STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MALCOLM BINGHAM, JR., Complainant,

vs.

MILWAUKEE PUBLIC SCHOOLS and
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 950, Respondents.

Case 450
No. 66975
MP-4345

Decision No. 32143-A

Appearances:

Malcolm Bingham, Jr., 4889 North 62nd Street, Milwaukee, Wisconsin 53218, on his own behalf.

Donald Schriefer, Assistant City Attorney, City of Milwaukee, City Hall, 200 East Wells Street, Room 800, Milwaukee, Wisconsin 53202-3551, on behalf of Respondent Milwaukee Public Schools.

Timothy Hawks and Jeffrey Sweetland, Attorneys, Hawks, Quindel, Ehlke & Perry, S.C., 700 West Michigan Avenue, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, on behalf of Respondent International Union of Operating Engineers, Local 950.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 15, 2007, Malcolm Bingham, Jr. filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against Milwaukee Public Schools and International Union of Operating Engineers, Local 950. The complaint did not contain any facts. While no facts were alleged in the complaint, it could be inferred from the complaint's 22 attachments that the Complainant was alleging that the District discharged him without just cause and that the Union breached its duty of fair representation towards him. The complaint alleged that by this action, the District had violated Sec. 111.70(3)(a)5 and the Union had violated Sec. 111.70(3)(b)1. On July 7, 2007, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact,

Conclusions of Law and Order, as provided in Secs. 111.07(5) and 111.70(4)(a) Stats. On July 16 and 17, 2007, the District and the Union, respectively, filed Answers to the complaint. Hearing on the complaint was held July 19, 2007 in Milwaukee, Wisconsin. Following the hearing, the District and the Union filed briefs on September 17, 2007. On September 27, 2007, the Examiner granted Bingham's request for an extension to file his brief. On October 17, 2007, the Examiner wrote Bingham and set a deadline for him to file his brief. Bingham filed his brief on November 15, 2007. Having considered the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Malcolm Bingham, Jr., hereinafter referred to as Bingham, was a District employee for 26 years. He was discharged by the District on June 1, 2006.

2. Respondent Milwaukee Public Schools, hereinafter referred to as the District, is a municipal employer which operates a public school system in Milwaukee, Wisconsin. Its offices are located at 5225 West Vliet Street, Milwaukee, Wisconsin.

3. Respondent International Union of Operating Engineers, Local 950, hereinafter referred to as the Union, is a labor organization with its offices located at 633 South Hawley Road, Milwaukee, Wisconsin. It is the exclusive collective bargaining representative for the (school) engineers, boiler attendants and boiler attendant trainees employed by the District. At the time he was discharged, Bingham was a boiler attendant and thus was in the bargaining unit just referenced.

4. In 1997, Bingham received a five-day suspension for poor attendance and absence without leave. When this occurred, he was working as a building service helper and was in another union's bargaining unit.

5. On June 29, 2004, Bingham received a three-day suspension for poor work performance and failure to perform assigned tasks. When this occurred, he was working as a boiler attendant trainee and thus was in the bargaining unit represented by IUOE, Local 950. The Union filed a grievance challenging the suspension, but Bingham had it withdrawn.

6. On January 17, 2006, Bingham received a formal written reprimand for failure to attend a mandatory in-service meeting. After that discipline was imposed, Union president David Reszczynski asked Bingham if he wanted to grieve the reprimand, and Bingham said no.

7. On November 7, 2005, Bingham took a promotion to become an engineer. While he was a probationary engineer, Bingham was assigned to the District's Green Bay Elementary School.

8. After Bingham became an engineer, he was required to obtain a structural pesticide license within six months. He did not do so. At a meeting on April 12, 2006, at which Bingham was accompanied by Union president Reszczynski and Union vice-president Michael Frank, management warned Bingham that he would be demoted to his former position if he did not obtain the license by May 8, 2006. Bingham did not obtain the license by that date. As a result, on May 8, 2006, he was demoted to boiler attendant for failure to meet the engineer's job requirements.

9. Following his demotion to boiler attendant on May 8, 2006, Bingham was assigned to the substitute crew as a floater. As such, he could be assigned to any building where building operations management determined there was a need. He was assigned to work the second shift at Juneau High School where he was to clean rooms and remove garbage.

10. By that time, the school year was winding down, and some teachers at Juneau were starting to pack up their teaching materials and personal belongings. One teacher who was doing that was Lisa Toi Mark. By May 9, Mark had collected posters, books, pencils, notebooks, educational materials, accordion folders, a megaphone, the school mascot's costume, and a 50-pound bag of popcorn. Mark packed these items into a green basket, a red box, and a large clear Rubbermaid tub and placed them at various locations around her classroom. She did not place any of these items by or on the trash can which is located in the front corner of her classroom. Mark had been instructed that if she wanted something thrown away, she was to attach a note to the item which said something to the effect of "please throw away" or "trash". She did not have such a note on any of the items just referenced because she did not want any of those items thrown out as trash. All the items just referenced had been in Mark's room spread all about for weeks, and none of the items had been removed and/or thrown out as trash by a custodial worker.

11. When Mark left her classroom for the day on May 9, the items referenced in Finding 10 were still in the various locations she had placed them. The megaphone and the school mascot uniform were in a black bag. The bag containing these two items and the 50-pound unopened bag of popcorn were stored on the floor below a chalkboard at the front of the classroom. The bag and the popcorn were several feet to the left of the trash can. The file folders containing the posters were on a table. The large clear Rubbermaid tub was on the floor under the table. Some other items were stacked on a student's desk and on a window ledge. Of these items, the popcorn, megaphone and mascot costume were MPS property; the rest, including new pencils, notebooks, and other supplies were Mark's personal property. None of these items had trash on them, none were next to the trash can in the room, and all were neatly packed into boxes, plastic storage containers, and bags in such a way that evidenced they were not trash.

12. The District's Building Operations Work Rules provide in Section XIII:

. . .

F. Board-owned equipment and supplies may not be used for personal use.

G. Theft of school equipment/supplies or unauthorized possession of such material may be cause for discharge.

H. Items such as cans, bottles, newspapers, cardboard, books, and other surplus miscellaneous materials are the property of Milwaukee Public Schools. They should not be removed from the premises for personal use or gain without the permission of the principal or the Manager of Building Operations. Building Operations employees should not grant permission for removal of any items from buildings without authorization. This includes equipment, furniture, supplies, etc. Time wasted checking, sorting, bagging, crafting, and bundling is not condoned. Removal of such property will be classified as theft and will be treated as previously specified.

Additionally, the District's Employee Rules of Conduct provide that the following conduct is prohibited:

. . .

(c) Damage, unauthorized use, possession, or removal of Board property or another person's private property.

. . .

(q) Failure or refusal to comply with school/departmental work rules, policies, or procedures.

13. Bingham knew of the work rules/policies just referenced. He further knew that even garbage located on District premises was considered District property and had to be disposed of as such. He further knew that an employee who took garbage from District premises was subject to termination for theft. He further knew that if an employee wants to take District property, they have to ask and get permission to do so. Permission can be granted by the building principal or the manager of building operations.

14. Bingham reported to Juneau to work the second shift on May 9. The engineer at Juneau, Tim O'Donnell, told Bingham his job was to remove garbage from classrooms.

15. When Bingham entered Mark's classroom on May 9, she was not there; she had left for the day. Bingham surveyed the room and saw all the items which were placed around the room. Bingham incorrectly concluded that everything he saw was garbage to be thrown away.

16. Although Mark did not intend for any of the materials referenced above to be thrown out as garbage, the proper procedure was for Bingham to put all the materials he thought were trash into the trash dumpsters located outside the school. Bingham followed that procedure for one item he took from Mark's room, namely the folders with the posters inside. Bingham threw them into a dumpster. Bingham did not follow the proper procedure for the other items which he took from Mark's room (i.e. the popcorn, the megaphone, the mascot costume, the green basket, the red box, and large clear Rubbermaid tub). He put all those items into his van. When he did this, Bingham did not have permission from the principal, the teacher (Mark), or the manager of building operations to remove any of these items from Juneau High School.

17. The next morning (May 10), when Mark entered her classroom, she realized that many of the materials that she had left there the previous day were missing. She was very upset by this. One reason she was panicked was because the popcorn and mascot costume, in particular, were needed for a student/staff basketball game that was to take place that afternoon. She contacted the principal, and the two of them went to Tim O'Donnell, Juneau's engineer. She and O'Donnell then went outside and searched through three large trash dumpsters. In doing so, they found three folders with the posters inside, but none of the other missing items. Later, the building principal and the school safety officer also searched the dumpsters, but they did not find any more missing items.

18. O'Donnell knew that Bingham had cleaned Mark's room the night before, so he got Bingham's home phone number and called him. In a short conversation, O'Donnell asked Bingham where he had placed the items he had taken from Mark's room. Bingham told O'Donnell that her "stuff" was still in the building. This statement was false because the "stuff" from Mark's room was not in the building; it was in Bingham's van.

19. Mark then got Bingham's phone number from O'Donnell and called him. When Mark called Bingham, she was still very upset about the items being taken from her classroom. She asked Bingham where her stuff was, and criticized him for taking it out of her room. She said that none of the items taken were near the trash can and were not garbage. While Bingham did not admit to taking her stuff, he reassured Mark that her stuff was not gone, and told her that it (i.e. her stuff) was in the building and would be returned to her that day.

20. Mark then talked to a building service helper who had worked the second shift with Bingham the night before. Mark asked the employee to contact Bingham about her missing stuff, and the employee indicated he would do so. That employee then went to Bingham's house and personally told Bingham that Mark was making "a big thing about her missing stuff", and that she wanted it (i.e. her missing stuff) returned to school by 3 p.m. that day.

21. That afternoon, Bingham returned the items he had taken from Mark's classroom to Juneau High School. He unloaded all the items from his van onto a cart, and put the cart inside the building near the receiving area. He did not tell anyone at the time that he

had returned the items he had taken from Mark's classroom; instead, he simply dropped them off in the cart and left the school.

22. Juneau's school safety personnel later found the cart near the receiving area with the items in it. They took photographs of it. After it was determined that the items in the cart belonged to Mark, the items were returned to her.

23. Juneau's security tapes from May 9 show Bingham pushing a dumpster into Mark's classroom and him loading numerous items onto it. That tape also shows Bingham pushing the dumpster outside. The tape from May 10 shows Bingham carrying items from a vehicle and placing them in a cart in the receiving area.

24. The building operations supervisor for Juneau, Acey Farmer, subsequently informed the District's project manager, Michael Gutierrez, about the incident involving Bingham. The reason Farmer told Gutierrez about it was because Gutierrez was responsible for coordinating and conducting disciplinary hearings concerning members of the sub crew. Farmer then obtained written statements from O'Donnell and Mark, and also obtained the security tapes and photographs referenced above.

25. Gutierrez scheduled a disciplinary hearing with Bingham for May 15. After this hearing was set, Bingham was notified of same. Bingham then called Union president Reszczynski and asked for union representation at that meeting. Reszczynski asked him what the meeting was going to be about, and Bingham said he didn't know. Reszczynski told Bingham that he and Michael Frank (the Union's vice-president) would be at the hearing with him.

26. On May 15, Bingham, Reszczynski and Frank met with Gutierrez and Farmer in a conference room at the District's building operations offices. The District representatives gave them the written statements from Mark and O'Donnell and then left the room.

27. After Gutierrez and Farmer left the room, Reszczynski and Frank met privately with Bingham. Reszczynski asked Bingham what happened. Bingham replied that he didn't know what they were talking about. Reszczynski then asked Bingham if he took the stuff, but Bingham did not answer. Reszczynski then told Bingham that he had to be truthful and tell them what happened. Bingham then said that he "might" have taken the items from the classroom. Reszczynski asked Bingham again if he took the stuff. This time, Bingham admitted that he had, in fact, taken the items from the classroom.

28. When the meeting with Gutierrez and Farmer resumed, Bingham and his union representatives were shown the pictures referenced in Finding 22, and Bingham was asked if he had seen those things before. While Bingham had just admitted to his union representatives that he had taken the items, Bingham's first response to Gutierrez and Farmer was that he had never seen the items before. Reszczynski then asked the District representatives to leave the room so he and Frank could privately caucus further with Bingham. They did.

29. After the District representatives left the room, Reszczynski asked Bingham again whether he had taken the items and whether he knew what was going on. Bingham was evasive and mumbled a response that Reszczynski could not understand. Reszczynski then told Bingham that he had to be truthful with these guys (referring to the District's representatives), whereupon Bingham admitted to taking the items. After that, Bingham told the two union representatives (Reszczynski and Frank) that he did not want them to represent him in the matter.

30. Reszczynski then drafted a letter which said: "I do not want Union Local 950 to represent me. I want other representation." Bingham signed it, and Reszczynski and Frank signed as witnesses. They then had Gutierrez and Farmer rejoin them, and they also signed as witnesses.

31. At that point, the meeting ended so that Bingham could seek a representative of his own choosing. Before the meeting ended though, Gutierrez told Bingham to return his badge and keys. He did. Gutierrez also told Bingham he was suspended without pay and that May 15 was his last day worked. He also told Bingham to let the District know when he had a new representative so that the disciplinary hearing could be reconvened.

32. Bingham subsequently tried to obtain other representation, but was unable to do so.

33. On May 22, Bingham called Reszczynski and said he wanted the Union to represent him at the reconvened disciplinary hearing. Reszczynski indicated it would do so. Reszczynski subsequently prepared a letter which indicated that Bingham had changed his mind and now wanted the Union to represent him. The letter provided thus:

> Malcolm Bingham now wants Union to represent him in a Building Operations Hearing on 5-22-06. President David Reszczynski, Union IUOE Local 950 and Michael Frank Union Rep IUOE Local 950 Building Reps.
>
> I Malcolm Bingham want Union Representation even though I refused 5-16-06, 4:19 p.m.

34. The disciplinary hearing reconvened on May 24. At the start of that meeting, Bingham signed the second letter in the presence of Reszczynski, Frank, Gutierrez and Farmer, who all signed as witnesses. Gutierrez then gave Bingham and the Union representatives a copy of the applicable District rules. Everyone present then watched Juneau's security tapes from May 9 and 10. As noted in Finding 23, those tapes show Bingham loading items from Mark's room onto a dumpster, him pushing the dumpster outside, and him returning the items to the school the next day and putting them on a cart. After the tapes were shown, the district representatives left the room.

35. After Gutierrez and Farmer left the room, Reszczynski asked Bingham why he had done what they saw on the videotapes. Bingham replied that he thought all the items he took were trash. He also said that he planned to take all the stuff to Green Bay School. Reszczynski then asked Bingham why he had brought the items back to Juneau, and Bingham replied that he did so because they were making a big deal out of the stuff that was missing. Reszczynski then asked Bingham why he had not told anyone that he had returned the items to Juneau, and Bingham replied that it was because he had to go to another assignment at another school.

36. When the joint meeting resumed, Bingham admitted he had taken the items from the classroom. When he was asked why he had done so, Bingham responded that he thought all the items taken were garbage. He also said he had taken them with the intent of taking them to another school. Gutierrez then read Sec. XIII, H of the Building Operations Work Rules which provides that the removal of property without permission will be classified as theft and will be treated as theft. Bingham admitted that he violated that rule because he never sought nor was granted permission to take Mark's items. That ended the meeting.

37. After the hearing was over, Reszczynski told Bingham what would happen next, namely that Classified Staffing would make the final recommendation for discipline to the superintendent. Reszczynski told Bingham to call him when he received the letter from the District so Bingham and the Union could file a grievance.

38. The District's standard operating procedure is that the person who conducts an investigatory meeting writes a recommendation afterwards to the (Department of) Classified Staffing. Gutierrez did that. He recommended that Bingham be terminated for knowingly violating the MPS and Building Operation rules. His written recommendation provided in pertinent part:

> **DISCUSSION:**
> Malcolm Bingham was assigned to substitute at Juneau High School, second shift, on May 9, 2006. On the morning of May 10, Toi Lisa Mark entered her classroom (128) and noticed that several items were missing from the room. She immediately reported the missing items to the school engineer, and they both went outside to the waste containers looking for the items in the event that they were accidentally disposed of. Later in the morning, it was discovered via security video that Mr. Bingham entered room 128 with a tilt-wheel dumpster and placed the items carefully in it. Note: Mr. Bingham had cleaned the room earlier that evening. The video continues to show Mr. Bingham taking the items to the receiving room and then pushing it outside. After viewing the videotape with the principal and engineer, Ms. Mark was given Mr. Bingham's residence phone number by the engineer. When speaking to Ms. Mark, Mr. Bingham initially denied having the items in his possession. Ms. Mark continued to insist that the items had to be in Mr. Bingham's possession as she informed him that several Juneau staff members looked in the dumpsters and opened garbage bags

and the items were no where to be found. Mr. Bingham then admitted that he had the items and would return them to school that day. Video of May 10 shows Mr. Bingham carrying the items from a vehicle and placing them onto a cart in the receiving room. When questioned why he removed the items from the room, Mr. Bingham claimed that he assumed it was garbage; therefore, he was going to give it to other schools that could use them. Michael Gutierrez read section XIII, H, of "Building Operations Work Rules" stating the removal of property without permission will be classified as theft and will be treated as theft. Mr. Bingham acknowledged the work rule and that no permission was granted to him for the removal of the items.

CONCLUSION:
Malcolm Bingham, Jr. violated "Building Operations Work Rules" and the MBSD "Employee Rules of Conduct" as they relate to theft when he knowingly removed the personal educational items of Ms. Mark as well as other items from classroom 128 at Juneau High School on May 9, 2006.

DISCIPLINARY ACTON RECOMMENDED:
It is recommended that Malcolm Bingham, Jr. be discharged from his position with the Milwaukee Public Schools. Mr. Bingham is currently on suspension without pay pending the decision of Classified Staffing.

Michael Gutierrez /s/
Michael Gutierrez
Project Manager

39. On June 1, MPS Personnel Analyst Michael Bellin concurred with the recommendation of Gutierrez and issued a letter to Bingham which provided in pertinent part:

. . .

Based on your record, the information presented at the hearing, and the recommendation of the Manager of Buildings, Grounds, and Fleet, you were suspended without pay since May 10, 2006 and you are now discharged from MPS, effective at the start of business on Thursday, June 1, 2006.

The reason for this action is:

Theft

Your actions constituted prohibited conduct as defined in the "Employee Rules of Conduct" adopted by the Milwaukee Board of School Directors on

> September 29, 1999, as well as a violation of the Building Operations Work Rules.
>
> You may file a grievance as to the just cause of this action within five (5) days of your receipt of this notice. . .

40. After Bingham was terminated, Reszczynski advised him to sign a grievance, which he did. On June 8, the Union submitted a second step grievance to Deborah Ford, the District's executive director of human resources. The grievance alleged Bingham had been fired without just cause. It further alleged that Bingham should have been suspended, rather than discharged.

41. A second-step grievance meeting was subsequently held with Bellin. At that meeting, Bingham admitted he had taken the items from Mark's room. He told Bellin that in doing so, he intended to take them to another school.

42. On Bellin's recommendation, Ford denied the second-step grievance on July 28. Her response stated in relevant part: "The evidence supports the allegations and the level of discipline is appropriate."

43. After reviewing Ford's denial of the grievance, Reszczynski called Bingham and asked if he wanted to go to the next step. Bingham said he did. Reszczynski prepared a third-step grievance appeal form addressed to William Andrekopoulos, the District's superintendent. After Bingham signed it, Reszczynski filed it with the District's labor relations office on August 2, 2006.

44. Prior to the third-step meeting, the Union sought the advice of its attorney as to the likelihood of success in an arbitration of the grievance. After reviewing Bingham's personnel file and all the materials relating to his discharge, the attorney advised that if the Union went to arbitration, it was unlikely to prevail (in arbitration).

45. A third step grievance meeting was subsequently held with the District's labor relations specialist, David Yaros. At that meeting, Bingham admitted to taking the items from Mark's room, but insisted he intended to take the materials to other District buildings. During the meeting, Reszczynski sought a last-chance agreement (for Bingham) as an alternative to termination, but Yaros did not agree to one (i.e. a last-chance agreement). Yaros asked Bingham if he had anything to add, and Bingham responded that he didn't follow the proper procedures, and that he should have asked somebody before taking that stuff. The meeting ended with Yaros saying he would prepare the District's response within ten working days.

46. After the meeting ended, Reszczynski told Bingham that was the end of the grievance proceedings, but that Bingham should call him after he received the District's decision, because there was another avenue open.

47. On Yaros's recommendation, Andrekopoulos denied the grievance on September 20. His responses stated in relevant part: "[G]iven the nature of the violation and the grievant's work record, the discipline imposed was appropriate and was imposed for just cause."

48. Based on its understanding of the facts and its attorney's opinion that it was not likely to prevail in arbitration, the Union decided not to appeal the grievance to arbitration.

49. Reszczynski attempted to contact Bingham by telephone to tell him of the Union's decision (not to appeal the grievance to arbitration), but was unsuccessful. He did not hear from Bingham again until Bingham filed the instant prohibited practice complaint.

50. Neither Reszczynski nor Frank harbored any bias or personal animosity against Bingham.

51. In October, 2006, Harvey Klumb, the lead worker on the District's pesticide crew and a member of the Union's bargaining unit, was charged with removing fire extinguishers from the District's 39th Street service facility. Klumb had no prior discipline, and both he and his wife had ongoing health/medical issues. On Gutierrez's recommendation, the District terminated Klumb for theft.

52. The Union grieved Klumb's discharge up to the third step.

53. At the third step meeting with Yaros on Klumb's grievance, the Union requested a last chance agreement. Yaros agreed to the Union's request. Yaros indicated that the reasons he agreed to a last-chance agreement for Klumb were as follows: Klumb was a long-term employee with no prior discipline; Klumb and his wife had ongoing medical problems; Klumb was on strong medications that may have affected his conduct; and when Klumb was confronted about the incident, he immediately admitted to the misconduct.

54. Following his discharge, Bingham contacted Reszczynski about some overtime pay he claimed he was due for work at Engleburg School on May 7. The District claimed Bingham had falsified his time for May 7 and refused to pay the overtime. Reszczynski investigated Bingham's claim and concluded that Bingham had worked the hours he claimed for May 7. Reszczynski then called Gutierrez and sought payment for the time in question. Although Gutierrez thought Bingham was not entitled to the pay, he nonetheless opted to pay Bingham for the time in question to settle the dispute.

55. The Union's conduct in representing Bingham at disciplinary meetings preceding his discharge and processing his subsequent discharge grievance, and its decision to not appeal that grievance to arbitration, does not reflect arbitrary, discriminatory or bad faith conduct toward Bingham.

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

CONCLUSIONS OF LAW

1. Complainant Bingham did not establish that Respondent International Union of Operating Engineers Local 950, by its representation of Bingham at disciplinary meetings preceding his discharge and processing his subsequent discharge grievance, and its decision to not appeal that grievance to arbitration, acted in an arbitrary, discriminatory or bad faith fashion toward Bingham. Respondent Union therefore did not violate its statutory duty of fair representation to Bingham and thus did not commit a prohibited practice within the meaning of Sec. 111.70(3)(b)1, Stats., by its conduct herein.

2. Inasmuch as Complainant Bingham did not prove that International Union of Operating Engineers Local 950 violated its statutory duty of fair representation to Bingham by its conduct herein, the Wisconsin Employment Relations Commission will not exercise its Sec. 111.70(3)(a)5, Stats., jurisdiction over Respondent Milwaukee Public Schools to determine the merits of Complainant Bingham's grievance claim that Respondent Milwaukee Public Schools violated the collective bargaining agreement between Respondent Milwaukee Public Schools and Respondent International Union of Operating Engineers Local 950 when it discharged Bingham in June, 2006.

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

ORDER

The complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 19th day of February, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

**MILWAUKEE PUBLIC SCHOOLS AND
I.U.O.E., LOCAL 950 (BINGHAM)**

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

As noted in this decision's prefatory paragraph, it can be inferred from the complaint's attachments that the Complainant is alleging that the District discharged him without just cause, and that the Union breached its duty of fair representation towards him.

POSITIONS OF THE PARTIES

Complainant

At the hearing, Bingham made the following closing statement:

> I have been serving for the Board for a long period of time, since '79, where the Board was my life. I enjoy working for the Board. I enjoy serving. And after hearing from this meeting today with all these liars around here, and all these people saying where I was such a bad employee, that my work performance was so bad, or whatever, that where – you know, I'm just thankful for you to give me this last shot where all my dying members told me to keep fighting, but I'm trying to move on with my life. And if the Board is going to be such of a chaos and corruption, I don't think need to be here, anyway. So until I get a million dollars, where I might have appeal, come back and try again, but other than that, I thank you for my time.

In his post-hearing brief, Bingham addressed what he described as the "facts and arguments with definitive truths that did not get mentioned nor expressed in [his] defense" (at the hearing).

Bingham begins by making the following comments about his "infraction" (i.e. his taking the items from Mark's classroom). First, Bingham maintains that the District's picture of him as "a liar and a thief" is not a true picture of him and his character. Second, Bingham challenges the credibility of teacher Mark. According to Bingham, her credibility is questionable. Third, Bingham avers that teacher Mark was responsible for the items being taken from her room because she failed to "secure" them. According to Bingham, those items could have been secured by either taking them home overnight or putting them in a locked receptacle, but Mark did neither. Fourth, Bingham characterizes his taking the items from Mark's classroom as simply a "misunderstanding" on his part. He attributes this "misunderstanding" to the fact that he had just been assigned to Juneau High School and was unfamiliar with the way things were done at that school. Fifth, he implies that by taking the items from Mark's classroom, all he was doing was "recycling" them. He notes in this regard that "the world has now gone 'green' and we must all do our part for this planet." Sixth, he

emphasizes that he returned the items to the school. In his view, he did not need to announce that he had returned the items. Seventh, he avers that the items taken had little or no cash value. Building on that premise, he asks rhetorically why he would jeopardize his employment with the District only to steal items of little or no value.

Next, Bingham addresses the level of discipline which was imposed by the District. According to Bingham, discharge was too harsh a penalty under the circumstances so there was not just cause for his discharge. Here's why. First, Bingham avers that the District failed to give due consideration to his length of service (26 years) to the District and his "credible character." Bingham maintains that he honed his "craft of cleaning" and was always willing to help teachers and administrators with various matters. Second, he notes that Harvey Klumb (another employee who was fired for theft) was reinstated by the District. Bingham asks rhetorically why Klumb was reinstated but he was not.

Next, Bingham contends that he did not receive fair representation from the Union. Here's why. First, he notes that his union representatives at all the meetings involved here were fellow MPS employees Reszczynski and Frank. He disapproved of them being his representatives in this matter and tried to get somebody else. According to Bingham, Reszczynski and Frank were untrustworthy and were not on his side. In his view, they were "partial to the opposition" (i.e. management) and presumed he was guilty rather than innocent. He also felt their "support and assistance" to him was insincere. Additionally, he characterized them as "contributors to the problem instead of being part of the solution." Second, Bingham avers that he received poor and inadequate representation from Reszczynski when the grievance was being processed. He attributes this, in part, to the fact that Reszczynski has little "arbitration training at a formal school." Third, Bingham contends that there should have been an attorney "looking out for [his] well being" and representing him at the disciplinary meetings (rather than Reszczynski). He notes in this regard that the Union had an attorney represent it in this case, but he was unable to retain one. Fourth, Bingham asserts that the Union should have appealed his discharge to arbitration, or in the alternative, gotten his job back (as it did for Harvey Klumb).

In sum, Bingham asks the Examiner to impose "fair play and justice" here, and "vindicate him" by dismissing the "false accusations" made against him and reinstating him.

Respondent District

The District's position is that the complaint should be dismissed. It elaborates as follows.

Before it addresses the Complainant's claim that the Union violated its duty of fair representation and the District fired him without just cause, the District comments at the outset on Bingham's credibility. As the District sees it, Binham's conduct and testimony at the hearing "show he should be accorded little or no credibility on any matter of substance." Here's why. First, it notes that when he was initially contacted about the items missing from

Mark's room, he lied separately to Tim O'Donnell (the Building Engineer) and to Mark about having taken the items. Specifically, he told them both that the items were still in the building when they were actually in his car. The District avers that as a result of those lies, "school personnel extended a considerable amount of time searching in vain for the missing items in the building and the three large dumpsters containing the previous days' garbage." Second, the District notes that at the first-scheduled disciplinary hearing, Bingham lied to his own union representatives when they asked him about the matter. While he later admitted to his union representatives in a caucus that he had taken the items, he then lied to Gutierrez and Farmer when he said he had never seen any of the items shown in the photographs. Third, the District avers that Bingham lied at the hearing when he testified the items taken were all by Mark's garbage can and had garbage on top of them. To support that premise, it relies on Mark's testimony that none of the items had garbage on them and they were located at various places around the room and not by the garbage can. Fourth, the District asserts that at the hearing, Bingham was evasive and hedged his responses to simple questions. To support that premise, it notes that while he admitted he did not tell anyone he had returned the items, he evaded a question asking if he knew Mark was particularly concerned because she needed some of them for an after-school event. The District further notes that when he was asked about his knowledge of the rule that prohibited employees from taking any items (whether garbage or not) without prior supervisory or principal approval, he hedged until confronted with his unemployment compensation hearing testimony, where he had acknowledged that rule and the fact that he had signed an acknowledgement form to this effect. Based on what the District calls this "history of untruthfulness and prevarication" it is the District's view that there is little reason to believe anything he has to say in his favor. According to the District, this includes most notably his claim (raised at the second disciplinary meeting) that his purpose in taking the items was altruistic – i.e., an intent to give them to another school.

Next, the District points out that under the MAHNKE decision, a complainant must first show that the Union somehow violated its duty of fair representation before the complainant can even attempt to pursue a contract claim against the Employer. As the District sees it, Bingham did not meet that threshold requirement (i.e. proving that the Union breached is duty of fair representation toward him) because he did not prove that the Union's conduct herein was arbitrary, discriminatory or in bad faith. Here's why. First, it notes that when Bingham had previously been suspended, the Union contacted him and offered to file grievances, but Bingham himself declined. Second, it notes that while this matter was still pending in the grievance process, "the Union successfully pressured MPS to pay the complainant for six hours of time that Mr. Gutierrez testified he was not entitled to." Third, it notes that the Union sought, albeit unsuccessfully, a last chance agreement (in lieu of termination). Fourth, the District emphasizes that the Union faced a situation where the employee admitted to a rule violation for theft. That fact, plus the facts already noted,"could reasonably suggest a likelihood of significant difficulties for the complainant at an arbitration hearing." Fifth, the District notes that the Union sought an objective, outside opinion on the likelihood of prevailing in arbitration from their attorney. After a review of the facts and the complainant's personnel records, their attorney advised them it was unlikely the union would prevail. According to the District, that conclusion was certainly reasonable given Bingham's poor work

history, his propensity for lying, and the fact that Bingham admitted to a work rule violation for theft.

Alternatively, the District argues that even if the Examiner finds that the Union did breach its duty of fair representation, he should still dismiss the complaint against the District because the termination was supported by just cause. Here's why. First, it again notes that Bingham did not dispute violating the District and Building Operation rules defining and prohibiting theft. It further notes that he admitted he knew and understood that he was not to remove any items from the school for any reason without permission, but he took the items anyway. As the District sees it, the fact that he returned the items the next day is irrelevant because "he did so only because he knew others already knew he had taken them, did so surreptitiously, and did so only after telling Mr. O'Donnell and Ms. Mark the items were still in the building." Second, it again notes that Bingham lied repeatedly about his actions to fellow employees, his union representatives and management personnel. Third, the District asserts that Bingham's disciplinary history was poor (citing his two prior offenses in 2006, his two prior suspensions and his recent demotion). As the District sees it, those matters establish that just cause existed for terminating Bingham.

Finally, the District addresses Bingham's allegation of disparate treatment as follows. First, it notes that at the hearing, Bingham alluded to an employee who was apparently demoted, but was subsequently allowed to take a test for promotion and was promoted back into the job from which he had been demoted. The District submits that "based upon the above facts, it is impossible to conclude this alleged incident has any relevance whatsoever to the complainant's case." Second, with regard to the Harvey Klumb matter, the District acknowledges that that employee was fired for theft – just as Bingham was – but was subsequently reemployed pursuant to a last-chance agreement negotiated at the third step of the grievance procedure between the Union and Yaros. The District emphasizes that the following factors distinguish Klumb's circumstances from Bingham's: 1) a long period of service with no prior discipline; and 2) Klumb's wife, as well as Klumb, "both suffered from very severe medical problems (so severe Mr. Yaros characterized their situation as a horror story), subjecting that employee to unbelievable stress levels that required very strong judgment-affecting medications." As the District sees it, these factors establish that Klumb's case had mitigating factors, while Bingham's case did not. Thus, the District argues that Klumb's case is distinguishable from Bingham's case.

In sum then, the District asks that the complaint be dismissed.

Respondent Union

The Union's position is that it did not breach its statutory duty of fair representation to Bingham by its conduct in connection with his termination and subsequent grievance. It maintains that to the contrary, it provided him with the best representation he possibly could have expected under the circumstances. In its view, it represented him in connection with both his termination and his grievance diligently and vigorously until there was nothing more it could reasonably do to undo his termination. It elaborates as follows.

The Union begins by pointing out that under the MAHNKE decision, in order to make a cognizable claim in a statutory duty of fair representation case, the complainant has to show that the union's conduct against the employee was arbitrary, discriminatory or in bad faith. The Union argues that Bingham did not meet that standard here and specifically failed to prove that the Union's conduct was arbitrary, discriminatory or in bad faith.

The Union contends that Reszczynski and the other Union officers "did everything they could to help Bingham present his case in the best light possible and to obtain the best possible outcome for him under the circumstances." As the Union sees it, it was Bingham himself who placed "substantial obstacles" in their way both when they represented him in the disciplinary meetings and when they processed his discharge grievance. It identifies the following "obstacles" which it faced. First, there was the matter of Bingham's conduct on May 9, 2006. On that day, he took a cartful of items out of a classroom that the teacher did not consider trash and did not want thrown out. Bingham knew that the District's rules prohibited the removal of anything, even garbage, from school premises, and regarded it as theft. However, Bingham loaded the cartful of items into his car and took them home after his shift ended. While Bingham claimed that he intended to take the items to another school, the Union submits that another interpretation was plausible, namely that he took them for his own personal use or profit. Second, the next day, two people (O'Donnell and Mark) called Bingham and asked him where he had put the items taken from the teacher's classroom. Bingham lied to both of them about the whereabouts of the items, specifically telling both of them that the items were still at the school (when they were not). Third, while Bingham returned the items to the school that same day, he did not tell anyone he had done so – he simply loaded them in a cart at the loading dock and took off. Fourth, when the Union tried to represent Bingham at the May 15 disciplinary meeting, he repeatedly lied about his actions to Reszczynski and Frank before he finally admitted that he had taken the items. Fifth, after Bingham had admitted to Reszczynski and Frank that he had taken the items, he then turned around and lied to Gutierrez about it (specifically telling Gutierrez that he had never seen the items shown in the photographs). Sixth, it was at that point that Bingham essentially fired the Union as his representative.

Next, the Union opines that "even though the facts and Bingham's obvious lack of candor made the Union's task extremely difficult", it nonetheless filed a grievance on Bingham's behalf and advanced it to the third step, the last step before arbitration. It notes that before the third-step meeting, Reszczynski and the other union officers took all of the information they had obtained, both from management and from Bingham, to the Union's attorney for review. After the attorney reviewed all that information, he advised them that the Union was unlikely to succeed in any arbitration of the grievance. The Union also notes that at the third-step meeting, Reszczynski tried to get the District to agree to a last-chance agreement for Bingham, but the District would not agree. With that, the Union submits there was nothing more it could do "that had any meaningful chance of getting Bingham his job back."

The Union contends that the magnitude of the Union's task in representing Bingham became apparent at the instant hearing "when he veered off into completely weird territory." As an example, it notes that at the hearing, when he testified about Mark's telephone call to

him, he admitted telling her that her "stuff was still in the building" (when in reality it was still in his car). He then insisted that was not a lie because he considered anything in his car to be MPS property. The Union avers this contention was patent nonsense, and illustrates why it was under no obligation to make this argument to an arbitrator. It notes in this regard that the MAHNKE decision (quoting HUMPHREY) held that unions are not obligated to pursue "wholly frivolous grievances which would only clog the grievance process."

Finally, the Union submits that Bingham's complaint about the Union's handling of his termination and subsequent grievance comes down to his unhappiness that it was not successful in obtaining a different outcome, in particular a last chance agreement, such as the District later agreed to extend to Klumb. According to the Union, the fact that the Union did not obtain the same result for Bingham as it did for Klumb does not make its conduct arbitrary. It notes that the Klumb matter occurred after Bingham's matter, including the grievance, was completed. Second, it notes that it made the same effort to get a last-chance agreement for Bingham that it did for Klumb. The difference was that Yaros, the District's representative, saw substantial differences between Klumb's case and Bingham's case.

The Union therefore asks that the complaint against it be dismissed.

DISCUSSION

The complaint contends that the District violated Secs. 111.70(3)(a)5 and that the Union violated Secs. 111.70(3)(b)1, Stats. These sections will be reviewed separately below. The discussion on each section is essentially divided into two parts: in the first part, I identify the applicable legal standards and in the second part, I apply those legal standards to the facts. I will address the Complainant's (3)(b)1 claim against the Union first.

Alleged Violation of Sec. 111.70(3)(b)1

Section 111.70(3)(b)1, Stats. states that it is a prohibited practice for a municipal employee, individually or in concert with others "[t]o coerce or intimidate a municipal employee in the enjoyment of the employee's legal rights, including those guaranteed in sub. (2)." The reference in Sec. 111.70(3)(b)1, Stats., to "a municipal employee. . .in concert with others" has historically been interpreted to extend the prohibitions in Sec. 111.70(3)(b)1, to labor organizations. RACINE UNIFIED SCHOOL DISTRICT, DEC. NOS. 14308-D, 14389-D, 14390-D (WERC, 6/77). Section (3)(b)1 has also been held to incorporate a labor organization's duty to fairly represent those in the bargaining unit for which it serves as the exclusive collective bargaining representative. See MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 31602-C (WERC, 1/07). In order to prove a violation of the duty of fair representation, it is necessary for the complainant to show, by a clear and satisfactory preponderance of the evidence, that the "union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." MAHNKE V. WERC, 66 Wis. 2D 524, 531 (1975) (quoting VACA V. SIPES, 386 U.S. 171, 190 (1967)). Under this standard, 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). Additionally, the standard just referenced does not require the union to arbitrate all grievances because "a union has considerable latitude in deciding whether to pursue a grievance through arbitration." E.g., MAHNKE, *supra*, 66 Wis. 2D at 531 (quoting HUMPHREY V. MOORE, 375 U.S. 335, 349 (1964)).

Having identified the legal standards applicable to duty of fair representation cases, I've decided to preface my discussion on the application of those standards to the facts involved here with the following quote from one of the Commission cases cited above:

> 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.

MILWAUKEE PUBLIC SCHOOLS, *supra*, at page 13.

In this case, Bingham contends that the Union breached its duty of fair representation to him in several respects.

Bingham's first contention is that Union representatives Reszczynski and Frank were "partial to the opposition" (i.e. management), untrustworthy, insincere, and not on his side. In addressing that contention, I've decided to first review what happened at the initial disciplinary meeting because I believe it provides some important context. At that meeting, Bingham had a different strategy than Reszczynski and Frank did about how to respond to the matter being investigated (i.e. what had happened to the items taken from Mark's classroom). What I'm referring to is this: Bingham's strategy was to lie. Specifically, he initially lied to both his union representatives and the District's representatives about being culpable for the items missing from Mark's classroom. Reszczynski and Frank did not support that strategy. They thought that given the evidence being presented by the District of Bingham's culpability, the better strategy was for him to be candid and admit to taking the items and try to make a

deal. From a labor relations perspective, that strategy has considerable merit and is well within the mainstream of conventional labor relations advice. It certainly has more merit than lying does. While this difference in strategy may have led Bingham to believe that Reszczynski and Frank were, in his words, "partial to the opposition" and not on his side, the facts show otherwise. Specifically, the facts show that Reszczynski and Frank tried to represent Bingham as best they could under the circumstances.

In the context of this case, the legal standards identified above require Bingham to show with objective evidence that his union representatives did something improper at the disciplinary meetings or in processing his subsequent grievance. However, the record evidence does not show any improper conduct or wrongdoing by Reszczynski and Frank toward Bingham. In so finding, it is specifically noted that there is nothing in the record establishing that either Reszczynski or Frank had any bias, personal animosity or predisposition against Bingham. Said another way, there is no evidence of any bad blood or negative feelings between them. Additionally, there is nothing in the record showing that Reszczynski and Frank somehow disregarded the merits of Bingham's situation or grievance. Finally, there is no evidence in the record that Reszczynski and Frank somehow conspired with the District to get Bingham fired. As a result, Bingham's conclusory allegations that Reszczynski and Frank were "partial to the other side" and not on his side in the disciplinary meetings and the subsequent grievance meetings lacks a factual basis in the record.

The focus now turns to Bingham's contention that he should have been represented by an attorney at the disciplinary meetings rather than by fellow employees Reszczynski and Frank. This claim is obviously based on the premise that a union has a legal duty to supply bargaining unit members with legal counsel. However, insofar as the Examiner can determine, this claim of a "right" to legal representation has been plucked from thin air. First, there is nothing in the applicable collective bargaining agreement which specifies that the Union has to provide legal counsel to bargaining unit members. Second, the Complainant does not cite any statutory authority which specifies that a union has to provide legal counsel to bargaining unit members, and the Examiner has not found any either. Third, Commission caselaw does not establish that unions have to provide legal counsel to bargaining unit members either. VILLAGE OF WEST MILWAUKEE (POLICE DEPARTMENT), DEC. NO. 28075-A (Jones, 4/98), *aff'd by operation of law*, DEC. NO. 28075-B (WERC, 5/98). The foregoing establishes that neither the applicable collective bargaining agreement, nor statutory authority, nor Commission caselaw obligates a union to provide legal counsel to bargaining unit members. What the Complainant did here was simply assert that the Union had to provide him with legal counsel without ever establishing any basis to support this conclusion. That means that the Union was not obligated to provide Bingham with legal counsel as he claimed. Consequently, the Union's failure to provide legal counsel to Bingham for the disciplinary meetings was not a violation of its duty of fair representation.

Next, Bingham notes that although the Union did not supply him with an attorney for his disciplinary meetings, the Union did have an attorney represent it in this case. Bingham sees that as significant. I don't. Here's why. Unions usually don't have attorneys represent

employees at disciplinary meetings or in grievance meetings. Similarly, employers don't usually bring in their attorneys for disciplinary meetings and grievance meetings. However, once litigation of any type commences, unions and employers commonly bring in their attorneys. That's what happened here. After Bingham filed the instant complaint against both the District and the Union, each side decided they wanted to have an attorney represent them in the litigation. They could do that. Thus, the fact that the Union had an attorney represent it in this case, while it did not supply an attorney to Bingham for his grievance meetings, is of no legal consequence.

Next, Bingham faults the Union for not appealing his grievance to arbitration. However, as was noted earlier, unions do not have to arbitrate all grievances. They are given considerable latitude and discretion in making that decision. In this case, the Union sought an opinion from their attorney on the likelihood of prevailing in arbitration on Bingham's grievance. After the attorney reviewed all the facts and merits of this case, the surrounding circumstances, and Bingham's work and disciplinary history, he concluded it was unlikely the Union would prevail in arbitration. That conclusion (i.e. that the grievance lacked merit and had little chance in arbitration) was a reasoned decision with a sound basis in labor relations. The Examiner therefore finds that the Union's decision to not appeal Bingham's discharge to arbitration was made in good faith and was based on the merits of the grievance.

Finally, Bingham faults the Union for not getting his job back. I've decided to begin my discussion on this claim by noting that this claim is similar to another claim Bingham made in his brief about who bears responsibility for what happened. In his brief, Bingham claimed that building engineer O'Donnell should have told Mark how to deal with the garbage, and that teacher Mark failed to "secure" the items by taking them home overnight or putting them in a locked receptacle. Thus, Bingham points the finger of blame, so to speak, at both of them for what happened. Bingham's contention that the Union failed to get his job back is similar in that he tries once again to pass responsibility to someone else for what happened. However, the Union was not responsible for Bingham's plight (i.e. his losing his job). By that statement, I mean it was not the Union's fault that he was in this situation. After all, it was not the Union that took the items from Mark's classroom, put them in a vehicle, and drove off with them. Bingham alone did that, so the position he found himself in later was of his own doing. Consequently, he was solely responsible for that conduct. While the Union tried to help him afterwards, it was not able to "undo" his termination. It certainly tried though. Specifically, at the third step of the grievance procedure, the Union tried to get a last chance agreement for Bingham in lieu of his being terminated, but the District would not agree to one. That was the District's call to make. The fact that the Union later got a last chance agreement for Harvey Klumb is of no legal consequence because the factual circumstances and mitigating factors referenced in Findings 51 and 53 show substantial differences between Klumb's case and Bingham's case. Thus, the fact that the Union got a last chance agreement for Klumb but not for Bingham does not make the Union's conduct toward Bingham arbitrary. It is therefore held that the Union's inability to get Bingham's job back was not a duty of fair representation violation.

Based on the foregoing, it is held that the Union's conduct toward Bingham was not arbitrary, discriminatory or in bad faith, and the Union therefore did not violate its duty of fair representation to Bingham. Accordingly, no violation of Sec. 111.70(3)(b)1, Stats., has been found.

Alleged Violation of Sec. 111.70(3)(a)5

Section 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 affecting municipal employees. . ." This provision makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. The traditional mechanism for enforcing a collective bargaining agreement is grievance arbitration. Where a collective bargaining agreement contains a grievance arbitration procedure, it is presumed (absent an express provision to the contrary) to be the exclusive method of settling contractual disputes. MAHNKE, *supra*. If the union has control over the contractual grievance arbitration procedure and elects not to take a grievance to arbitration, an employee may not pursue a claimed breach of the agreement under Sec. 111.70(3)(a)5, Stats., unless the union has violated its duty of fair representation when deciding not to take the grievance to arbitration. MAHNKE, *supra.*

The Complainant asks the Examiner to review the merits of his discharge. I decline to do so. My rationale follows.

There is a basic jurisdictional problem with my deciding the merits of the Complainant's contract claim (i.e. the merits of his discharge grievance). It is this. It has long been the Commission's practice not to exercise its collective bargaining agreement enforcement jurisdiction regarding a dispute that is subject to resolution under an agreed-upon and presumptively-exclusive grievance procedure like the one contained in the District's 2005-06 collective bargaining agreement with the Union. E.G., MILWAUKEE COUNTY, DEC. NO. 28525-B (Burns, 5/98) at 12, aff'd –C (WERC, 8/98). This means that the Commission will only decide the merits of a grievance if it is shown that the complainant's access to the applicable grievance procedure is being prevented by a union failure to fairly represent the employees' interests on the subject through the grievance procedure. E.G., MILWAUKEE COUNTY, *supra*. In other words, in order for a contract claim to be addressed in this type of case, a complainant must first show that the union violated its duty of fair representation to the employee.

The Examiner has already concluded, above, that the Union's conduct toward Bingham was not arbitrary, discriminatory or in bad faith and that the Union did not violate its duty of fair representation to him. This finding, in turn, precludes the Examiner from addressing the Complainant's contract claim against the District. Accordingly, the Examiner declines to exercise the Commission's MERA collective bargaining agreement enforcement jurisdiction to decide the merits of the Complainant's contract claim (i.e. the merits of his discharge grievance).

. . .

In summary then, it is concluded that the Union did not violate Secs. 111.70(3)(b)1, Stats., by its conduct herein. Given that finding, I have not exercised the Commission's jurisdiction under Sec. 111.70(3)(a)5, Stats., to determine if the District violated the parties' collective bargaining agreement by discharging Bingham. The complaint has therefore been dismissed.

Dated at Madison, Wisconsin, this 19th day of February, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

REJ/gjc
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