STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHRISTINE BURGER, Complainant,

vs.

WHITEFISH BAY EDUCATION ASSOCIATION AND WHITEFISH BAY SCHOOL DISTRICT, Respondents.

Case 41
No. 66591
MP-4318

Decision No. 32299-A

Appearances:

Patricia A. Lauten, Jeffrey S. Hynes & Associates, S.C., 2300 North Mayfair Road, Suite 390, Wauwatosa, Wisconsin 53226, appearing on behalf of Complainant.

Mark F. Vetter, Davis & Kuelthau, S. C., 300 North Corporate Drive, Suite 150, Milwaukee, Wisconsin 53045, appearing on behalf of Respondent District.

Rebecca Ferber Osborn and Aimee Klemes, Wisconsin Education Association Council, 13805 West Burleigh Road, Brookfield, Wisconsin 53005-3058, appearing on behalf of Respondent Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

The complaint filed on January 3, 2007 alleges that Respondent District violated Sec. 111.70(3)(a)5, Stats., by not recalling Complainant and providing her with the same rights as other bargaining unit members with respect to a vacant position. The complaint further alleges that Respondent Association violated Sec. 111.70(3)(b)1 and 4, Stats., and Respondent Association and Respondent District violated Sec. 111.70(3)(c), Stats., when the Association, alone and in concert with the School District, abandoned Complainant's grievance for political reasons. On December 20, 2007, the Commission appointed Coleen A. Burns as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Sec. 111.70(4)(a) and 111.07, Stats. Hearing in the matter was held in Whitefish Bay on April 10 and 30, 2008. Upon conclusion of the Complainant's case-in-chief, the

Respondent Association moved to dismiss the complaint. Following argument on this motion, the Examiner advised the parties that she was granting the motion to dismiss the complaint and that a written decision would follows. A transcript of the hearing was received by the Commission on June 6, 2008.

On the basis of the arguments of the parties, and the record as a whole, the Examiner makes and issues the following

FINDINGS OF FACT

1. At all times material hereto, Christine Burger, hereafter Complainant, has been a resident of the State of Wisconsin. Complainant was employed by the Whitefish Bay School District as a part-time teacher until her layoff; which was effective at the end of the 2005-2006 school year.

2. Whitefish Bay Education Association, hereafter Association or WBEA, is a labor organization located in Whitefish Bay, Wisconsin. The Association is the exclusive bargaining representative of a collective bargaining unit consisting of certain employees of the Whitefish Bay School District. At the time of the Complainant's layoff, Complainant was a member of the collective bargaining unit represented by the Association. At all times material hereto, the Association has been represented by Patrick Connolly in his capacity as Executive Director of the North Shore United Educators. At all times material hereto, Mike O'Brien, Sue Vielgut and Scott Franzmeier have acted upon behalf of the Association.

3. Whitefish Bay School District, hereafter District, is a municipal employer located in Whitefish Bay, Wisconsin. At all times material hereto, District Administrator James R. Rickabaugh and District Director of Human Resources and Special Services John Hedstrom have acted on behalf of the District.

4. The 2005-2007 collective bargaining agreement between the parties was ratified in August 2006. Prior to this ratification, the Association and the District were covered by the parties' 2003-2005 collective bargaining agreement. At all times material hereto, the contract provision containing the grievance procedure has contained the following language: "An earnest effort shall first be made to settle the allegation informally between the bargaining unit member or association and the appropriate administrator. . . . If the informal process does not lead to a mutually acceptable resolution, a grievance may result and shall be processed in accordance with the following procedure." At all times material hereto, the "following procedure" has consisted of four steps; including Step 3, Board hearing, and Step 4, final and binding arbitration. At all times material hereto, the parties' collective bargaining agreements have also contained the following

ARTICLE I

RECOGNITION OF BARGAINING UNIT

The Board recognizes the Whitefish Bay Education Association as the exclusive bargaining representative on wages, hours, and conditions of employment for all full-time certificated employees of the district engaged in teaching (including classroom teachers, librarians, guidance counselors, special education teachers) and part-time certificated employees teaching under an individual teaching contract with the district, but excluding the following:

1. All administrators and central office personnel.

2. Certificated non-instructional personnel such as psychologists and the activities director.

3. Substitute teachers.

4. Paraprofessionals, teacher aides or clerks, volunteer lay personnel.

5. Office, clerical, maintenance and custodial employees.

6. Recreation personnel (full-time certificated employees of the district engaged in teaching are not included in this exclusion).

The purpose of this Article is to recognize the right of the Association to represent employees in negotiations with the Board as provided in Section 111.70 of the Wisconsin Statutes.

Article I of the parties' 2003-05 collective bargaining agreement, unlike the parties' 2005-07 collective bargaining agreement, ended with the following:

> Where the term "teachers' is used in this Agreement, it shall mean the same as the term "bargaining unit members."

. . .

ARTICLE XXXIII

LAYOFF

This procedure shall apply when the School Board reduces the bargaining unit members. Limited term and long term employees who are employed to assume the duties of absent staff members shall not be covered by this procedure and their employment rights shall terminate upon the conclusion of the term of their individual employment agreement with the District.

A. The Board may lay off bargaining unit members when one or more of the following circumstances are present:

1. A substantial decrease in pupil population or enrollment in the School District.

2. A substantial financial limitation beyond the control of the School District.

3. A substantial decrease in the enrollment in a specific grade level, subject area, or program area.

4. The return of a bargaining unit member from a leave of absence.

5. The enactment of laws that directly affect staffing and are beyond the control of the Board.

B. **Time and Notice.**

1. In the event that the Board anticipates that a layoff will be necessary, any bargaining unit member affected by the layoff will be notified by March 1, preceding the effective day of the layoff. However, such bargaining unit member may be issued an individual contract contingent upon the availability of work.

2. Final notice of layoff shall be given by the Board no later than June 30 prior to the effective day of layoff.

C. **Procedure.**

1. The Board shall layoff bargaining unit members according to seniority and qualification in the District.

(a) Seniority is measured by the length of continuous full-time teaching service in the District measured from the earliest date on which each bargaining unit member began his or her first teaching assignment under an initial contract for full-time service. Full-time service shall include all years of full-time service before and after any prior layoff or Board approved leave of absence. Seniority shall be accrued during Board approved leaves of absence.

(b) Qualification is determined by a bargaining unit member's current certification.

2. Layoff shall be in inverse order of seniority with the condition that each bargaining unit member retained must be qualified to teach a remaining teaching assignment.

3. When two or more bargaining unit members have the same seniority and qualifications, the bargaining unit member with the least district teaching experience in any remaining course, subject area, or grade assignment shall be laid off first.

4. When seniority, qualification, and district experience in the course, subject area, or grade is equal, the Board may consider dual certification, extracurricular assignments, teaching performance, or other factors relevant to it, in its discretion, in determining which of the bargaining unit members in question shall be retained.

D. **Right and Method of Recall:**

1. All laid off available bargaining unit members shall be reinstated in the inverse order of their being laid off, if qualified to fill the vacancies that exist. The Board shall decide when recall shall occur. No new permanent or substitute appointments shall be made by the Board while there are laid off available bargaining unit members who are qualified to fill the vacancies that exist.

2. The Board shall mail a recall notice by Certified Mail, return receipt requested, to the bargaining unit member's last known address. If the Board does not receive written confirmation of the bargaining unit member's acceptance of recall within fifteen (15) days from the date of mailing of the notice, the bargaining unit member's right to recall shall be waived.

3. It is the responsibility of the laid off bargaining unit member to keep the District Administrator informed of the address to which any recall notice is to be sent.

4. A laid off bargaining unit member shall be available for recall for a period of three years following the effective date of the layoff.

5. Nothing in this Article shall prevent a bargaining unit member from obtaining other employment during the period of time that such bargaining unit member is laid off.

E. **Effects of Layoff.**

1. Any laid off bargaining unit member shall not accrue salary benefits, tenure or seniority rights during the period of layoff. However, upon reemployment such bargaining unit member shall receive full credit for all salary benefits, tenure and seniority rights earned prior to layoff.

2. Any laid off bargaining unit member who is on recall shall have the opportunity of continuing his/her insurance benefits at his/her own expense with the consent of the insurer.

F. This Article defines the layoff procedures to be followed in the Whitefish Bay School District. Nothing in this Article is intended to deprive any bargaining unit member of tenure rights under Section 118.23 of the Wisconsin Statutes.

G. The Association shall be informed of the names of the bargaining unit members being laid off pursuant to Section B of this Article.

. . .

5. By letter dated February 24, 2006, Hedstrom advised the Complainant as follows:

February 24, 2006

. . .

As you are probably aware, part-time teachers are not covered by Wisconsin teacher contract laws 118.22 and 118.23 or by the layoff provisions of our current collective bargaining agreement in Article XXXIII.

This letter is sent to inform you that we value your service as a teacher in the District and hope to be able to offer you a full or part-time contract to you for the 2006-2007 school year. However, at this time, we have not yet completed our budgets, class schedules and staffing report, nor has the School Board yet approved our staffing levels for 2006-07. We hope to finalize each of these in the near future. In the interim, please inform me of your availability for next year by returning the attached form.

On behalf of the students, the Administration, and the School Board of Whitefish Bay, please accept this expression of gratitude for your contributions to our schools. We look forward to staying in close contact with you regarding this matter.

. . .

cc: Principal
Personnel Office
Business Office
WBEA

The Association received a copy of this letter; which was a form letter that, for a number of years, had been sent by the District to all of its part-time teachers. The Complainant received this form letter in each of the two preceding years of her part-time employment with the District. Attached to this letter was the following form, which Complainant completed and returned to the Personnel Office by March 15, 2006:

> To: Personnel Office
>
> I hereby notify the School District of Whitefish Bay that I would be available to accept __X___ decline _____ a contract should an opening occur for the 2006-2007 school year.
>
> Christine Burger /s/ 3/9/06
> Christine Burger Date
>
> ***Please return this form to the Personnel Office by March 15, 2006.***

On or about March 23, 2006, Complainant telephoned Vielgut, Association Vice-President and Co-Chair of contract negotiations, to report that Assistant Principal Greg Kabara had told her that she was being non-renewed and to ask for advice on what Complainant could do. Subsequently, Complainant reported to Vielgut that, on or about March 27, 2006, Kabara had informed Complainant that she was being laid off. In response to this second conversation and in an effort to clarify whether Complainant was being laid off or non-renewed, on or about March 29, 2006, Association Building Representative Franzmeier, sent Rickabaugh the following e-mail regarding Complainant:

> The association understands that as a part time employee, she is offered no contractual protections. Sue V. and I would just like to ask a few questions to clarify Christine's status. Are you available Thurs after school? If not, maybe a day next week? Thanks for your time. See you at the leadership meeting tonight.

Rickabaugh's responsive e-mail is as follows:

> I am willing to find a time to meet. However, can you tell me a little more about the purpose of the meeting?

> Christine is a part-time employee without contractual rights. She has received a preliminary notice of layoff, not nonrenewal. Is there an aspect to this where the association sees standing?

On March 30, 2006, Rickabaugh and Hedstrom met with Vielgut and Franzmeier to clarify Complainant's situation and the procedures that were being followed. During this meeting, Vielgut questioned the District Representatives on a number of issues that had been brought to her by Complainant. Franzmeier took notes of this meeting. These notes reflect that Vielgut questioned the District Representatives regarding the differences between non-renewal and lay-off; that the District Representatives indicated that, in the past, the District had laid-off and reposted the position; and that the District Representatives indicated that the District intended to repost Complainant's position. At the conclusion of this meeting, Vielgut understood that Complainant had been laid off and that Complainant would have the opportunity to compete within the pool of applicants for posted positions. On March 31, 2006, Vielgut sent Rickabaugh the following e-mail:

> Thank you for meeting yesterday. In looking over our notes, I have one question that remained unanswered. Will the district post the position before they definitely decide to lay off Christine or will they reach a final decision to lay her off and then post the position? It is important for Christine to have this information in order for her to make plans for her future. Thank you.

At some point in March, Vielgut telephoned Connolly to discuss Complainant's situation and to ask if there was anything that the Association could do. At that time, Connolly was the Association's "go to person" with respect to contract language and grievances and the Association typically relied upon Connolly's advice in such matters. Connolly reviewed the Association's contract language and informed Vielgut that there could be a meritorious grievance. On April 4, 2006, Connolly met with the Complainant, Vielgut, Mike and Sandy O'Brien. At that time, Complainant's situation was discussed; the contract language was reviewed; Connolly indicated that the contract language could be used to support a grievance; and there was an agreement to postpone filing a grievance until the District posted the position that had been held by Complainant. On or about April 12, 2006, the District posted a .9 Physical Education and Health Position to start in August of 2006. On April 27, 2006, Association President Mike O'Brien and Vielgut met with Rickabaugh. At that time, they presented Rickabaugh with a written grievance that includes the following:

. . .

> On April 13, 2006 the District posted a .9 P.E./Health position for the 2006-07 school year. That position is currently held by Christine Burger. She received a layoff notice on Feb. 24, 2006 and promptly returned her notice of availability. The WBEA contends that Ms. Burger is protected under Article I and Article 33 of the Collective Bargaining Agreement thus entitling her to return to the .9 position in 2006-07.

I. Articles:

A. Article I recognizes both full-time and part-time bargaining unit members:

"The Board recognizes the Whitefish Bay Education Association as the exclusive bargaining representative on wages, hours and conditions of employment for all full-time certificated employees of the district engaged in teaching (including classroom teachers, librarians, guidance counselors, special education teachers) and part-time certificated employees teaching under an individual teaching contract with the district. . . "

Both full-time and part-time bargaining unit members are protected under the contract unless duly noted in specific Articles.

B. Article 33 explains procedures for layoff. This Article covers both full-time and part-time employees. Article 33 Sections A and B have been violated because Ms. Burger's teaching position remains a position for which the District is advertising a vacancy.

II. Facts

A. Feb. 24, 2006: Christine Burger received a preliminary notice of layoff of her .9 contract for the 2006-07 school year.

B. Mar 9, 2006: Ms. Burger signed a letter of availability for a .9 contract. It was received by the district.

C. Article 1 of the contract states that both full-time and part-time bargaining unit members are covered under the bargaining agreement.

D. Under Article 33, layoff language refers to both full-time and part-time bargaining unit members.

E. April 13, 2006: A .9 P.E./Health position for 2006-07 was posted on the WECAN web site. It is the same position that Ms. Burger is teaching this school year 2005-06.

F. Ms. Burger cannot be laid off from a position that is continuing within the District and for which the District is taking applications.

We contend that by posting the .9 position, a violation of the contract took place.

III. Relief:

Ms. Burger has the right to layoff recall under the contract. The job should not have been posted. The position must be offered to her for the 2006-07 school year.

. . .

Attachments: Article 1, 33 of the 2003-05 Collective Bargaining Agreement
WECAN posting
Letter of Feb. 24, 2006
Letter of Mar. 9, 2006

. . .

In an e-mail dated April 27, 2006, Rickabaugh advised Hedstrom, in relevant part, of the following:

Interesting meeting this morning with Mike O'BRIEN and Sue Vielgut. They are arguing that the contract does not allow us to layoff a part-time employee and post the same position without calling the layoff person back. They then presented a formal, already written, grievance to me. (So much for the informal discussion.)

They also claim standing to make the claim now because the position was posted on April 12 and noted by them on April 13.

As you might imagine, I "chastised" them for setting up a meeting under false pretense and ignoring the grievance appeal process. Not that it carried much weight.

. . .

On May 3, 2006, Complainant notified Kabara, in writing, as follows:

I am applying for the .9 Physical Education position in event that my grievance over proper lay off is not sustained.

By letter dated May 5, 2006, Rickabaugh advised O'Brien as follows:

. . .

I have reviewed the grievance submitted by the Whitefish Bay Education Association on behalf of Christine Burger. Per Article XXXIII, C (1), the only members of the bargaining unit who are affected by the layoff provision are

those who have seniority. Employees who are part-time do not have, nor do they accrue, seniority.

Employees without seniority do not have rights in the layoff process. The administrative decision stands on this premise. Consequently, the grievance is denied.

. . .

By letter dated May 16, 2006, O'Brien advised the President of the District's School Board as follows:

. . .

Re: Grievance of April 27, 2006
We are proceeding to Step 3, Article VI of the Grievance Process in the WBEA Contractual Agreement

On April 13, 2006 the District posted a .9 P.E./Health position for the 2006-07 school year. That position is currently held by Christine Burger. She received a layoff notice on Feb. 24, 2006 and promptly returned her notice of availability. The WBEA contends that Ms. Burger is protected under Article I and Article 33 of the Collective Bargaining Agreement thus entitling her to return to the .9 position in 2006-07.

I. Articles:

A. Article I recognizes both full-time and part-time bargaining unit members:

"The Board recognizes the Whitefish Bay Education Association as the exclusive bargaining representative on wages, hours and conditions of employment for all full-time certificated employees of the district engaged in teaching (including classroom teachers, librarians, guidance counselors, special education teachers) and part-time certificated employees teaching under an individual teaching contract with the district. . . "

Both full-time and part-time bargaining unit members are protected under the contract unless duly noted in specific Articles.

B. Article 33 explains procedures for layoff. This Article covers both full-time and part-time employees. Article 33 Sections A and B have been violated because Ms. Burger's teaching position remains a position for which the District is advertising a vacancy.

II. Facts

A. Feb. 24, 2006: Christine Burger received a preliminary notice of layoff of her .9 contract for the 2006-07 school year.

B. Mar 9, 2006: Ms. Burger signed a letter of availability for a .9 contract. It was received by the district.

C. Article 1 of the contract states that both full-time and part-time bargaining unit members are covered under the bargaining agreement.

D. Under Article 33, layoff language refers to both full-time and part-time bargaining unit members.

E. April 13, 2006: A .9 P.E./Health position for 2006-07 was posted on the WECAN web site. It is the same position that Ms. Burger is teaching this school year 2005-06.

F. Ms. Burger cannot be laid off from a position that is continuing within the District and for which the District is taking applications.

G. In a discussion of the issue on April 27, 2006, Dr. Rickabaugh stated that the difference between a non-renewal and a layoff is that "non-renewal is about performance, a layoff is about district needs."

We contend that by posting the .9 position, a violation of the contract took place.

III. Relief:

Ms. Burger has the right to layoff recall under the contract. The job should not have been posted. The position must be offered to her for the 2006-07 school year.

. . .

By letter dated May 24, 2006, Rickabaugh advised Mike O'Brien as follows:

. . .

We have had the opportunity to review the April 27, 2006 grievance which you filed on behalf of Christine Burger. The grievance refers to the fact that Ms. Burger has been employed as a part-time teacher during the 2005-06 school year. Her assignment was to a .9 physical education/health position. On

> February 24, 2006, she was issued a preliminary notice of lay-off for the 2006-07 school year. On April 13, 2006, the District posted a .9 physical education/health position for the 2006-07 school year.
>
> Since the posting on April 13, 2006, the District's staff needs in the physical education/health area have increased. The District is now in need of a full-time (1.0) physical education/health teacher for the 2006-07 school year. The posting for the position will be made on May 25, 2006.
>
> As you know, part-time teachers do not have any seniority rights or rights to full-time positions. However, Ms. Burger may apply for the full-time position in the same manner as any other internal or external applicant. This procedure was followed this past year relative to the application of a part-time special education teacher for a full-time special education position.
>
> Based upon the foregoing change of circumstances, I believe the grievance is moot as there has been no violation of the Collective Bargaining Agreement. We thus will not be scheduling an appeal session with the School Board.
>
> Please contact me if you wish to discuss this matter further.

. . .

By letter dated May 30, 2006, Complainant notified Hedstrom, in writing, as follows:

> I am applying for the full time Physical Education/Health position in event that I do not prevail on my grievance.

On or about June 1, 2006, Mike O'Brien provided the District's School Board President with the following document:

. . .

> Re: Christine Burger Grievance, Amended and Attached;
> Second Request For Board Level of the Grievance Procedure;
> Notification of Arbitration
>
> Dear Mr. Scrivner:
>
> In a letter dated May 24, 2006 I received a notice from District Administrator Rickabaugh informing me that the above-referenced grievance would not be advanced to the Board level of the grievance procedure. Christine Burger and the Whitefish Bay Education Association are entitled by the terms of the collective bargaining agreement to have the grievance considered by the School

Board and to have a written statement of the Board's position on the grievance. A failure to properly process the grievance by the Board is, in the opinion of the WBEA, a prohibited labor practice. Accordingly, the WBEA is again requesting that the Board consider the attached grievance, using the normal procedure, and provide a written response from the Board within the time specified in the collective bargaining agreement.

Because the Board has refused to hear the grievance and in order to avoid any problems with the grievance timelines, the Whitefish Bay Education Association is hereby notifying the School Board of its intent to process the grievance to arbitration. This letter of notification is being sent to both the District Administrator and to you.

In order for the Association to properly make decisions about this grievance under §111.70, Wis. Stats., it hereby requests that the School Board provide the following:

1. Copies of all correspondence, letters, e-mails, documents and attachments sent by the School Board Members, the District Administrator, any school administrator or supervisor regarding Christine Burger during the 2005-06 school year. Please include the names, addresses and telephone numbers of the people to whom the material was sent.

2. Copies of all correspondence, letters, e-mails, documents and attachments received by the School Board Members, the District Administrator, any school administrator or supervisor regarding Christine Burger during the 2005-06 school year. Please include the names, addresses and telephone numbers of the people who sent the material.

3. Copies of all correspondence, letters, e-mails, documents, and materials regarding any communication (in-person, by telephone or written) between or among School Board Members, and between or among the District Administrator and a School Board Member(s), and between and among a School Board Member(s) and an administrator(s) or supervisor(s) and between and among the District Administrator and an administrator(s) or supervisor(s) where the communication included the subject of Christine Burger. Please include the names, addresses and telephone numbers of the people who were involved in the communication.

4. Copies of all School Board minutes involving the subject of Christine Burger.

Thank you for your attention in this matter.

. . .

Cc: James Rickabaugh, District Administrator
Whitefish Bay School Board Members
Christine Burger

On or about June 1, 2006, Mike O'Brien provided the District's School Board President with the following document:

. . .

Re: Christine Burger Grievance of April 27, 2006, Amended

On April 13, 2006 the District posted a .9 P.E./Health position for the 2006-07 school year. That position is currently held by Christine Burger. She received a layoff notice on February 24, 2006 and promptly returned her notice of availability. The WBEA contends that Ms. Burger is protected under Article I and Article 33 of the Collective Bargaining Agreement thus entitling her to return to the .9 position in 2006.

On May 24, in a letter to Mike O'Brien from James R. Rickabaugh, District Administration, the Association was informed of the following:

1. The District had changed the P.E./Health position from a .9 position to a 1.0 full-time position which was posted on May 25, 2006.

2. The District has refused to process the grievance to the School Board level.

I. Articles:

A. Article I recognizes both full-time and part-time bargaining unit members:

"The Board recognizes the Whitefish Bay Education Association as the exclusive bargaining representative on wages, hours and conditions of employment for all full-time certificated employees of the district engaged in teaching (including classroom teachers, librarians, guidance counselors, special education teachers) and part-time certificated employees teaching under an individual teaching contract with the district. . . "

Both full-time and part-time bargaining unit members are protected under the contract unless duly noted in specific Articles.

B. Article 33 explains procedures for layoff and recall. This Article covers both full-time and part-time bargaining unit employees. Article 33 Sections A, B, and D have been violated.

1. She has been improperly laid off because the .9 position was offered by the School District at the time of lay off and the 1.0 position is currently being offered.

2. The District has also violated Section D. because the District failed to recall her to the 1.0 position when it became available.

3. None of the criteria for layoff in Section A have been met.

II. Facts

A. Feb. 24, 2006: Christine Burger received a preliminary notice of layoff of her .9 contract for the 2006-07 school year.

B. Mar 9, 2006: Ms. Burger signed a letter of availability for a .9 contract. It was received by the district.

C. Article 1 of the contract states that both full-time and part-time bargaining unit members are covered under the bargaining agreement.

D. Under Article 33, layoff language refers to both full-time and part-time bargaining unit members.

E. April 13, 2006: A .9 P.E./Health position for 2006-07 was posted on the WECAN web site. It is the same position that Ms. Burger is teaching this school year 2005-06.

F. Ms. Burger cannot be laid off from a position that is continuing within the District and for which the District is taking applications.

G. In a discussion of the issue on April 27, 2006, Dr. Rickabaugh stated that the difference between a non-renewal and a layoff is that “non-renewal is about performance, a layoff is about district needs.”

H. None of the criteria for lay off listed under Article 33, Section A were met at the time of lay off nor have they been met with the change of the position from .9 to 1.0.

Remedy Sought:

A. The District should rescind the layoff notice and restore Christine Burger to the P.S./Health position offered by the District.

B. The District should acknowledge that it failed to properly implement the recall procedure in this matter.

CC: Christine Burger
James Rickabaugh, District Administrator
School Board Members

. . .

The amended grievance was filed in response to the District's decision to change the .9FTE posted position to a full-time position. On June 4, 2006, Rickabaugh sent Hedstrom the following e-mail:

> Just wondering if we have sent a final notice of layoff to Christine Burger. I note in the contract that such a letter must be sent prior to June 30, if in fact her layoff becomes reality.

In an e-mail dated June 7, 2006, Mike O'Brien advised Rickabaugh as follows:

> We have scheduled time at the board meeting on June 14 to hear the grievance appeal. However, John and I would like to meet with you and Sue to discuss the format of the board grievance hearing and go over the information you requested. Are the two of you available at 12:15 on Friday? The time works for both of us. We can meet in my office if you'd like.

O'Brien responded with the following e-mail:

> Two things:
>
> 1. It would be helpful to know more detail regarding the content/purpose of the meeting Friday.
> 2. I believe it would be helpful to have Pat Connolly attend and I will see if he is available at that time. Sue and I are keeping 12:15 open.

Rickabaugh responded on June 8, 2006 as follows:

> My schedule for tomorrow afternoon has loosened a little, so we can meet a bit later than 12:15 if you'd like. Just let me know.
>
> Regarding the purpose/content of the meeting. We just want to go over how the board is planning to conduct the hearing. The administration will be presenting its case as well. This is a change from the last time the board heard a grievance. We also want to briefly review the packet of additional information you requested to be certain everyone is in agreement.

On June 9, 2006, Rickabaugh and Hedstrom met with Connolly, O'Brien and Vielgut. During this meeting, these District Representatives provided the Association Representatives with information and documentation regarding prior lay offs of part time teachers. Hedstrom provided five years of lay off form letters that had been sent to part time staff each year. The District Representatives stated that the District was not aware of any prior complaint from a teacher and that District records indicated that, over the past three years, there were situations similar to that of Complainant in that there was a part time lay off, a job posting, an interview, and a new hire. Following this meeting, Connolly met with Mike O'Brien, Vielgut and the Complainant. At this meeting, Connolly discussed Complainant's grievance and reviewed the documents that had been provided by the District. Connolly questioned Vielgut and O'Brien as to what they would testify to if they were asked their understanding of the contract language and they responded that they had always believed that the layoff language did not provide any protection to part-time teachers. Connolly indicated that the Association did not have a very strong case; that he would contact WEAC legal; and that he would continue to look at the case over the weekend. Vielgut sent Connolly the following e-mail:

> . . .
>
> **Sent:** Monday, June 12, 2006 9:13 AM
>
> . . .
>
> Pat,
>
> Will you be getting ahold of WEAC legal today? If so, could you let us know the outcome?
>
> Also, Would it be ok to ask for more time to evaluate Christine's situation and ask for additional information? (There's a board meeting on June 28 and July 12)
>
> Such as:
>
> In light of the information the WBEA received on June 9, 2006 concerning the grievance, we are requesting more time to evaluate whether to proceed. We

would also ask the district to provide the following pieces of information as soon as possible:

1. A copy of Christine Burger's summative evaluation for the 2005-06 school year.

2. A copy of Christine Burger's coaching evaluation for the 2005-06 school year.

3. The District's policy on the internal and external postings of jobs for WBEA members.

4. A copy of the specific minutes of the Feb. 15, 2006 School Board meeting concerning any discussion items of Christine Burger's employment or evaluations.

5. A copy of the specific minutes of Administrative Council meetings dated Feb. 21, 2006, Apr. 11, 2006, May 10, 2006 and May 23, 2006 when the following topics were discussed: Physical Education staffing issues, Layoff notices, the PE/Layoff grievance and Christine Burger.

6. Any other School Board meeting minutes or Administrative Council meetings minutes when Christine Burger was discussed.

If it's ok, I'm sure you can put it in better terms.

Also, in Scott's May 29 e-mail to Rickabaugh, he states that "she is offered no contractual rights." I'm getting picky, but the word "offered" isn't really the same as "given". Could that help us?

. . .

Connolly sent Vielgut, Mike O'Brien, and Complainant the following e-mail:

Sent: Monday, June 12, 2006 10:01 AM
Subject: Layoff Grievance

I have consulted with two WEAC attorneys this morning. The attorneys agree with my assessment of the grievance.

The threshold question is whether Christine, as a part time teacher, is covered by the layoff language.

Based on the documentation provided by the District in the form of layoff notices which have been sent to part time teachers for the past years, it is clear the District and the WBEA's understandings are that part time people are not covered by the layoff language. The administration claims that further research will likely confirm this practice going back for many years.

Union leaders received copies of the layoff notices in which the first sentence of the notice asserts that part time teachers are not covered by the layoff provision. The WBEA was, therefore, aware of the District's interpretation and practice. The Union made no objection, nor did it attempt to raise the matter in contract negotiations.

Scott's 3/29/06 e-mail response to Rickabaugh confirms the WBEA's view that Christine "is offered no contractual protections. . ." with regard to layoff.

My discussions with Mike and Sue confirm that they will testify that the WBEA believed that there was little or nothing the union could do for part time teachers in these situations.

The Admin maintains that rightly or wrongly, it used layoff (not lay off within the meaning of the contract) as a means of avoiding non-renewing part-time teacher contracts. Their actions in this case of first issuing a non-renewal and then a layoff support the use of this practice. They imply that this approach avoids the stigma of a non-renewal on the teacher's employment record.

The administration asserts there are similar cases of past instances where part-time teachers were laid off, their jobs were posted, they were allowed to interview, and they were not rehired for the position.

Conclusion: Despite the fact that the layoff language can be read in conjunction with the recognition clause to provide layoff procedures for part time teachers, the consistent practice of the District has been that part-time teachers are not covered by the layoff language and that the union knew and understood that interpretation and practice. Therefore, I recommend that the grievance not be advanced to the Board level.

1. I do not think it would be in Christine's interests to press this issue where I conclude she has no chance of prevailing at the Board level nor in arbitration.

2. I think it is unwise from a political standpoint for the union to advance the grievance.

3. I think it is unwise for the long term relationship between the WBEA and the Board to advance the grievance.

I suggest that Mike, as president of the WBEA, contact the Board and cancel the grievance meeting scheduled for Wednesday.

Connolly responded to Vielgut's e-mail of June 12 as follows:

Date: Mon, 12 Jun 2006 10:21:06 – 0500

Let us assume we ask for and receive the information listed below. Will having the information affect the question of whether part time teachers are covered by the layoff language?

Let us assume the District refuses to provide the information claiming that it is private information dealing with personnel and that the union is not entitled to it relative to this grievance because part time teachers are not covered by the layoff language so there is no legitimate grievance and no legitimate basis for the union to have the information. Let us assume the WBEA (WEAC) litigates to get this information, the threshold question still remains.

We have discovered a large gap in the union's ability to protect part time teachers. It is a gap which has been exploited by the Board for many years. It is a matter which can only be resolved through negotiations. However, given the QEO threat, correcting this problem will be very difficult.

Mike O'Brien and Complainant were also addresses on this e-mail.

6. Relying upon Connolly's recommendation that the grievance not be advanced to the Board level, the Association abandoned Complainant's grievance and did not advance this grievance to the Board hearing. Mike O'Brien sent the following e-mail to Rickabaugh:

Subject: Lay off grievance hearing 6/14/06

Jim:

In an effort to keep Christine, Sue, you and I on the same page, I want to recap the basics of our phone conversation this morning.

I informed you that the association would not call witnesses nor enter an argument on behalf of the grievance but that Ms. Burger wished to have an audience with the school board. Although the association would be present to support Ms. Burger, the association would be silent at the hearing. I also requested, on her behalf, that the hearing be rescheduled to allow Christine more time to prepare.

> You responded that tomorrow evening's hearing (6/14/06) would be cancelled and that discussions need to take place to determine the next step.
>
> You also me to consider whether a letter to Christine changing her status from lay off to termination would be preferred. At this time I am still unsure what that means.
>
> Finally, you indicated that it might be beneficial for the district and the association to consider changes to the part time lay off procedure which ensure greater clarity in future cases. I believe the association would be open to that.
>
> As you know, you may contact me via e-mail or phone and that I will be teaching summer school beginning next week so I will be available to discuss how the district wishes to proceed.
>
> Thank you.

Copies of this e-mail were also sent to Complainant and Vielgut. By letter dated June 21, 2006, Hedstrom advised the Complainant as follows:

. . .

> As a follow-up to a letter from me of February 24, 2006 and pursuant to Section 118.22 of the Wisconsin Statutes and Article XXXIII of the 2003-2005 Collective Bargaining Agreement between the Whitefish Bay Education Association and the Whitefish Bay School Board, this letter is written to notify you of the decision of the Whitefish Bay School Board to lay you off effective with the beginning of the 2006-2007 school year. The .9 position you currently hold has been eliminated.
>
> We wish you all the best in your continuing endeavors.

. . .

In a letter dated August 28, 2006, Complainant's Attorney was provided with the District's Step 3 Grievance Response denying the grievance. This letter included the following:

> Although the WBEA decided not to pursue the grievance matters which it filed, the School Board extended Ms. Burger the opportunity on August 9, 2006 to present her position regarding WBEA's grievance and amended grievance.

7. The Association's conduct in processing Complainant's layoff grievance, including the Association's decision to not advance this grievance to Step 3 (Board Hearing) and

Step 4 (Arbitration) of the contractual grievance procedure does not reflect arbitrary, discriminatory or bad faith conduct on its part toward Complainant. In making the decision to abandon Complainant's grievance, the Association exercised its considerable discretion in handling grievances in good faith and with honesty of purpose.

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

CONCLUSIONS OF LAW

1. Respondent Association is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. Respondent District is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. Complainant Christine Burger is a "Municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

4. Complainant Christine Burger has not established, by a clear and satisfactory preponderance of the evidence, that Respondent Association, through its representation of Complainant, including its decision to abandon Complainant's grievance, has acted in an arbitrary, discriminatory or bad faith fashion, and, therefore, has not proven her allegation that Respondent Association has violated its statutory duty of fair representation to Complainant in violation of Sec. 111.70(3)(b)1, Stats.

5. Inasmuch as Complainant Christine Burger has not proven that Respondent Association has violated its Sec. 111.70(3)(b)1 statutory duty of fair representation to Complainant by abandoning her grievance, the Examiner will not assert the Wisconsin Employment Relations Commission's jurisdiction over Complainant's claim that Respondent District and Respondent Association have violated a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats., and Sec. 111.70(3)(b)4, Stats., respectively.

6. Complainant Christine Burger has not established, by a clear and satisfactory preponderance of the evidence, that Respondent Association and Respondent District have violated Sec. 111.70 (3)(c), Stats., as alleged by Complainant.

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

ORDER

The complaint of Christine Burger is dismissed in its entirety.

Dated at Madison, Wisconsin, this 6th day of November, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/
Coleen A. Burns, Examiner

WHITEFISH BAY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

The complaint alleges that Respondent District violated Sec. 111.70(3)(a)5, Stats., by not recalling Complainant and providing her with the same rights as other bargaining unit members with respect to a vacant position. The complaint further alleges that Respondent Association violated Sec. 111.70(3)(b)1 and 4, Stats., and Respondent Association and Respondent District violated Sec. 111.70(3)(c), Stats., when the Association, alone and in concert with the School District, abandoned Complainant's grievance for political reasons. Respondent Association and Respondent District deny that they have committed prohibited practices as alleged in the complaint.

POSITIONS OF THE PARTIES

Complainant

On February 24, 2006, Complainant received a preliminary layoff notice for the 2006-2007 school year. As part of this notice, Complainant was to indicate her desire to accept or decline the contract for the coming year. This same process had been used in the past two years.

In April, the District posted a .9FTE position in the same position that Complainant has worked for the past three years. At that point, Complainant learned that she was not going to be considered for the position and then talked to the Association. The District maintained that Complainant did not have any layoff/recall rights, but that Complainant could interview for any vacant position for which she was qualified.

The Association reviewed the contract language; specifically Section 1 and Section 33. The Association determined that Complainant had a right to the vacant position under the layoff/recall provision and filed a grievance.

After the grievance was filed, there were a series of meetings; during one of these meetings there was a veiled threat that the Association should not continue to push the grievance. Subsequently, the position was changed to a .9FTE Physical Education, Health and Biology position. The District knew that the Complainant did not possess the necessary Biology license to qualify for that position.

The grievance was processed to Step 2; where it was denied. The grievance was processed to Step 3. The posted position changed to a full-time P.E. and Health position.

The Step 3 meeting was before the District's School Board; which is the step immediately prior to arbitration. Prior to this meeting, the Association met with District members and it was decided to not pursue the grievance further on the following bases: it would not be in

Complainant's best interest; it would not be in the best interest politically; and it would not be in the best interest because the District and the Association were going to be negotiating a new contract.

As Complainant testified she had the support of many friends. The merits of the grievance did not become an issue until the matter was to go public in front of the Board. This is made clear by Connolly's e-mails of June 12th; referencing a QEO threat and resolving this through negotiations.

Early in the process, the District Administrator chastised the Association for bringing the grievance. The March 30th notes contain veiled threats against Complainant.

The form letter used in the layoff process stated the District's position that part-time employees are not covered under the contract. Thus, this District position was known to the Association from the time that the grievance process was started.

The Association's reasons for pulling out were largely political and motivated by contract negotiations. Had the Complainant gone before the Board on June 14th, with the support of the Association, it is likely that she would have been able to get her job back. By the time that she was able to obtain representation, the position was filled; which almost certainly meant that the Board was not going to decide in her favor.

Both form letters reference the collective bargaining agreement. Either teachers are covered by the collective bargaining agreement or they are not. The District and the Association cannot reference the collective bargaining agreement when they send out letters in June and then deprive Complainant of the opportunity to be covered under the contract in February.

All other provisions of the contract have been followed and it is undisputed that part-time teachers are members of the bargaining unit. No exception is carved out in the layoff provision. This was clearly known and recognized by the Association when it pursued the grievance.

Inconsistent with past practice, the Complainant was never interviewed for any vacant position. Nor was she rehired for any position. Complainant was not able to find employment in the area and suffered monetary losses.

Respondent Association

Complainant received a layoff notice consistent with District procedures involving part-time employees. Association Representative Sue Vielgut became concerned that the Complainant was not being treated fairly by the District and contacted then Executive Director of North Shore United Educators Pat Connolly; the individual that the Association consulted when determining whether or not there was a basis for filing a grievance.

After reviewing the contract and meeting with Association leaders, Connolly thought that an argument could be made under the contract language; linking the layoff language to the recognition clause. The Association then filed a grievance.

The grievance process is designed so that the parties will share information in the hopes that a matter can be resolved outside of litigation. This is what occurred in this case.

Prior to the Board step of the grievance procedure, Association representatives Vielgut and Mike O'Brien sat down with District Administration, *i.e.*, Dr. Rickabaugh and John Hedstrum, to discuss Board procedures. At this meeting, District Administration provided the Association with information that was detrimental to its case; evidencing that the District and the Association had operated for many years with an understanding that part-time employees did not have protection under the layoff clause.

Following this meeting, Connolly sat down with Complainant and the Association's local leadership, and proceeded to question experienced individuals regarding what they viewed the rights of part-timers to be historically. Their responses confirmed the District's view; with the effect that the evidence of past practice did not support Connolly's initial contract interpretation that the layoff language applied to part-time employees.

At this point, Connolly indicated that it did not look like there would be a basis for pursuing this grievance further. Connolly further indicated that he would make an effort to contact WEAC legal over the following weekend; which he did. Thereafter, Connolly provided Complainant and Association leaders with a detailed explanation of the merits of the grievance and the likelihood of success of the grievance.

The political reasons referenced by Complainant were explained by Connolly; that it would be damaging to the Association's credibility and relationship with the Board to pursue a case in which the Association's own leaders did not support the underpinnings of the case. Such considerations are valid.

After receiving Connolly's explanation, O'Brien notified the District Administrator that the Union would not be advancing the case to arbitration; but ensured that he preserved Complainant's right, as allowed in the contract, to advance the case to the Board; which Complainant did.

The Association responded very seriously to the fact that Complainant was being deprived of her livelihood and made every effort to pursue a grievance on her behalf. The evidence, however, did not support her claim.

The threshold issue in this case is whether the Association breached its duty of fair representation. Complainant has failed to establish that the Association has acted in an arbitrary, discriminatory or bad faith manner towards her.

The Association did not breach its statutory duty of fair representation. Complainant's allegations against the Association are baseless. The complaint should be dismissed and the Association should be awarded attorney's fees.

Respondent District

Complainant did not have any contractual right to employment beyond the 2005-06 school year. For at least the prior seven years, letters similar to that sent to the Complainant have been sent to all District part-time employees and the Association has not challenged the statements contained therein or their implementation by the Respondent. In 2006, the Association sent an e-mail confirming that a part-time employee is offered no contractual protection.

If the District were to negotiate with Complainant and grant her rights exceeding the rights of a part-time teacher under the collective bargaining agreement, the District would violate Sec. 111.70(3)(a)4 and 5, Stats. Complainant fails to state a claim upon which relief can be granted. The Complaint should be dismissed and Respondent District be awarded costs, disbursements, and attorney fees expended in defending this action and whatever other relief the Commission determines appropriate.

DISCUSSION

Statutory Allegations

Complainant alleges that the District and Association have violated Sec. 111.70(3)(c), Stats; that the District has violated Sec. 111.70(3)(a)5, Stats.; and that the Association has violated Sec. 111.70(3)(b)1 and 4, Stats. Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer individually or in concert with others:

> To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

Sec. 111.70(3)(b), Stats., makes it a prohibited practice for a municipal employee, individually or in concert with others:

> 1. To coerce or intimidate a municipal employee in the enjoyment of the employee's legal rights, including those guaranteed in sub. (2).
>
> . . .

> 4. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them.
>
> . . .

Sec. 111.70(3)(c), Stats., states that it is a prohibited practice for "any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par. (a) or (b)." Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

Merits

The Complainant alleges that the District and the Association have violated a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats., and Sec. 111.70(3)(b)4, Stats., respectively. The Association and the District have negotiated a collective bargaining agreement that contains a grievance procedure that culminates, at Step 4, in final and binding arbitration.

As Examiner Nielsen states in MUSKEGO-NORWAY SCHOOL DISTRICT, DEC. NO. 30871-D (Nielsen, 5/05); *aff'd by operation of law*, DEC. NO. 30871-E (WERC, 7/05):

> . . .
>
> Section 111.70(3)(a)5 makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. Section 111.70(3)(b)4 is a parallel provision, making it a violation of MERA for a labor organization to violate the contract. However, where the parties have negotiated a contract which includes grievance arbitration as the mechanism for enforcing contractual rights and the grievance procedure has not been exhausted, the Commission will not exercise its discretion to hear claims of 3(a)5 and 3(b)4 violations. Instead, the Commission will honor the parties' contract and the grievance procedure will be presumed to be the exclusive venue for these claims. This is a rebuttable presumption, and the Commission will assert its jurisdiction to hear contract claims where the parties waive reliance on the grievance procedure, 3/ or where there is clear and satisfactory evidence that the grievance and arbitration machinery cannot be relied upon to dispose of employee grievances. 4/ . . . (cites omitted)

The violation of the collective bargaining agreement alleged by Complainant is that she was denied her right to be recalled to a vacant Physical Education position and not granted the same rights as other bargaining unit members to this vacant position.

In the present case, the Association filed a grievance, and amended grievance, on behalf of Complainant, contending that the District laid off Complainant and did not recall Complainant to a vacant Physical Education position in violation of the contract provisions that govern layoff and recall. The Association processed this grievance through Step 2 of the contractual grievance.

Shortly before this grievance was to be heard by the Board at Step 3 of the contractual grievance procedure, the Association made the decision to not advance the grievance to the Step 3 Board Hearing and, thus, abandoned Complainant's grievance. For the reasons discussed above, prior to asserting the Commission's jurisdiction to decide Complainant's Sec. 111.70(3)(a)5 and (3)(b)4 claims, the Examiner must first decide whether the contractual grievance and arbitration provisions of the parties' collective bargaining agreement cannot be relied upon by Complainant to dispose of Complainant's grievance because the Association violated its Sec. 111.70(3)(b)1 statutory duty of fair representation to Complainant when it abandoned Complainant's grievance.

Association's Statutory Duty of Fair Representation

In MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 31602-C (WERC, 1/07), the Commission states:

. . .

> It is exceedingly difficult for an individual bargaining unit member to establish a breach of the duty of fair representation, and properly so. Decades of experience under federal and state labor relations laws have demonstrated the wisdom and necessity of maintaining this exceptionally high bar. It acknowledges that unions have limited resources, that grievances may be handled by relatively unsophisticated fellow employees or union staff, who as human beings sometimes make mistakes of judgment or are negligent, that a union's resources come from dues and fees paid by employees, that the union is a collective enterprise that must serve the interests of the overall group, that serving those collective interests frequently comes at the cost of a particular individual's real or perceived interests, and that a union must have discretion to make these decisions without being subjected to expensive second-guessing by agencies or courts.
>
> Thus, as the Examiner and the Union have pointed out, it is well-established that a union does not breach its duty of fair representation simply by negligently processing a grievance, simply by failing to communicate with a grievant, simply by making unwise or improvident decisions about the merits of

a grievance, or simply by settling a grievance against the wishes of the grievant. Imperfections in representation are permitted the union, with one important caveat: " … *subject always to complete good faith and honesty of purpose in the exercise of its discretion*." HUMPHREY V. MOORE, 375 U. S. 335, 349 (1964) (emphasis added).

The seminal articulation of the Union's duty of fair representation remains that set forth in VACA V. SIPES, 386 U. S. 171, 190 (1967), i.e., avoiding conduct toward a member of the bargaining unit that is "arbitrary, discriminatory, or in bad faith." In the context of an employee grievance, the essence of the analysis of the union's conduct under each of these three prongs is whether the union has abused its considerable discretion in handling the grievance. The inquiry is not a piecemeal analysis of how a grievance was handled at any particular stage, but rather a judgment based on the total picture. As Judge (now Justice) Kennedy described the duty in his concurring opinion in ROBESKY V. QANTAS EMPIRE AIRWAYS, 593 F. 2D 1082 (9TH CIR. 1978):

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

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

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

Complainant has been a part-time employee during her three years of employment with the District. (T. II at 258) On or about February 24, 2006, Complainant received the District form letter advising Complainant that the District was not in a position to offer Complainant a contract for the 2006-2007 school year. (Jt. Ex. #9; T. II at 260) In each of the preceding two years, Complainant had received such a letter and subsequently received a contract for the following year. (T. II at 260-1)

On or about March 23, 2006, Complainant telephoned Association Vice-President Vielgut to tell her that Assistant Principal Karbara had told Complainant that she had been non-renewed and to ask for advice. (T. I at 21; 63, T. II at 261-2) Thereafter, Vielgut learned that, on March 27, 2006, Complainant had been told that she was laid off. (T. I at 22-23)

Association Representative Scott Franzmeier's March 29, 2006 e-mail indicates that, at the time of the e-mail, the Association held the view that, as a part-time employee, Complainant did not have protection under the contract. (Dist. Ex. #1) Notwithstanding this e-mail, Franzmeier and Vielgut requested a meeting with the District Administrator to clarify information that Complainant had received regarding her employment status and to determine what procedures were being followed by the District. (Id.; T. I at 33)

The requested meeting was held on March 30, 2006. (Comp. Ex. #1) In attendance at this meeting were Vielgut, Franzmeier, Hedstrom and the District Administrator. (Comp. Ex. #2) As a result of this meeting, Vielgut understood that Complainant was being laid-off. (T. I at 41)

Complainant recalls that, following the meeting of March 30, 2006, Vielgut called Complainant and indicated that "the overall feeling when she left the meeting is that something else was going on but she was not aware of, couldn't pinpoint, and she felt that I was being threatened by Mr. Rickabaugh." (T. II at 271). In subsequent testimony, Complainant was questioned about Vielgut's call as follows:

> Q: Now, I believe you testified on direct testimony that Ms. Vielgut said that she was being threatened by Dr. Rickabaugh during the meeting. Was that your testimony?
> A: Not that she was being threatened, that I was being threatened.
>
> . . .
>
> Q: . . And do you recall specifically what Ms. Vielgut told you relative to the threat, what specifically was discussed?
> A: That if I pursued this grievance, that I would have hard time getting a job anywhere in Wisconsin because he was a powerful superintendent and he knew lots of people, and that's when, I believe, Mr. Hedstrom chimed in and said, "You know, Milwaukee area is very tight-knit." (T. II at 304)

Franzmeier took notes during the March 30, 2006 discussion. (T. I at 38) Franzmeier's notes contain the word "(threatening?)" beneath a line which states "Careful not to taint her chances elsewhere" and a line that states "J.H.- Milw Area is close knit. Adm know each other." (Comp. Ex. #2) Since Franzmeier did not testify at hearing, the record does not reveal what he meant when he wrote "(threatening?)."

Upon being questioned regarding the above referenced notes, Vielgut stated that "J.H." is John Hedstrom; the discussion was about "the distinction between non-renewal and the layoff, and if a teacher is non-renewed, it's difficult to get a job elsewhere because of the non-renewal on the record. With layoff, it's less difficult." (T. I at 45) Later, Vielgut was asked "Did you take this to – as a threat, that she might not be able to find work elsewhere outside of the school district?" and responded "Possibly." (T. I at 46)

Complainant's grievance, which was filed on or about April 27, 2006, contends that the District laid off Complainant in violation of the contract provisions that govern layoff and recall. (Jt. Ex. #3) Vielgut recalls that the grievance was hand delivered to the District Administrator and that the District Administrator was surprised that the Association was giving him a formal grievance at that point. (T. I at 49-50)

After the District Administrator received the grievance, he sent the e-mail dated April 27, 2006, to Hedstrom, the District's Director of Human Resources, (Comp. Ex. #12) In this e-mail, the District Administrator states that he "chastised" Mike O'Brien and Vielgut "for setting up a meeting under false pretense and ignoring the grievance appeal process. Not that it carried much weight."

According to the District Administrator, the "chastising" was that the meeting was set up without specifying that it was a grievance meeting and that, under the process, the Association should have met first with the principal. (T. II at 234) The District Administrator states that he did not think it was fair that he was surprised by the grievance and that he was unhappy that the Association had not followed the grievance process by first meeting with the principal. (T. II at 234-5)

At hearing, Vielgut was questioned and responded as follows:

Q: Did he chastise you a little bit?
A: I - - - I don't remember all the particulars.
Q: Was he angry?
A: He might have been. I don't remember exactly. (T. I at 50)

The contractual grievance procedure states "An earnest effort shall first be made to settle the allegation informally between the bargaining unit member or association and the appropriate administrator. . . . If the informal process does not lead to a mutually acceptable resolution, a grievance may result and shall be processed in accordance with the following procedure." (Jt. #1 and 2) Vielgut states that there is often an informal process when filing grievances. (T. I at 50)

Patrick Connolly, who is now the retired Executive Director of the North Shore United Educators, recalls that, in March 2006, Vielgut contacted him to ask if there was anything in the contract that could help the Complainant. (T. I at 109) Connolly further recalls that, in response to this contact, he reviewed the contract language and concluded that, when you take Article I and Article XXXIII together, the language covered part-time teachers under the

peculiar circumstance in which there was no one certified to teach physical education with less seniority than Complainant. (T. I at 109-10)

Connolly states that, on April 4, 2006, he met with the Complainant, Vielgut, Mike and Sandy O'Brien; that Connolly suggested that contract language could be used to support a grievance; and there was an agreement to postpone filing a grievance until the District posted the position that had been held by Complainant. (T. I at 111-12) Complainant recalls that, at some point, she met with Connolly, Vielgut, Sandy and Mike O'Brien. (T. 11 at 264) Complainant further recalls that, prior to this meeting, Vielgut had contacted the District Administrator to fact find Complainant's situation; that, during this meeting, it was discussed that Complainant was being laid off; they went over the contract; and that Connolly indicated "we had a grievance and that we should move forward with that." (T. II at 265-6)

As discussed above, this grievance was filed on April 27, 2006. According to Connolly, he did not draft the grievance; but did provide advice to the Association representative who prepared the grievance. (T. I at 110) The grievance refers to the February 24, 2006 letter that was sent to the Complainant and indicates that this letter is attached to the grievance; but Connolly does not recall looking at the attachments to this letter. (Id.; Jt. Ex. #3)

The layoff language of the parties' collective bargaining agreement addresses layoff and recall rights. As set forth in the grievance, as filed on April 27, 2006 and amended by the Association on May 24, 2006, Complainant's layoff grievance asserts that Complainant was not only improperly laid off, but also, that Complainant was not properly recalled.

Connolly, Mike O'Brien, and Vielgut met with the District Administrator and Hedstrom on June 9, 2006 in response to the District Administrator's June 7, 2006 request to meet. (Comp. Ex. #3) At the time of this meeting, the grievance was scheduled to be presented to the Board, at Step 3 of the grievance procedure, on June 14, 2006. (Id.)

The expressed purpose of the meeting was to review the format of the June 14, 2006 Board hearing and to review information requested by the Association. (Comp. Ex. #3) When questioned whether the District's standpoint was that they did not want the grievance to go to the Board, Hedstrom's responded ". . . no, I don't think there was any time we ever said no, don't pursue the grievance. (T. 201)

As discussed above, Franzmeier's e-mail dated March 29, 2006 reflects an Association understanding that Complainant's part-time status does not provide Complainant with contractual protections. (Dist. Ex. #1) Connolly states, however, that, he did not see this e-mail until he met with the District Administrators on June 9, 2006. (T. I at 117-18) According to Connolly, at that meeting, he was also presented, for the first time, with District documentation that indicated, for at least five years, part-time teachers had received the form letter stating "As you are probably aware, part-time teachers are not covered by Wisconsin teacher contract laws 118.22 and 118.23 or by the layoff provisions of our current collective bargaining agreement in Article XXXIII" and, for three years, Complainant had also received this letter. (T. I at 117-118)

Vielgut took notes of the meeting of June 9th. (T. I at 62) These notes indicate that there was a review of procedures for the June 14th board meeting and that the District's Representatives provided information on past practices with respect to the layoff of part-time teachers. These notes also indicate that the District's Representatives provided five years of letters sent to part-time staff; that the District Representatives stated that they were unaware of any prior complaint from a teacher; and that, in going back three years, the District's Representatives found that situations similar to that of Complainant had occurred, *i.e.*, a layoff, job posting, interview, and a new hire. (Comp. Ex. #4) According to Vielgut, the District had examples of such situations and that the Association previously had not been aware of these examples. (T. I at 68)

Connolly states that, at the meeting of June 9th, he was not going to make any concession to the District on the grievance before he had a chance to review the documents and discuss them with the Association, but that when he left the meeting he was unsettled by the documentary evidence that had been provided by the District. (T. I at 116-18) Connolly recalls that, after the June 9th meeting, he met with Mike O'Brien, Vielgut and Complainant to discuss the grievance; questioned O'Brien and Vielgut about their understanding of the contract language; and was informed that they always believed that the layoff language did not provide any protection for part-time teachers. (T. I at 119)

Vielgut recalls that, at that time, the Association realized that because of the past practice information provided by the District, the Association was "in a predicament where we might not be able to succeed in the grievance." (T. I at 72) Vielgut further recalls that the Association asked Connolly to contact WEAC legal for more information. (T. at 71)

Complainant recalls that, after Connolly and Vielgut met with the District Administrator on June 9th, she spoke with Connolly and Vielgut and they said that it did not look good. (T. II at 278-9) Complainant further recalls that, on Monday June 12, 2006, the Association officially dropped her grievance and that she was advised of this fact by Connolly's e-mail of June 12, 2006. (Comp. Ex. #6)

According to Complainant, this e-mail listed several reasons for dropping her grievance; among which was "political" and "it would not be in their best interests in terms of contract negotiations." (T. II at 279) Complainant states that someone told her that the Association was not going forward with her grievance because of contract negotiations; but that she does not know who said this or when. (T. II at 295-6) Complainant further states that she inferred from Connolly's statement "I think it is unwise from a political standpoint for the union to advance the grievance" that the Association was not going forward with her grievance because of contract negotiations. (Id.)

In his e-mail of June 12, 2006, which was addressed to Complainant and Association Representatives Mike O'Brien and Vielgut, Connolly states that he consulted with two WEAC attorneys; that they agree with his assessment of the grievance; and offers the following:

> Conclusion: Despite the fact that the layoff language can be read in conjunction with the recognition clause to provide layoff procedures for part time teachers, the consistent practice of the District has been that part-time teachers are not covered by the layoff language and that the union knew and understood that interpretation and practice. Therefore, I recommend that the grievance not be advanced to the Board level.

Prior to stating this "Conclusion," Connolly sets forth his understanding of the parties' practices, as well as his understanding that, if the Association pursued the grievance, Association Representative's Mike O'Brien and Vielgut would "testify that the WBEA believed that there was little or nothing the union could do for part time teachers in these situations."

Vielgut confirms that, based upon their conversations with Connolly, Connolly correctly understood how Vielgut and Mike O'Brien would testify. (T. I at 94) Vielgut further confirms that Connolly's e-mail accurately reflects the past practice examples provided to the Association by the District. (T. I at 95)

Following the "Conclusion," Connolly states:

> 1. I do not think it would be in Christine's interests to press this issue where I conclude she has no chance of prevailing at the Board level nor in arbitration.
>
> 2. I think it is unwise from a political standpoint for the union to advance the grievance.
>
> 3. I think it is unwise for the long term relationship between the WBEA and the Board to advance the grievance.
>
> I suggest that Mike, as president of the WBEA, contact the Board and cancel the grievance meeting scheduled for Wednesday.

Connolly was questioned regarding his basis for his conclusions, set forth in Items 1 through 4 above. (T. I at 122-4) With respect to Item 1, *supra*, Connolly states that he did not think it was in Complainant's best interest to have the Association pursue the grievance because he did not think that she had a chance to win. (T. I at 122) With respect to Item 2, *supra*, Connolly states that it would be politically unwise to go forward with a Board hearing in which Association leaders would be making the Board's case. (T. I 123) With respect to Item 3, *supra*, Connolly states that it would be difficult to maintain a respectful relationship between the Association and the Board if one party felt that the other party was bringing forward grievances which they knew would not be successful. (T. 123-4)

Shortly after he sent the above referenced e-mail, Connolly sent an e-mail addressed to Vielgut, Mike O'Brien, and Complainant. (Assoc. Ex. #1) In this e-mail, Connolly includes the following statement:

> We have discovered a large gap in the union's ability to protect part time teachers. It is a gap which has been exploited by the Board for many years. It is a matter which can only be resolved through negotiations. However, given the QEO threat, correcting this problem will be very difficult.

Connolly states that the "QEO threat" is the bargaining law which permits an employer to unilaterally implement a financial offer. (T. I at 125) Connolly further states that a "QEO threat" was not discussed at the June 9, 2006 meeting and this meeting did not contain any discussion concerning bargaining over language changes. (Id.) Connolly asserts that the "QEO threat" had nothing to do with the grievance and that it was simply a comment to local Association leaders that, while they needed to correct the contract language, the likelihood of obtaining such a change in negotiations was not good. (T. I at 126)

Vielgut states that, when the Association filed the grievance it had the opinion that the contract language could be read such that the lay-off language applied to part-time employees, but, at the June 9th meeting, this opinion changed. (T. I at 90.) Vielgut further states that the District did not, in any way, threaten the Association with consequences if it pursued the grievance. (T. I at 94)

According to Vielgut, the Association's decision to not pursue the grievance was not related to contract negotiations; but rather, was based upon the past practice examples provided by the District. (T. I at 94-95) Vielgut states that Connolly is the "go to person" with respect to contract language and grievances; that the Association typically relies upon Connolly's advice; and did so in Complainant's case. (T. I at 89-90)

Summary

Complainant argues that, during a series of meetings beginning on March 30, 2006, District Representatives engaged in conduct that inappropriately influenced the Association's decision to not pursue Complainant's grievance. According to Complainant, the District Administrator "chastised" the Association for pursuing Complainant's grievance and threatened to "blackball" Complainant if Complainant's grievance were pursued. Complainant also asserts that the Association's decision to not pursue her grievance was influenced by inappropriate "political" considerations, including a "QEO threat" to the Association's contract negotiations.

The "blackball" threat is alleged to have occurred during the meeting of March 30, 2006. Complainant was not present at the meeting of March 30, 2006. Neither Franzmeier's notes, nor any witness in attendance at the March 30, 2006 meeting, claim that a grievance was mentioned or discussed. Indeed, the Association did not file a grievance on behalf of Complainant until several weeks after this meeting.

The meeting was held in response to an Association request to meet. The Association requested clarification of the differences between non-renewal and layoff and, during the ensuing discussion, a District Representative made statements such as the Milwaukee area is close knit;

administrators know each other; and that there is a need to be careful not to taint Complainant's chances elsewhere. Vielgut stated that it was possible that this was a threat that the Complainant would not find work outside of the District.

Vielgut does not link this "possible" threat to Complainant's grievance. Nor is there other credible evidence that links this "possible" threat to Complainant's grievance. Neither the evidence that Complainant was not successful in gaining employment with another Wisconsin school district, nor any other record evidence, provides a reasonable basis to conclude that, during the meeting of March 30, 2006, any District representative threatened to "blackball" Complainant if she, or the Association, pursued a grievance.

The "chastising" is alleged to have occurred during the meeting of April 27, 2006. Complainant was not present at the meeting of April 27, 2006. The evidence of the meeting of April 27, 2006, including the District Administrator's e-mail of that date, provides a reasonable basis to conclude that the District Administrator "chastised" Association Representatives for not specifying that the purpose of the meeting was to file a grievance and for not following the contractual grievance procedure by first contacting the principal. The record provides no reasonable basis to conclude, however, that the District Administrator "chastised" Association Representatives for pursuing Complainant's grievance.

The record establishes that, in deciding to file Complainant's grievance and in deciding to abandon Complainant's grievance, the local Association Representatives relied upon Connolly's advice. Neither the Association's decision to consult Connolly regarding Complainant's situation, nor the Association's decision to rely upon Connolly's advice, is arbitrary, discriminatory or bad faith conduct.

Connolly credibly testified that his initial advice to the Association that there was support for the grievance in the contract language was based upon Connolly's interpretation of Article I and Article XXXIII, construed as a whole. Given the evidence that, at the time of this advice, Connolly had little, or no, knowledge of the evidence of the parties' past practices, Connolly's interpretation of the contract language, as well as his advice to the Association that there was support for the grievance in the contract language, does not involve arbitrary, discriminatory or bad faith conduct.

On June 12, 2006, Connolly recommended to the Association that the grievance not be advanced to the Board level. When making this recommendation, Connolly confirmed his understanding that, under the past practices of the parties, part-time teachers, such as Complainant, are not covered by the layoff language.

The June 2006 letter confirming Complainant's layoff does state:

> As a follow-up to a letter from me of February 24, 2006 and pursuant to Section 118.22 of the Wisconsin Statutes and Article XXXIII of the 2003-2005 Collective Bargaining Agreement between the Whitefish Bay Education

> Association and the Whitefish Bay School Board, this letter is written to notify you of the decision of the Whitefish Bay School Board to lay you off effective with the beginning of the 2006-2007 school year. The .9 position you currently hold has been eliminated.

This letter, which was issued after Connolly made his recommendation to abandon the grievance, may have provided Complainant with a reasonable basis to conclude that the District considered the provisions of Article XXXIII to be applicable to Complainant. Neither party to the contract, however, disputes Connolly's understanding of their practices. Given the evidence of these practices, Connolly's conclusion that Complainant had no chance of prevailing at the Board level, nor in arbitration, is a pragmatic assessment of the merits of Complainant's grievance.

Complainant questions the timing of Connolly's conclusion that the grievance was not meritorious; arguing that Association Representatives had been aware of the District's position before the grievance was filed and that the merits of the grievance did not become an issue until shortly before there was to be a public hearing before the Board. Until Connolly was confronted with the June 9, 2006 evidence of the Association's corroboration of the District's position that part-time employees are not covered by the layoff and recall language of the contract, it was reasonable for Connolly to rely upon his prior interpretation of the contract language. Contrary to the argument of the Complainant, it is not evident that the other Association representatives had previously received all of the past practice information provided to Connolly on June 9, 2006.

Neither Vielgut's notes of the June 9, 2006 meeting with District Representatives, nor her testimony concerning this meeting, indicate that the District Representatives made any "QEO" threats involving the grievance, or any other threat. Connolly credibly testified that the "QEO threat" referenced in his e-mail of June 12, 2006 had nothing to do with the grievance and that it was simply a comment to local Association leaders that, while they needed to correct the contract language, the "QEO threat" would make it difficult to change the contract language.

Complainant states that she inferred from Connolly's June 12, 2006 statement "I think it is unwise for the long term relationship between the WBEA and the Board to advance the grievance" that the Association was not going forward with her grievance because of contract negotiations. Such an inference is not reasonably supported by the plain language of Connolly's statement. Moreover, Connolly credibly testified that this statement was based upon his conclusion that it would be difficult to maintain a respectful relationship between the Association and the Board if one party felt that the other party was bringing forward grievances which they knew would not be successful.

Complainant also has a vague recollection that someone told her that the Association was not going forward with the grievance because of contract negotiations. Not only do Vielgut's notes of the June 9, 2006 meeting fail to reference any discussions regarding contract

negotiations, but also, Vielgut testified that the Association's decision to not pursue the grievance was not related to any contract negotiations and that the District did not, in any way, threaten the union with consequence if it pursued the grievance. Complainant's vague recollection is insufficient to rebut this testimony of Vielgut. The record provides no reasonable basis to conclude that a "QEO threat," real or perceived, or the Association's contract negotiations was a factor considered by the Association when it made its decision to abandon Complainant's grievance.

When recommending that the Association abandon Complainant's grievance, Connolly considered the potential negative effect upon the Association's relationship with the District and its Board of Education if the Association pursued a grievance that Connolly had reasonably assessed could not be won by the Association. As discussed in MILWAUKEE PUBLIC SCHOOLS, SUPRA, the union is a collective enterprise that must serve the interests of the overall group and serving those collective interests frequently comes at the cost of a particular individual's real or perceived interests.

Conclusion

The Association did not perfunctorily process Complainant's grievance. The procedures followed by the Association, as well as their interactions with Complainant and the District, reflect an understanding of the negative consequences of the District's actions upon Complainant and a desire to represent Complainant to the best of the Association's ability. The procedures followed by the Association in this case were more than adequate and fair to protect the interests at stake.

The Association's decision to not process Complainant's grievance to Step 3 (Board Hearing) and Step 4 (Arbitration) of the contractual grievance procedure was not based upon any factor other than Connolly's recommendation. In making his recommendation, Connolly did not act in an arbitrary, discriminatory or bad faith manner. In relying upon Connolly's recommendation, the Association did not act in an arbitrary, discriminatory or bad faith manner. In making the decision to abandon Complainant's grievance, the Association exercised the Association's considerable discretion in handling grievances in good faith and with honesty of purpose.

Complainant has not established, by a clear and satisfactory preponderance of the evidence, that the Association's decision to abandon Complainant's grievance has violated its statutory duty of fair representation toward Complainant in violation of Sec. 111.70(3)(b)1, Stats. Accordingly, the Examiner will not assert the Commission's jurisdiction to determine Complainant's Sec. 111.70(3)(a)5, Stats., claim that the District has violated the collective bargaining agreement or Complainant's Sec. 111.70(3)(b)4, Stats., claim that the Association has violated the collective bargaining agreement. Complainant's allegation that, in abandoning Complainant's grievance, the Association and District violated Sec. 111.70(3)(c), Stats., is without merit.

Inasmuch as Complainant has not proven, by a clear and satisfactory preponderance of the evidence, that the Association and the District have committed the prohibited practices alleged in her complaint, the Examiner has dismissed the complaint in its entirety. The Respondents seek an award of attorney's fees and costs. That remedy is not available to respondents in complaint proceedings. See, CITY OF KENOSHA, DEC. NO. 29715-B (Nielsen, 5/00); MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 29502-A (Burns, 7/99); CITY OF LACROSSE, DEC. NO. 29613-A (Crowley, 5/99); WISCONSIN STATE EMPLOYEES UNION, DEC. NO. 29177-C (WERC, 5/99).

Dated at Madison, Wisconsin, this 6th day of November, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

CAB/gjc
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