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-C

Appearances:

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

Richard Thal, Lawton & Cates, Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53703-2965, appearing on behalf of Madison Teachers Incorporated and John Matthews.

Heidi S. Tepp, Labor Relations Attorney, Madison Metropolitan School District, 545 West Dayton Street, Madison, Wisconsin, 53703, appearing on behalf of Madison Metropolitan School District, Art Rainwater and June Glennon.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 4, 2007, Lance S. Davenport filed a complaint with the Wisconsin Employment Relations Commission asserting that the Madison Metropolitan School District (District) and the Madison Teachers Incorporated (MTI) had committed prohibited practices within the meaning of the Municipal Employment Relations Act. Hearing on the complaint was held September 25, 2007 in Madison, Wisconsin before Commission Examiner Stuart D. Levitan.

Following receipt of post-hearing briefs, Examiner Levitan issued Findings of Fact, Conclusions of Law and Order on July 18, 2008 wherein he concluded that Respondent MTI had not breached its duty of fair representation to Complainant Davenport by refusing to arbitrate two grievances and thus had not committed a prohibited practice within the meaning of Sec. 111.70 (3)(b) 1, Stats. Given his conclusion that Respondent MTI had not breached its duty of fair representation to Complainant Davenport as to the two grievances, Examiner Levitan did not exercise the Commission's jurisdiction over Complainant Davenport's allegation that Respondent District had violated a collective bargaining agreement and thereby committed prohibited practices within the meaning of Sec. 111.70(3)(a) 5, Stats. Given his conclusions, Examiner Levitan dismissed Complainant Davenport's complaint.

Complainant Davenport then filed a petition for review of Examiner Levitan's decision with the Wisconsin Employment Relations Commission. On October 15, 2008, after considering the petition and argument filed by the parties, the Commission concluded that Examiner Levitan had erred by not allowing Complainant Davenport sufficient opportunity to testify. Given this error, the Commission set aside the Examiner's Findings of Fact, Conclusions of Law and Order and remanded the matter for additional hearing. Although it rejected Complainant Davenport's contention that Examiner Levitan was not impartial, the Commission nonetheless concluded that it was appropriate to substitute Examiner Peter G. Davis for Examiner Levitan.

Additional hearing was held on January 21, 2009 in Madison, Wisconsin before Examiner Davis. Complainant Davenport was allowed to supplement the record on March 10, 2009 by submission of an additional exhibit. The parties thereafter filed written argument, the last of which was received July 1, 2009.

Having reviewed the record and being fully advised in the premises, I make and issue the following

FINDINGS OF FACT

1. The Madison Metropolitan School District, herein the District, is a municipal employer.

2. Madison Teachers Incorporated, herein MTI, is a labor organization that serves as the collective bargaining representative of teachers employed by the District. During the period of July 1, 2003 – June 30, 2005, MTI and the District were parties to a collective bargaining agreement covering the wages, hours and conditions of employment of all regular full-time and regular part-time teachers and teachers under temporary contracts and a collective bargaining agreement governing the wages, hours and conditions of employment of substitute teachers. Both of those collective bargaining agreements contained a grievance procedure for resolution of disputes over compliance with the agreement. The last step of each grievance procedure was final and binding impartial arbitration.

3. Lance S. Davenport, herein Davenport, was a teacher employed by the District and represented for the purposes of collective bargaining and contract administration by MTI. In 1995 and 1998, MTI filed grievances on Davenport's behalf and subsequently obtained settlements that benefited Davenport.

4. During the 1997-1998 school year, Davenport was deeply involved in a dispute with the District and fellow employees represented by MTI over whether a student was receiving appropriate special education services.

5. During the 2003-2004 school year, Davenport worked as teacher at East High School. At Davenport's request, by letters dated June 24, July 9, July 28, August 13 and August 31, 2004, MTI contacted the District to ask why Davenport had not received a regular teaching contract for his 2003-2004 work. By the following letter dated September 3, 2004, the District provided MTI with an explanation as to why Davenport had not received a regular teaching contract.

> Ken Volante
> Executive Asst. for Labor Relations
> Madison Teachers Inc.
> 821 Williamson Street
> Madison, WI 53703
>
> RE: **Lance Davenport/Temporary Contract**
>
> Dear Ken:
>
> I am writing in response to your correspondence requesting information about the vacancy at East High School 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.
>
> Christine Thompson 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 Christine's leave of absence.

Sincerely,

June Glennon
June Glennon /s/
Employment Manager

On October 5, 2004, MTI filed a grievance dated October 4, 2004 pursuant to the 2003-2005 regular/temporary teacher collective bargaining agreement between the District and MTI in which MTI asserted that the District had violated said agreement by failing to give Davenport a regular teaching contract for his 2003-2004 work. That same day, Davenport signed a document authorizing MTI to represent him as to said grievance and further granting MTI "authority to commence, carry forth, and settle or otherwise dispose of" the grievance "as MTI . . . may deem proper."

After further investigating the matter and evaluating the facts and the applicable contract language, MTI concluded that it had no reasonable chance of persuading a grievance arbitrator that Davenport had a contractual right to receive a regular teaching contract for the 2003-2004 school year. MTI further concluded that a satisfactory settlement of the grievance would include payment to Davenport of the difference between the wages he was paid during the 2003-2004 school year as a long-term substitute teacher and the higher wage rate paid to employees working under a temporary contract as well as reimbursement of Davenport for any medical expenses he incurred during the 2003-2004 school year which would have been covered had he been under a temporary contract.

In December 2004, in response to the grievance and at the request of MTI, the District paid Davenport $5,835.60 - the difference between the wages he was paid during the 2003-2004 school year as a long-term substitute teacher and the higher wage rate paid to employees working under a temporary contract. The District further advised MTI and Davenport that it would consider paying Davenport for any medical expenses he incurred during the 2003-2004 school year which would have been covered had he been under a temporary contract.

6. In September, 2004, the District concluded that Davenport had resigned as an employee of the District because he failed to contact the District by a September 22, 2004 deadline. In December, 2004, Davenport learned of the District's conclusion and disagreed with same. Sometime prior to January 6, 2005, at Davenport's request, MTI contacted the District and indicated that Davenport had contacted the District on September 22, 2004 and thus had not resigned. By letter dated January 14, 2005, the District advised MTI that Davenport had not contacted the District by the September 22, 2004 deadline and thus that it continued to believe that Davenport had resigned. On February 25, 2005, MTI filed a grievance dated February 22, 2005 pursuant to the 2003-2005 substitute teacher collective bargaining agreement between the District and MTI in which MTI asserted that the District had violated said agreement by determining that Davenport had resigned. That same day, Davenport signed a document authorizing MTI to represent him as to said grievance and

further granting MTI "authority to commence, carry forth, and settle or otherwise dispose of" the grievance "as MTI . . . may deem proper."

7. On January 26, 2005, before the formal contractual grievance disputing Davenport's resignation had been filed, financial concerns prompted Davenport to meet with an MTI staff person to discuss the option of retiring. During the meeting, the MTI staff person advised Davenport that if he retired, it would negatively affect the remedy that might be available as to the contested resignation. Following the meeting, in February, 2005, Davenport did retire retroactively effective to September 22, 2004.

8. During the spring of 2005, Davenport was driving past MTI offices and noticed MTI Executive Director John Matthews and District School Board member/former MTI President Bill Keys standing outside the offices chatting. Davenport stopped and approached Matthews and Keys to discuss his February 2005 grievance. During that conversation, Matthews advised Davenport that obtaining phone records confirming a September 22, 2004 telephone call by Davenport to the District would be important. Keys advised Davenport that he thought such records were available from the District's telephone service provider. During that conversation, Davenport suggested that Matthews and Keys were conspiring against him and Matthews was angered by that accusation.

Davenport subsequently attempted to obtain telephone records that would confirm that he placed a call to the District on September 22, 2004 indicating his interest in continued employment. During those efforts, the service provider (TDS) advised Davenport that it would not release the records to him but might if such records were sought by subpoena. Davenport had a MTI staff person talk to TDS about potential access to the telephone records.

9. By the following letter dated June 15, 2005, MTI advised Davenport that it would be withdrawing the February 25, 2005 grievance as to Davenport's disputed resignation but that the October 4, 2004 grievance over his contractual status during the 2003-2004 school year was still being processed.

June 15, 2005

Lance Davenport
7205 Century Avenue
Middleton, WI 53562-1508

Re: Voluntary Resignation Grievance

Dear Lance:

We write in followup 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. 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).

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 which we filed on your behalf dated October 4, 2004. I will continue to keep you updated as to the progress of said grievance.

Sincerely,

Ken Volante /s/
Ken Volante
Executive Assistant For Labor Relations

KAVrjk

c: Attorney Rich Thal, L&C
John Matthews, MTI
Doug Keillor, MTI

10. By the following letter dated July 15, 2005, MTI sought information from Davenport that would allow it to further process the October 4, 2004 grievance.

July 15, 2005

Lance Davenport
7205 Century Avenue
Madison, WI 53562-1508

Re: Dental Cost Records

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 there 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 you incurred during the period as to whether there are any medical claims that of the 2003-04 school year of which MTI would continue to pursue payment.

Sincerely,

Ken Volante /s/
Ken Volante
Executive Assistant For Labor Relations

KAVrjk

11. By the following letter dated October 5, 2005, MTI responded to concerns raised by Davenport as to the status of the October 4, 2004 and February 25, 2005 grievances.

October 5, 2005

Mr. Lance Davenport
7205 Century Avenue
Middleton, WI 53562-1508

Dear Lance:

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 that 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 grievance 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 from 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 not hesitate to contact me if you have any questions concerning this matter.

Very truly yours,

LAWTON & CATES, S.C.

Richard Thal /s/
Richard Thal

RT/baj

c: Mr. John A. Matthews
Ms. Ken Volante
Mr. Steve Porter

12. By the following letter dated February 15, 2006, MTI again sought information from Davenport that would allow it to further process the October 4, 2004 grievance.

February 15, 2006

Mr. Lance Davenport
7205 Century Avenue
Middleton, WI 53562-1508

Dear Lance:

In a letter to you 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.

Very truly yours,

LAWTON & CATES, S.C.

Richard Thal /s/
Richard Thal

13. By the following letter dated June 7, 2006, MTI advised Davenport as to the status of the October 4, 2004 and February 25, 2005 grievances.

June 7, 2006

Lance Davenport
7205 Century Avenue
Middleton, WI 53562-1508

Re: Grievances

Dear Lance:

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 affirmed

the effective date for your separation date 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 your 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 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." 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 at 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 had 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 e-mail at volantek@madison teachers.org.

Sincerely,

Ken Volante /s/
Ken Volante
Executive Assistant For Labor Relations

KAVrjk

c: John Matthews, MTI
Doug Keillor, MTI
Rich Thal, Attorney

Consistent with the letter of June 7, 2006, on June 9, 2006, MTI signed a Memorandum of Understanding that indicated both Davenport grievances had been settled with the payment of $78.21 by the District to Davenport. The District signed the Memorandum on June 16, 2006.

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

CONCLUSIONS OF LAW

1. Unless the Respondent Madison Teachers Incorporated breached its duty of fair representation to Complainant Lance S. Davenport by the manner in which it processed the two grievances filed on Davenport's behalf, the grievance arbitration procedures in the two 2003-2005 collective bargaining agreement between Respondent Madison Metropolitan School District and Respondent Madison Teachers Incorporated are the exclusive means by which any alleged violations of those agreements raised by the Davenport grievances can be litigated.

2. By the manner in which it processed the two Davenport grievances, Respondent Madison Teachers Incorporated met its duty of fair representation to Complainant Lance S. Davenport and thus did not commit a prohibited practice within the meaning of Sec. 111.70 (3)(b)1, Stats.

3. Because Respondent Madison Teachers Incorporated met its duty of fair representation to Complainant Lance S. Davenport as to the Davenport grievances, the grievance arbitration procedures in the two 2003-2005 collective bargaining agreements between Respondent Madison Metropolitan School District and Respondent Madison Teachers Incorporated are the exclusive means by which any alleged violations of those agreements can be litigated and the Wisconsin Employment Relations Commission will not assert its jurisdiction under Sec. 111.70(3)(a)5, Stats. to determine whether Respondent Madison

Metropolitan School District violated the 2003-2005 agreements as to matters raised in the two Davenport grievances.

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

ORDER

The complaint filed by Lance S. Davenport is dismissed.

Dated at Madison, Wisconsin, this 27th day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/

Peter G. Davis, Examiner

MADISON METROPOLITAN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I understand Davenport's complaint to be asserting that the Respondent Madison Metropolitan School District (District) violated two different 2003-2005 contracts between the District and Respondent Madison Teachers Incorporated (MTI) and that I have jurisdiction to resolve the merits of that assertion because MTI breached its duty of fair representation by the manner in which it processed and settled two grievances.

Section 111.70 (3)(a) 5, Stats., provides that is an prohibited practice for a municipal employer (such as the District) to violate a collective bargaining agreement. However, where, as here, the collective bargaining agreements in question contain final and binding impartial grievance arbitration procedures, the Commission will not asserts its jurisdiction over Sec. 111.70(3)(a)5 claims (or the counterpart provisions found in Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act and Sec. 111.84(1)(e) of the State Employment Labor Relations Act) because those procedures are presumed to be the exclusive means by which alleged violations of those agreements can be resolved. MAHNKE V. WERC, 66 Wis. 2D 524 (1974); RACINE EDUC. ASS'N. V. RACINE UNIFIED SCHOOL DIST., 176 Wis. 2D 273 (Ct. App. 1993); GRAY V. MARINETTE COUNTY, 200 Wis. 2D 426 (Ct. App. 1996);UNITED STATES MOTOR CORP., DEC. NO. 2067-A (WERB, 5/49); HARNISCHFEGER CORP., DEC. NO. 3899-B (WERB, 5/55); MELROSE-MINDORO JOINT SCHOOL DISTRICT NO. 2, DEC. NO. 11627 (WERC, 2/73); CITY OF MENASHA, DEC. NO. 13283-A (WERC, 2/77); MONONA GROVE SCHOOL DISTRICT, DEC. NO. 22414 (WERC, 3/85). However, if an employee covered by such a collective bargaining agreement can prove that his collective bargaining representative failed to fairly represent him by illegally thwarting his efforts to arbitrate a grievance over an alleged violation of the agreement, then there is a sound policy basis which overcomes the presumed exclusivity of the grievance arbitration procedure and the Commission will assert its prohibited practice/unfair labor practice jurisdiction to determine whether the agreement has been violated. MAHNKE, *supra*., GRAY, *supra*., MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 31602-C (WERC, 1/07).

As reflected in Finding of Fact 2 and Conclusion of Law 1, the record here satisfies me that the grievance arbitration clauses in the 2003-2005 regular/temporary teacher and substitute teacher contracts are the exclusive means by which the merits of the two grievances can be resolved unless Davenport can prove that MTI breached its duty of fair representation by the manner in which it processed and settled two grievances. Thus, I proceed to consider the alleged breach of the duty of fair representation.

In GRAY, *supra*., a case involving a union that was the collective bargaining representative of municipal employees such a Davenport and thus covered by the Municipal Employment Relations Act, the Wisconsin Court of Appeals adopted and applied the burdens and standards set forth by the Wisconsin Supreme Court in MAHNKE, *supra*. (a case involving

a private sector employee advancing a Sec. 111.06(1)(f) breach of contract claim under the Wisconsin Employment Peace Act) for determining whether a union has breached its duty of fair representation. GRAY and MAHNKE establish as a general matter that an employee must prove that the union acted in an arbitrary, discriminatory or bad faith manner to establish a breach of the duty of fair representation. More specifically, where, as here, the claim is that the union breached its duty of fair representation by failing to arbitrate a grievance, MAHNKE holds that a union making such a decision should take into account at least the monetary value of the claim, the effect of the alleged breach on the employee and the likelihood of success in arbitration.

The record, as reflected in the Findings of Fact, persuades me that MTI met its obligations under GRAY and MAHNKE when deciding to settle rather than to arbitrate the two grievances filed on Davenport's behalf. MTI was aware of and considered the monetary value of Davenport's claims, the effect of the alleged breaches on Davenport and the likelihood of success in arbitration. The record also makes clear, contrary to Davenport's assertions, that MTI did all it reasonably could to process the grievances promptly.

In reaching this conclusion, I have considered Davenport's allegation that MTI acted as it did out of hostility toward him because of his advocacy on behalf of students (see Finding of Fact 4) which put him at odds with other MTI-represented employees and perhaps also because of his accusation that Matthews was part of conspiracy against him (see Finding of Fact 8). Such allegations, if proven, would put MTI's conduct outside the scope of "good faith and honesty of purpose" that are encompassed by the duty of fair representation. See CITY OF MEDFORD, DEC. NO. 30537-C (WERC, 8/04); MILWAUKEE BOARD OF SCHOOL DIRECTORS, *supra*. However, whatever inferences of illegal motivation could be drawn from these facts are more than amply overcome by the content of the settlement achieved on Davenport's behalf as to the October 2004 grievance and the evidence of MTI's decision-making process as to both grievances that is contained in the record. Simply put, the record satisfies me that MTI processed the two Davenport grievances with the same high degree of care and resource commitment that would have been extended to any MTI-represented employee.

To the extent Davenport seeks to prove a breach of the duty of fair representation by citing the difference between the allegations and remedy contained in the formal grievances filed on his behalf and the subsequent resolution of those grievances for less than was originally sought, the record clearly establishes that the formal grievances did no more than stake out the best possible claim and result on Davenport's behalf. Statement of the best possible claim does not automatically make the allegation true or attainable. As evidenced by the existence of this case, it might well have been productive for MTI to have told Davenport from the very beginning that there were no guarantees as to the merits of his grievances or the remedies that could be obtained through grievance arbitration. However, MTI did not breach its duty of fair representation by failing to do so. [1] Rather, as MTI's subsequent investigation

[1] The facts of this case are not akin to those present in MILWAUKEE BOARD OF SCHOOL DIRECTORS, *supra*., wherein a breach of the duty of fair representation was found by the Commission in part because of the union's failure to tell an employee that if she rejected a proposed settlement agreement, the grievance might not proceed

proceeded and subsequent events (including Davenport's retirement) occurred, MTI reasonably reassessed the formally alleged contractual violations and the possible remedies that could be achieved and settled or dropped the grievances on that basis. In the context of the February 2005 grievance over whether Davenport did or did not resign, MTI's reassessment reasonably included a judgment that Davenport's retirement would limit or eliminate the possibility of receiving any affirmative remedy even if the disputed phone records could be obtained and that said records established that Davenport did indeed call the District on September 22, 2004. In that context, MTI's decision not to pursue the phone records and to drop the grievance fell well within the confines of the duty of fair representation owed Davenport. [2]

Given all of the foregoing, I am satisfied that Davenport has not proven that MTI breached its duty of fair representation by the manner in which it processed the two grievances. Because no breach of the duty of fair representation has been established, I do not exercise the Commission's jurisdiction over Davenport's violation of contract claim. Thus, I have dismissed Davenport's complaint.

Dated at Madison, Wisconsin, this 27th day of August, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/
Peter G. Davis, Examiner

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to arbitration. In this case, as credibly testified to and supported by contemporaneous notes, Davenport was told at the time he was actively considering retirement that such action on his part would negatively impact any remedy he might receive.

[2] Davenport also focuses on Matthews' alleged comment/promise during the spring 2005 conversation that he would make Davenport whole-which comment Davenport asserts meant that the remedy sought in the formal grievance would be sought and attained. Matthews denies making the comment in question and cites years of experience that have taught him that there are no sure things in grievance arbitration and thus that such a comment would be foolhardy to make. I make no finding as to whether the comment was made because even if made in a burst of bravado, such a "promise" in the context of the duty of fair representation and the facts of this case would not preclude MTI from later reassessing whether to proceed to arbitration and deciding to drop the grievance. I am also satisfied from the record as a whole that any such comment was made after Davenport had decided to retire and thus was not something upon which Davenport could have relied when deciding to retire.