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-B

Appearances:

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

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

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

ORDER ON REVIEW OF EXAMINER'S DECISION

On February 19, 2008, Examiner Raleigh Jones issued Findings of Fact, Conclusions of Law and Order in the above-captioned matter, concluding that the Complainant, Malcolm Bingham, Jr. (Bingham) had not established that the Respondent, International Union of Operating Engineers, Local 950 (Union) had failed to meet its duty of fair representation in deciding not to arbitrate a grievance concerning Bingham's termination from employment by the Respondent Milwaukee Public Schools (MPS). Accordingly, the Examiner dismissed the charges against both the Respondent Union and the Respondent MPS.

On March 6, 2008, Bingham filed a timely petition seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. The parties were provided an opportunity to submit briefs on or before April 28, 2008 in support of or opposition to the petition for review, but they elected to rely upon the briefs they had submitted to the Examiner. The Commission considered those briefs, along with the entire record, in reaching its decision in this matter.

For the reasons set forth in the Memorandum that follows, the Commission largely affirms the Examiner's Findings of Fact, affirms his Conclusions of Law, and affirms his Order dismissing the complaint.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

1. The Examiner's Findings of Fact 1 through 43 are affirmed.

2. The Examiner's Findings of Fact 44 through 48 are set aside and the following Findings of Fact 44 through 47 are made:

> 44. After filing the third step grievance, the Union sought the advice of its attorney as to the likelihood of success if the grievance were arbitrated. The Union provided the attorney with Bingham's personnel file and all the materials relating to his discharge. The attorney subsequently advised the Union that it was unlikely to prevail in arbitration.
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> 45. The Union and Bingham met with MPS officials at the third step of the grievance procedure, during which the Union sought a last-chance agreement for Bingham, as an alternative to termination. MPS refused.
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> 46. The Union did not pursue Bingham's termination grievance to arbitration, based upon its understanding of the facts and counsel's advice that arbitration would likely be unsuccessful.
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> 47. By letter dated September 20, 2006, MPS denied Bingham's grievance at Step 3. After Bingham received the denial, he understood that the Union did not intend to pursue his grievance to arbitration and decided not to pursue the matter at that time.

3. The Examiner's Findings of Fact 50 through 55 are renumbered 48 through 54 and are affirmed.

4. The following Finding of Fact 55 is made:

> 55. After learning about the Klumb situation, Bingham decided to file the instant prohibited practice claim.

5. The Examiner's Conclusions of Law are affirmed.

6. The Examiner's Order is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of June, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Milwaukee Public Schools

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

With some exceptions explained below, the Examiner's Findings of Fact have been affirmed and the most pertinent facts are summarized as follows.

Malcolm Bingham, Jr. worked for MPS for about 26 years, first in building services, where he was a member of a different bargaining unit, and more recently as a Boiler Attendant and, as a result of a promotion in 2005, an Engineer. In the latter two capacities he was a member of the Union's bargaining unit. At the time of the events giving rise to this case, Mr. Bingham had been demoted from Engineer to Boiler Attendant because he had not obtained a structural pesticide license that was a requirement for keeping the Engineer position. After his demotion, Mr. Bingham did not have a regular building assignment and instead floated to various buildings as assigned by MPS supervisors.

In the 26 years preceding his discharge, Mr. Bingham was the subject of three disciplinary actions: a five-day suspension for poor attendance and absence without leave in 1997; a three-day suspension for poor work performance and failure to perform assigned tasks in 2004; and a written reprimand for failure to attend a mandatory in-service meeting in 2006. The record is silent as to whether Mr. Bingham grieved the 1997 suspension. He did not grieve the 2004 suspension or the 2006 reprimand.

In the spring of 2006, the school year was drawing to a close, and Juneau High School was also about to be closed permanently. As a result, at Juneau there were considerable trash and debris for removal to dumpsters as well as considerable teaching materials and personal items that teachers were packing to take home with them. Administrators had instructed staff to mark items for disposal as "trash" so as to clearly differentiate them from materials to be saved.

Juneau teacher Lisa Mark had been packing up her classroom for some time and, among the items she had collected but not marked as "trash" were posters, books, pencils, notebooks, educational materials, accordion folders, a megaphone, the school mascot's costume, and a 50-pound bag of popcorn. These items were packed into a green basket, a red box, and a large clear Rubbermaid tub and were placed in various locations around her classroom. They were not situated near the trash can at the front corner of her classroom, nor, although many of these items had been in her classroom for some weeks, had they been mistaken for trash by any custodial worker.

On May 9, 2006, Mr. Bingham was assigned to work the second shift at Juneau High School, primarily picking up trash and cleaning classrooms and other places in the building. At that time, in Mark's classroom, the megaphone and the mascot costume were in a black plastic bag which, together with the unopened 50-pound bag of popcorn, had been placed on the floor at the front of the classroom several feet away from the trash can and not marked for disposal. File folders containing the posters were on a table, the Rubbermaid tub was on the floor under the

table, and the green basket and red box, neatly packed with items such as new pencils, notebooks, and supplies, had been placed on desks or on the window ledge. None were marked as "trash." Some were MPS property; some were Mark's personal property. After asking another worker's opinion, Bingham concluded that all of these items were trash. He disposed of the folders containing the posters by tossing them into the dumpster, where they were found the next day after a search by administrators and Ms. Mark. Bingham decided that the other items could be used by staff and children at the Green Bay Elementary School, where he used to work, and he removed them to his vehicle with the intention of transporting them there. Mr. Bingham was captured on security video cameras pushing a dumpster into Ms. Mark's classroom and loading numerous items into it, and then pushing it outside.

MPS rules clearly state that all garbage removed from a school building should be deposited in MPS-owned dumpsters and that even such trash was MPS property that could not be taken home by employees. Bingham was aware of these rules.

On May 10, Ms. Mark reported the items missing from her classroom and, being especially concerned about the popcorn, mascot costume, and megaphone, which she needed for an after-school event that afternoon, she obtained Mr. Bingham's home telephone number and called him there to insist that he provide whatever information he could about the whereabouts of the missing materials. Later that afternoon, without notifying supervisors, administrators, or Ms. Mark, Mr. Bingham went to the building before his shift was to begin at another building located some distance away, unloaded several items from his vehicle, and placed them on a cart in the receiving area, all of this captured on security videotapes. He then left the building to report for duty elsewhere. The items, which were the remaining items missing from Mark's classroom, were discovered shortly thereafter by a building employee and returned to Mark.

After gathering written statements from Ms. Mark and another witness, the District scheduled an investigatory interview with Mr. Bingham for May 15. Mr. Bingham asked Union President Reszczynski for representation at that meeting, and Mr. Reszczynski as well as Union Vice-President Michael Frank were present when the meeting convened. At the outset of the meeting, MPS provided Mr. Bingham and the Union with the written witness statements and then allowed the Union representatives to meet privately with Mr. Bingham to discuss the situation. During this meeting, Mr. Bingham first expressed ignorance about the events in question, but eventually, urged by Mr. Reszczynski to be truthful, admitted that he had indeed removed the items. However, when the meeting with MPS supervisors reconvened shortly thereafter, Bingham was shown photographs of the removed materials and denied having seen them before. The Union then sought another recess for a private meeting with Mr. Bingham, during which they urged him to be truthful with the MPS supervisors. At that point, Bingham lost confidence in whether the Union was on his side in the matter and declined further Union representation. He signed a statement saying, "I do not want Union Local 950 to represent me. I want other representation." MPS postponed the remainder of the investigatory meeting in order to allow Mr. Bingham to obtain alternative representation and placed Bingham on a suspension without pay in the meantime.

Mr. Bingham was unable to obtain alternative representation, and on May 22 he asked the Union to renew its representation, which the Union agreed to do. The disciplinary meeting reconvened on May 24, with the same Union officials present to represent Bingham, at which time all present watched the May 9 and May 10 security videotapes. Bingham then acknowledged removing the items but stated that he thought they were garbage and said he had intended to take them to the Green Bay School. At the conclusion of the meeting, Reszczynski told Bingham to call the Union after he received the District's decision about discipline so that the Union could file a grievance if necessary.

By letter dated June 1, 2008, MPS terminated Bingham's employment effective immediately, on the ground of "theft." On Reszczynski's advice, Bingham signed a grievance challenging his termination, which was submitted in a timely fashion to MPS at Step 2 of the grievance procedure. In a response dated July 28, 2006, MPS denied the grievance at Step 2. Reszczynski telephoned Bingham, who indicated he wished to proceed to the third step of the grievance procedure. Reszczynski then prepared a third step submission, Bingham signed it, and Reszczynski filed it in a timely fashion on August 2, 2006.

At some point after submitting the grievance at Step 3 but prior to receiving MPS' 4th step response dated September 20, 2006, the Union sought advice of counsel as to whether to proceed to arbitration. The Union provided its counsel with the contents of Bingham's personnel file as well as the other materials related to his termination. Counsel advised the Union that it would be unlikely to prevail if it took Bingham's grievance to arbitration.[1]

The Union and Bingham met with MPS officials at the third step of the grievance procedure, during which the Union sought a last-chance agreement for Bingham as an alternative to termination. MPS refused. At the conclusion of the meeting, Reszczynski and Bingham had a conversation about what would happen next, if MPS denied the grievance. The record is confusing as to what occurred during this conversation. Reszczynski testified that he told Bingham that this was the last step to the grievance procedure but there was "another avenue open," and Bingham testified that Reszczynski told Bingham the third step was his "last shot,"

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[1] The Examiner found that the Union sought legal advice about arbitrating Bingham's grievance before the third step grievance meeting. We have set aside this element of the Examiner's findings, because we find the record ambiguous as to when the Union sought/received this legal advice. The ambiguity is largely owing to the fact that, while the record reveals the date the Union submitted the third step grievance (August 2), the date on which the Union met with counsel about Bingham's case (September 5), and the date on which MPS sent its written response at Step 3 (September 20), the record is inconsistent about the date of the third step meeting itself. After testifying that he (the Union) met with counsel on September 5, Reszczynski was asked the leading question, "So it [the meeting with counsel] would be prior to the third step meeting," to which Reszczynski responded "yes." (TR at 164). However, Reszczynski later testified that he believed (though he was not sure) that the third step meeting was held on "August 22 or 21st of 2006." (TR at 184).

after which "you're going to have to go out and seek your own lawyer."[2] In any case, after receiving MPS's denial of the grievance on or about September 20, 2006, Bingham telephoned a "Mr. Davis at Vincent High School," who apparently was a Union representative, to inquire "where should we go from here? … Am I going to be receiving anything in writing to where you don't want to pursue my case to arbitration?" Although Mr. Davis purportedly replied, "No, you have it wrong," Bingham by his own testimony decided to "move on with my life" and did not pursue the matter at that time.

The Union did not carry Bingham's termination grievance to arbitration, based upon counsel's advice that arbitration would likely be unsuccessful. The Union, however, in or about the same time frame and at Bingham's behest, did prevail upon MPS to reimburse Bingham for some overtime pay that he had been docked.

Some months later, Bingham learned that the Union had obtained a "last chance" agreement for another bargaining unit member (Mr. Klumb) who also had been accused of stealing. In the Klumb case, MPS officials had agreed to the Union's suggestion of a last chance arrangement, because MPS saw mitigating factors in play, including Klumb's illness and other personal problems. After Bingham learned that, unlike his own situation, Klumb had been able to keep his job, Bingham decided to file the instant prohibited practice charge.

Discussion

The Examiner correctly stated the basic standards that apply to Bingham's claims. First, Bingham must carry the relatively heavy burden of establishing that the Union's breached its duty of fair representation in handling his grievance, by handling his grievance in a way that was

[2] The Examiner accepted Reszczynski's version of this conversation, without discussing Bingham's version. The Examiner also found that Reszczynski had told Bingham to call the Union after receiving MPS' response and that Reszczynski had tried to telephone Bingham to inform him of the Union's decision not to arbitrate. We have set aside these findings, because the evidence is confusing about what Reszczynski told Bingham and because, ultimately, it is unnecessary to determine exactly what was said. If, in fact, as Reszczynski may have testified, the Union consulted with counsel prior to the third step meeting, then the Union had already received counsel's opinion of the likelihood of success in arbitration prior to the third step meeting. In that circumstance, Bingham's memory of the conversation at the end of the Step 3 meeting would make more sense than Reszczynski's. It seems improbable that the Union would have indicated to Bingham that "another avenue" was available if, in fact, it had already received negative legal advice on that point. As to the follow up phone call, it also seems improbable that, if the Union had suggested it might arbitrate, Bingham would not have followed up with Reszczynski, as Bingham had always theretofore been very attentive to his grievance. In any case, Bingham himself testified that, whatever impression he had gained from Reszczynski's comments at the third step meeting, he (Bingham) understood from a conversation he initiated with another Union representative (Mr. Davis at Vincent High School), shortly after receiving MPS' September 20 grievance denial, that the Union would not be taking his case to arbitration. It is sufficient for deciding this case that Bingham was actually aware in a timely fashion that the Union did not intend to arbitrate his case and we are comfortable reaching the conclusion that he was so aware.

"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). Only if Bingham establishes that his grievance was unlawfully handled by the Union will the Commission reach the merits of Bingham's grievance against MPS. MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 31602-C (WERC, 1/07).

Here, the Examiner concluded that Bingham did not establish that the Union had failed to process his grievance in a lawful manner. Specifically, the Examiner held that, contrary to Bingham's belief that the Union was not on his side, the Union had in fact utilized normal, non-negligent labor relations strategies in representing Bingham at the first, second, and third steps of the grievance procedure. The Examiner found nothing in the record to indicate that Reszczynski or other Union officials held any bias toward Bingham, despite Bingham's overt distrust and his initial refusal to allow them to represent him. The Examiner noted that the Union proactively and successfully pursued Bingham's claim for docked overtime pay, even after Bingham had skirmished with them over handling his termination grievance. The Examiner also pointed out that, while MPS had decided to treat Klumb more leniently than Bingham for similar misconduct, the Union had made the same effort for Bingham as it had for Klumb, i. e, trying to obtain a "last chance" arrangement. On all these points regarding how the Union handled Bingham's grievance in the lower steps of the procedure, the Commission agrees with the Examiner and the reasoning set forth in his decision.

As to the decision not to arbitrate Bingham's grievance, the Examiner correctly observed that a union "has considerable latitude and discretion" in deciding whether or not to arbitrate for numerous policy reasons set forth in MILWAUKEE PUBLIC SCHOOLS, SUPRA. In this case the Union had received an opinion from its attorney as to the likelihood of success in arbitration, and had provided the attorney with the "facts and merits of this case, the surrounding circumstances, and Bingham's work and disciplinary history." Presumably the attorney reviewed all this information before advising the Union that it was unlikely to win if it arbitrated. The Examiner characterized this conclusion about the merits of the grievance as "a reasoned decision with a sound basis in labor relations." Since, in the Examiner's view, the Union had decided not to arbitrate based on a good faith view of the merits of the case, the Examiner held that its decision was lawful. While we ultimately agree, we find the question a bit more troubling than the Examiner's somewhat truncated analysis would suggest.

The principal Wisconsin case elaborating the duty of fair representation under MERA is the MAHNKE decision, SUPRA. MAHNKE itself involved a union's decision not to arbitrate the discharge of a 20-year employee, based, as far as the record disclosed, solely on avoiding the expense of arbitrating. The Court stated as follows:

> VACA requires the union to make decisions as to the merits of each grievance. It is submitted that such decision should take into account at least the monetary value of his claim, the effect of the breach on the employee and the likelihood of

> success in arbitration. Absent such a good-faith determination, a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation.
>
> This is not to suggest that every grievance must go to arbitration, but at least that the union must in good faith weigh the relevant factors before making such determination.

66 WIS. 2D AT 524.

Here, the evidence about the Union's decision-making process rests entirely on the fact that it sought and obtained a legal opinion about the likelihood of success in arbitration. The record does not expressly indicate how the attorney reached that opinion. Nor, more importantly, is there explicit evidence that the attorney's decision about the merits and/or the Union's follow-up decision not to arbitrate took into consideration how long Bingham had worked for the District without much prior trouble and no other misconduct of the type involved here, or the fact that *discharge* at Bingham's stage of life would seriously affect not just his present income but his future employability and his retirement. These considerations create sympathy for Bingham's situation and could well affect an arbitrator's ultimate disposition of the case. Hence, given MAHNKE's prescriptive language, the mere fact that an attorney advised the Union that it probably would not prevail in arbitration provides an uncomfortably meager basis on which to evaluate the *bona fides* of the Union's decision not to arbitrate this long-term employee's discharge.

All that said, Bingham's fortunes nonetheless turn against him on MAHNKE's primary holding: he, as the complaining employee in a duty of fair representation case, bears the burden of proving that the Union acted unlawfully. Here the record contains no evidence that would cast doubt on the Union's "good faith and honesty of purpose" in exercising its wide discretion. See MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 31602-C, at 13, citing HUMPHREY V. MOORE, 375 U.S. 335, 349 (1964). Any suspicion that Bingham's early skirmish with Union officials over representational tactics contributed to an unwillingness to represent him is not only speculative but countered by the Union's subsequent active and effective advocacy for Bingham over his docked pay. Albeit the Union presented slim evidence about its decision-making process, that evidence at least implicitly indicates that the Union considered the MAHNKE factors related to Bingham's work record and long history of employment before deciding not to arbitrate. The Union provided materials relating to these subjects to its attorney and, absent evidence casting doubt on the subject, presumably these materials played a role in the attorney's opinion and therefore in the Union's conclusion. We therefore conclude on this record that Bingham has failed to meet his burden to prove that the Union's decision not to arbitrate his grievance violated its duty of fair representation.

For the foregoing reasons, we affirm the Examiner's Order dismissing Mr. Bingham's complaint in its entirety.

Dated at Madison, Wisconsin, this 2nd day of June, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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