STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LANCE S. DAVENPORT, Complainant,

vs.

MADISON METROPOLITAN SCHOOL DISTRICT (ART RAINWATER AND JUNE GLENNON) AND MADISON TEACHERS INC. (JOHN MATTHEWS), Respondents.

Case 306
No. 67017
MP-4353

Decision No. 32139-A

Appearances:

Ms. Heidi S. Tepp, Madison Metropolitan School District, 545 West Dayton Street, Madison, Wisconsin 53703, appearing on behalf of the Madison Metropolitan School District.

Mr. Richard Thal, Lawton & Cates, Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53707-2965, appearing on behalf of Madison Teachers, Inc.

Mr. Lance S. Davenport, 625 North Blackhawk Avenue, Madison, Wisconsin 53705, appearing on his own behalf.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 4, 2007, Lance S. Davenport filed a complaint with the Wisconsin Employment Relations Commission alleging that the Madison Metropolitan School District (Art Rainwater and June Glennon) and Madison Teachers Inc. (John Matthews) had committed unfair labor practices by certain actions they took in their respective roles as his employer and labor representative. The complaint did not identify the particular statute(s) Davenport alleged the respondents to have violated. On June 27, 2007, the Commission appointed Stuart D. Levitan, a member of its staff, to conduct a hearing on the complaint and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Secs. 111.70(4)(a) and 111.07, Stats. Hearing in the matter was held on September 25, 2007,

at the Commission offices in Madison, Wisconsin. A stenographic transcript was made available to the parties by October 3, 2007. The parties filed written arguments, the last of which was received on April 2, 2008. The undersigned Examiner hereby makes and issues the following

FINDINGS OF FACT

1. Lance S. Davenport was employed for 13 years by the Madison Metropolitan School District as a substitute and temporarily contracted teacher, with certifications in "emotional disabilities," grades 6-12. During his employment, he was a member of the substitute teacher bargaining unit, represented by Madison Teachers, Incorporated.

2. Madison Teachers Inc., (MTI) is a labor organization which represents various employees of the Madison Metropolitan School District. At all times material hereto, John Matthews was its Executive Director; Ken Volante its Executive Assistant for Labor Relations, and Doug Keillor its Assistant to the Executive Director.

3. Madison Metropolitan School District (MMSD) is a municipal employer. At all times material hereto, Art Rainwater was its Superintendent and June Glennon its Employment Manager in its Department of Human Relations. At all times material hereto, Bill Keys was a member and president of the MMSD Board of Education.

4. At all times material hereto, there has been a collective bargaining agreement in force between the parties which provides for final and binding arbitration of grievances arising thereunder.

5. During the 1998-1999 school year, Davenport worked in a temporary contract position at Sherman Middle School. On May 26, 1999 District Administrators Dawn Maxwell and Bob Hoekenga had presented to Davenport his Teacher Evaluation Form, as follows:

> **PROFESSIONAL KNOWLEDGE**
>
> Lance gave the students a brief writing task. How this activity fit into the larger picture was not clear. As the students finished or stopped doing the work, they were not redirected with feedback on how they had done or any suggestions made by the teacher in terms of a specific redirect with a desired outcome. Generally, students became disruptive and were actually seeking the teachers' attention in an inappropriate manner. I do not believe that Lance understood the basis for the behavior being exhibited in the class.
>
> On November 2, 1998, the newly redesigned ED program was put into place. Mr. Lance Davenport was given the following schedule ….Lance never met with the eighth grade staff to set his curriculum in a parallel fashion, so those students could be mainstreamed back to a regular program with a smooth

transition. Lance also did not modify curriculum for students who were in the mainstream. I had teachers reporting to me their concerns of work modifications not being done by Lance.

Lance would benefit from participating in curriculum development training, so as to be able to meet the needs of both the self-contained and mainstreamed student. By taking university taught courses on behavior management, Lance would be able to meet the needs of the severely emotionally disturbed student.

PROFESSIONAL INTEREST

Mr. Davenport has consistently shown no interest in wanting to be a team member. At the first ED meeting held on November 2, 1998 Lance would not cooperate in wanting to work with the rest of the ED staff on rules and regulations for the ED program. These rules and regulations were established since the start of the school year. Mr. Davenport first joined Sherman on October 15, 1998. Since various issues have arisen regarding interpersonal relationships between Lance and other staff members. On November 25,1998 I met with Mr. Davenport to go over his job description, SEA roles/responsibilities, my role as administrator and teamwork within the ED program. I informed Lance that he would gain more respect if he would give respect. He was also informed that all student schedule changes would have to have my approval. This did not occur until March. Prior to March, Mr. Davenport would make changes and give the information to the guidance counselors, who would then come to me to receive approval. (The reason for my approval was to make adjustments to SEA schedules if needed). Mr. Davenport did not attend the all-day IDEA training on January 18, 1999. This had led to his not knowing which forms to sue and having to depend on our PST, Lee Korpela to aid with a great deal of Lance's paperwork. Since February,1999 Lacne has not been attending the scheduled EEN staff meetings. These meetings occur twice a month. On March 8,1999, Dr. Boyd came out to meet with the Sherman staff on their concerns about the ED program. Mr. Davenport did not attend this meeting.

Lance would benefit from training in the area of teamwork and working cooperatively with others. This would also give him the training, that one should not walk into a situation assuming they have all the information needed to be successful.

ASSIGNMENT TO PUPILS

I believe that the assignment of task was not specific enough, the outcome was poorly defined, and that the quality of work expected was not talked about. The students were capable of doing much more. My professional judgment on this

issue has been confirmed on more than one occasion when I observed these same students working with the special education assistant and another teacher who teaches these students on a regular basis.

Mr. Davenport does not set very high academic expectations for his students. Many of the student assignments focused on being able to take board notes are it from his classes or their regular education classes.(sic) When going into room 216 to remove a student or talk with Lance, students were observed to be playing board games, watching videos or talking with one another. While being the primary teacher during the 8th grade career unit, Lance did not follow the coversheets or any of the previously laid out plans put together by the guidance counselors. These students were not prepared for their interviews with people from the community. On May 13, 1999 while doing a formal observation of another staff member, Lance sat at least 15 feet away from the student he was supposed to be working with and did not go over to work with the studentuntil one of the regular education teachers had worked with the student for several minutes. The regular education teacher toldme that it wasnot uncommon for Mr. Davenport to be reading fishing magazinesm, the newspapers, or doing IEP's when he was supposed to be working with the students. On May 21, 1999 I observed Lance approximately 20 feet away from his student doing his IEP paperwork rather than working with his student. Parents have expressed concern that they don't know what assignments their students should be doing for Mr. Davenport. It is Lance's responsibility tokeep parents/guardians informed at all times of their student's academic status.

Taking of university classes would give Lance the skills to be able to adapt and modigy grade levelcurriculum, so those students with disabilities would achieve academic success. A change may occur if Lance received additional training.

INSTRUCTIONAL PREPARATION

The principal is now asking that Lance turn in lesson plans on a regular basis. The lesson plans reflect general themes. There was no relationship between the stated theme for first hour and the activities that were occurring in the first hour class. I believe that Lance has general ideas about what he wants to do and has been given some direction regarding the broad coals for this first hour class. I have observed the first hour class on three different occasions to date during this school year, and at no time did I see blocks of instruction lasting more than five minutes. Very little teaching occurred and the majority of the teacher's time was consumed responding to the off task behavior of the students. In general, the students appeared to be bored and not challenged as students.

Mr. Davenport has struggled in the area of paperwork completion for most of this school year. On November 2, 1998 Mr. Davenport and another ED teacher

were told to redo IEP's for students who were going to be joining the self contained program. On December 4, 1998 another memo was sent out stating that all IEP's needed to be completed by December 18, 1998. On December 18, 1998 Mr. Davenport did not complete the paperwork. On November 17, 1998 there was an IEP meeting held, for which the principal ended up having to type the student's IEP into the computer because Mr. Davenport did not know how to use the laptop. There was a meeting held with Lance, and his MTI representative on January 25, 1998 (sic) to discuss my concerns regarding Lance's failure to complete paperwork and maintain daily lesson plans. On May 10 and 11, 1999 Lance called to take personal illness days. There were no lesson plans, student schedules or any schedule left for the substitute teacher. On May 24,1999,Lance called me at 10:35 am to inform me that he had gone home for lunch and would be taking a personal illness day for the rest of the day. "Jeff isn't going to be there anyway," was want (sic) Lance told me. I tried to contact Mr. Davenport at home at approximately 11:05 am to find out if there was a chance he could return to school (to) complete some of his paperwork. There was no answer so I left a message for Lance to call me right away. Earlier in the day when Ms. Foss informed Lance that his student had been excused for the day, his comment, "was good now I can, (then hesitation and looked at Ms. Foss) get some things done." Mr. Davenport called me on May 25, 1999 to take a personal illness day, and once again there were no lesson plans, or daily schedule left for the substitute teacher.

Lance should not hesitate to access other staff and professionals in the building that could assist with the students in helping them have a more positive educational experience. Mr. Davenport does not generalize over time suggestions that are made by support staff and administration, because we are always revisiting the same issues/concerns.

TECHNIQUES OF TEACHING

Lance opens the class with statement about what tasks he wants the students to do. After less than ten minutes, students become unfocused, disrespectful of the teacher, and engage in inappropriate activities.

. . .

It is hard to say exactly what kind of techniques Mr. Davenport uses. When I have gone up to the ED resource room, I have seen Mr. Davenport sitting behind a desk or table giving instruction. Even in one-on-one situations, I have seen Lance sit away from the students and wait for the regular ed teacher to intervene first. Students do not appear to be learning the social skills they need from Mr. Davenport, because they're (sic) numbers of referrals and suspensions are increasing. Many of these students have not benefited from having

manifestation meetings to determine if their IEP is suited to their needs. The entire ED staff was given the directive on February 22, to give me a list of students that were close to 10 days of suspension, so that I could contact Bob Hoekenga to arrange for manifestation meetings. Lance was the only ED staff member who did not follow this directive. Staff and students have reported that Lance is inconsistent in applying classroom rules, for example swearing is allowed in the classroom some times, but other times is not. On several occasions, I have walked into first hour and the students were watching CNN news or MTV. This was reported to me again by staff and students, that this was a daily event.

RECORD OF OBSERVATIONS, CONFERENCES, ETC.

1) I have met with Mr. Davenport individually on November 20 and 24, 1998 to discuss the ED program and job description;

2) Bob Hoekenga and I met with Lance on December 12, 1998 to talk about attitude, teamwork, paperwork, communication, talking about other staff members to parents, and not asking questions when first startring to work at Sherman;

3) On January 4, 1999 I met with Lance and two SEA's to try and work their problems out. Lance refused to cooperate toward resolution of these problems.

4) On January 25,1999 Lance met with Jeff Knight- MTI rep, Brian Wright – Labor Relations, and myself. We met to discuss 13 points of concern, which have been mentioned throughout this evaluation.

5) On March 12, 1999 there was a meeting with Lance, Brian Wright, Jeff Knight, myself and Nancy Young, to discuss Lance going through Conflict Resolution with one of our SEA's;

6) April 7, 1999 Lacne met with the principal to talk about the reorganization of the ED program;

7) December 7, January 19, February 4, February 18 and February 22 ED staff meetwith Liz Weller and LeeKorpela to go over teamwork and improving the ED program at Sherman;

8) October 27, November 10, November 24, December 8, January 12, January 26, February 9, March 9, EEN staff meetings;

9) November 6, November 13, November 17, November 20, December 4, December 11, December 18, January 8, February 3, February 23, March 17, March 19, April 7, April 28, May 12 and May 20 various dates of parent/guardian meetings.

ADDITIONAL COMMENTS

I am concerned with Mr. Davenport's lack of respect for administration and the directives given. On December 8 I gave Lance a directive to set up an IEP meeting with a parent, he responded in a rude manner. He also exhibited rude behavior toward me when I placed a new student in his last hour class. I have also received many verbal and written concerns from staff members about Mr. Davenport being rude toward them in front of parents, staff and students.

On January 13, 1999 I removed Lance from being the case manager for one of our 8th grade ED students. The reason for his removal was in part due to his not following the student's IEP when the student reached her emotional distress level. On May 17,1999 I again had to remove Mr. Davenport from being the case manager for a 7th grade ED student. This reassignment resulted from many concerns raised by the mother of this student in regard to Mr. Davenport's relationship with her and her son.

Mr. Davenport likes to work with children who do not typically success in any traditional educational system. He likes working in the school environment. Threw was four-week period (when we returned from spring break until the first week of May) when Lance was showing improvement with his communication to administration. He kept administration informed of IEP meetings, student behavior and the status of his paperwork.

Davenport signed for receipt of this evaluation on May 26, 1999. On or about August 24, 1999, he prepared a response, as follows:

As stated in the meeting regarding this evaluation, my response to this inaccurate and malicious evaluation will be lengthy. In that few, if any, prospective future employing principals or others will be apt to read my response, the calculated discrediting of my talent and good name serves its intended devious purpose I'm sure.

In the meantime it is also honest to say that their much belated collaboration violates the constructive purpose of an evaluation by being received too late in the school term cited to provide anything more than an effort on their part to scapegoat their own administrative and program supervision failures upon me because I would not participate in their dishonest and unethical team methods by which they dealt with special needs students and their parents at Sherman Middle School during the 1998-1999 school term.

To say that Bob Hoekenga's motives and actions were unscrupulous is an understatement. To say that Dawn Maxwell's failures as acting principal were her own alone is very accurate.

In short, the evaluation I received was a direct backlash against me for my refusal to participate in their unethical practices and unprofessional styles of leadership. Such blatant dishonesty should be reprimandable in any organization sincerely seeking to provide exemplary or even routine educational services.

My detailed continuation of this response will follow later, itemizing inaccuracies, lies and motives of Bob Hoekenga and Dawn Maxwell. In that removal of such dishonest "evaluations" is not part of standard practice – though it should be – I can only hope that prospective employing administrative personnel will read my response and compare it to vice principal Jack Schleisman's letter of recommendation. I certainly did not go backwards in my competency or sincerity while at Sherman Middle School.

Strictly business,
Lance S. Davenport

6. In 2002-2003, Davenport and MMSD officials engaged in a written exchange concerning Davenport's employment status and future, starting with this September 3, 2002 letter from Davenport to MMSD President Bill Keys:

I hope this letter finds you in good health and strength.

As you know, I am a seasoned veteran special education teacher. I do possess certifications in 'emotional disabilities" grades 6-12. I also have a master's degree in my field as well as two teaching credentials in sociology and broadfield social studies.

In addition to my other extensive background I have been employed with the Madison District for over ten years as a substitute teacher – both short and long-term – and as a "temporarily contracted" teacher – having had no less than four such "temporary" placements.

According to a reference letter written by Mr. Jack Schleisman (winner of the district's distinguished service award) I am an "exemplary" teacher.

However, though being also considered to be a "suitable" and "capable" teacher – quoting Mr. Milton McPike, and even though "always working well with the students" – quoting Mr. Krause at Black Hawk Middle School – my name has been repeatedly absent from lists referred out by the district office by Ms. Beth Weber when job openings occur.

Ms. Weber has – for some reason unknown to me – intentionally not sent my name out as a candidate according to Ms. Vera Riley, assistant principal at East High School. Ms. Weber has also told the Department of Public Instruction that she had not had "certified", "suitable" and/or "capable" candidates to fill openings over time when my application has been on file, kept current, and I have been available.

Your inquiry into this situation would seem very appropriate and your response to me greatly appreciated.

On September 9, 2002, Keyes replied to Davenport as follows:

Thanks for your letter. I do recall our long relationship form our years at West High together, and have good memories from our conversations.

However, except in cases of non-renewals, other disciplinary actions, and approval of contracts recommended by the Human Resources Department, individual School Board members are not, by law, to be involved in any individual personnel decision. We can only inquire –which I have done – and even then, our access to certain information is restricted when it comes to personnel matters. I cannot comment on the specifics of your situation because I simply do not have the authority to do so.

I suggest you contact Superintendent Rainwater if you wish to get more information, and M.T.I. is you believe that your situation is a union issue.

On September 17, 2002, Davenport wrote to Rainwater as follows:

Per the suggestion of Bill Keys I am forwarding to you two letters. One is a copy of a letter I sent to Mr. Keys. The other is a response letter he sent me.

As you can tell from the content of my letter a deliberate attempt has been made to interfere with my opportunity for gaining full-time employment as a contracted teacher. Reportedly, Ms. Beth Weber and Ms. June Glennon have withheld my name for consideration by school principals and staff who would have considered hiring me in the past.

Further, these same two individuals have helped non-certified persons acquire teaching positions in which I am fully certified by telling the Department of Public Instruction that they had no available, capable and/or suitable candidates.

The Madison Metropolitan School District claims to provide high ethical standards and purports to be teaching our youth the same. The unfair labor and ethical practices I have experienced are certainly not an example to be admired.

In fact, the practices of Ms. Weber and Ms. Glennon are supposed to be precluded by law.

Your timely and appropriate inquiry into this matter is appreciated. I await your response.

On October 10, 2002, Rainwater wrote Davenport as follows:

I am writing in reply to your letter regarding your application for a regular teaching contract with the Madison Metropolitan School District.

The teacher application screening process involves several steps, including the thorough review of the personnel file of anyone who has worked for MMSD. It also includes seeking references from other employers for whom the applicant has worked. Based upon the results of these two steps, you are not eligible for referral for a regular contract with MMSD.

DPI regulations allow the district to request a provisional license for a candidate even though there are certified candidates available if they are not suitable candidates. At this time, I find no evidence of unfair or unethical practices related to your application.

On November 9, 2002, Davenport wrote Rainwater as follows:

I am writing in reply to your letter dated October 10, 2002, regarding my application for a regular teacher contract with the Madison Metropolitan School District.

In that letter you stated that "the teacher application screening process involves several steps including the thorough review of the personnel file of anyone who has worked for MMSD. It also includes seeking references from other employers. Based upon those two steps you (Lance Davenport) are not eligible for referral for a regular contract with MMSD." Later in that same letter you justified requesting provisional licenses for other uncertified candidates because I am found to be "unsuitable" as a candidate as reported to the Department of Public Instruction.

Nowhere in your letter do you clarify what is "unsuitable" about me nor do you cite specific evidence supporting your response. Certainly, no "other employers" I have had could or would have referred to me as an "unsuitable" teacher. Further, there is no legitimate example in my personnel file to support a finding that I am an "unsuitable" teacher and, therefore, justifiably ineligible for referral.

Please provide me with the specific information you have been receiving from your subordinate representatives, and I assure you that you will find evidence of unfair and unethical practices related to my application if you are honestly interested in dealing with this situation in a forthright manner.

With all due respect,

On December 6, 2002, Rainwater replied to Davenport as follows:

I am writing in reply to your letter of November 9, 2002, regarding your application for a regular teaching contract with the Madison Metropolitan School District.

You state that there is "no legitimate example in my personnel file to support a finding that I am an unsuitable teacher." Your personnel file contains an extensive performance evaluation based upon a temporary contract at Sherman Middle School which is co-signed by two district administrators citing several performance deficiencies.

Last year you were on leave from MMSD while employed under regular contract in Sun Prairie. Sun Prairie School District has confirmed that you resigned in lieu of going forward with non-renewal process.

Based upon these facts you are not eligible for referral for a regular teaching contract.

On January 20, 2003, Davenport wrote Rainwater as follows:

Your most recent correspondence cites two examples that need your further review.

The first being an "evaluation" concocted by administrators Bob Hoekenga and Dawn Maxwell. That document was a calculated series of lies and misrepresentations intended to discredit and silence me. Their behavior followed my questioning of their directives that were in violation of the legal rights of special education students and their parents. Further, I was subpoenaed to testify as to their allowance and support of specific support staff behaviors that were abusive and unprofessional. Such matters were discussed in the presence of Ms. June Glennon. At that meeting Ms. Maxwell admitted threatening emotionally disturbed students that she would "wash their mouth out with soap and be sure that the soap had lye in it" and Bob Hoekenga admitted distributing IDEA violations to me which were directly his, and not my, responsibility.

Regarding your second example, a check of my correspondence in August of 2001 clearly states my intention to leave the Madison District for a one year period to relieve stress.[1] At Sun Prairie I was described as "one of the best special educators to ever walk through their doors." No doubt, your source of information has some vested interest as I left Sun Prairie having achieved a high level of respect for my talent and later received a call from a school board member there apologizing to me for any difficulties I may have faced within their district.

Certainly, a man in your position should not find himself in a position to say "I didn't know" when the true details of unhealthy situations emerge to the forefront. I have been honest and upfront with you. I would hope you have the integrity to continue to investigate the injustices I have brought to your attention. Eventually, what is true, just and right surfaces. Hopefully, that will be very soon.

On February 10, 2003, Rainwater replied to Davenport as follows:

I am writing in response to your letter which requested further review of two issues. The first is the negative evaluation in your personnel file. You state that the evaluation was "concocted by administrators Bob Hoekenga and Dawn Maxwell." As you know, an ed can write a (timely) response to an evaluation and have the response attached to the evaluation in their personnel file.

The second was related to the reference we received from the Sun Prairie School District about your performance there last school year. The Sun Prairie School District confirmed that you resigned while being considered for non-renewal.

On March 4, 2003, Davenport replied to Rainwater as follows:

Per advisement I have appealed to your positional authority for investigation and response regarding the unfair labor practices engaged in by your subordinates. Your correspondence indicates that you are not interested in ferreting out the truth in these matters. Your responses further indicate that you must support such practices.

Certainly the "evaluation" you mentioned was a concocted attempt to discredit me and cover up illegal and unethical practices at Sherman Middle School. I did

[1] On August 23, 2001, Davenport submitted a letter to MMSD stating, "Due to the stress and duress created by the unfair labor practices of some personnel in the Madison Metropolitan School District and their interference with my opportunities to become a full-time contracted teacher I am planning to follow recommendations that I take a one-year leave of absence from my position as a substitute teacher. Please note that I do not withdraw my candidacy for a full-time teaching contract and that I wish to retain any seniority I may have accrued as a substitute."

> in fact write an immediate response to that vicious farce. However, submitting such a response would have been futile and fruitless according to my representative's advice considering the dishonest collaboration that had been and was occurring at the district office level. There were "no time constraints" on the acceptability of that response.
>
> Your referencing of communications with the Sun Prairie School District is without merit as absolutely no negative reference should come from anyone in the Sun Prairie School District. My **choice** to resign there and return to the Madison Metropolitan School District was pre-planned as I told you earlier. My decision to resign there also involved my personal total commitment to providing the highest level of professional and ethical services in special education.
>
> I recently heard you speak. You started that you and your position were like a CEO with you and your position being responsible for everything that goes on in your organization. I believe that.
>
> It seems very apparent that I have exhausted all proper channels internally to spur a sincere investigation into and proper addressment of the unfair, unethical, and even illegal practices brought to your attention.
>
> With all due respect to your position,

7. During the 2001-2002 school year, when Davenport was on a leave of absence from his position as a substitute teacher with MMSD, he took a teaching position with the Sun Prairie Area School District. On September 26, 2002, Annette Mikula, Director of Human Resources for the Sun Prairie School District, returned to the MMSD a rating scale for Davenport on which she answered "No" to the question, "Would you employ him/her without hesitation?" She also noted:

> Mr. Lance Davenport was employed by the Sun Prairie Area School District for the 2001-2002 school year. He worked as an EBD teacher at the Senior High School. Mr. Davenport's personnel file reflect that he resigned his position at the end of the school year. Mr. Davenport's contract was considered for non-renewal.

8. During the 2003-2004 school year, Davenport substitute taught at MMSD's East High School. Davenport assumed the assignment of a recently retired teacher, Richard Wessels, while the District sought to fill the position through an internal posting and then referrals from an outside candidate pool. Due to a decline in enrollment, East High lost an allocated position, eliminating the position before it was filled on a permanent basis. At the same time, another special education teacher, C. T., went on medical leave, creating a

temporary vacancy which Davenport filled.[2] On June 24, 2004, MTI Executive Assistant for Labor Relations Ken Volante wrote Glennon as follows:

> MTI understands that Rich Wessels resigned from East High School and his position has been filled by Lance Davenport under a long-term assignment. Pursuant to Section IV-B-2-b of the Collective Bargaining Agreement, Mr. Davenport should have been hired under a regular contract.
>
> Please advise as to why this position was filled under a long-term assignment instead of a regular contract.

Volante wrote follow-up letters to Glennon on July 9, July 28, August 13 and August 31. On September 3, 2004, Glennon replied to Volante as follows:

> I am writing in response to your correspondence requesting information about the vacancy at East High that was filled by Lance Davenport under temporary contract from late October 2003 through the end of the school year in June 2004.
>
> Rich Wessels resigned on October 31, 2003. The position was posted for internal applicants from November 7 through November 12, 2003. There were no internal applicants. External referrals were made for the position in November and December.
>
> Mr. Davenport was placed in the position as a substitute while the District attempted to fill the position. The District continued to try to fill the position until the second week of December, when the enrollment snapshot was completed resulting in a loss of 1.0 FTE at East, so the position was eliminated.
>
> {C.T.} started a medical leave at about the same time, creating a temporary vacancy. Lance Davenport was retained under temporary contract to fill the vacancy created by {C's} leave of absence.

On October 4, 2004, Volante wrote MMSD Labor Relations Director Duane McCrary as follows:

> MTI encloses the following grievance insofar as Mr. Davenport filled an assignment for Richard Wessels who had resigned at East High School last year. Mr. Davenport filled said assignment from October 2003 through June 2004. MTI broached this issue with Employment Manager June Glennon who wrote that Mr. Davenport was issued a temporary contract for this position and further inferred that Mr. Davenport began the assignment for Mr. Wessels then

[2] I have used initials to protect the privacy of this employee, who otherwise is not involved in this proceeding.

continued an assignment during {C. T.'s} medical leave "at about the same time." A review of Board of Education agendas has demonstrated no such contract.

Further, Mr. Davenport filled in solely for Mr. Wessels from the beginning of the assignment through the end of the school year. Mr. Davenport should have been employed under a regular contract insofar as Section IV-B-2-b of the Collective Bargaining Agreement dictates that the resignation action of an employee creates a regular position to be filled under a regular contract.

Please be further advised that Mr. Davenport is due a regular contract, compensation for the difference between long-term pay and what should have been his placement on the teacher salary schedule, as well as all benefits costs he incurred when the School District had an obligation under the Collective Bargaining Agreement to pay these benefits.

MTI expects expedient resolution to this matter.

Also on October 4, 2004, MTI Executive Director John Matthews signed the following:

FORMAL STATEMENT OF GRIEVANCE
Re: Lance Davenport

Madison Teachers Inc., as petitioner and aggrieved party, with an on behalf of Lance Davenport and any others similarly situated, hereby submits a written grievance alleging breach of contract by the administration and/or the Board of Education of Madison Metropolitan School District.

As an organizational grievance, said grievance shall commence at Level 23 of the Grievance Procedure, Section II-B of the Collective Bargaining Agreement.

Violation is claimed of the collective bargaining agreement, of Section IV-B-2-b, and any other pertinent provisions, inasmuch as Mr. Davenport was retained and compensated under a long-term substitute assignment when he was due a regular contract for the regular teaching position.

RESOLUTION SOUGHT

Madison Teachers demands immediate compliance with the terms and conditions of the collective bargaining agreement and Mr. Davenport be issued a regular contract effective with the beginning of his assignment replacing East High Teacher Rich Wessels, who resigned, creating a permanent vacancy. MTI further demands that Mr. Davenport be retroactively compensated for the discrepancy between his long-term substitute assignment pay and regular

contract salary placement, the remuneration for all benefit costs he incurred and that he be made whole.

On October 5, 2004, Davenport executed a standard MTI authorization, as follows:

AUTHORIZATION
RE: *Temporary Contract*

I, Lance Davenport the undersigned hereby appoint and authorize Madison Teachers Inc. or its agent(s) (*hereinafter "MTI")* to represent me in regard to the matter referenced above. I specifically authorize and consent to MTI acting in my name, place, stead, and on my behalf, granting MTI full power to perform any and all acts relative to the above described matter/proceeding(s) relative thereto. MTI and/or its agent(s) is/are hereby granted authority to commence, carry forth, and settle or otherwise dispose of the above described matter on such terms and conditions as MTI, through its agent(s), may deem proper.

I further agree hereby, in consideration of the services and representation provided to me, to hold harmless MTI, its agent(s) and employees, from any and all claims which may arise in connection with its representation and/or disposition relative to the above-referenced matter. This instrument shall be in full force and effect on the date of the executive hereof, and shall remain in full force and effect thereafter until the said matter is concluded.

Following the filing of the grievance, Glennon investigated the situation, and determined that MMSD had erred in failing to issue Davenport a temporary contract, as the collective bargaining agreement called for. While also investigating the circumstances, MTI staff came to the conclusion that there was not in fact a vacancy for Davenport to fill.

On December 9, 2004, Volante wrote to Davenport as follows:

Re: Retroactive Pay/Benefits

Dear Lance:

I write to you in order to confirm whether the School District has paid you retroactive pay for the difference between your long-term substitute salary and what should have been your placement under contract last school year. Please be further advised that the School District has stated they will "consider" the payment of insurance claims that were not covered last school year.

Please advise as to the provider and status of your health insurance coverage last year. In addition, as the grievance remains unsatisfied, MTI has appealed to the Wisconsin Employment Relations Commission for a panel of arbitrators.

The District had issued Davenport a check for $5,835.60 on December 1, 2004, representing the difference between his long-term substitute salary and what he should have received on a temporary contract under the collective bargaining agreement.

9. On April 21, 2004, MSD Employment Manager June Glennon wrote to Davenport as follows:

> A review of our records indicates that the teaching license we have on file for you will expire before the beginning of the 2004-2005 school year. If you plan to re-enroll as a substitute teacher for next school year, please make sure your licensure is current, and provide us with a copy by August 20, 2004.
>
> The SubFinder system cannot place you in assignments without a copy of your current teaching license(s) on file with the District. If you have any questions, please call the Sub Placement Office at [redacted] or [redacted]. If you have any questions regarding your renewal, you may reach DPI at [redacted].

10. On May 21, 2004, Glennon wrote to all substitute teachers, including Davenport, as follows (all ***emphases*** in original):

> On behalf of the Madison Metropolitan School District, we would like to thank you for your service as a substitute teacher during the 2003-2004 school year. This was a challenging year in the Substitute Placement Office. We appreciate your commitment and dependability in helping us meet the substitute teacher needs in the District.
>
> At the present time we are preparing our substitute program for the 2004-2005 school year. If you would like to remain on our substitute list for the coming school year, please complete the bottom portion of this letter, detach and return to Human Resources before July 1, 2004. If you **do not** plan to return as a substitute teacher, please notify us in writing *before* July 1, 2004.
>
> Further information concerning substitute teaching, including a revised handbook, will be provided at a later date. Just a reminder – a current license must be on file in Human Resources before your substitute teaching re-enrollment can be processed!
>
> We wish you an enjoyable summer and look forward to your return in the Fall.

11. Davenport's 1999-2004 Wisconsin Educator License expired on June 30, 2004; as of September, 2004, Davenport did not have a valid license from the Wisconsin Department of Public Instruction that would allow him to teach in any capacity. An MMSD teacher, whether under regular contract or a substitute, who fails to maintain the necessary teaching licensure voids the contract and is no longer considered employed by MMSD. A teacher who

so voids her or his contract and subsequently obtains licensure is considered for reemployment like any other teacher who had worked for MMSD. The District would not have considered Davenport for reemployment based on his prior performance in the district. Davenport took six credits of continuing education in the fall semester, 2004-2005, and in January 2005, filed a license renewal application with DPI. Because Davenport took the credits after his license expired, he was only eligible for a one-year extension.

12. Prior to the start of the 2004-05 school year, MMSD instituted a new substitute placement system. Glennon's office wrote to all substitutes, inviting them to attend an orientation so that they would know how the system worked so they could continue as substitutes. Davenport did not attend the orientation, or communicate with the district about it in any way. On September 15, 2004, Glennon wrote to Davenport as follows:

> Dear Lance:
>
> As of today, the District has not received a *Substitute Re-enrollment Form* indicating your intend to continue subbing for the 2004-05 school year. We are hereby processing your voluntary resignation from the substitute pool.
>
> If it is not your intent to resign, please call Emily {redacted} or Laura {redacted} in the Substitute Placement Office no later than September 22, 2004.

13. On the afternoon of September 22, 2004, Davenport called MTI Executive Assistant for Labor Relations Ken Volante to relate that he had just called the substitute placement office, per Glennon's directive, but that nobody answered and he had to leave a message. Davenport told Volante he felt uneasy about whether his call to the sub office would be acknowledged, so he called him to document that he had indeed responded to Glennon's directive. Glennon testified that her office had no record of Davenport making such a phone call. The District processed what it considered Davenport's resignation, based on what Glennon considered to be his failure to respond. As of late September 2004, Glennon was aware of the negative evaluations that Davenport had received, and that he had not filed the necessary license renewal documentation.

14. Davenport did not contact Glennon's office again until December 2004, when he called to find out why he was not getting any substitute assignments. Glennon spoke to Davenport on December 16, 2004, and explained that he was not getting any referrals because the district considered him to have resigned in September. Davenport contacted Volante, who contacted Glennon. On January 14, 2005, Glennon wrote to Volante as follows:

> I am writing in response to your letter of January 6, 2004 regarding Lance Davenport's status. In my e-mail communication to you on December 20, 2004, I advised that we processed Mr. Davenport's voluntary resignation in

> September. I also confirmed this to Mr. Davenport in a phone conversation on December 6, 2005.[3]
>
> Mr. Davenport was sent a re-enrollment form for the 2004-05 school year three times, beginning in July of 2004. He never returned any of them. He was sent a letter inviting him to attend a substitute orientation related to the new sub placement system. He did not attend and did not contact us. In September I wrote Mr. Davenport to advise that we would process his resignation if we did not hear from him by September 22, 2004. (*copy of letter enclosed)*.
>
> He did not respond or contact us in any way until December 16, 2004. His resignation remains in effect.

15. On January 25, 2005, Davenport came to the MTI office to meet with Assistant to the Executive Director Doug Keillor, the MTI staff person who advises members on issues related to their retirement. Davenport and Keillor had a further conversation on January 26. In addition to counseling Davenport on certain economic aspects of his retirement, Keillor advised him as to the impact resignation would have on his pending grievances. Keillor advised Davenport that pending grievances remained active, but he could not make a claim for future wages beyond his retirement date, which Keillor understood to be September 24, 2004.

16. On February 22, 2005, Volante wrote to MMSD Labor Relations Director Duane McCrary as follows:

> Dear Duane:
>
> Please be advised that MTI files this grievance insofar as the School District has processed Mr. Davenport's involuntary resignation. MTI has continued to dispute this action made effective by Employment Manager June Glennon on September 22, 2004.
>
> As I had advised previously, Mr. Davenport called into the Substitute Placement Office on September 22, 2004, and subsequently confirmed this call with MTI at 1:55 p.m. on that date. This action was in response to the School District's request in a letter dated September 15, 2004, that stated, "*if it is not your intent to resign, please call Emily {redacted} or Laura {redacted} in the Substitute Placement Office no later than September 22, 2004.*
>
> Mr. Davenport complied with the School District's request. Mr. Davenport was entitled to remain an active substitute teacher.

[3] Glennon clarified at hearing that the correct date was December 6, 2004.

The grievance which MTI filed on that date read as follows:

FORMAL STATEMENT OF GRIEVANCE – USO
RE: Lance Davenport

Madison Teachers Inc., as petitioner and aggrieved party, with and on behalf of Lance Davenport, hereby submits a written grievance alleging breach of contract by the administration and/or the Board of Education of Madison Metropolitan School District.

As an organizational grievance, said grievance shall commence at Level 3 of the Grievance Procedure, Secion II-B of MTI's United Substitute's Collective Bargaining Agreement.

Violation is claimed of MTI's United Substitute's Collective Bargaining Agreement, Section IV-F, and any other pertinent provisions, inasmuch as the District has processed the involuntary resignation of Mr. Davenport.

RESOLUTION SOUGHT

Madison Teachers demands immediate compliance with the terms and conditions of MTI's United Substitute's Collective Bargaining Agreement and that Lance Davenport be made whole.

On February 25, 2005, Davenport executed the standard MTI grievance authorization, for a matter entitled "Involuntary Resignation."

17. On June 15, 2005, Volante wrote to Davenport as follows:

We write in follow up to our letter dated May 16, 2005, whereby we asked that you furnish evidence from your phone company that you called the Madison Metropolitan School District on September 22, 2004, in order to affirm that you wished to remain a substitute teacher.[4] While investigating the possibility that MTI would subpoena those records, MTI in consultation with legal counsel, came to the conclusion that by your retirement in February, you affirmed the effective date for your separation from the School District as September 22, 2004. MTI Assistant to the Executive Director Doug Keillor advised you of the impact of your retirement/separation on January 26, 2005 (i.e., that it would negate any intent to return to active employment in the aforementioned situation).

[4] Notwithstanding the use of the first personal plural pronoun, only Volante signed the letter.

> Therefore, given your active status from the beginning of the 2004-05 school year through September 22, 2004, and the subsequent retirement which affirmed the separation date of September 22, 2004, MTI cannot pursue a make whole remedy in this case, and will, therefore, advise the School District of our withdrawal of our grievance.
>
> Be further advised that this action is separate from MTI's grievance of (sic) which we filed on your behalf dated October 4, 2004. I will continue to keep you updated as to the progress of said grievance.

18. On July 15, 2005, Volante wrote to Davenport as follows:

> I have record of communication from you of March 7, 2005, regarding estimates for dental work "needed but not done due to lack of insurance." You note that were "150-300/ 'tooth extraction' bills not paid by insurance also as I recall and I'm getting documentation for."
>
> As of this date, I am not in receipt of this additional documentation. This documentation would allow me to pursue further "make whole" remedy in the grievance filed on your behalf dated October 4, 2004.
>
> Also, please advise as to whether there are any medical claims that you incurred during the period of the 2003-2004 school year of which MTI would continue to pursue payment.

19. On October 5, 2005 Atty. Richard Thal, legal counsel for MTI, wrote Davenport as follows:

> This letter follows our telephone conversation in which we discussed the status of the October 4, 2004 grievance filed on your behalf. MTI has the estimate showing that if a tooth replacement were done, it would cost $2,422. But MTI has no information regarding the cost of the tooth extraction that was done when you should have been employed under a temporary contract. Please provide MTI with anything you have that shows the cost of the extraction. Had you been under a temporary contract, your dental insurance would have provided you with a total of $1,000, which is the individual cap per annum under the policy.
>
> It is my understanding that the District paid you the difference between your long-term sub pay and what you would have received had you received a temporary contract. Hence, MTI will demand monetary damages equal to the amount Delta Dental would have paid for the extraction and the tooth replacement. We are unlikely to get what we demand, however, because arbitrators generally provide make-whole awards that are limited to actual and specific monetary losses suffered.

When we spoke, you informed me that you did not voluntarily resign, and you said that you would like clarification of MTI's position concerning the grievances dated February 25, 2005. As Ken Volante stated in his June 15, 2005, letter, MTI will withdraw that grievance. The primary reason that it will withdraw the grievance is that the effect of your September 22, 2004 termination date is that even if an arbitrator were to find that you re-enrolled as a substitute teacher, you could not receive a make-whole award for the period after September 22. Moreover, given your status, there is no reasonable basis for MTI to try to get your records form the telephone company.

You explained to me that you agreed to the termination for the purpose of receiving retirement benefits, but you were hoping that the District would re-employ you. The District can re-employ retirees after a 30-day break in service. As you discussed with Doug Keillor, however, the District was not contractually obligated to rehire you.

Please do no hesitate to contact me if you have any questions concerning this matter.

20. On February 15, 2006, Thal wrote Davenport again, as follows:

In a letter dated October 5, 2005, I asked you to provide me with information regarding the cost of your tooth extraction. Please provide me with information regarding the tooth extraction by the end of February. Once we receive that information, MTI will determine what to do regarding the October 4, 2004, grievance filed on your behalf.

Feel free to contact me if you have any questions concerning this matter.

21. On June 7, 2006, Volante wrote to Davenport as follows:

I write to you in follow-up to your hand-written note, delivered to MTI, wherein you request "MTI's formal intent regarding my two grievances." Please be advised that on June 15, 2005, I wrote to you subsequent to consultation with legal counsel and advised that MTI had no "make-whole" remedy to pursue in your resignation grievance because your retirement action in February confirmed the effective date for your separation from the School District as September 22, 2004. MTI Assistant to the Executive Director, Doug Keillor, advised you regarding the impact of your retirement/separation on January 26, 2005 (i.e., that it would negate any intent to return to active employment in the aforementioned situation).

> MTI also filed a grievance on your behalf relative to your long-term assignment at East High School during the 2003-04 school year. MTI gained resolution that included retroactive compensation for the pay discrepancy between your long term substitute pay and your temporary contract salary placement. You subsequently confirmed that this differential had been received during our meeting of December 21, 2004.
>
> Further, MTI requested that you receive remuneration for all benefit costs incurred during that period. By letter dated October 5, 2005 Attorney Richard Thal advised that "MTI will demand monetary damages equal to the amount that Delta Dental would have paid for the extraction and tooth placement. We are unlikely to get what we demand, however, because arbitrators generally provide make-whole awards that are limited to actual and specific monetary losses suffered." That being the case, the School District has offered and MTI has accepted what would have been the District's portion (50%) of the tooth extraction less what would have been your premium contribution for dental insurance ($20.79). Therefore, the School District will reimburse you $78.21.
>
> Again, we have no evidence of any other claims beyond that referenced and the School District's offer to settle would be the extent of the make-whole remedy possible in an arbitration proceeding.
>
> Finally, as part of the make-whole remedy requested at the time, MTI demanded the issuance of a regular contract due to your placement in a regular assignment as East High School. Upon extensive research and consultation with both MTI staff and legal counsel, such remedy would be impossible given the dissolution of the assignment which you filled i.e., even if the arbitrator made a far-reaching decision that would force the School District to hire a temporary employee into a regular contract, there would be no position to place you into.
>
> In sum, the outstanding matters in this case will result in the issuance of a check in the amount of $78.21 and MTI will close its cases as fully resolved upon confirmation of the issuance of this payment. Such confirmation would most easily be achieved by contacting me via email at [redacted].

22. MTI filed at least two grievances on Davenport's behalf in the mid-late 1990's. On January 26, 1995, MTI filed a grievance alleging that MMSD violated Seciton IV-E of the parties' collective bargaining agreement by failing to interview Davenport and select him for the full-time regular contract ED position at West High. In September, 1995, the parties agreed to a non-precedential settlement of the grievance, under which the District paid Davenport $2,000 and agreed to refer him for the first five vacant special education positions for which he was certified and qualified. On February 12, 1998, MTI filed a grievance alleging that MMSD violated Sections IV-C and IV-H of the parties' collective bargaining agreement by removing Davenport from an assignment at Lindbergh Elementary school

without the principal first conducting an evaluation of 30 continuous minutes or more that indicated that his performance had been substandard. The parties subsequently agreed to a non precedential settlement of the grievance, under which the District expunged and destroyed all documents relating to Davenport's performance at Lindbergh from December 1997 through January 1998, and paid him $2,000.

23. Davenport has not established by the preponderance of the evidence that MTI's handling of either his "involuntary resignation" grievance or his "temporary contract" grievance was arbitrary, discriminatory or in bad faith.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Complainant Lance S. Davenport, while employed by Madison Metropolitan School District, was a "municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

2. Respondent Madison Teachers, Inc., is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

3. Respondent Madison Metropolitan School District is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

4. Because complainant Lance S. Davenport has not established by the preponderance of the evidence that Madison Teachers, Inc., acted in an arbitrary, discriminatory or bad faith fashion when it decided to not arbitrate his "involuntary resignation" or "temporary contract" grievances, he has not proven his allegation that Respondent Madison Teachers, Inc. has violated Sec. 111.70(3)(b)1, Stats.

5. Because complainant Lance S. Davenport has not proven his allegation that Respondent Madison Teachers, Inc., has violated its Sec. 111.70(3)(b)1 statutory duty of fair representation by deciding to not arbitrate either of his grievances, the Wisconsin Employment Relations Commission will not exercise its Sec. 111.70(3)(a)5, Stats., jurisdiction over respondent Madison Metropolitan School District to determine whether the District violated the collective bargaining agreement between it and Respondent Madison Teachers, Inc., when it failed to provide Lance S. Davenport with a regular contract at East High School or processed his resignation in September, 2004.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the examiner makes and issues the following

ORDER

That the complaint in this matter be, and hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin, this 18th day of July, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/

Stuart D. Levitan, Examiner

MADISON METROPOLITAN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

In support of his complaint, Davenport declares as follows:

Amidst a multitude of complex legal violations committed by employer Madison Metropolitan School District (MMSD) a single event occurred breeching most fundamental rights of employment and equal opportunity to have such without interference.

When employment manager June Glennon, of MMSD, terminated by employment, effective 9-22-2004, she did so outside the protections of contract, ethics, and the legal process. That event was grieved in written process by Madison Teacher's Incorporation (sic) (MTI) but never settled in a reasonable time frame as it should have been especially considering the emergency of loss and need.

That grievance was never reported to be a "stretch" for the union to act upon. Again, it was a highest priority crisis situation – a union worker unfairly losing a job and total income having known medical needs.

My termination by Ms. Glennon climaxed a long historic opportunity blacklisting and interference with employment process. Ms. Glennon's acts were retaliatory against my being "uncollaborative' in situations where MMSD personnel, protected by MTI, violated special education legislation. My voice and presence in MMSDD and MTI evidently needed to be silenced once and for all, even if it entailed an illegal dismissal and lies to cover that event up.

Certainly one six hour hearing is insufficient to contain all the information available to examine all these separate but related high level of infraction cases of violations exhibited by MMSD.

That MTI and in particular John Matthews, executive director, grossly failed to represent me in a timely and good faith manner is evidenced by the sheer passage of time itself. That John Matthews would blatantly, arrogantly, and with great contempt for the ethical legal process, lie under oath as to his spoken promise to me only further indicates his total lack of any good faith.

Agents and employees of MTI and MMSD committed perjury, which needs to be ferreted out, and is a violation of the Peace Act as an unfair labor practice.

Such acts being new at hearing, lying under oath, should dictate the commission need to formally hear more on that violation of law.

In direct regard to the case of the 9-22-2004 termination effective on that date absolutely no MMSD or MTI fabricated restructuring of comments, or events can make that illegal termination "moot."

Once the 9-22-2004 termination was effective, all my efforts, lack of actions, and decisions, had to be purely defensive and survivalist to endure and survive to fight formy rights. That MTI was absolutely insincere was becoming apparent. That John Matthews would lie under oath regarding a promise to me certainly proved beyond a doubt there was bad faith in operation and union failures were absolutely intentional.

The transcript shows that I was terminated on 9-22-2004 because June Glennon said I did not call in as requested on that date.

I did call in on 9-22-2004 as required by only reached an answering machine. I immediately called MTI to further protect myself with documentation that I had just made the required call. That is documented in MTI records and in the transcript.

Why would I possibly call the union and report that I had called as required if I had not? My pure survival dictated I had no time for any conceivable mind game. I called – she terminated my employment anyways – and an MMSD employee now has lied under oath.

Having been present at the hearing, the examiner should already be convinced that the termination event was an unfair and illegal labor practice at the very least.

This brief on that event should not be necessary.

Certainly a motion to provide more hearing examination is in order since the Peace Act was violated at the hearing itself. I do now submit such a motion and request.

I find it most frustrating to have to again and again point out what is so obviously a violation of the laws and is in the transcript already. I trust an impartial examiner with legal expertise and background can easily conclude that my strategy at the hearing was to get as much reality based information out and into the transcript so that the professional examiner need only use their own intelligence to see that I have been the only plausible, honest and fully credible party in testimony of what actually transpired in my case.

In its brief, the District asserts and avers as follows:

Davenport has failed to establish that the District has violated the collective bargaining agreement or statutes. The record does not support his claim to entitlement to a regular teaching contract. Moreover, the commission has said it will not exercise its jurisdiction to determine the merits of a breach of contract claim where the parties' agreement provides for final and binding arbitration, which the parties' contract herein does. The union filed grievances on Davenport's behalf, and they were resolved in his favor.

Davenport was made whole after the district erred in not issuing him a temporary contract during the 2003-2004 school year. Davenport was never entitled to a regular teaching contract because the position he was seeking to fill at East High was eliminated, and his word record made him not eligible for referral from the candidate pool for a regular teaching contract. The union itself concedes that the remedy it sought was overreaching, and that there was no position into which Davenport could be placed. There is no provision in either the Substitute Teacher collective bargaining agreement or the Teacher collective bargaining agreement which entitles a substitute teacher to a regular teaching contract; no provision is even cited by Davenport. Absent such a contractual right, Davenport has no claim to a regular teaching contract.

Further, the district rightfully terminated Davenport's employment when he failed to re-enroll in the substitute teaching pool despite being given numerous opportunities. When the district did not receive a re-enrollment form from Davenport, it sent him two additional forms, and again received no response. The district wrote to Davenport to invited him to an orientation session; he did not attend. On September 15, 2004, the District wrote Davenport advising him that it was processing his voluntary resignation from the substitute teaching pool, and informing him that if this was not his intent, he needed to contact the district by September 22. Contrary to his assertions, there is absolutely no record that Davenport even contacted the substitute placement office by or on that date. The District therefore processed his voluntary resignation, along with about thirty (30) others who, like Davenport, failed to convey to the district their intent to continue substitute teaching. But even if he had responded in time, Davenport voided his employment by failing to maintain a valid teaching license. Further, Davenport's retirement negated any claim he might have had for reinstatement.

The record contains absolutely no evidence that the District violated Davenport's rights in any way. The examiner must conclude that complainant has not met his burden of proof and find that the District did not commit any prohibited practices under MERA.

In its brief, MTI asserts and avers as follows:

> MTI's conduct toward Davenport was not arbitrary, discriminatory or in bad faith, and thus MTI did not breach its duty of fair representation. The record evidence shows that MTI followed applicable case law in considering the value of Davenport's claim, the effect of the settlement agreement, and the likelihood of success.
>
> To satisfy his first burden, Davenport would have had to produce evidence that MTI ignored his claims that he was entitled to receive a regular contract and that he should not have been removed from the substitute list. But there was no permanent vacancy in which Davenport could be placed, and Davenport did not hold a valid teacher's license at the time he was removed from the sub list. Davenport thus does not come close to meeting his burden.
>
> Prior to settling the grievances, MTI considered the effects of its conduct and it considered the likelihood of success, as is proper under applicable case law. Moreover, Davenport failed to present any evidence that MTI was deficient in its handling of his two grievances, essentially because MTI efficiently obtained for Davenport the remedy to which he was entitled, namely $5,835.60 in back pay and being made whole for dental expenses incurred. But based on its extensive research and consultation with staff and counsel, MTI made the reasonable determination that the remedy it originally sought – the issuance to Davenport of a regular contract and his placement in a regular assignment at East High – would be impossible to obtain, even through a successful arbitration. Based on this evaluation, MTI settled the grievances. There is no evidence of bad faith.
>
> Nor is there any evidence that John Matthews lied about promising a certain result to Davenport, or that District employment manager June Glennon lied about her actions.
>
> Accordingly, because Davenport has not met his burden to show that MTI has breached its duty of fair representation, the complaint against MTI should be dismissed.

In his response, Davenport posits further as follows:

> Of course neither MMSD or MTI want their perjury at hearing to be examined. As crimes and violations of the Peace Act such a further examination appears mandatory. My claims have been honest, real and well documented. Legitimate grievances were filed. That MTI intentionally failed to follow through in a timely and appropriate manner lacking good faith is also well evidenced. That MTI's executive director John Matthews would point blank lie about a promise

to "make whole" only exclamation points his intentional failure. That Bill Keys was present hearing that promise yet lied to the examiner about it is an extreme violation of labor law and violation of public trust and ethic not to mention being an obvious collusion of disturbing proportions in fair labor practice.

June Glennon is also lying, or else she intentionally destroyed the records of the 9-22-2004 phone call. I am sure she thought she could get away with such an illegal act as her lies have allowed her to date.

It was also pointed out that I could have asked John Matthews further questions at hearing. Why would I? If he would continue to be evasive, not recall, or lie to the examiner, what would be the point? After listening to John Matthews and Bill Keys lie regarding a simple conversation where I was told by John Matthews he would "make me whole" the only question on my mind would have been to ask both men if they are familiar with the scripture stating clearly "Hell is reserved for all liars."

I did call June Glennon on September 22, 2004 as directed. The commission can subpoena TDS records to prove this. The evidence shows I called Ken Volante that date to verify I had made the required call. Why would I possibly do that if I had not? Glennon's assertion that her phone system does not lose calls is absolutely comical. Certainly the workers at such locations would be a first line of inquiry. They might in fact reveal that my call was taken and got covered up.

For Thal to state that "for his life" he could not see how MTI and Matthews had failed to represent me indicated he certainly must have little or no life to make such a statement. Certainly his role in orchestrating the denials and continued lies of his clients must be suspect at the very least. May Richard's eyes be opened if he truly can not see representative failure and may he also see the mirror more clearly every day. Perhaps Mr. Thal will be willing to be honest at some point. It would be to his spiritual advantage as time truly is running out and he should re-examine his life. Thal is well implicated in fostering violations of the Peace Act, and followed the deceptive strategy of having all his clients present a set of lies in unison. Thal's pre-orchestrated "moot" attack strategy has no basis in reality and only puts more MTI subordinates in line to answer for perjury.

The procedural purpose of a teacher evaluation is to be corrective and to seek improvement while teaching. That the evaluation of my performance at a troubled middle school was issued at the end of the school year indicated that it was aimed to be a vehicle to discredit me in retaliation for testifying on behalf of a student who was abused at Sherman Middle School by MTI staff in the employ of MMSD. Both MTI and MMSD were not happy with me testifying in court. My defense of that student resulted in retaliation – period. My refusal to cover up these serious violations resulted in the retaliatory and fake evaluation.

MTI and MMSD try to negate my illegal termination via being 'mooted' by my survival retirement step. Certainly it is a final diversionary ploy to propose an illegal firing could possibly be 'mooted' after the fact. If such were at all possible I should have been told prior about the 'moot' effect. There is no documentation of the 'moot' effect in MTI correspondence until after the retirement act. How is that fair, honest and good faith behavior? It was not. I cannot believe the 'moot' effect is legally sound at all to offset an illegal termination.

Perhaps violations of the Peace Act went all the way to the top. It now seems feasible to say the least. Under a perjury investigation, office personnel could verify MMSD employees are lying.

That I was in school evenings in the fall of 2004 to attain my teaching license renewal does not indicate I planned to retire. I certainly expected to prevail in all my grievances. I believed I would be made whole as promised and as indicated by grievances being valid enough to submit by MTI.

That John Matthews and Bill Keys both lied about the "make whole" promise by Matthews indicates a planned collusion easily falling into the realm one would label as a conspiring act – especially when it is a representing union Executive Director and a School Board President linked to an ongoing labor dispute. John Matthews' deceptive and untrue account shows he was lying in his testimony. Bill Keys has set himself in a position where his perjury needs to be examined under the Peace Act.

There can be no reasonable doubt that my case warrants such close scrutiny and action. The transcript is filled with alarming examples of unusually high level fair labor practice violations. MTI's failure to represent is only dwarfed by the perjury factor. The possibility of illegal collusion and even conspiracy needs to be investigated by a prudent and diligent commission.

Wessel's contact was for a full year. He was allocated for a full year. As his contracted replacement I was allocated for a full year. It way my and Ken Volante's understanding that fulfillment of my contract in progress over a certain time duration gave me upgraded "regular contract" rights to the job, upgraded by contractual rights and gave me rights of being assured offer of a next year "regular contract." Somehow that evaporated. I am fully convinces there was a paper shuffle to keep me out of attaining a regular contract. I am equally convinced the grievance had merit to prevail – claiming a mysterious allocation shift certainly appears to be a ploy to keep me out of regular teacher status by any means that might appear legitimate. What really evaporated was any residual good faith MTI or MMSD might claim.

We are talking about years of unfair labor practices and high levels of infraction of worker rights law not to mention violations of special needs students. All these side issues and MTI's failure to address them, while confusing to anyone not living through it supports and indicates that intentional effort was being made to keep me from securing increased contract rights by service in the right place at the right time that forced a denial of opportunity employer (MMSD) to issue me a regular contract.

Whether I deserved a regular contract needs to be arbitrated as was scheduled or I should be fairly compensated for my losses. That I was denied equal opportunity under all laws prescribing such is in need of compensation as a remedy. That I was denied medical benefits for a full benefit year including dental should be compensated for in kind or cash. That I was illegally terminated on 9-22-2004 is clear and I should be compensated for all lost benefits and wages after that date. I should be able to retrieve my employment reversing the illegal termination act.

That MTI failed intentionally to represent me at illegal levels up to and including collusion with MMSD and via perjury should be remedied with monetary damage settlement if possible.

That agents and employees of MTI and MMSD have all delivered perjurious testimony needs to be addressed.

Historic blacklisting and intentional interference with employment has occurred as well as retaliation for "whistle blowing." This factual occurrence was only partially uncovered in one brief hearing. The transcript should motivate additional attention and examination.

In that employees of Sun Prairie Schools have both violated a legal exit agreement, the commission should be prepared to offer an examination of their labor violations.

Bottom line is that I am a special educations teacher of the highest level of integrity and competence. I failed to collaborate with student rights violations by MTI/MMSD colleagues and administrators and paid a very high price. My own rights were violated as a result. I should be rendered all possible compensations.

I await the commission's decision in good faith. Perhaps Matthews and Keys are aware of my special education textbook – *Conspiracy to Commit Incompetence – the New Dark Ages of Special Education*. Certainly I never used that term ever in conversation with them as I am certainly not a delusional paranoid.

DISCUSSION

Complainant Lance S. Davenport has alleged a series of misdeeds by agents and officials of the MMSD and MTI, centering on MMSD's action in September, 2004 to remove him from its substitute list, and MTI's response to that action. He also still feels aggrieved by the union's failure, at about the same time, to get him a permanent position following his temporary contract at East High.

Although Davenport does not specify the statutes he alleges the district and union to have violated, he essentially alleges the union has failed to fulfill its duty of fair representation by the manner in which it processed his grievances in violation of Sec. 111.70(3)(b)1, Stats., and that MMSD violated the terms of the collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats.[5]

The principles and precedents of fair representation cases are well-established.

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

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

Absent a showing of arbitrary, discriminatory or bad faith conduct, a union is not obligated to process grievances through all steps of the grievance procedure. CITY OF APPLETON, DEC. NO. 17541, (WERC, 1/80). The failure of a union to notify a grievant as to the disposition of his grievance is not an adequate basis for finding a breach of duty. UW-MILWAUKEE (HOUSING DEPARTMENT), SUB.NOM GUTHRIE V. WERC, DEC. NO. 11457-F, (WERC, 1977). Mere negligence in the processing of a grievance including the late filing of briefs is insufficient to constitute a violation WISCONSIN COUNCIL 40, DEC. NO. 22051-A,

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[5] Sec. 11.70(3)(b)1., Stats., makes it a prohibited practice "for a municipal employee, individually or in concert with others, to coerce or intimidate a municipal employee in the enjoyment of the employee's legal rights, including those guaranteed" elsewhere in MERA.. Sec. 111.70(3)(a)5., Stats., makes it a prohibited practice for a municipal employer to "violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment...."

(McLaughlin, 3/85), and that it is not for the Commission to judge the wisdom of union policies absent proof of perfunctory or bad faith grievance handling (MARINETTE COUNTY, DEC. NO. 19127-C, (Houlihan, 11/82), *aff'd*, DEC. NO. 19127-D, (WERC, 12/82).

In MILWAUKEE PUBLIC SCHOOLS AND SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 150, DEC. No. 31602-C (WERC, 11/02), the Commission stated:

> It is exceedingly difficult for an individual bargaining unit member to establish a breach of the duty of fair representation, and properly so. Decades of experience under federal and state labor relations laws have demonstrated the wisdom and necessity of maintaining this exceptionally high bar. It acknowledges that unions have limited resources, that grievances may be handled by relatively unsophisticated fellow employees or union staff, who as human beings sometimes make mistakes of judgment or are negligent, that a union's resources come from dues and fees paid by employees, that the union is a collective enterprise that must serve the interests of the overall group, that serving those collective interests frequently comes at the cost of a particular individual's real or perceived interests, and that a union must have discretion to make these decisions without being subjected to expensive second-guessing by agencies or courts.
>
> Thus, as the Examiner and the Union have pointed out, it is well-established that a union does not breach its duty of fair representation simply by negligently processing a grievance, simply by failing to communicate with a grievant, simply by making unwise or improvident decisions about the merits of a grievance, or simply by settling a grievance against the wishes of the grievant. Imperfections in representation are permitted the union, with one important caveat: " … *subject always to complete good faith and honesty of purpose in the exercise of its discretion*." HUMPHREY V. MOORE, 375 U. S. 335, 349 (1964) (emphasis added).
>
> The seminal articulation of the Union's duty of fair representation remains that set forth in VACA V. SIPES, 386 U. S. 171, 190 (1967), i.e., avoiding conduct toward a member of the bargaining unit that is "arbitrary, discriminatory, or in bad faith." In the context of an employee grievance, the essence of the analysis of the union's conduct under each of these three prongs is whether the union has abused its considerable discretion in handling the grievance. The inquiry is not a piecemeal analysis of how a grievance was handled at any particular stage, but rather a judgment based on the total picture. As Judge (now Justice) Kennedy described the duty in his concurring opinion in ROBESKY V. QANTAS EMPIRE AIRWAYS, 593 F. 2D 1082 (9TH CIR. 1978):
>
> > [W]e should inquire whether the union decisions lacked a rational basis, or whether by perfunctorily processing a grievance so that

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

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

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

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

Davenport's strong belief notwithstanding, the preponderance of the evidence in the record does not support his charges against the union. To the contrary -- the record shows MTI staff and legal counsel gave appropriate consideration when they filed, processed, considered and settled Davenport's grievances. MTI staff and counsel also provided an appropriate level of communication with Davenport as to the status of his grievances, and a meaningful explanation of the matters potentially adverse to his interests.

Prior to this controversy, Davenport had no question about the union's good faith because MTI has a record of providing appropriate grievance representation to him. MTI first handled grievances for Davenport in 1995 and 1998, each time securing a $2,000 payment and other considerations (including having a negative performance record expunged and getting the guarantee of referrals). I regard these as positive outcomes for Davenport, and thus affirmative evidence of base line good faith dealings on the part of MTI. [6]

Davenport says the union is now hostile towards him because he testified on behalf of an undefined student at Sherman Middle School who was subjected to some unspecified mistreatment at some unknown time by unidentified "MTI staff who were in the employ of MMSD."

[6] I understand Davenport to feel he should have gotten more from these grievances as well.

Retaliation and revenge are indeed strong motivators for improper acts, and Davenport's claim of bad faith by the union would be substantially supported if such retaliation and revenge were proven. However, Davenport has offered no evidence whatsoever to support any of his claims about the events at Sherman Middle School, his actions, or the response by MTI or MMSD. Davenport's uncorroborated statements about the purported events fall far short of establishing the matter by the preponderance of the evidence.

I understand that Mr. Davenport is not versed in hearing procedure, and may not have known how to get certain evidence into the record. But even accepting as true that there was a special education controversy at Sherman in which Davenport testified, he still fails to show any evidence why that would cause Volante and Matthews to engage in this conspiracy against him.

Moreover, it appears from Davenport's questions to Glennon at hearing that the incident at Sherman Middle School may have happened as early as 1991, certainly at least by 1993 or 1994. Since the union successfully advanced two grievances on Davenport's behalf several years afterwards, I cannot find that the Sherman Middle School controversy establishes the basis for any MTI hostility towards him.

The fall of 2004 brought two more grievances – the "involuntary resignation," and "temporary contract" grievances -- each of which Davenport still feels is unresolved and relevant to his complaint.

The "involuntary resignation" grievance began on September 22, 2004, the deadline for Davenport to let the sub office know he was still interested in being a substitute. At the time, he had already:

- Entirely ignored Glennon's letters of April 21 and May 21;
- Allowed his license to lapse (not to be renewed until January, 2005);
- Entirely ignored an invitation to attend an orientation for the new substitute system.

Against that backdrop, Davenport contends he called and left the message that he *did* wish to remain in the substitute pool. Glennon testified that her office has a standard procedure for retrieving and logging in such phone calls, and that no such message was received or recorded. Glennon, long aware of Davenport's negative employment record with the district and Sun Prairie, and of the extended correspondence between Davenport and Rainwater, thereupon processed Davenport's resignation from the active sub list, without notifying him that she was doing so.

It was not until that December that Davenport first called the sub office to ask why he wasn't getting any assignments. Although almost two months had passed since a worried Davenport called Volante to relate his concerns that the District would not acknowledge his

response on September 22, this mid-December call was the only contact Davenport had with that office since that date. [7]

On Dec. 16, Glennon told him that the district considered that his failure to respond by September, in light of his failures to respond to earlier requests, to attend the orientation and to submit evidence of valid licensure, constituted resignation.

After his unsettling talk with Glennon, Davenport called Volante, who promptly contacted Glennon. Although some of the communications are included in the record only by reference, Glennon responded by email on December 20, indicating timely action by Volante. Davenport thus has no cause to complain about Volante's initial response to his concerns. Volante's next action, his January 6 letter to Glennon, was also timely, further indicating the union's proper representation in its initial dealings with Davenport.

Glennon's January 14, 2005 response stated directly the district's belief that Davenport had resigned. As quoted at Finding of Fact 14, Glennon's explanation appears reasonable and valid on its face.

Except to Volante, who recalled Davenport's call on September 22, expressing concern the district would do just what Glennon's letter did – deny he had responded in time. And so, believing that Davenport had indeed responded to the district by the deadline, Volante and Matthews filed a formal grievance on February 22, 2005, alleging a violation of Section IV-F, and demanding that Davenport be made whole.

Again, Davenport cannot complain about this timely and active union response to his concerns.

Davenport demonstrated by a preponderance of the evidence that he called MTI on September 22 and spoke to Volante, telling him he had just called the sub office and left a message. As to the call itself, the evidence conflicts.

Davenport alleges an organized effort by MMSD staff to wrongfully deny that he had made the call, explicitly alleging perjury before me and other misdeeds. These are very serious allegations, but Davenport has offered no evidence in their support.

And he decries with great intensity the union's failure to obtain the telephone records, which all agree could be dispositive of whether he called the sub office or not. But for all his understandable anger and outrage, there is insufficient evidence to support his charge.

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[7] Given Davenport's concerns as expressed to Volante, I am surprised he did not call again that afternoon, or at least early the next morning. Yet despite the urgency of the situation, Davenport did nothing for seven weeks.

First, there is actually no evidence in the record that such records existed. Davenport, Matthews and Keys certainly discussed them, with the union and management leaders both agreeing how valuable they would be.

Davenport depends on what he said was MMSD President Bill Keys' assurance about using the phone records to prove the call. But as Keys testified, his knowledge about this was based on TV shows.

Nor is there any evidence that the union – and only the union -- would have been able to obtain them.

Because Davenport did not testify, his assertions about the phone records situation come only in his questions of witnesses. His unsworn and uncorroborated statements about what an unidentified phone company employee said about the records and how they could be obtained do not provide the necessary preponderance of evidence to establish that the necessary records existed and could be obtained by, and only by, the union.

Whether or not the phone records existed, and whether or not the union was the only party able to obtain them, does not really get to the heart of Davenport's complaint against the union, which is that it improperly gave up advancing his grievance.

Davenport claims that MTI Executive Director John Matthews "promised to make me whole" once they got the phone records that proved he had called, but then did nothing to obtain the records. Matthews agrees that he told Davenport that phone records would indeed be crucial documentation in pursuing the grievance, but he testified he never did, and never would, promise a member they would be made whole. Keys corroborated Matthews' testimony.

Knowing the attitudes that labor and management representatives have towards grievance arbitration – that it is unpredictable, and that even strong cases sometimes fail -- I don't think Matthews *would* ever "promise" a full make-whole remedy. So I find his testimony internally consistent. But even if Matthews *had* been unduly optimistic about the ability to obtain the phone records and about their impact on the grievance, that would not make the union's subsequent settlement of the grievance suspect.

Because about a month before Volante filed the grievance, Davenport had come to talk about retirement with another MTI assistant, Doug Keillor, who testified he advised Davenport that retirement would not affect pending grievances seeking back pay or benefits, but would prevent any claim on future wages. Davenport testified to the contrary, asserting that Keillor never told him he was surrendering claims to future employment. This discrepancy, Davenport concludes, is further evidence of the union's mendacity. It isn't.

It is Keillor's job to advise MTI members on matters relating to retirement, including its impact on grievances. The analysis Keillor testified he gave Davenport about the effect of

retirement on the two grievances is the analysis I would expect him to give, making his testimony internally consistent. Davenport has not provided any evidence other than his own unsworn and uncorroborated statements and allegations that Keillor failed to fulfill this standard aspect of his job responsibilities.

And even if Keillor *had* somehow neglected to explain the effect of his retirement to Davenport, that still would not establish a failure of representation. WISCONSIN COUNCIL 40, DEC. NO. 22051-A.

Notwithstanding Keillor's understanding of the difficulty a retired Davenport would face seeking a remedy the involved re-employment, Volante a month later did file the "involuntary resignation" grievance noted above (Fact 16). Again, this is the action of a union official aggressively working to protect a member's interests and ensure management's compliance with the collective bargaining agreement.

But based on their further investigation, Volante and Thal came to understand that Davenport had processed his retirement, making any remedy problematic at best. It is highly unfortunate that Davenport's personal financial situation apparently required him to have to file for his retirement benefits, but it did, and the union could not simply wish away that inconvenient fact. And under the collective bargaining agreement, that ended Davenport's employment relationship with the district As Volante explained to Davenport in his letters of June 15, 2005 and June 7, 2006, his retirement effectively eliminated any future-oriented make-whole remedy. The availability of a meaningful remedy is a legitimate matter for the union to take into consideration when determining whether to settle or arbitrate a grievance. Knowing that Davenport thereafter had no continuing employment rights, the union staff and counsel made a reasonable determination that no meaningful remedy could come from continuing the "involuntary resignation" grievance

Given the entirety of the situation – not only Davenport's failures to respond to Glennon's earlier letters, or to attend the orientation, but also his failure to apply for a renewed license until January, 2005, and ultimately his retirement the following month, with an effective date for his separation of September 22, 2004 – MTI seems to have "made a reasoned decision about proceeding with the grievance," as our case law requires. MAHNKE, 66 WIS. 2D. 524, 534.

Although Davenport's primary concern seems to be the way MTI handled his "involuntary resignation" grievance, he also complains about its handling of the contemporaneous "temporary contract" grievance. But Volante's actions here also refute Davenport's charges.

On June 24, 2004, Volante wrote Glennon that MTI believed Davenport should have been hired under a regular contract to fill the vacancy caused by Wessels' resignation. Volante wrote four follow-up letters over the next two months, explicitly preserving the union's ability to file a grievance. On September 3, Glennon responded, explaining the relationship between

Wessel's resignation, the elimination of his position, C.T.s' medical leave, and Davenport's temporary contract.

Notwithstanding Glennon's detailed and plausible explanation, Volante continued to investigate, and determined that the district's records did not fully support Glennon's narrative. Accordingly, on October 4, 2004, over the signatures of Volante and Matthews, MTI formally grieved the district's failure to provide Davenport with a regular contract for a regular teaching position. Again, this is not the action of a union failing in its duty of fair representation.

Glennon and Volante continued to investigate this situation. Glennon soon realized that the district had erred in failing to issue Davenport a temporary contract (which she had, erroneously, believed it had already done), and thus owed him several thousand dollars in back pay. Volante, meanwhile, determined that Glennon had been correct in her assertion that lower enrollment had caused the loss of 1.0 FTE positions at East High, and that there indeed was no permanent vacancy for Davenport (or anyone else) to fill under regular contract.

Accordingly, as Davenport confirmed to Volante in December, 2004, the district made him whole for the discrepancy in pay between his long-term substitute pay and the temporary contract salary placement. MTI also pursued payment to Davenport to make him whole for the loss of dental benefits that should have been covered during that period; although Davenport took many months to respond to MTI's requests for information as to the precise costs incurred, MTI did succeed in securing for him additional reimbursement for the district's portion of his tooth extraction minus what his premium contribution would have been.

Davenport has a right to complain about the impact on his dental health from the district's failure to provide him with the proper temporary contract in a timely manner. Had he received the contract as called for in the collective bargaining agreement, he would have been able to give proper attention to problems with his teeth. However, because of his economic circumstances, he was not able to pay for the full procedure in the hopes of a later reimbursement, but only attend to the extraction itself. As part of the grievance settlement, the union secured the proper district contribution for that procedure, and made a reasonable professional determination that it could not obtain an arbitral award to pay for services that Davenport *would* have secured if he had had the insurance coverage, but didn't. Davenport has every right to continue to feel dissatisfied at this outcome; however, the fact that a grievant is dissatisfied, or that the outcome of a grievance settlement is less than optimal, does not establish that the union has failed in its duty of fair representation.

Based on their considerable professional experience in grievance arbitration, and understanding of MMSD employment and budgeting practices and procedures, MTI staff and legal counsel made the determination that the elimination of 1.0 FTE at East effectively precluded any remedy beyond the compensation ($5,835.60 in back pay and $78.21 for dental benefits) which the District was providing. Accordingly, MTI closed its file on the October 4 "temporary contract" grievance as being fully resolved.

MTI's decision to do so was entirely appropriate. As Volante explained to Davenport in his letter of June 7, 2006, Davenport's desired remedy – an arbitration award directing the district to place him into a permanent full-time position – "would be impossible." Not only would such a remedy require hiring a temporary employee into a regular contract, but the position itself had already been eliminated, leaving no vacancy for Davenport to fill.

There is no evidence at all that this assessment was undertaken in bad faith in any way, nor any evidence that the union's refusal to proceed was discriminatory. Although Davenport rightly claims that there was much at stake, it is appropriate and entirely lawful for the union to balance the value of the grievance against the likelihood of success. Where, as here, there is no reasonable likelihood of success, the union is not required to continue to pursue the matter.

MTI succeeded in enforcing Davenport's rights under the collective bargaining agreement; though efforts by Volante and others, MTI secured for Davenport several thousand dollars to which he was contractually entitled, and which the district initially did not pay. Having obtained that compensation, MTI made the reasonable and well-informed judgment that no further remedy could be forthcoming, and so declined to proceed any further. In so doing, it acted reasonably and responsibly, and without bad faith.

There was nothing perfunctory about MTI's handling of either of Davenport's grievances, and no evidence at all of bad fair. Instead, there was evidence that MTI aggressively and successfully prosecuted at least four of Davenport's grievances, over a time period lasting more than a decade. Accordingly, because Davenport has failed to establish by a preponderance of the evidence that MTI actions showed arbitrary, discriminatory or bad faith conduct, I have dismissed all charges against it.

Davenport also alleges the district violated sec. 111.70(3)(a)5, Stats., which makes it a prohibited practice for a municipal employer "to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees. . ."

However, where the collective bargaining agreement in question contains a grievance arbitration provision, the commission generally does not exercise its statutory jurisdiction to resolve violation of contract disputes because the contractual grievance arbitration provision is presumed to be the exclusive mechanism for resolution of such disputes. MUSKEGO-NORWAY SCHOOL DISTRICT, DEC. NO. 30871-D (Nielsen, 5/05); *aff'd by operation of law*, DEC. NO. 30871-E (WERC, 7/05); MAHNKE V. WERC, 66 Wis. 2D 524, 529-30 (1974); UNITED STATES MOTORS CORP., DEC. NO. 2067-A (WERB, 5/49); HARNISCHFEGER CORP., DEC. NO. 3899-B (WERB, 5/55);CITY OF MENASHA, DEC. NO. 13283-A (WERC, 2/77); MONONA GROVE SCHOOLS, DEC. NO. 22414 (WERC, 3/85). One of the limited exceptions to our general refusal to exercise our statutory jurisdiction over violation of contract claims is where an employee establishes in a Commission complaint proceeding that the grieving employee's collective bargaining representative has breached its duty of fair representation by refusing to process the grievance. MAHNKE, *supra*; MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC.

NO. 31602-C (WERC, 1/07). MILWAUKEE PUBLIC SCHOOLS and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 950, DEC. NO. 32143-A (Jones, 2/2008). Where such a breach of the duty of fair representation can be established, the Commission will then exercise its jurisdiction to decide whether the collective bargaining agreement has been violated. MILWAUKEE BOARD OF SCHOOL DIRECTORS, *supra*. FLORENCE COUNTY and LABOR ASSOCIATION OF WISCONSIN, INC., DEC. NO. 32403 (WERC, April, 2008).

The collective bargaining agreement between the parties contains a grievance procedure culminating in final and binding arbitration. I have found that the union did not fail in its duty of fair representation to Davenport in its consideration of any of his grievances. Accordingly, pursuant to well-established commission precedent, I have dismissed Davenport's complaint against the district.

Dated at Madison, Wisconsin, this 18th day of July, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stuart D. Levitan /s/
Stuart D. Levitan, Examiner

SDL/gjc
32139-A