79). The Commission's rationale for not asserting its jurisdiction in such circumstances is to give full effect to the parties' agreed-upon procedures for resolving disputes under their contract. In this case, the parties' collective bargaining agreement contains an arbitration provision. That being so, the Examiner will not exercise the Commission's jurisdiction over the breach of contract claim and determine whether the District violated Sec. 111.70(3)(a)5 by its conduct here.

Those arguments not addressed in my discussion were considered, but were deemed unnecessary to decide these matters.

Dated at Madison, Wisconsin, this 29th day of November, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

REJ/gjc
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