STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOUIS C. NOTO, Complainant,

vs.

GATEWAY TECHNICAL COLLEGE

and

GATEWAY TECHNICAL EDUCATION ASSOCIATION, Respondents.

Case 72
No. 68772
MP-4493

Decision No. 32752-B

Appearances:

Attorneys Emily Rupp Anderson and **Alan C. Olson,** Alan C. Olson & Associates, S.C., 2880 South Moorland Road, New Berlin, Wisconsin, 53151, appearing on behalf of Complainant.

Attorneys Autumn M. Kruse and **Michael Aldana,** Quarles & Brady, LLP, 411 East Wisconsin Avenue, Milwaukee, Wisconsin, 53202-4497, appearing on behalf of Respondent Gateway Technical College.

Attorney Jina L. Jonen, Wisconsin Education Association Council, 33 Nob Hill Drive, Madison, Wisconsin, 53708, appearing on behalf of Gateway Technical Education Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 1, 2009, Louis C. Noto filed a complaint with the Wisconsin Employment Relations Commission, alleging that Gateway Technical College and the Gateway Technical Education Association had committed certain prohibited practices in violation of Sections 111.70(3)(a)1, 3, and 5, as well of Section 111.70(3)(c), of the Municipal Employment Relations Act. On May 29, 2009, the Commission appointed Danielle L. Carne to act as Examiner, to make and issue Findings of Fact and Conclusions of Law, and to issue

appropriate Orders. On June 19, 2009, Respondents Gateway Technical College and the Gateway Technical Education Association filed answers to the complaint, denying any alleged violation and making certain affirmative defenses.

Also on June 19, 2009, Respondent Gateway Technical College filed a partial motion to dismiss, which motion was accompanied by supporting argument. Respondent Gateway Technical Education Association joined in the motion. The Complainant submitted written argument in opposition to the motion on June 22, 2009. Gateway Technical College filed additional argument in reply on August 4, 2009. The undersigned denied the motion on January 20, 2010. GATEWAY TECHNICAL COLLEGE, DEC. NO. 32752-A (1/10, CARNE).

Also on January 20, 2010, the undersigned issued an order bifurcating the proceedings in this matter. That order provided that the issue of whether the Gateway Technical Education Association had acted in violation of its duty of fair representation would be addressed first and that any claims brought against Gateway Technical College would be heard subsequently, if appropriate.

Hearing as to the question of whether the Gateway Technical Education Association has acted in violation of its duty of fair representation as alleged was held in Kenosha, Wisconsin, on February 17, February 18, and April 7, 2010. Transcripts of the proceedings were made and received by the undersigned on May 6, 2010. Thereafter, the Complainant and the Gateway Technical Education Association each filed initial and reply briefs, the last of which was received on July 12, 2010, at which time the record in this matter was closed.

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

FINDINGS OF FACT

1. Respondent Gateway Technical College (hereafter "GTC") is a municipal employer with its principal offices located in Kenosha, Wisconsin.

2. Respondent Gateway Technical Education Association (hereafter "GTEA") is the collective bargaining representative of approximately 300 GTC employees, approximately 270 of which are GTC instructors.

3. Complainant Louis C. Noto (hereafter "Noto") is employed by GTC as an instructor and is a member of the bargaining unit represented by GTEA.

4. At all relevant times, GTC and GTEA have been parties to a collective bargaining agreement (hereafter "Agreement") covering wages, hours, and conditions of employment of, among others, all full-time GTC instructors such as Noto.

5. The Agreement contains a grievance procedure for resolution of disputes over the interpretation and application of the Agreement. The last step of the grievance procedure is final and binding arbitration. Although the grievance procedure gives an individual employee the right to file and process a grievance through a step 4 appeal to the GTC Board of Directors, an employee does not have the right under the Agreement to arbitrate a grievance without GTEA's participation.

6. Noto's primary job duty since the time of his hiring as a GTC instructor in August of 2000 has been to teach courses at the Lakeview Technical Academy (hereafter "LTA"). LTA is a specialized high school that offers GTC courses to Kenosha Unified School District (hereafter "KUSD") high school students. LTA courses are dual-credit courses, meaning that students who successfully complete the courses receive both KUSD credit and GTC credit.

7. Each course that is taught at GTC has a specific amount of workload credit value associated with it. The credit value is determined through a curriculum process that involves GTC and the Wisconsin Technical College System (hereafter "WTCS")[1]. In the curriculum process, a ratio of lecture and lab hours is established for a course.[2] With the use of a table that is attached to the Agreement as Appendix A (hereafter "Appendix A"), these hours are converted into workload points. A GTC instructor's pay is based on the total number of workload points he or she carries in an academic year. The curriculum process through which lecture / lab configurations are assigned to GTC courses does not involve GTEA.

8. Pursuant to a specific agreement between GTC and GTEA, the workload for LTA instructors is calculated using Appendix A.

9. The Agreement between GTC and GTEA provides, at Article V, Section 13(h) (hereafter "Section 13(h)"), that the workload for "contracts for service" is to be calculated under the lecture column of Appendix A. Under Appendix A, a lecture hour is worth more points than a lab hour.

10. Most of the courses taught by instructors in the GTC department that formerly was known as the Business and Industry Services Division (hereafter "BISD") and later became known as the Workforce Economic Development Division (hereafter "WEDD") are considered contracts for service, and workload points for most of the instructors in that department are therefore calculated under the lecture column of Appendix A, pursuant to Section 13(h) of the Agreement.

[1] This is a statutorily established entity which, as its name suggests, oversees the technical colleges in the State of Wisconsin.
[2] There are other categories of hours, as well, but only the lecture and lab categories are relevant here.

11. The purpose of WEDD is to offer educational training to business for their incumbent employees. A WEDD instructor will market his or her services to a business and then will work with that business to custom design a course that fits with the educational and training needs of the business and its employees.

12. WEDD classes are considered contracts for service that merit the extra workload points available through Section 13(h) of the Agreement, because of the effort WEDD instructors are required to put into custom designing those courses.

13. Custom-designed WEDD courses do not conform to the WTCS curriculum requirements. Therefore, employees who take WEDD courses do not receive GTC transcripted credit. On the occasions when business employees have received GTC credit for taking a WEDD course, the WEDD instructor's workload for that course is not calculated, pursuant to Section 13(h), solely from the lecture column of Appendix A. Rather, the workload for these courses is calculated according to the actual lecture / lab configuration assigned to the course.

14. The workload for courses that offer GTC transcripted credit never has been calculated entirely on the lecture column of Appendix A, unless the course is actually configured as a 100 percent lecture course.

15. In the past, LTA courses have been billed by GTC to KUSD under "Youth Options" contracts.[3] Starting in the fall of 2007, LTA courses began to be billed under "38.14" contracts.[4] WTCS had directed GTC to begin billing LTA courses under 38.14 contracts, because that billing mechanism would ensure that LTA courses would have closed-enrollment and, as such, would only be available to KUSD students.[5]

16. WEDD contracts for service also are billed by GTC to the businesses that pay for them as 38.14 contracts, and they are also closed-enrollment courses for that reason.

17. Starting in November of 2007, Noto began to assert to GTEA representatives that he believed the classes taught by LTA instructors should be workloaded as WEDD courses, pursuant to Section 13(h) of the Agreement, under the lecture column of Appendix A. Noto's first message regarding this subject was sent on November 15, 2007, to Pat Smoody (hereafter "Smoody"), who was the president of GTEA during the 2007-2008 academic year. It read as follows:

---

[3] "Youth Options" is a federally-funded program that allows high school students to take advanced, college courses and to earn college credit, as well as high school credit, for having done so. Local school districts pay the Youth Options tuition through contracts between themselves and the college-level institution.

[4] "38.14" is a reference to a provision in the Wisconsin statutes.

[5] By default, technical college courses are open to the public.

Pat,

In looking at the new contract it appears that all WEDD courses are to have their load points calculated as 100% lecture. The course that we teach at LTA are WEDD courses. Will our load points be recalculated based on 100% lecture?

18. In response to Noto's November, 2007 assertion, Smoody contacted Zina Haywood (hereafter "Haywood"), a GTC vice-president, and Ron Sellnau (hereafter "Sellnau"), a GTC dean and the supervisor for LTA instructors. Smoody communicated with Haywood and Sellnau with the objective of determining whether any change had occurred that would suggest that the workload for LTA courses should be calculated pursuant to the contracts for service provision in Section 13(h) of the Agreement. Both Haywood and Sellnau indicated to Smoody that nothing beyond the billing mechanism for LTA courses had changed. They explained that the billing change had been implemented because WTCS had directed GTC to do so, to ensure that LTA classes, unlike other technical college classes, were closed to the public. Haywood and Sellnau indicated that, unlike customized WEDD courses, LTA courses were still part of the regular GTC curriculum and, therefore, not considered contracts for service. Smoody also checked GTC documentation to confirm what Haywood and Sellnau had stated. All of the information Smoody received in November of 2007 confirmed what she already had understood about LTA courses.

19. On November 20, 2007, Smoody sent the following response to Noto's inquiry from a few days before about the contracts for service issue:

Lou:

You are teaching credit courses within a program but to the high school population. All credit courses workload are based on lecture/lab/clinical ratios from the curriculum sheet and then the hours per week per course have the workload pulled from Appendix A in the contract. This has no relationship at all to the contract for service classes provided to business customers. The classes you teach at night are not WEDD if they are open enrollment to any individual student that signs up for them and the students pay tuition and fees just like they do on campuses. The only classes that are WEDD are those that have 38.14 contracts created and companies pay rather than students and it is on an hourly billing rate, not tuition and fees.

This may be more confusing in an email rather than a conversation, so if you have questions, give me a call after the Thanksgiving Holiday.

20. After Smoody's initial response to Noto regarding the contracts for service issue, Noto continued to raise questions about it, sending additional e-mail messages to Smoody, Selllnau, and other GTC administrators. On November 26, 2007, Noto sent the following e-mail message to Sellnau:

> Ron,
>
> The new contract states that WEDD contract courses will be considered 100% lecture when calculating work load. The courses that we teach during the day at LTA are WEDD contract courses as of this Fall. It appears that Pat was not aware of this fact and my request for confirmation from Ed and Debbie has gone unanswered though the contract is very clear. If you could find the time to read the attached note I would appreciate a response which I haven't really gotten yet.

On November 28, 2007, Sellnau responded:

> Lou.....they are now "billed" like WEDD contracts because the state told us we had to, and because the course/s are closed to anyone other than KUSD students. The courses are still Youth Options, which is no change as far as part practice is concerned. It is still a regular GTC course, charging regular course and material fees, and is not "customized training" that would mandate full cost recovery. Pat Smoody and Zina have spoken about this matter, and are in agreement.

21. On December 5, 2007, Smoody sent the following additional response to Noto regarding the contracts for service issue:

> Lou:
>
> Ron is correct. Zina and I did speak about this and confirmed that nothing has changed in how the classes are delivered from previous years. Also, in Colleague I have confirmed the tuition and fees is the billing basis for the classes taught by the GTEA instructors at Lakeview teaching the high school students or the general population in the evening. I have also verified that this billing change was required by the WTCS as Ron describes.
>
> 38.14 contracts that do receive the lecture workload adjustment are those delivered to business and industry customers that are billed the hourly rate specified by the college for the delivery of those classes. Because KUSD doesn't pay the hourly rate per hour of a 38.14 contract for service, no adjustment of the workload points to all lecture points is necessary. In the cases where this contract language on page 20 must be applied, the district is currently in the process of making the workload adjustments necessary to be in compliance with the collective bargaining agreement.
>
> If you have additional questions, please contact me.

22. On February 12, 2008, Noto raised the contracts for service issue again. He wrote a message to Smoody, among others, describing a meeting he had attended with some KUSD instructors and administrators. Noto wrote that these individuals had indicated that they did not consider the GTC courses at LTA to be Youth Options courses anymore.

23. On February 13, 2008, Smoody responded to Noto's February 12 e-mail, with a message asking him to elaborate on what KUSD believed the changes were. Noto responded that Smoody should talk to KUSD directly. In response, Smoody told Noto that his message about KUSD had piqued her curiosity. She also wrote the following:

> I still believe that it is simply a billing document change mandated by the state system in order to have closed enrollment, but if KUSD believed something more than that has changed we'd have to revisit whether or not that means the workload adjustment to all lecture is appropriate.

At the end of her message, Smoody asked Sellnau and GTC administrators Debbie Davidson (hereafter "Davidson") and Ed Knudson (hereafter "Knudson"), if they had any thoughts regarding the issue. Davidson responded on the same day with a message stating that KUSD was still using Youth Options funds for the LTA courses and that the course content and nature of the instructional time had not changed from previous years.

24. On February 15, 2008, Noto responded to Smoody's February 13 message, asserting that it was not true that nothing had changed. He stated that "the contract" had changed, referring to the Agreement between GTC and GTEA[6]. He also stated that one of his courses had changed because the workload points associated with it had been lowered. Noto asserted that, "[i]t would appear that there is a contradiction, no change in one case results in a lowered work load while no change in another case results in not being included in the WEDD course 100% lecture load noted in the contract". On February 24, 2008, Smoody responded to Noto with the following:

> Nothing has changed my believe [sic] that these are still workloaded with the lecture/lab points that campus instructors receive. It is simply a billing document change in order to keep the enrollment just the high school students at Lakeview which in essence is a closed class.
>
> ....
>
> I do not see that there is any contract violation here as you are assigned the workload that the approved course lecture/lab configuration requires.

[6] At that point, Noto seems to have believed that the provision at Section 13(h) stating that contracts for service were to be workloaded entirely from the lecture column of Appendix A was new. In fact, that provision has been part of the collective bargaining agreements between GTC and GTEA at least since the 1998-2001 agreement.

25. On March 5, 2008, an LTA special education instructor exchanged messages with the director of the KUSD special education department regarding the contracts for service issue, reporting that Noto had thought he had noticed, a couple months earlier, some kind of reaction from KUSD administrators when Noto started to discuss the youth options issue and stating that Noto wanted to know whether there had been any changes in how KUSD viewed the LTA program. The special education director responded, "[w]ell, I'm unclear as to what [Noto] thought he noticed. The change is only that the Gateway classes are not Youth Options classes offered by the district anymore."

On March 12, 2008, Noto forwarded these March 5 messages to Smoody and several GTC administrators, summarizing them as follows:

> [T]his is the response received from KUSD personnel concerning the change from YOP to WEDD contract classes at LTA. They may be paying for the courses out of YOP funds, but the courses are no longer considered YO classes as offered by the district.

26. GTEA did not follow up with KUSD officials regarding the March 5, 2008 exchange, and GTEA did not respond to Noto's March 12, 2008 message.

27. On March 19, 2008, another LTA instructor forwarded an e-mail message to Noto that contained a reference to an LTA class not being a Youth Options course. On that same day, Noto forwarded the message to Smoody, as well as various GTC administrators and instructors, stating the following:

> This is another example of the opinion of KUSD that, contrary to the opinion apparently held by most of you, the WEDD courses offered at LTA are no longer considered YOP regardless of which account the money to pay for them comes from. It is still my opinion that such courses meet the criteria for work loading at 100% lecture has stated in the contract. I'm not sure that a lack of response is the best way to handle my concern since the others copied on this note are also interested in a response.

GTEA did not respond to this message.

28. Also on March 19, 2008, Noto sent a message to Smoody pointing out that a GTC document referred to as the "seniority list" indicated that he is a WEDD instructor. The seniority list is a document generated by the GTC Human Resources (hereafter "HR") Department and relied on by GTEA to answer seniority questions. In response to Noto's March 19 message, Smoody indicated that she would obtain copies of the position postings for LTA instructors.

29. By the end of March of 2008 Smoody obtained the position posting from Noto's file, which describes the position into which Noto was hired as being part of the "Open

Learning Campus", not WEDD. She also obtained the personnel sheet from Noto's file, which indicates that he was hired as an instructor in the "Open Learning Campus". The personnel sheet is the most reliable indicator of a GTC employee's department affiliation.

30. The Open Learning Campus Department began to be called the Manufacturing Department approximately five years prior to the proceeding in this matter. Noto's personnel sheet does not reflect that name change.

31. In June of 2008, Noto filed the following grievance regarding the contracts for service issue:

> **3rd Level Grievance #08-2139.005 - 6/30/2008**
>
> Complainant is Mr. Louis (Lou) Noto, and individual residing at 1522 47th Ave., Kenosha WI 52144. Complainant's telephone number is (262)552-8673.
>
> Respondent is Gateway Technical College, a municipal employer with offices at 3520 30th Ave., Kenosha, WI 53144. Business phone number (262)564-3008. Respondent's Representative is Mr. Bryan Albrecht, President Gateway Technical College, Mr. Albrecht's representative, Vice President of Personnel, Mr. William Whyte.
>
> **Facts which constitute the claim:**
>
> a. Complainant was assigned to the Lakeview Technology Academy on 8/24/2000 as an instructor.
>
> b. Lakeview/BISD(WEDD) Department manager Edward Knudson (Dean/Executive Director). His responsibilities; manage the BISD and Lakeview Technical Academy's GTC instructional staff.
>
> c. Complainant worked for Mr. Knudson, as an instructor at the Lakeview Tech. Academy location from Fall 2000 through the Spring of 2008. Primary work function to teach contract classes to KUSD Youth Options students.
>
> **Complaint:**
>
> **Contract Violation – GTEA Collective Bargaining Agreement – Article V, Section 10 (g) (page 20)** [*sic*]
>
> ***Business & Industry Services Teachers***

… Workload for contracts for service will be calculated on the Lecture column of Appendix A. Technical assistance will be considered part of instructional workload and will be calculated from the Lecture column on Appendix A.

d. The Complainant, Lou Noto, taught classes to KUSD students under what would be termed as a contract for service, with KUSD in this case being the customer or client of the contract. This type of contract is a 'closed' or 38.14 type of contract, that being a contract **NOT** open to the public enrollment and the owner/facilitator of the contract was BISD/WEDD, so in essence Mr. Noto was contracted to work for the BISD/WEDD organization.

e. The GTEA contract clearly states in Article V, Section 10, that workload hours for contracts for service will be calculated on the Lecture column of Appendix A. Mr. Noto was paid hours in part from the Lab column of Appendix A, which is incorrect (sic) all compensation should have been from the Lecture column of Appendix A.

f. The Complainant, Mr. Louis Noto is seeking correct compensation for workload hours paid as Lab hours, that should have been paid as Lecture hours for contract for service classes taught at Lakeview Tech. Academy from Fall 2000 to Spring 2008.

Resolution to this Grievance

g. Back pay to Complainant for Lab workload hours to Lecture workload hours or each of the semesters 2000FA-2008SP.

h. Interest will be granted at a rate of 1% per month starting August 2000 through June 2008.

32. Noto received the following GTC response to his grievance regarding the contracts for service issue:

The following is Administration's response to the above noted grievance at the 2nd level:

- Mr. Louis Noto's date of hire was August 24, 2000.

- Mr. Noto was hired into position #1444.1, Instructor Electromechanical Technology, Lakeview Technical Academy/Open Learning campus. He was not assigned to Business and Industry Services (BISD) as he states in the above referenced grievance.

- Mr. Noto's supervisor at the time of hire was Dean Edward Knudson, who supervised instructors both at Lakeview Academy and the Business and Industry Services Division.

- Until fall of 2007, students enrolled in Mr. Noto's classes at Lakeview Technology Academy were *Youth Options* students. In the summer of 2007, the WTCS state office required that classes such as those taught at Lakeview be billed as 38.14 contracts. The change was a billing change which was not intended to impact the offerings at Lakeview or any other facility through which Gateway Technical College teaches under the same circumstances. Instructors who teach classes for KUSD continue to be workloaded per the bargaining agreement.

- The Administration will not engage in individual bargaining with a bargaining unit member to resolve this grievance.

The above noted grievance is denied.

In total, GTC denied Noto's grievance on this issue at three steps. The step three denial was issued on July 8, 2008.

33. On July 7, 2008 Fadi Zaher (hereafter "Zaher"), the GTEA president for the 2008-2009 academic year, sent this e-mail message to Noto:

> HR recently sent me the grievance that you filed, Barbara Henken's response to it, and your filing at the next step.
>
> I am somewhat confused. GTEA, represented by Pat Smoody at that time, had several communications with you pertaining to this issue, and she informed you that, based on the language and intent of our contract with the GTC administration, GTEA did not believe, given the stances at that time, in the existence of grounds for a grievance. Since you have pursued the grievance, I am wondering if you obtained new/additional facts and information to support this grievance. If so, please let us discuss these new/additional facts and information in order to determine their value and their effect on changing the validity of your grievance.
>
> Please be advised that when you chose to pursue this grievance yourself, you denied yourself from the assistance we provide for all our members. GTEA is and will always go above and beyond to service our members. GTEA does and will always assist our members to make certain they get what they are entitled to under our Collective Bargaining Agreement.

> Please feel free to contact me or any other GTEA representatives if you would like help with this issue or need help with any other work issues.

34. On October 16, 2008, Noto sent an e-mail message to Zaher, stating the following:

> 1. I was hired into BISD and as recently as this past Spring was still identified in official GTC publications as a member of WEDD. I have never received any information to the contrary. I teach daily at LTA which is were [sic] I market the school. Per contracts, that should be worth 43 load points each year back to 2000.[7]
>
> 2. All of my classes at LTA have been closed to the general public which could easily make a case that they are in effect 38.14 contract classes and should be workloaded at 100% lecture per the contracts.

35. In a meeting of October 23, 2008, Noto and Zaher discussed the contracts for service issue, among others. On October 28, 2008, Zaher indicated to Noto that Leigh Barker (hereafter "Barker"), who is the director of the United Technical College Council ("UTCC")[8], wanted to meet with Noto to discuss the issues that had been raised at the October 23 meeting. The meeting with Barker occurred in early November, and the contracts for service issue was discussed.

36. On December 5, 2008, after Noto repeatedly had suggested that GTEA was not addressing his concerns, Zaher sent an e-mail message that discussed, among other things, the contracts for service issue. Zaher pointed out that GTC had denied Noto's grievances related to that issue, finding that he had not been hired as a WEDD instructor and, therefore, was not entitled to a 100 percent lecture workload. Zaher also wrote the following:

> I did also send you an e-mail on July 7, 2008 that stated in part:
>
> *I am somewhat confused. GTEA, represented by Pat Smoody at that time, had several communications with you pertaining to this issue, and she informed you that, based on the language and intent of our contract with the GTC administration, GTEA did not believe, given the stances at that time, in the existence of grounds for a grievance. Since you have pursued the grievance, I am wondering if you obtained new/additional facts and information to support this grievance. If so, please let us discuss these new/additional facts and information in order to determine their value and their effect on changing the validity of your grievance.*

---

[7] Noto was also asserting that he was entitled to the 43 additional workload points WEDD instructors received, pursuant to Article V, Section 13(h) of the Agreement, for the 15 hours per week they spend engaged in marketing efforts. The claim was made in the original complaint filed in this matter, but was withdrawn at hearing.

[8] This is a coalition of local bargaining units, such as GTEA, that represent technical college employees.

> I did not receive a response from you, nor did you pursue the grievance on your own to step 4. GTEA agreed that you were not a WEDD instructor, even though you were listed as such on some GTC documents. I agree such a listing should not have occurred, and I believe you deserve an explanation from administration as to WHY you were ever listed that way. I do intend to follow up with HR to get an answer to that question. We will request that you receive an explanation from the College administration as to why you were listed as "WEDD" when the College states you were not. However, since you were not a WEDD Instructor, GTEA does not agree that you were loaded incorrectly, and will not pursue you being awarded 43% additional workload points for marketing and/or 100% lecture for the classes you teach at LTA.

37. On December 8, 2008, Zaher sent the following message to Barb Henken (hereafter "Henken") and Bill Whyte (hereafter "Whyte"), respectively the director and the vice-president of the GTC HR Department, regarding the confusion over Noto's department:

> Barb and Bill,
>
> Mr. Lou Noto filed grievance # 08-2139.005 and was denied all the way through step 3 of the process. Though GTEA is in agreement with the response and the reasons behind rejecting his claims, we believe that Mr. Noto deserves and official explanation from administration as to why he was ever listed as a WEDD faculty while he was not in fact one based on your reasoning and explanation in your rebuttal.
>
> Please let us know if we could be of any help.

38. Other than sending the December 8, 2008 e-mail message to Henken and Whyte, Zaher never did anything else to solicit information from GTC regarding the issue raised in that message.

39. On December 9, 2008, Whyte responded to Zaher's message of the day before with the following:

> Barb is out today but I will talk with her tomorrow on this. However, in reviewing the file I see that Mr. Noto did receive a response from Barb at both the second and third step of the grievance. Perhaps he did not accept her response, but then he dropped the grievance at the point. Is he looking for a different response?

40. On December 10, 2008 Whyte sent the following e-mail message to Noto and GTEA representatives:

> Mr. Noto,
>
> The GTEA leadership has asked me to explain your department designation and the confusion that was caused as a result. The specific reference was why you were ever listed as a WEDD faculty member.
>
> I have gone through all of our paperwork and you were never listed as a WEDD faculty member. The original and only Personnel Information Sheet shows your department as "Open Campus" and the Position Posting that you were hired under shows "Lakeview Technical Academy/Open Learning Campus". It is true that your Dean at that time was Ed Knudson and he was responsible for BISD (now WEDD) and Lakeview Academy but these truly were two separate entities.
>
> As Barb Henken pointed out in her response to your grievance the Lakeview students were Youth Options students in the beginning, but in 2007 the state WTCS office changed the rules and asked that they be billed as 38.14 contracts. That change did not move them into WEDD - it was simply a billing change.
>
> I hope this helps to clarify your question. Thank you,

41. Although Noto was identified on the 2007-2008 seniority list, in the 2008-2010 GTC course catalogue, and on his business card as a member of WEDD, and although June 2008 listing of WEDD contracts includes two of Noto's classes, GTEA representatives never challenged Whyte's statement that Noto never had been listed as a WEDD faculty member.

42. On April 7, 2009, Steve Wilks, a GTC administrator who handles contracts between GTC and school districts such as KUSD, sent an annually circulated memorandum detailing, for the 2008-2009 academic year, the various ways for high school students to earn GTC credit. The list included "contract for service courses", and defined a contract for service course as "a Gateway course usually taught at the high school by a Gateway instructor as part of a 38.14 contract". On that day, John Nelson (hereafter "Nelson"), another GTC-employed LTA instructor, forwarded it to Zaher, asking Zaher to take another look at the assertion that the LTA classes are contracts for service and, as such, should be loaded entirely from the lecture column of Appendix A. Nelson's message to Zaher also referenced the Section 13(h) language from the Agreement, and it attached a digital copy of GTC Administrative Procedure C-150 regarding contracts for service, which states the following:

> Pursuant to the provisions of Section 38.14(3) of the Wisconsin Statutes, the Gateway District may enter into contracts to provide service to public educational institutions, local governmental bodies, private educational institutions, businesses, and industries. …

43. On August 6, 2009, John Thibodeau, who is the associate vice-president of the Student Learning Department at GTC, sent the following e-mail message to a state consultant:

> Hello, Jim,
>
> I am following up on your phone conversation today with Ed Knudson regarding the two Project Lead the Way (PLTW) courses that we will be sending up the WTCS in the very near future. These will be 7-credit courses because of the number of hours of instruction that PLTW requires.
>
> Just to remind you of our rationale:
>
> - These are not program courses. They are customized classes for high school students run through 38.14 contracts from our WEDD division.

44. On October 16, 2009, to Smoody, Zaher, Barker, and Tanya Burton (hereafter "Burton"), who was the GTEA grievance chair, the following regarding the contracts for service issue:

> Last Thursday was Parent/Teacher conferences. As I entered the school on Friday morning, Bill Hittman came up to me. I thought he was going to ask how the conferences went but instead he started the conversation with, *"What's wrong with the people you work with, are they crazy?"* I was caught so off guard by this that I couldn't even manage what would have been my usual response. Instead, I asked who he was talking about. He was extremely upset with Beverly and Dennis. I don't remember that he actually told me what he was mad about but apparently they had said, done or planned to do something he didn't like. The conversation only lasted a few minutes and went on something like, actually pretty much like, this:
>
> *"Don't these people understand that these aren't Youth Option classes any more? These are 38.14 Contract courses. I pay good money for these classes. I paid over $70,000 for these classes last year. I own the course and I own the instructor's time. I should get what I want not what they feel like giving me. I'm going to send them an email and explain the difference to them."*
>
> I wished him good luck and told him I had been trying unsuccessfully for about 2 years to get GTC and then union to understand that KUSD didn't consider these courses YOP anymore. I asked Bill to copy us on his email and he said he would be glad to. I felt I had to be honest with him so I also noted that I has resorted to filing a formal complaint with the state in part because of this issue. He asked what the difference in course designation meant to the instructors and I told we believed the contract classes theoretically should pay the instructor at a higher rate based on our interpretation of the GTC contract. He wanted to know

> if I got the $70,000 he paid last year. I reminded his that there were 4 of us and that each of us probably did get some. He wanted to know if he was billed for. With that our conversation ended and I want to my lab. A short time later John Nelson walked in and I told him what had happened and described the conversation in detail. John's response was "Wow!" because he understood the potential implications.

45. GTEA representatives did not do anything to follow-up on Noto's October 16, 2009 message. They did not contact Hittman or anyone at LTA or KUSD to investigate what they might have understood regarding the status of LTA courses. Nor did they respond to Noto's e-mail message.

46. In the fall of 2000, when Noto first was hired as a GTC instructor, he went on an undetermined number of WEDD marketing calls.

47. In his tenure as a GTC instructor, Noto never has been a member of BISD or WEDD.

48. To bring his high-school-age students up to speed on concepts necessary for them to understand the college-level courses he teaches at LTA, Noto routinely is required to spend time teaching extra curriculum to his students, such as background material on electronics, technology or other scientific or technological principles.

49. The courses Noto teaches at LTA are not customized in the sense that WEDD courses are customized.

50. The courses Noto teaches at LTA never have been considered contracts for service, and his workload never has been calculated entirely under the lecture column of Appendix A.

51. GTEA never has represented Noto in a grievance regarding the contracts for service issue.

52. GTEA had a rational basis for its handling of the contracts for service issue and for electing not to pursue a grievance on Noto's behalf related to that issue.

53. There are four ways GTC instructors are compensated. "Workload pay" is the base pay an instructor receives for hours spent teaching inside the contractually-established thirty-five-hour workweek and 157-day academic year, and for carrying a workload that falls within the range of workload points deemed to be full-time, which is 190 to 210. "Overload pay" is the additional pay an instructor receives for carrying a workload that exceeds 210 workload points in any given academic year. "Extended contract" is pay an instructor receives for any work completed during non-contract time, which is any time that extends beyond the GTC academic calendar. Entering into an extended contract is voluntary for most GTC

instructors, but not for LTA instructors. Because the KUSD academic calendar followed by LTA instructors is longer by several weeks than the GTC academic calendar, LTA instructors necessarily receive extended contract pay every semester. The fourth way GTC instructors are paid is through Letters of Employment (hereafter "LOE"), for special assignments.

54. Smoody generally has been regarded as the GTEA expert with regard to workload calculation issues. She has abundant experience in that area.

55. GTEA representatives do not, as a matter of routine, verify the accuracy of the calculations made by GTC for instructor workloads every semester. Given the time such a task would take, it would be a practical impossibility to do so.

56. During the course of Noto's tenure at GTC, on an undetermined number of occasions, Noto asked Smoody to review his workload numbers for a given semester to verify their accuracy. In the course of reviewing Noto's workload numbers in this context, Smoody never identified any error.

57. On March 18, 2008, Noto attended a meeting with Smoody, Sellnau, Nelson, and Russ Birkholz (hereafter "Birkholz"), who is another GTC-employed LTA instructor. The purpose of the meeting was to review the workload numbers for LTA instructors for the 2007-2008 academic year. To undertake this review, GTEA had gathered together more than a half-dozen documents, such as the relevant curriculum sheets, workload reports, and the LTA and GTC academic calendars. The workload review process took two to three hours at the March 18 meeting and continued after the meeting was finished. During this time, Smoody and Sellnau worked to create detailed spreadsheets that analyzed the accuracy of the workload calculations that GTC had made for Noto's workload.

58. As a result of the curriculum process described at Finding of Fact 7, each GTC course is assigned a number representing Personal Hours of Instruction (hereafter "PHI"). To account for the non-class time an instructor puts into managing a course, the PHI assigned to the course is supposed higher than the number of contact hours it is anticipated an instructor will put in to actually teaching the course. If an instructor wants to challenge the PHI associated with any course, that instructor would have to do so through the curriculum process. GTEA is not involved in the process of establishing PHI for GTC courses.

59. The result of the March 18, 2008 meeting and the efforts that followed it was a determination that in some cases the actual contact time for LTA courses, including a Direct Current/Alternating Current (hereafter "DC/AC") course taught by Noto, exceeded the PHI that had been assigned to those courses.

60. After the workload problem was identified at the March 18 meeting, Sellnau met with GTC administrators to make adjustments to the end-date for the affected courses, so that their contact time was more in-line with their PHI. On March 20, 2008, Sellnau forwarded messages outlining those adjustments to Smoody, Noto, Birkholz, and Nelson.

Smoody responded that same day, indicating her agreement with point values Sellnau had provided but stating that she did not understand the significance of the decision to change the end-date for the courses, and she requested additional explanation. Sellnau responded with a brief explanation and indicated that he understood that Noto and Birkholz would be making any necessary adjustments in the courses they were teaching.

61. On March 26, 2008, Smoody printed a workload report associated with Noto's classes. On that report, she made calculations and notes that reflected the impact on Noto's workload that would result from the changed end-dates.

62. In addition to having the end dates of his classes changed in the spring of 2008, the workload analysis carried out by Smoody and Sellnau also resulted in Noto being credited with additional workload points for the 2007-2008 academic year, for the time he had spent teaching above the PHI. With this credit, Noto received an extra 4.05 workload points for the fall of 2007 semester and 21.1 workload points for the spring of 2008 semester. In September of 2008, Smoody would print another workload report related to Noto's classes to establish that he had in fact been paid for those additional workload points. Through this step, Smoody would confirm that Noto had been paid, through extended contracts, $1,488.60 for the fall semester and $755.42 for the spring semester for those points.

63. On April 4, 2008, Noto sent the following message to Smoody:

> Pat,
>
> It's not now been 2 weeks since we met to discuss the workload and adjust my DC/AC course hours for this year. At that meeting you said you would have to approach the Executive Committee to see if the Union would pursue recovery of any underpayment for hours over 72 scheduled for this course over the last 7 years. Has anything happened regarding this?

Within a few days, Smoody responded to this message by telling Noto that they would have to determine if there was anything grievable before the GTEA executive committee would become involved.

64. On April 7, 2008, Birkholz sent the following e-mail message to Smoody:

> Pat:
>
> As per our conversation on 4/3/08 I would like to meet with you and anyone else from the union to discuss the mismatch between the work schedule on campus and the work schedule at Lakeview that we were informed by management, we needed to work. This mismatch has been in place since school year 2000-01 thru 2006-07. I believe it was corrected by this school year. We have just been informed of this mismatch as of March 31, 2008.

Please let me know ASAP as to when we can arrange such a meeting.

Within a few days, Smoody responded with a message to Noto and Birkholz, stating that she was not sure what Sellnau had meant by a "mismatch" issue, but offering dates for a meeting later in April.

65. On April 22, 2008, Smoody, Zaher, Nelson, Noto, Birkholz, and Jim Lewis (hereafter "Lewis"), who is a member of the GTEA executive board, met for further discussion regarding workload miscalculation issues. At the beginning of this meeting, Lewis indicated that he thought they would have a problem addressing the workload issues that were being raised, because of the twenty-day time limit for filing grievances set forth in the Agreement. Smoody responded that the time limits may not have expired, because the workload problem just had been discovered. At the conclusion of the meeting, Smoody told the LTA instructors in attendance to gather their workload reports for previous years.

66. On May 1, 2008, Noto sent a message to Jodie Carstens (hereafter "Carstens"), an administrative assistant in the GTC HR Department, requesting copies of workload documents for his DC/AC course, as far back as they were available. After not receiving a response to that request, on May 8, 2008, Noto reiterated his request in another message to Carstens. Noto never received a response from Carstens to either message.

67. On May 12, 2008, Noto sent the following message to Smoody:

> Pat,
>
> I still have had no response from Jodie Carstens about copies of my old workload and calanders [*sic*] to determine exactly how many hours extra I put into DC/AC over the last 8 years. It has been implied rather strongly that she was instructed not to respond. What I do have shows at least 80 hours per course section every time it was offered.

Smoody responded to Noto's message on the same day, directing him to provide the workload documents he had in his possession to Smoody and stating that she would contact Carstens within the week to attempt to retrieve his other workload documents.

68. On May 20, 2008, Noto sent the following e-mail message to Smoody and other GTEA representatives:

> I know it's only been a little over a week since I sent the note below but with your school year ending today I was wondering if anything had come of the issue of my extra hours teaching DC/AC over the past 8 years?

On the same day, Smoody responded to Noto stating that she had not had an opportunity either to open the envelope with workload documents Noto had provided to her or to contact

Carstens. She indicated she would take care of those matters later that week or in the next week. At some point not long after this, Smoody did place a call to Carstens with the intention of requesting Noto's old workload documents, but Carstens did not answer the telephone. Smoody did not leave a message for Carstens, and Smoody never again attempted to reach Carstens regarding this issue.

69. At the end of the 2007-2008 academic year, GTEA designated Zaher to be the point person with regard to issues raised by LTA instructors, including issues related to workload calculations. GTEA never specifically told Noto told that Zaher had been designated the contact person for LTA instructors.

70. On August 22, 2008, Noto sent Smoody a message asking her if there had been any developments regarding the workload miscalculation issue over the summer.

71. On September 3, 2008, Zaher sent a message to all GTEA members instructing them on how to ensure that the PHI for their courses was in proper proportion to the contact time for their courses. The next day, Noto responded to Zaher's message with the following:

> I'm still waiting to hear what the school and union plan to do about the extra hours beyond 72 that I was scheduled for and taught AC/DC for the 2000 thru 2007 school years. This has not been resolved at all let alone to my satisfaction. This was left with Pat Smoody and you after Jim Lewis backed out during a meeting last Spring. We're talking about 20 course offerings with an 18 hour difference between what was scheduled and what I was paid for.

72. On September 5, 2008, Noto forwarded the August 22, 2008 message he had sent to Smoody, stating "[t]his is another of the e-mails I've received no response to". He also forwarded to Burton and Smoody his September 3 and 4, 2008 exchange with Zaher. Noto did not receive any response from Burton or Smoody.

73. On October 10, 2008, Zaher sent the following to Noto regarding the workload miscalculation issue:

> Good Morning Lou,
>
> In an effort to research your concern about a potential discrepancy between your workload and hours spent in the classroom, we reviewed all the materials you had earlier provided to Pat Smoody.
>
> Included in the materials you provided, the GTEA was able to find evidence about the following facts:
>
> - Your workload points for the 2007-08 school year were adjusted for that part of each class's workload that belonged inside the work year

> (and thus on workload), and that part that belonged on extended contract. You were compensated prorata [sic] for both the academic years 2006-2007 and 2007-2008 for the extra time you spent in the classroom beyond your assigned workload points.
> - There were no materials to provide any further information or documentation before these two academic years.
>
> Lou, it is clear from an e-mail you sent to Pat Smoody back on March 17, 2008 (10:10 a.m.) that you were aware of receiving workload adjustments in previous years. Because of this knowledge and the fact that you received them preciously, you certainly should have been aware if you were no longer receiving them. What, if anything, did you do about this at that time? Did you ask anyone about the change at that time? If not, going back to previous years now, years later, is not available because the grievance timelines are long past. I understand that Pat Smoody indicated this to you at a meeting at Lakeview with you and Ron Sellnau on March 18, 2008. The GTEA's conclusion about this has not changed.
>
> It is my understanding that you are now getting extended contract for the days you must teach beyond the contract calendar, and it appears that you received compensation/extended contract in prior years. Accordingly, the GTEA considers this matter closed.

74. On October 16, 2008, Noto responded to Zaher's October 10, 2008 message with the following:

> Now to the main event. I waited to speak with my fellow employees who were present at the meetings where the topic of hours scheduled versus hours paid for was discussed and their recollection of the events match mine. The note you reference, March 17th, was the result of a conversation I had the day before with the Dean I worked for when I started here in 2000. Until that conversation I was never aware of the fact that I was paid separately for any additional hours beyond 72. As Russ Birkholz so clearly stated at our meeting with you, Pat and Jim Lewis in the Kenosha Room on April 22, we had no idea what the various items on our load assignment signified at that time. As a matter of fact, I had complained to my supervisors and the Union repeatedly over the past seven years about the fact that John Nelson and I worked the same number of hours (90 scheduled) but he received more load points and the response up until last April was always the difference in lab/lecture ratio. A meeting with Pat, Ron Sellnau and the 3 of us from LTA that took place the week before Easter was the first time anyone paid attention to my complaints and noted how badly I was being shorted on load and pay. At the meeting on April 22, Jim Lewis tried to start the meeting by telling us that our 20 days to complain had expired, which we all expected to hear because it has become the standard response to just

> about every complaint those of us at BISD/WEDD or LTA have raised. That approach was brushed aside as even Pat Smoody noted that the problem had just come to light. I have a number of e-mails that include Pat and you concerning my failed attempt to get additional workload records from the school. I also have e-mails where Pat stated she would get that information and do a review. Unfortunately I also have e-mails asking the status of this issue that received short responses basically stating that when time allowed this issue would be revisited. Now you come back with basically what Lewis tried to use at the 4/22 meeting that was discounted at that time. You also state in your note that a correction was made to my workload in '07. The only thing I have been aware of over the past years is a contract extension because the Unified and GTC calendars do not match but that correction was still based on only 72 hours of pay for each DC/AC section as opposed to the 90 hours scheduled.
>
> Fadi, you and GTEA have a right to your opinion that this matter is settled but please don't think that your opinion is in any way binding on me.

Noto also asserted that GTEA would fall-back on the twenty-day timeframe for filing grievances set forth in the Agreement in instances where GTEA had "burned up the clock, usually without responding".

75. In a meeting of October 23, 2008, Noto and Zaher again discussed the workload miscalculation issue, among other issues. Zaher indicated to Noto on October 28 that Barker wanted to meet with Noto to discuss the issues raised at this meeting. This meeting occurred in early November, and the workload miscalculation issue was discussed.

76. In a message of December 5, 2008, after Noto had suggested repeatedly that GTEA had not addressed his concerns, Zaher sent an e-mail message that addressed, among other things, the workload miscalculation issue, stating as follows:

> You clearly knew that you had received the adjustments on your workload in previous years *(Source: Email to Pat Smoody on March 17, 2008 at 10:10 a.m.)*. Because you had received them previously, you should have known and noticed when you no longer were receiving the workload adjustments. It was back then that you were contractually obligated to file the grievance. (Source: Article IV, Section 3 - Grievance, Step 1)
>
> The very next day (March 18, 2008), during a meeting with you and Ron Sellnau, Pat Smoody stated to you that going back to previous years was not likely to happen because the grievance timelines were past. Pat also stated to you that Article V, Section 8A says that all "Thirty-five (35) hour work week scheduled will be confirmed in writing by the end of the first week of each semester according to Administrative Procedure A-500…" This schedule includes workload points on the RFAL workload report as well as the XPIN

> work day/work week grid with the 35-hours identified by the dean. All faculty receive this information at the beginning of each semester, and all faculty have an obligation to review it at that time for any mistakes or missing information. If there is a mistake or something missing, corrective/changes should be requested within 20 work days of receiving this information.
>
> Also after you, John Nelson, and Russ Birkholz met with Jim Lewis, Pat Smoody, and me on April 22, 2008, John Nelson and Russ Birkholz (2 out of the 3 LVA instructors) were able to determine that the hours worked out correctly once they compared how many hours KUSD's calendar had those students our of class during the semester and said that the PHIs taught evened out when you removed those hours. Since all LVA instructors are subjected to the same calendar, GTEA accepted that the hours were correct.

77. In June of 2009, Noto's dean sent a message regarding the extra days Noto had taught in the spring of 2009 under KUSD's calendar and the resulting extended contracts. This message led to another exchange in which Noto raised his concerns regarding the workload miscalculation issue. On June 5, 2009, Noto sent the following message to several GTC administrators, as well as Smoody, Zaher, and Burton:

> I've been thinking about this all day and I really would like an answer to a question. Would any of you care to explain why I have to teach 100% of my hours to achieve load while campus instructors only have to teach 80%. Apparently this arrangement only applies to the 4 GTC instructors at LTA just like the use of the 190 divisor for extended contracts that we have no choice but to teach while campus instructors have their base pay divided for extended contracts that we have no choice but to teach while campus instructors have their base pay divided by 157 to determine their hourly rate.

On June 6, 2009, Zaher responded:

> Lou,
>
> Sorry, I fail to understand your point. Could you please be more specific as to what you mean and what leads you to believe that everyone else besides the Lakeview instructors teaches less. Where are you getting these numbers from (100% and 80%).

On June 8, Noto responded:

> I have included Dennis and others on this note because it also addresses his response to my note of 6/5 and the others also received my 6/5 note.

> Under the new setup of trimesters a 3 credit course would meet for 3 hrs. per week for 15 weeks. That comes to 45 contact hours but the course PHI is still 54, a difference of 20%. Or as I put it below, the instructors only teach 80% of the course PHI. In Dennis' note he made the statement that I had to teach the entire 36 PHI of the course. To be honest, that is where I stopped reading, or more correctly, where I stopped absorbing what I was reading. Revisiting his e0mail, I note that he followed the statement with 1800 minutes which would be 80% of the original required minutes for a 36 PHI course. Sorry Dennis, those words just pushed the wrong button at that time.
>
> This issue first came up last year when I was originally told that the DC/AC course I taught at LTA would be reduced from 72 to 60 hours. That's when all parties involved first realized what I had been questioning for years, why was I teaching the same number of hours as John Nelson and lecturing more while receiving fewer load points. I was being paid for 72 hours which would be the equivalent of a 90 PHI course but I was actually scheduled for 90 hours which would be the equivalent of a 108 PHI course. If I may paraphrase Leigh, that issue and the issue of 100% lecture for 38.14 classes, remain to be addressed.
>
> I also should note that I made an error in my note below. The 157 divisor is used to determine the campus instructor's daily rate, not hourly as I stated. But, as noted by Pat during the Wednesday meeting, those of us at LTA really don't have the option to refuse the extended courses which are a direct result of the KUSD schedule. Therefore, our extended contract calculations should be based on 157 not 190 to calculate the daily rate, a difference of 21%. The reason all of my courses were extended at LTA was because KUSD did not want the students' seat time reduced. The simple fact is that all of the courses I teach are completely new to high school students to the extend [*sic*] that I usually have to teach them additional background material before we can tackle the course material. With the lack of background knowledge for most of the topics covered, attempting to rush them through the courses generally results in disaster.

Later that day, Zaher responded to Noto:

> Lou,
>
> There is no difference between the old (2 semesters) and new (3 semester)setups in the amount of minutes/each class. a [*sic*] PHI class was 54 50-minute sessions (a total of 2,700 minutes) now it is 45 60-mionue sessions (again a total of 2,700). Instructors used to teach 100% of the PHIs and are still doing the same 100% (not 80%) based on the minutes they used to and are still teaching (2,700 minutes). And that applies to everyone.

Hope this helps.

On June 9, 2009, Noto wrote:

> I find this all interesting but I clearly remember having the course PHIs explained to me early in my career here. It was stated that the PHI the instructor taught was only 80% of the total course PHI. As an example, I got hold of a Summer Semester catalog yesterday and noted that 3 CR. Gen. Ed. Classes such as English or Math courses began the week of 5/18 and will end the week of 8/24. That's 15 weeks at 3 hours per week or 45 hours of instruction. If I remember the PHI for a 3 credit course like this is 54 or 20% more than the hours taught.
>
> What I find more interesting about your note is how it relates to my tenure at LTA. The high school courses at LTA are, and always have been, in 90 minute blocks. Bases [*sic*] on the old "50 minutes equals and hour" approach at other campuses, that would indicate that the LTA classes should have only been 75 minutes. Or put another way, every time we taught a class at LTA we taught 15 minutes, 20% longer than we were paid for based on what other GTC instructors received. This is the first year that I've seen anyone use minutes to calculate my load but then I can understand that because it's the first time anyone has gone to the extreme of subtracting every minute possible from my schedule. In the past I never heard of anyone counting the minutes only the number of days per course section.
>
> What gets really interesting is that my DE9 class, for which the students get 4 credits and I receive 35 load points meets for 90 minutes per day for 18 weeks or 135 PHI. Divide that by .8 and you get 168.75, that's lot for 35 load points. DC/AC (21 points) and Mechanical Skills (24 points) are 12 weeks each for a total of 90 PHI. Divide that by .8 and you get 112.5. The 2 metrology courses were 5 weeks each until this year when they were reduced to 4 weeks to fit the KUSD schedule. At 4 weeks each they are 30 PHI. Divide that by .8 and you get 37.5 which is the actual number of hours I taught these classes in prior years.
>
> That's a lot of extra hours of teaching at LTA compared to teaching at Kenosha, Racine, etc. and a lot of money I didn't get paid. This is what started my complaint last Spring [*sic*] and you can see that I still have not been convinced that I was treated correctly.

On June 11, 2009, Zaher responded:

---

[9] Digital Electronics (hereafter "DE").

> Lou,
>
> PHI's first became an issue when some of the tech colleges, including GTC, went to 16 week calendars and changed from 50-minute periods to 55-minute periods. That state WTCS continued (and still continues) to count each 50-minute block of time as one PHI. So each district has to do the conversion. Now GTC has gone to a 15-week calendar and 60-minute periods. But each 50-minute block of time continues to equal one PHI for state reporting purposes. The total minutes continue to match.

On June 12, Noto replied:

> I do believe you are missing the point. If everything matches why do I continue to spend 135 actual contact hours per DE course with my students for a 4 credit, 35 load point class? Why is DC?AC taught at night at LTA or on all of the other campuses scheduled for the equivalent of 72 "50 minute" hours or 3600 minutes, but for me during the day at LTA the same course was scheduled until this year for 90 "50 minute" contact hours for 5400 minutes. No matter how you look at it 3600 does not equal 5400.

On June 16, 2009, Zaher replied:

> Lou,
>
> I am not missing the point you are not getting the math.
>
> It is true that you spent 135 contact hrs to teach each section of DE, 605-118-3L1A and 605-118-3L1B, during this past spring of 09 semester. For each of these two sections of DE you did not receive 35 workload point you got 31.97 workload point [*sic*] on your regular workload points for your contract year plus 12.83 workload points on extended contract, "I believe the math involved here is fairly straight forward" 31.97 + 12.83 = 44.8 workload points. "No matter how you look at it 35 workload points does not equal 44.8 workload point" correct!
>
> As for the DC/AC, while you spent 5,400 minutes teaching each section of DC/AC, 605-113-2L1A and 605-113-2L1B, during this past fall of 09 semester. For each of these two sections of DC/AC you did not receive 21 workload points you got 21 workload points on your regular workload points for your contract year plus 7.61 workload points for the additional time you had to teach extra "I believe the math involved here is fairly straight forward" 21 + 7.61 = 28.61 workload points. "No matter how you look at it 21 workload points does not equal 28.61 workload points" correct!

> Obviously, when you are spending more time in the classroom to deliver any class more than the required time per its PHIs, you are getting the extra compensatory workload points.

78. GTEA never obtained or worked through with Noto the documents containing his workload numbers for the fall of 2000 through the spring of 2007 semesters.

79. Noto never has been successful in his effort to recoup any lost wages due to workload miscalculation errors from the fall of 2000 through the spring of 2007 semesters. Nor has GTEA ever represented him in a grievance regarding this issue.

80. GTEA had a rational basis for its handling of Noto's workload miscalculation issue and for electing not to pursue a grievance on Noto's behalf related to that issue.

81. In the first week of March of 2008, Noto began to suspect that one of his spring 2008 sections of his DC/AC class would be cancelled as a result of low enrollment. Noto initiated a conversation with GTC administrators and GTEA representatives about how the possible cancellation would affect his workload numbers. Sellnau hypothesized that a cancellation would reduce Noto's workload by 21 points. Lewis clarified that Noto would not lose the entire 21 points allocated to the class, but rather would get prorated credit for the portion he had taught at the beginning of the semester, prior to the cancellation.

82. Also in March of 2008, GTEA was initiating a multiple-instructor grievance. On March 13, 2008, Burton sent an e-mail message to the GTEA membership, attaching a draft of the grievance, indicating that members who believed the grievance applied to their situation should submit their names for inclusion on the grievance. The description contained in the grievance provided as follows:

> The District Deans have arbitrarily decided, in violation of contract language, to change the workload and method of payment of bargaining unit members, after the first week of the semester. Per the contract, workloads and work weeks are confirmed in writing by the end of the first week of each semester. The District has changed the individual's workload and workweek without mutual agreement.

83. Article V, Section 9(C) of the Agreement provides that "[t]eachers shall be sent a copy of their schedule at least thirty (30) days prior to the semester for which the schedule is made". The basis for the March, 2008 grievance by GTEA was that GTC had been removing courses from within the regular workload covered by the 35-hour work week and instead placing them on LOE, allegedly violating Article V, Section 9(C) of the Agreement.

84. Prior to filing the grievance with GTC, GTEA representatives did not take steps to make a determination as to whether any of the individuals who had identified themselves as grievants were properly included in the grievance. If a GTEA member had indicated in

response to Burton's March 13, 2008 e-mail message that he or she had a situation that fit within the grievance, that member's name automatically was added to the list. The GTC HR Department would take responsibility for investigating whether the grievance actually applied to the identified employees.

85. On March 13, 2008, Noto sent an e-mail message to Burton explaining that a section of his DC/AC class was being cancelled and asking her if that situation fit with the grievance that was being circulated. On the next day, the DC/AC class was cancelled, and Noto sent another message to Burton telling her that his class had in fact been cancelled and stating, "I would really like to know if I qualify for this grievance.…"

86. The Agreement between GTC and GTEA does not state what workload credit a GTC instructor should receive for a class that has been cancelled after the semester has begun. The practice between GTC and GTEA is that the instructor of a cancelled class receives a prorated workload for the time he or she spent teaching the course.

87. In the meeting of March 18, 2008, Smoody, Sellnau, and Noto discussed the proper workload for Noto's cancelled DC/AC class. Smoody and the others in attendance at the meeting reviewed the workload documents they had available to determine the exact prorated number of workload points to which Noto was entitled for the time he spent teaching the class before it was cancelled. They determined that he was to receive 4.38 workload points.

88. On March 20, 2008, Noto was copied on an e-mail message from Sellnau to GTC administration, which indicated that Noto should receive 4.38 workload points for his cancelled DC/AC course.

89. Not having received a response from Burton to his March 13 and 14, 2008 messages, Noto sent the following to Burton on April 1, 2008:

> Tanya,
>
> I'm still waiting to find out if I am a part of your executive grievance or not. It's been 2 weeks, decisions are being made and I would like to know whether or not I am included in the grievance.

90. On April 2, 2008, Burton responded to Noto's e-mail stating that she had been out of the office since March 14, 2008, and confirming that Noto's name had been included in the grievance. She told Noto that GTEA was waiting for a reply from GTC and that she would keep him posted on developments.

91. The LOE grievance was resolved in May of 2008. After having undertaken its investigation, GTC provided to GTEA its response to the grievance. The written response by Henken reported GTC's findings with regard to each of the nineteen named individuals. Even though Noto was not covered by the grievance, Henken provided information related to his

workload, as well, stating "Mr. Noto's workload will change as a result of moving the additional workdays for instructors at Lakeview Technical Academy to Extended Contract". This response was a reference to the workload adjustments that had been made on Noto's behalf, earlier that spring, related to the workload miscalculation for the 2007-2008 academic year.

92. In the beginning of the fall 2008 semester, Noto's workload reports reflected the 4.38 workload points he had received for the portion of the DC/AC class he had taught the previous spring prior to its cancellation.

93. In an October 16, 2008 e-mail message Noto sent to Zaher, Noto raised the issue of the cancellation of the DC/AC class. He stated that the cancellation had cost him 17 points, but that he had received "again no response from the union".

94. Also, on October 16, 2008, Noto sent an e-mail message to Burton, forwarding their exchange from the previous April about the LOE grievance, asking her "what ever happened with this grievance?"

95. On October 20, 2008, at 3:09 p.m., Burton responded to Noto with the following message:

> Hi Lou,
>
> I wanted to let you know that I am following up on your request. Based on when we settled the grievance in May, GTEA was told you would be paid under Extended Contract. Please let me know if this is true.
>
> In the meantime, I am gathering more information and will email you back in a couple of days once I have gotten some more responses.

On October 21, 2008, Noto replied to Burton with the following message:

> Tanya,
>
> Due to the fact that I work at LTA I have extended contract every year so it's not that easy to tell. The fact is that I suspected I had been shorted on extended contract pay this past Spring based on my work load without any additions for this grievance that I didn't know was settled. I have no idea what the settlement was but I can assure you that I was not paid for the 17+ load points they took away from me when the DC/AC course I was teaching was dropped after the deadline.

Also later on October 21 Noto also sent the following message to Burton:

> Tanya, I just realized that I couldn't possibly have gotten any extended contract pay for this grievance because I had to battle with payroll to get them to pay on the 2 extended contracts I knew about.

96. In response to the e-mail exchange of October 20 and 21, 2008, Burton contacted Henken to inquire about the pay Noto had received under extended contract, to which Henken had referred in the grievance response the previous May. On October 22, 2008, Burton sent the following e-mail message to Noto, reminding him of the extended contract pay he had received for the workload corrections that had been made:

> Hi Lou,
>
> I just got a response from barb Henken in HR regarding your extended pay for the Workload grievance that was filed in the Spring, 2008 semester.
>
> Here is what I received:
>
> **Course #900-004-2LAA; paid out on 5/24/08; $1488.60.**
> **Course #900-004-3LAB; paid out on 6/21/08; $7755.42.**
>
> I hope this information helps. Please let me know if you need anything else.

97. On October 23, 2008, Noto sent the following e-mail message to Burton:[10]

> Tanya,
>
> I went home and dug out my check stubs.
>
> 5/24 EXCO 900-004-2LAA $1,488.60
> 6/7 EXCO 900-004-3LAB 3,877.71
> 6/21 EXCO 900-004-3LAB 3,877.71
>
> There were a number of e-mails between myself, Payroll and Ron Sellnau before Payroll came up with the 6/7 payment. Since I had, and for that matter still don't have, any idea what the grievance settlement was I have no way of knowing if this is what it was supposed to be. My original reason for asking if I was included in the executive grievance was because the school had moved a student from an active class to a different section and then shut down my class after the 2nd week of the course which I understood to be a contract violation. At that time my workload was reduced by over 17 load points. I was still above full load but wasn't sure if the settlement would mean my getting paid for those lost points or not.

[10] The date of this message does not appear on this exhibit, but its content suggests that it was sent very soon after, and probably on the same day, as Burton's October 23 message.

Burton responded to Noto's message that same day, indicating that she had again contacted the GTC HR Department regarding this issue.

98. In meetings in October and November of 2008, Zaher and Barker both discussed the class cancellation issue with Noto.

99. In a message of December 5, 2008, after Noto had suggested repeatedly that GTEA had not addressed his concerns, Zaher sent an e-mail message that addressed, among other things, the class cancellation issue. Zaher's message stated as follows:

> You received the prorated workload points for the timeframe that the one student was in the section alone while KUSD made scheduling changes moving the student to the other section. This transfer left your section vacant and then they cancelled it. As I told you in person, management has the right to cancel classes any time they want especially when they are empty from any students. The GTEA would be able to question the decision if the cancelation [sic] did lead to underload which clearly was not the case.

100. On March 13, 2009, at 12:20 p.m., Noto send the following e-mail message to Burton:

> Tanya,
>
> I never heard any more about this and I'm still questioning what I received. I taught 3 classes last Spring. Once block of PLTW DE, 605-118-3L1A, and 2 blocks of DC/AC, 605-113-3L1A and 3L1B. My pay stubs indicate the pay noted below which appears to be for extended courses. I have no way of knowing if the 2 larger amounts are multiple payments for 1 class or individual payments for 2 classes. The DC/AC class that went to completion ended earlier than the DE class but both went beyond the GTC semester end date. Looking at the 3 payouts below I can't tell which payment is for which class and none appear to be for the lost load.
>
> It was my understanding that the Executive Grievance was filed to recover pay for courses that were terminated after the 2nd week of class which was the case for my DC/AC class 3L1B. That termination cost me 17 load points, but still left me overloaded. I don't know that I was reimbursed for that amount if, in fact, that was the purpose of the grievance and I was determined to be qualified for it as you stated earlier.
>
> What I'm trying to say is that I don't know if I was paid for 1 or 2 sections of extended DC/AC or for the portion of the class that was cancelled but, based on the numbers below, it appears that I was not paid for 3 extended courses and an additional 17 load points.

101. On March 16, 2009, Zaher had a conversation with Noto in which Zaher indicated that Noto's situation had not fit within the situation addressed by the LOE grievance. On that same day, Burton sent an e-mail message to Noto indicating that she understood Noto had spoken with Zaher and that the class cancellation issue had been resolved. Noto replied to Burton's message with the following:

> Actually the resolution rests on Fadi's statement that the original grievance was only for instructors who had courses moved from Load to LOE which was never the case with me. I was of the impression that the original grievance covered the act of ending a course after the end of the 2nd week of class.
>
> I still really don't know what I was paid for at the end of the year. I have no way of relating the numbers on my check stub, EXCO 900-xxx-xxxx, to the courses that I taught. I have to assume that the smaller amount was for the DC/AC section that finished the semester and the other 2 are for DE but I really have no way of knowing.

102. Noto never has been successful in his effort to recoup the additional seventeen workload points for the DC/AC course that was cancelled. Nor has GTEA ever represented him in a grievance regarding this issue.

103. The GTEA had a rational basis for its handling of the class cancellation issue and for not filing a grievance on Noto's behalf relating to that issue.

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

CONCLUSIONS OF LAW

1. Noto's claims against GTEA are not barred by the statute of limitations.

2. Noto's claims against GTEA are not barred by the failure to exhaust the grievance procedure set forth in the Agreement between GTC and GTEA.

3. Unless the GTEA breached its duty of fair representation to Noto by actions described in Findings of Fact 1 through 103, the Agreement between GTC and GTEA is the exclusive means by which alleged violations of the Agreement can be litigated.

4. Through the actions described in Finding of Fact 1 through 103, GTEA did not breach its duty of fair representation to Noto.

5. Because GTEA did not breach its duty of fair representation to Noto, the Wisconsin Employment Relations Commission will not assert its jurisdiction to determine whether GTC violated a collective bargaining agreement and thereby committed prohibited practices within the meaning of Chapter 111.70 of the Wisconsin Statutes.

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

ORDER

The complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 21st day of July, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

GATEWAY TECHNICAL COLLEGE

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

This complaint arises out of Noto's contention that GTC breached the Agreement between GTC and GTEA (1) by not calculating his workload under the lecture column of Appendix A of the Agreement, pursuant to the contracts for service provision at Section 13(h), (2) by miscalculating his workload for his DC/AC class, and (3) by cancelling a section of his DC/AC class in the spring of 2008. Where a collective bargaining agreement contains final and binding arbitration procedures, however, the Commission will not assert jurisdiction over statutorily-based breach of contract claims, because contractually-established procedures are presumed to be the exclusive means by which alleged violations of such agreements can be resolved. MAHNKE V. WERC, 66 WIS. 2D 524, 529-530, 532 (1975); GRAY V. MARINETTE COUNTY, 200 WIS. 2D 426, 436 (CT. APP. 1996); UNITED STATE MOTOR CORP., DEC. NO. 2067-A (WERB, 5/49); HARNISCHFEGER CORP., DEC. NO. 3899-B (WERC, 5/55); MELROSE-MINDORO JOINT SCHOOL DISTRICT NO. 2, DEC. NO. 11627 (WERC, 2/73); CITY OF MENASHA, DEC. NO. 13283-A (WERC, 2/77); MONONA GROVE SCHOOL DISTRICT, DEC. NO. 22414 (WERC, 3/85). If an employee covered by such a collective bargaining agreement can prove, however, that his collective bargaining representative failed to fairly represent him by unlawfully thwarting his efforts to arbitrate a grievance over an alleged violation of the agreement, there is a sound policy basis that overcomes the presumed exclusivity of the grievance arbitration procedure, and the Commission will assert its prohibited practice jurisdiction to determine whether the agreement has been violated. MAHNKE V. WERC, 66 WIS. 2D AT 529-530, 532.; GRAY V. MARINETTE COUNTY, 200 WIS. 2D AT 436.

As reflected in Finding of Fact 5 and Conclusion of Law 3, the record here satisfies me that the Agreement between GTC and GTEA contains a grievance arbitration clause that is the exclusive means by which alleged violations of the Agreement can be resolved. Thus, before the Commission can properly assert jurisdiction over Noto's claims against GTC, Noto must prove that GTEA breached the duty of fair representation it owed him.

When the VACA V. SIPES decision was issued by the U.S. Supreme Court in 1967, it already had been well-established that, as the exclusive bargaining representative of employees in a bargaining unit, a union has a statutory duty to represent all of those employees fairly both in its collective bargaining with the employer and its enforcement of the resulting agreements. 386 U.S. 171, 177 (1967). A logical corollary to the exclusive right to represent employees is the obligation to guard their interests. VACA established the legal standards for evaluating duty of fair representation claims, providing that a breach of the duty occurs "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith". ID. at 190. This standard built on the Court's prior articulation of such a duty in HUMPHREY V. MOORE, which required a union "to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct". 375 U.S. 335, 342 (1964).

The Wisconsin Supreme Court adopted the VACA standard in MAHNKE v. WERC, SUPRA, a case where the duty of fair representation was applied to a claim brought by a private sector employee under the Wisconsin Employment Peace Act. Subsequently, in GRAY v. MARINETTE COUNTY, SUPRA, the principles adopted in MAHNKE were applied to a claim, such as the present one, brought under the Municipal Employment Relations Act by a public sector employee.

More recently, the Wisconsin Court of Appeals has clarified that arbitrary conduct, discriminatory action, and bad faith form three separate and distinct possible routes by which a union may be found to have breached its duty of fair representation. SEIU LOCAL NO., 150 v. WERC, 328 WIS. 2D 447, ¶ 37, n.11 (2010), *citing* BLACK v. RYDER/P.I.E. NATIONWIDE INC., 15 F.3D 573 (6TH CIR. 1994). The question of whether a union has acted discriminatorily or in bad faith requires inquiry into the subjective motivation behind its actions. ID. AT ¶ 21, n.5, *citing* TRNKA v. LOCAL UNION NO. 688, UNITED AUTO., AEROSPACE AGRIC. IMPLEMENT WORKERS OF AM., 30 F.3D 60, 63 (7TH CIR.1994). A successful claim on either of these bases requires proof that the union acted (or failed to act) due to an improper motive. ID., *citing* NEAL v. NEWSPAPER HOLDINGS, INC., 349 F.3D 363 (7TH CIR. 2003).

The question of whether a union has acted arbitrarily, on the other hand, requires inquiry into the objective adequacy of its actions. ID. AT ¶ 20, *citing* TRNKA v. LOCAL UNION NO. 688, UNITED AUTO., AEROSPACE AGRIC. IMPLEMENT WORKERS OF AM., SUPRA. Acts of omission not intended to harm a union member may be so egregious, so far short of minimum standards of fairness to the employee, and so unrelated to legitimate union interests as to be arbitrary. ID. AT ¶ 21, *citing* COLEMAN v. OUTBOARD MARINE CORP., 92 WIS.2D 565 (1979). Put another way, a union's actions may be deemed arbitrary if they (1) reflect reckless disregard to the right of the individual employee, (2) severely prejudice the injured employee, and (3) the policies underlying the duty of fair representation – those being a union's need to be able to screen meritless grievances and to allocate resources – would not be served by shielding the union from liability in the circumstances of the particular case. ID.

Over the years, courts have elaborated on what these general standards specifically require of unions when administering the machinery of a grievance arbitration process. The MAHKE court concluded that

> Vaca [] requires the union to make decision as to the merits of each grievance. It is submitted that such decision should take into account at least the monetary value of [an employee's] claim, the effect of the breach on the employee and the likelihood of success in arbitration. Absent such a good-faith determination, a decision not to arbitrate based solely on economic considerations could be arbitrary and a breach of the union's duty of fair representation.
>
> This is not to suggest that every grievance must go to arbitration, but at least that the union must in good faith weigh the relevant factors before making such determination.

66 WIS. 2D AT 534. These requirements seem keyed toward avoiding the "perfunctory" investigation into the merits of a grievance forbidden in VACA. 386 U.S. AT 193.

Even with these requirements in place, however, it is well-established that the law grants to a union "considerable latitude" in handling grievances. MAHNKE V. WERC, 66 WIS. 2D AT 531. A union does not breach its duty of fair representation by settling a grievance short of arbitration, even if it does so against the wishes of a grievant. SEIU LOCAL NO., 150 V. WERC, 328 WIS. 2D 447, ¶ 20, *citing* VACA V. SIPES, SUPRA. Not even proof that a grievance was meritorious is sufficient by itself to prove breach of the duty. ID. AT ¶ 20, *citing* TULLY V. FRED OLSON MOTOR SERV. CO., 37 WIS.2D 80 (1967). A union may properly reject a meritorious claim, unless its action is arbitrary or taken in bad faith. ID., *citing* MAHNKE V. WERC, SUPRA.

The sufficiency of a union's communications with a grievant often plays a role in duty of fair representation cases. Nevertheless, it has been established that poor communication, without more, does not constitute a breach of a union's duty. ID. AT ¶ 47, *citing* TRACY V. LOCAL 255 OF THE INT'L UNION OF ELEC., ELEC., TECHNICAL, SALARIED & MACH. WORKERS, AFL-CIO, 783 F.SUPP. 1527 (D.MASS.1992). More specifically, the failure to provide information on the status of a grievance is not, on its own, indicative of arbitrary behavior in the processing of the grievance. ID.

Beyond that, proof that a union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation. ID. AT ¶ 53 *citing* CANNON V. CONSOL. FREIGHTWAYS CORP., 524 F.2D 290 (7TH CIR.1975). Imperfections in representation are permitted, with the important caveat that a union's representation is carried out with the requisite good faith and honesty of purpose. HUMPHREY V. MOORE, 375 U.S. at 349. A union's actions are arbitrary only if they are "so far outside a wide range of reasonableness as to be irrational". SEIU LOCAL NO., 150 V. WERC, 328 WIS. 2D 447, ¶ 22 *citing* AIR LINE PILOTS ASS'N, INT'L V. O'NEILL, 499 U.S. 65 (1991). Thus, courts are not to substitute their judgment for that of the union, even if in hindsight it appears that the union could have made a better call. ID. AT ¶ 23, *citing* TRNKA V. LOCAL UNION NO. 688, UNITED AUTO., AEROSPACE AGRIC. IMPLEMENT WORKERS OF AM., SUPRA, NEAL V. NEWSPAPER HOLDINGS, INC., SUPRA, GARCIA V. ZENITH ELECS. CORP. 58 F.3D 1171 (7TH CIR. 1995).

Such deference is required in the context of the collective bargaining system, where the interests of individual employees in a bargaining unit are necessarily subordinate to the collective interests of all employees in the unit. VACA V. SIPES, 386 U.S. AT 182. In certain cases, for the greater good of the members as a whole, some individual rights may have to be compromised. MAHNKE V. WERC, 66 WIS.2D AT 532, *citing* FRAY V. AMALGAMATED MEAT CUTTERS, 9 WIS. 2D 631 (1961). This concept has been explained as follows:

> . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The

> complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." …Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. …

ID. AT 531, *citing* HUMPHREY V. MOORE, SUPRA.

In any case, it is the employee-complainant who bears the ultimate burden of persuasion. ID. AT 535.

Jurisdictional Issues

GTEA asserts that Noto's claims related to all three of the identified subject areas are barred by his failure to exhaust the grievance procedure set forth in the Agreement. GTEA also asserts that Noto's claims related to the contracts for service issue and the class cancellation issue are barred by the one-year statute of limitations that applies in prohibited practice cases.

As discussed, it is well-settled that an employee must at least attempt to exhaust exclusive grievance and arbitration procedures contained in an applicable collective bargaining agreement. MAHNKE V. WERC, SUPRA. An exception to this general rule will be made, however, where the employer has repudiated the grievance procedure; where there has been unfair representation by the union; or where the employee can show that it would have been futile to exhaust the grievance process. GLOVER V. ST. LOUIS-SAN FRANSCISCO RY. CO., 393 U.S. 324, 330 (1969); CITY OF MADISON, DEC. NO. 28864-A (CROWLEY, 1/97); AFF'D EXAMINER'S FINDINGS OF FACT, MODIFIED EXAMINER'S CONCLUSION OF LAW AND AFFIRMED EXAMINER'S ORDER, DEC. NO. 28864-B (WERC, 10/97).

Here, GTEA has argued that each of Noto's three claims should be dismissed because Noto failed to exhaust the grievance process. Noto does not dispute the assertion that he failed to exhaust the grievance process. Rather, he invokes an exception to the exhaustion requirement, asserting, with regard to each issue, that it would have been futile to attempt to do so. Based on the record before me, I am persuaded that this exception should apply. With each of the issues, Noto knew that GTEA was not willing to support him in pursuing a grievance. With regard to the contracts for service issue, Noto knew based on communications with GTEA representatives that GTEA did not agree with his view that his workload should have been calculated under Section 13(h) of the Agreement. With regard to the workload miscalculation issue, Noto came to understand over time that GTEA did not intend to grieve a workload error that preceded the 2007-2008 academic year. And with regard to the class cancellation issue, Noto understood that GTEA did not agree that GTC should have credited him with all of the workload points from his cancelled class.

Noto also understood that, with no notable exception, GTEA's views with regard to these issues were shared by GTC. Several GTC administrators had openly disagreed with Noto's view on the contracts for service issue, and GTC denied Noto's grievance with regard to that issue through the first three steps of the grievance process. On the workload miscalculation issue, Noto knew that at least one GTC administrator, Sellnau, had worked with GTEA to resolve the miscalculation issue in a way that was limited to the 20078-2008 academic year. It was fair for Noto to assume that GTC would not provide him any additional relief beyond that resolution. Further, to the extent that Noto came to understand, generally, that GTC and GTEA had a practice of not reaching back to previous years to make such corrections, this would have given Noto an additional basis for concluding that it would have been futile to pursue a grievance with regard to that issue. With regard to the class cancellation issue, it was apparent, based on the fact that GTC and GTEA had mutually agreed to allocate 4.38 workload points to Noto for the portion of the class he taught, that he would not have much success pursuing a grievance in this area, either. Given these circumstances, it is reasonable to apply the futility exception to the exhaustion requirement.

GTEA points out that the grievance procedure set forth in the Agreement can be invoked by individual employees, without union assistance, and argues therefore that GTEA's refusal to participate in a grievance cannot be used as a basis for determining that it would have been futile to go through the process. GTEA, however, cites no support for the proposition that a contractual grievance procedure that allows individual employees to pursue grievances automatically precludes an employee from making a futility argument. The fact that such an option was at Noto's disposal here does not defeat the legitimacy of his futility argument, given the positions GTC and GTEA had taken with regard to Noto's three issues.

GTEA also argues that Noto's claims relating to his workload configuration and the class cancellation are barred by the statute of limitations. Pursuant to Section 111.70(4)(a), Wis. Stats., a one-year statute of limitations applies to prohibited practice claims. When a requirement to exhaust a contractual grievance procedure applies, the one-year statute of limitations is computed from the date on which the grievance procedure was exhausted by the parties to the agreement, provided that the complaining party has not unduly delayed the processing of the grievance. WILMOT SCHOOL DISTRICT, DEC. NO. 21092-A (WERC, 10/84), *citing* HARLEY-DAVIDSON MOTOR COMPANY, DEC. NO. 7166 (WERC, 6/65), CITY OF MADISON, DEC. NO. 15725-A, B (WERC, 6/79), LOCAL 950, OPERATING ENGINEERS, DEC. NO. 21050 (WERC, 7/84). Here, because of the applicability of the futility exception, the statute of limitations for Noto's claims began to run not when the grievance process had been exhausted. As established, that never occurred. Rather, it began to run when Noto first realized, with regard to each of his claims, that it would have been futile to pursue a grievance.

With regard to the contracts for service issue, GTEA argues that Noto should have known, at the latest, by February 24, 2008, sufficient facts to cause the statute of limitations clock to begin running on that date. That is the date on which Noto received an e-mail message from Smoody stating "I do not see that there is any contract violation here as you are assigned the workload that the approved course lecture/lab configuration requires". Noto points out,

however, that on February 13, 2008, he had received a message from Smoody in which she indicated that, if evidence came to light that supported Noto's view of the contracts for service issue, GTEA would "have to revisit" the issue. Having received this February 13 message, Noto reasonably could have read Smoody's February 24 message with the understanding that, even though she was saying there was no contract violation at that point, GTEA's position could still be changed with regard to the contracts for service issue, if the right information came to light. Thus, it is not clear that Smoody's February 24 message would have prompted Noto to conclude that it was futile to pursue a grievance regarding the issue at that point. The same is true for the period of a little over one month between February 24 and April 1, 2008.[11] During that period of time, Noto was feeding information to Smoody that he apparently believed might cause GTEA to see his view of things with regard to the contracts for service issue.

A similar analysis applies to the class cancellation issue. As GTEA points out, Noto certainly knew, in March of 2008, that his class was being cancelled; and he was told sometime shortly thereafter that he would be allocated 4.38 workload points for the portion of the class he had taught. GTEA argues that this information should have indicated to Noto that the class cancellation issue had been resolved and that no grievance would be filed on his behalf. The problem with this contention, however, is that it ignores the confusion that was created by the LOE grievance that was being processed at the same time. Noto reasonably believed the grievance possibly applied to his class cancellation issue. On April 2, 2008, a date within the statue of limitations period, Burton indicated to Noto that his name had been included on the grievance and she would keep him posted on developments. Given these events, it was reasonable for Noto not yet to have concluded that it was futile to attempt to resolve this issue through the available grievance process. Thus, I conclude that neither the claim related to the contracts for service issue nor the claim related to the class cancellation issue is barred by the statute of limitations.

Contracts for Service Issue

From the time when he was hired in 2000, Noto's workload has been calculated under Appendix A of the Agreement, based on the lecture/lab configuration associated with each of his classes. WEDD instructors' workloads, on the other hand, are calculated from the lecture column of Appendix A, regardless of the lecture/lab configuration assigned to their classes. Noto argues that there are many factors that support his contention that his workload should be calculated exclusively under the lecture column of Appendix A pursuant to Section 13(h): he asserts that many GTC documents indicate that he is a member of WEDD, that the courses he teaches are billed under the same contracts as WEDD courses and therefore have closed-enrollment like WEDD courses, and that his courses are customized like WEDD courses. Noto argues that, through its procedural failure to adequately investigate the facts related to the contracts for service issue and its ultimate failure to grieve the issue on his behalf, GTEA breached its duty of fair representation.

[11] April 1, 2008, is exactly one year prior to the filing of Noto's Wisconsin Employment Relations complaint. Any date after this is within the statute of limitations.

Much attention has been focused in this case on a series of GTC documents that identify Noto as a member of WEDD. The record shows the following: a 2007-2008 seniority list – this is a list of employees that is generated by the GTC HR Department and relied on by GTEA for seniority information – identified Noto as a member of WEDD; the 2008-2010 GTC course catalogue identified Noto as a WEDD instructor; a GTC document listing WEDD contracts generated in June of 2008 includes two contracts for courses Noto teaches; and Noto's business cards, since his date of hiring, have indicated that he is a member of BISD, the GTC department that later became WEDD. There is, however, also documentary evidence on the record that suggest that Noto is not a WEDD instructor. The posting for the teaching position into which Noto was hired identifies the position as being in the "Open Learning Campus" Department. Also, the personnel sheet that was placed in Noto's file when he was hired continues to indicate that he is a member of the Open Learning Campus Department.

Noto argues that the inconsistency between these documents should have prompted GTEA to pursue a grievance on his behalf with regard to the contracts for service issue, and GTEA's failure to do so was a breach of its duty. I disagree. It must be remembered that in examining the evidence in a fair representation case, the dispositive question is not whether there was some merit in the grievance the employee claims should have been pursued. A union may decide not to pursue even a meritorious grievance, even over the objection of the affected employee, as long as it has made the decision in a non-arbitrary manner. SEIU LOCAL NO., 150 V. WERC, 328 WIS. 2D 447, ¶ 20. The question, therefore, is whether GTEA had some rational basis for its decision not to pursue a grievance related to Noto's contracts for service issue. On a general level, there is no basis for determining that GTEA was somehow compelled to pursue a grievance on Noto's behalf by the mere fact that there was inconsistency in GTC's documentation. Moreover, the record shows that it was reasonable for GTEA to rely on the personnel sheet and the position posting, over the other documents, in making the decision not to pursue a grievance. The undisputed evidence indicates that the personnel sheet in a GTC employee's file is known to be the most reliable, most official document relating to that individual's employment status at GTC. In March of 2008, when Noto raised the fact that he was listed as a WEDD instructor on the seniority list, Smoody decided to consult with the personnel sheet in Noto's file. This decision suggests that she was operating under the assumption, which was confirmed at hearing, that the personnel sheet would contain the final word on the question of Noto's department. When she checked, Smoody noted that Noto's personnel sheet indicated that he is a member of the Open Learning Campus Department. Also, the posting for Noto's position, which Smoody also obtained and reviewed, confirmed that Noto was hired into Open Learning Campus.

Further, the record suggests that the other documents relied on by Noto are not particularly reliable sources of information in this area. On both the seniority list and the course catalogue, there are other instructors whose departments are incorrectly identified. Further, the record shows that Noto is designated on his business card as a member of BISD as the result of an administrative error. At the time when Noto was hired, Knudson was both the dean of BISD and the supervisor for LTA instructors. Knudson testified that he supplied Noto with business cards, and because of his affiliation with BISD, the cards erroneously identified

BISD as Noto's department. Knudson testified that despite what Noto's cards indicate, he was hired to teach at LTA as an instructor in the Open Learning Campus Department.

Noto attempts to cast doubt on the reliability of the personnel sheet by pointing out that it also is not completely accurate. Specifically, although Noto's personnel sheet identifies his department as Open Learning Campus, the record indicates that for the past five years he actually has been a member of the Manufacturing Department. Noto suggests that this contradiction undermines GTEA's claim that the personnel sheet provided a rational basis for its decision not to pursue a grievance on the contracts for service issue. The record, however, does not support Noto's argument on this point. Henken credibly testified at hearing that although Noto's personnel sheet says Open Learning Campus, and Noto is now in Manufacturing, his department assignment has not changed and the personnel sheet is not inaccurate. Rather, it was the name of the Open Learning Campus Department that was changed, to Manufacturing. Henken indicated that, while personnel sheets are updated to reflect an employee's transfer from one department to another, they are not updated to show department name changes. Such name changes occur with frequency, apparently, and it would be impossible to update employee personnel sheets with that kind of information.

Noto also contends that his contracts for service claim had merit and should have been pursued by GTEA, because LTA courses like WEDD courses are billed under 38.14 contracts and, therefore, are the "contracts for service" referred to in Section 13(h). It is established on the record that, in the fall of 2007, GTC to begin billing LTA courses under 38.14 contracts, rather than under Youth Options contracts as they had been billed. In the fall of 2007, WEDD courses also had been and continued to be billed under 38.14 contracts. Noto's e-mails from November of 2007 suggest that it was the change to the billing mechanism for LTA courses and Noto's belief that the change made LTA courses contracts for service that prompted him to raise the issue in the first place. The evidence on the record, however, shows that GTEA had a rational basis for not agreeing with Noto's position on this point and, therefore, for not being motivated by this information to pursue a grievance. In her early investigation into this issue, Smoody spoke to Haywood and Sellnau. Her conversations with these individuals suggested that the change from Youth Options contracts to 38.14 contracts for the LTA classes had been carried out for a narrow reason. Specifically, it was intended that LTA courses should be available only to KUSD students, and courses taught under 38.14 contracts are closed to the public. To close the enrollment of LTA courses, WTCS had directed GTC to begin billing the courses under 38.14 contracts. Haywood and Sellnau indicated to Smoody that the change that had taken place in the fall of 2007 was limited to this billing issue. The information Smoody obtained from Haywood and Sellnau was consistent with documentation Smoody consulted at the time and with her independent understanding of the situation. Based on this information, Smoody reasonably concluded that, despite the change to 38.14 billing, LTA been transformed into WEDD contracts for service.

At hearing, Knudson testified that the 38.14 billing for LTA courses was something that should have occurred all along, even before the fall of 2007. Based on this testimony, Noto contends that no substantive change with LTA courses needed to occur to qualify them as

contracts for service. He argues that the content and functioning of LTA courses was such that they always should have been considered contracts for service, like the WEDD courses. The problem with this contention is that it goes against the evidence. The record before me indicates that the reason WEDD courses are considered contracts for service that are eligible for 100 percent lecture load under Appendix A, is not because they are billed as 38.14 courses, but rather because of the special effort that is required to teach a WEDD course. The purpose of WEDD is to offer training and education to employees at businesses. WEDD instructors do not offer ready-made classes to these customers. Rather, WEDD instructors meet with the business representatives who engage their services, and they custom design courses based on the identified needs of the business' employees. The undisputed evidence on the record indicates that the contracts for services clause at Section 13(h) of the Agreement gives more workload credit to WEDD instructors because they are required to put this extra effort into the design of their courses.

Although Noto's courses came to be billed under 38.14 contracts, there is significant evidence indicating that his courses are not customized like WEDD courses. Rather, Noto's courses are a part of the standard GTC curriculum and have established competencies that must be taught. This is why LTA students are able to earn GTC transcripted credit for taking these courses. In contrast, WEDD contracts for service courses do not offer GTC credit to the employee-students who take them, because their customized nature means that they do not conform to GTC curriculum requirements. Knudson testified at hearing that GTC courses that offer transcripted credit never have been workloaded as contracts for service under the lecture column of Appendix A. Consistent with that point, the record shows that anytime a WEDD instructor teaches a course that offers the students GTC credit, the instructor's workload for that course is not calculated under the lecture column of Appendix A as a contract for service would be.

Noto has pointed in this proceeding to many unique attributes associated with his courses, but these do not qualify them as customized WEDD-like courses. Noto argues, for example, that he is the only GTC instructor who teaches his classes. There is no evidence, however, that indicates that a class that is taught by only one instructor is not a part of the standard GTC curriculum or requires special customization. Noto also points out that he was required to take special training to be qualified to teach his one of his DE courses. The record suggests no connection, however, between such a training requirement and the kind of customization undertaken for WEDD contracts for service courses. Noto also argues that his DE course is not listed in the course catalogue. While this might be the case, most likely because the DE course is, like WEDD courses, closed enrollment, this fact does not establish that the course is customized. Noto further argues that his courses are customized because he has to put extra effort into bringing his high school students up to the level of being able to comprehend the content of the college-level courses he is teaching them. The record shows, however, that for varying reasons GTC instructors commonly need to bring their students up to speed. The fact that Noto may have to introduce, as he asserts, even more background information in his classes because his students are high-school-age does not remove his classes from the regular GTC curriculum and does not qualify them as customized contracts for

service courses. Given these important differences pertaining to the content of Noto's courses, it was not arbitrary for GTEA to conclude that Noto's courses were not contracts for service courses and not eligible to be workloaded pursuant to Section 13(h) of the Agreement and, therefore, that this issue was not worth pursing through a grievance.

I also am not persuaded by Noto's argument that GTEA breached its duty of fair representation by failing to adequately investigate the contracts for service issue. Noto argues, for example, that when the contracts for service issue first came up in November of 2007, GTEA conducted an inadequate investigation by simply accepting at face value the information provided by Sellnau and Haywood relating to the new billing mechanism. The record, however, suggests otherwise. As discussed, Smoody cross-referenced what Sellnau and Haywood had said with relevant GTC documentation. She also testified that what Sellnau and Hawood explained in their e-mail responses regarding the issue was consistent with Smoody's independent understanding of the situation. Agreeing with GTC's assessment of the situation was not the same as accepting GTC's explanation at face value. Given the circumstances, GTEA was not providing deficient representation by having concluded that GTC's explanations were reasonable and that the issue did not warrant additional investigation or the filing of a grievance at that time.

A year later, in December of 2008, Zaher sent a message to GTC HR Department administrators Henken and Whyte, asking them to resolve the contradiction between the fact that the grievances Noto had filed regarding the contracts for service issue had been rejected and the fact that Noto had been listed on various GTC documents as a WEDD instructor. Whyte responded with the following explanation:

> I have gone through all of our paperwork and you were never listed as a WEDD faculty member. The original and only Personnel Information Sheet shows your department as "Open Campus" and the Position Posting that you were hired under shows "Lakeview Technical Academy/Open Learning Campus". It is true that your Dean at that time was Ed Knudson and he was responsible for BISD (now WEDD) and Lakeview Academy but these truly were two separate entities.

GTEA never followed-up on Whyte's very strong, very broad, and obviously incorrect assertion that Noto "never" was listed as a WEDD instructor. Noto argues that the failure to do so is additional evidence of the inadequate representation GTEA was providing on the issue. While it might be said now that GTEA ideally would have at least asked Whyte to provide another response that accounted for all of the relevant documents, I find that its failure to do so did not rise to a breach of its duty. Given that GTEA already had rejected Noto's grievance on the contracts for service issue three times, it is fair for GTEA to have concluded that quibbling with Whyte would not change things. Still, Noto would argue that GTEA's failure to follow-up on Whyte's message should be read as evidence that GTEA was only dealing with the contracts for service issue in a perfunctory fashion. The reality, however, is that GTEA's handling of the contracts for service issue in the thirteen months leading up to Whyte's December of 2008

e-mail – this is the period of time in which Smoody discussed the issue with Haywood and Sellnau and reviewed relevant documentation, Smoody exchanged messages with Noto regarding KUSD's opinion on the matter, Smoody invited input from other GTEA representatives and GTC administrators and received a response from Debbie Davidson that confirmed what Haywood and Sellnau already had reported, Smoody obtained and reviewed copies of Noto's personnel sheet and position posting, and Zaher and Noto had discussed the issue over e-mail and in person – was anything but perfunctory.

Noto also objects to GTEA's handling of the contracts for service issue because of its lack of response to information from Noto regarding KUSD's opinion of the matter. On February 13, 2008, Smoody sent the e-mail to Noto indicating that if he could present something from KUSD beyond the billing mechanism information, GTEA would "have to revisit" the question of whether the contracts for service clause should apply to LTA instructors. On February 12, 2008, Noto had told Smoody that KUSD instructors had said that they did not consider LTA courses to be Youth Options courses any longer; on March 12, 2008, Noto forwarded to Smoody a message in which a KUSD administrator stated that LTA classes were not Youth Options classes anymore; and on March 19, Noto forwarded to Smoody another message indicating that a KUSD administrator had suggested that LTA classes were no longer Youth Options classes. Even after the present complaint was filed, Noto continued to share with GTEA communications involving KUSD administrators that indicated that they believed LTA courses were no longer Youth Options courses.

Noto believes GTEA should have contacted KUSD administrators to discuss the contracts for service issue and asserts that its failure to undertake that investigation was a breach of its duty. For two reasons, I disagree. First, the option that had been contemplated by Smoody of revisiting the matter was never triggered, because Noto really never brought any new information to light. Noto was sharing with GTEA a basic sentiment, over and over again, which was that KUSD administrators thought LTA classes were no longer Youth Options classes. It was reasonable for GTEA to have concluded that this notion was consistent with what already was understood about the billing change from Youth Options contracts to 38.14 contracts. Zaher's July 7, 2008 e-mail message to Noto in which he states that was "wondering if [Noto] obtained new/additional facts and information" to support a grievance on this issue highlights GTEA's perception that, although Noto had continued to discuss what KUSD thought, he actually had not provided any new information. Second, in the end, what KUSD administrators thought really did not matter. It was the Agreement between GTC and GTEA that contained the contracts for services provision that was at the heart of the ongoing debate. GTEA would have known that KUSD was a party to the 38.14 contracts with GTC, but it was not a party to the Agreement between GTC and GTEA. GTEA also would have known that Section 13(h) would be applied in a way that was consistent with the manner in which GTC and GTEA had applied that provision in the past. Even if the contracts for services provision would need to be further defined to resolve Noto's issue, it was reasonable for GTEA to have concluded that KUSD's input was not necessary.

A union's conduct is not arbitrary when it fails to conduct interviews that would have provided no beneficial information. SEIU LOCAL NO., 150 V. WERC, 328 WIS. 2D 447, ¶ 53 *citing* EMMANUAL V. INTERNATIONAL BHD. OF TEAMSTERS, LOCAL UNION NO. 25, 426 F.3D 416 (1ST CIR. 2005). In the end, given the fact that KUSD played only a peripheral role in the contractual relationship between GTC and GTEA, and considering the fact that KUSD did not seem have any previously unknown information about LTA courses, GTEA's failure to contact KUSD administrators for their views regarding the contracts for service issue cannot be deemed arbitrary.

The past practice analysis relating to Section 13(h) also applies to other materials relied on by Noto. To support his argument that GTEA breached its duty by not supporting him on the contracts for service issue, Noto cites to Section 38.14(3)(a) of the Wisconsin Statutes, which states that a "district board may enter into contracts to provide educational services to public and private educational institutions, federal and state agencies, local governmental bodies, and industries and businesses". Similarly, GTC Administrative Procedure C-150 states that "pursuant to the provision of Section 38.14(3) of the Wisconsin Statutes, the Gateway District may enter into contracts to provide services to public educational institutions". Despite the fact that these materials allowed for an interpretation under which LTA courses could have been classified as contracts for services, the past application of Section 13(h) by GTC and GTEA was not consistent with such an interpretation. Given this fact, in conjunction with all of the other information known about the contracts for service issue by GTEA, these materials did not undermine GTEA's rational basis for not pursuing the contracts for service issue on Noto's behalf. For similar reasons, the 2008-2009 transcripted credit update introduced into evidence under an April 7, 2009 e-mail message is not significant. This document describes a contract for service as "a Gateway course usually taught at the high school by a Gateway instructor as part of a 38.14 contract". That situation sounds like it fits with the LTA setup, but there is no evidence on the record indicating either that Steve Wilks, the GTC administrator who handles contracts between GTC and school districts such as LTA, had the interpretation of Section 13(h) of the Agreement between GTC and GTEA within his frame of reference when he created this document or that GTC and GTEA had assented to his definition.

Workload Miscalculation Issue

Noto's second area of contention is related to the workload for his DC/AC course, which Noto asserts GTC miscalculated since he was hired at GTC in 2000. As established in the findings of fact, the PHI assigned to a course is supposed to exceed the number of contact hours required to teach the course. In the spring of 2008, Noto discovered that the PHI associated with his DC/AC course seemed to assume that the course required 72 contact hours, when in fact it required 90 contact hours. Thus, the PHI assigned to the course had been too low relative to its contact hours, and Noto, as a result, had been under-loaded for that course. Noto asserts that GTEA's handling of this issue was deficient in many respects: that GTEA failed to obtain prior workload document relevant to the issue, as it had agreed to; that GTEA failed to grieve the issue for years preceding the 2007-2008 academic year, as it had agreed to;

and that GTEA continually failed to understand and respond to Noto's concerns about the issue.

Based on the record before me, there is no question that GTEA provided adequate assistance to Noto regarding the workload miscalculation issue in late March and early April of 2008. When the problem first was discovered, Smoody promptly met with Noto to address the issue on March 18, 2008. This first meeting, most of which was devoted to analyzing the workload miscalculation issue, lasted for 2 or 3 hours. In the days that followed, Smoody, with Sellnau's assistance, worked diligently to resolve the miscalculation issue. Smoody and Sellnau exchanged many communications about the issue and developed detailed spreadsheets to document their conclusions. By early April, GTC administrators had been contacted regarding the problem, the end-dates for some of Noto's classes had been changed to bring the contact hours more in-line with the PHI, and Noto was credited with 4.05 workload points for the fall of 2007 and 21.1 workload points for the spring of 2008, in recognition of the work over the PHI he had already done during that school year. A spreadsheet dated April 2, 2008, established that Noto would be paid for these additional workload points through extended contracts.

The problem appears to have started shortly after this resolution was put into place. On April 4, 2008, Noto sent the following message to Smoody:

> Pat,
>
> It's not now been 2 weeks since we met to discuss the workload and adjust my DC/AC course hours for this year. At that meeting you said you would have to approach the Executive Committee to see if the Union would pursue recovery of any underpayment for hours over 72 scheduled for this course over the last 7 years. Has anything happened regarding this?

Birkholz also sent a message a couple days later to Smoody, stating that he wanted to meet with someone from GTEA to discuss the "mismatch" problem related to the work schedules of LTA instructors that had been occurring since 2000. In response to those messages, Smoody arranged another meeting for April 22, when Smoody, Zaher, Lewis, Noto and Birkholz met, to discuss workload issues. Apparently right at the beginning of this meeting, Lewis raised the concern that any grievance related to the workload issues would be untimely under the twenty-day limit for filing set forth in the Agreement. Smoody apparently responded that the contractual time limit might not serve as a bar, because the workload problem just had been discovered. At the end of the meeting, Smoody instructed Noto and Birkholz to gather all their old workload reports. When Noto was unsuccessful in the subsequent weeks in his effort to obtain his workload reports from the GTC HR Department, Smoody said she would try to do so. Smoody then put minimal effort into attempting to obtain Noto's workload reports from the HR Department, was unsuccessful in doing so, and then stopped trying. During this same period of time, in e-mail messages Noto sent to GTEA representatives in April, May, and September of 2008, he made repeated reference to the fact that his workload problem spanned

all the way back to the fall of 2000, when he was hired at GTC. Prior to an October, 2008 communication by Zaher, GTEA never sent a message to Noto stating that GTEA would not be going back to past years to correct Noto's workload problem. Based on these events, Noto alleges that GTEA must have seen merit in a workload miscalculation grievance going back to 2000 and intended to use the old workload reports to put together a grievance over the issue. He argues that GTEA's failure to follow through with these steps should be the basis for a finding that GTEA arbitrarily dropped the ball on a meritorious grievance and, by doing so, breached its duty of fair representation.

The main problem with Noto's claim in this area is that it ignores the fact that GTEA had a solid rational basis for proceeding exactly as it did. The record establishes that GTC and GTEA had an established, consistently followed past practice of not going back to previous academic years to fix workload errors. At hearing, Henken testified that, in her ten-year tenure as director of the GTC HR Department, neither GTEA nor GTC ever had filed a workload grievance related to an error committed in a prior academic year. Zaher testified that the rule of not going back to previous years has been applied to him in the past, when he discovered that he had been shorted due to a workload error. Further, the record indicates that the rule was applied not long before this case arose to WEDD instructors involved in a grievance related to the marketing points they are entitled to under the Agreement. When that grievance was resolved, the instructors received the points for the semester in which the problem was discovered and going forward only. Smoody testified that over the years there have been many instances in which instructors were told that GTEA would not reach back to previous years to recover money lost to workload errors. She explained that, instructors receive their workload reports on a routine basis, the expectation is that they will monitor them, and they are offered training on how to do so effectively. Smoody also explained that, with 300 bargaining unit members, it would be impossible to manage the grievances that old workload errors would produce. Based on this well-developed, long-standing past practice, GTEA had a reasonable basis for deciding not to grieve Noto's workload miscalculation issues for previous years.

In an effort to cast doubt on the veracity of GTEA's claim that it never intended to file a grievance for past years on Noto's behalf, Noto's case focuses heavily on Smoody's instruction at the April, 2008 meeting to gather old workload reports. Noto contends that Smoody never would have asked for those reports unless GTEA intended at that point to file a grievance over previous academic years. Smoody testified at hearing that she intended to use those reports as a teaching tool rather than the basis for a grievance. Noto testified that he never heard that explanation until the hearing in this case and, moreover, that such a purpose seems unlikely since Smoody could have used the reports already in her possession from the 2007-2008 academic year to teach him how to analyze the calculations. I do not find it unlikely that Smoody could have told Noto to gather the workload reports for the reason she asserts. Even after the work Smoody and Sellnau did in late March and early April of 2008, Noto and Birkholz continued to complain about workload miscalculations going all the way to 2000. Even if GTEA never intended to grieve the problem, Smoody's apparent instinct to get to the bottom of it by at least looking at the old reports and, in the process, using them as a teaching tool seems reasonable.

Smoody's lack of communication with Noto regarding her actual reason for wanting him to gather his old workload reports really is part of a larger communication failure, which is certainly the most egregious presented by this case. During and after the period of time when Smoody was not telling Noto that she did intended to use his old workload reports only as a teaching tool, Noto was sending numerous e-mail messages to GTEA representatives referring to the fact that his workload problem went all the way back to 2000. In an April 4, 2008 message to Smoody, Noto asked her about talking to the executive committee "to see if the Union would pursue recovery of underpayment for hours over 72 schedule for [the DC/AC] course over the last 7 years"; in a May 12, 2008 e-mail message to Smoody, Noto referred the extra hours he had put in "over the last 8 years"; in an e-mail message dated May 20, 2008, to Smoody and other GTEA representatives, Noto referred to his extra hours of teaching "over the past 8 years"; and in an e-mail message to Zaher on September 4, 2008, Noto referred to his extra hours "for the 2000 thru 2007 school years". GTEA did not respond directly to any of these messages with a communication that stated that any grievance would not go back to prior years.[12] Indeed, it was not until October 10, 2008, that Zaher finally spelled out GTEA's position on that issue clearly in writing:

> Lou, it is clear from an e-mail you sent to Pat Smoody back on March 17, 2008 (10:10 a.m.) that you were aware of receiving workload adjustments in previous years. Because of this knowledge and the fact that you received them preciously, you certainly should have been aware if you were no longer receiving them. What, if anything, did you do about this at that time? Did you ask anyone about the change at that time? If not, going back to previous years now, years later, is not available because the grievance timelines are long past. I understand that Pat Smoody indicated this to you at a meeting at Lakeview with you and Ron Sellnau on March 18, 2008. The GTEA's conclusion about this has not changed.

GTEA representatives certainly could have communicated this position sooner than October of 2008. Perhaps they were negligent with their failure to do so. Still, for several reasons, it is not a failure that rises to a breach of the duty of fair representation. First, as established, poor communication in and of itself does not constitute arbitrary conduct. SEIU LOCAL NO., 150 V. WERC, 328 WIS. 2D 447, ¶ 47. Second, contrary to Noto's contention, GTEA's failure from April through October of 2008 to specifically tell Noto that they were *not* going to grieve his issue, absolutely did not constitute an agreement by GTEA *to* grieve his issue. To the extent that such a promise might have brought GTEA closer to having committed a breach of its duty, Noto's contention that GTEA made such a promise is not supported by the record. Further, it has been established that the likelihood of success in arbitration and the degree of prejudice to an employee are factors that can be considered in determining whether a

[12] There is significant debate on the record as to whether Smoody told Noto either in the meeting of March, 2008, or the meeting of April, 2008, that GTEA would not grieve workload problems from previous years. Smoody testified that she did say this. Also, her notes from the April meeting have a handwritten note that says, "past years are past years". Noto testified that Smoody did not make this point. It is difficult to resolve this inconsistency, and in the end I have determined that it is not absolutely necessary to do so.

union's actions in handling a potential grievance constituted a breach of the duty of fair representation. MAHNKE V. WERC, 66 WIS. 2D AT 534; SEIU LOCAL NO., 150 V. WERC, 328 WIS. 2D 447, ¶ 48. An employee must be not only prejudiced, but severely prejudiced. SEIU LOCAL NO., 150 V. WERC, ID. Here, given the practice between GTC and GTEA not to seek to correct workload problems from previous years, it is unlikely that GTEA would have been successful in pursuing such a grievance. Just as Noto was not prejudiced by GTEA's decision not to file a grievance for this reason, he also was not prejudiced by GTEA's poor communication regarding that decision. Noto can claim to have been inconvenienced by arguably useless communications and stressed by not having his expectations met regarding that issue, but that is not severe prejudice.

Finally, it is necessary to address Noto's assertion that GTEA breached its duty of fair representation by failing to understand and respond to Noto's concerns over this issue. In the fall of 2008, Zaher became the point person for dealing with issues involving LTA instructors, including the kind of workload issues Noto had been raising. After Zaher was placed in that role, Noto and Zaher engaged in some lengthy e-mail debates regarding the workload miscalculation issue in October and December of 2008 and June of 2009. The exchanges in June of 2009, in particular, represent a very detailed, somewhat complicated interchange regarding workload calculations. In one message of June 6, 2009, Zaher states to Noto, "[s]orry, I fail to understand your point". Noto has drawn from this kind of comment, as well as Zaher's general unwillingness to accept Noto's position with regard to the miscalculation issue, a conclusion that Zaher was not capable of understanding the workload problem Noto was facing and that GTEA therefore had failed to provide adequate representation by making Zaher the points person with regard to such issues. I disagree. First, although no one was the expert Smoody was regarding workload issues, it seems to have been appropriate for Zaher to be the LTA point-person role given his role as the GTEA president for the 2008-2009 academic year. More importantly, Zaher's communications with Noto, which were not unlike those Noto had exchanged with Smoody, displays anything but a lack of responsiveness and understanding. On the contrary, the volume of those communications alone paints a picture of representation that easily falls within the "wide range" of reasonableness. To the extent that the record contains messages from Noto to which GTEA representatives simply did not respond – and it does – these are primarily instances in which GTEA already had provided Noto with multiple explanations, and Noto simply would not accept the answers.

Class Cancellation Issue

In March of 2008, a section of Noto's DC/AC class was cancelled due to low enrollment. Noto alleges that GTEA breached its duty by providing deficient representation in three ways related to this issue. First, Noto alleges that the issue GTEA attempted to resolve with regard to the class cancellation was misdirected – it was not the right issue. GTEA representatives viewed the problem as one of ensuring that Noto received a proper number of prorated workload points for the portion of the class he had taught prior to its cancellation; Noto perceived the problem as one of ensuring that he received all of the workload points for the class, because he believed GTC had violated the Agreement by cancelling the class.

Second, Noto alleges that GTEA failed to keep Noto informed about the status of a grievance that Noto believed would address his class cancellation issue. Third, Noto alleges that GTEA failed to provide him with any concrete answer as to whether he was paid under the settlement of the grievance, how much he was paid, and how he was paid. I find the class cancellation issue to present the least compelling argument in support of Noto's duty of fair representation allegation against GTEA.

Article V, Section 9(c) of the Agreement states that "[t]eachers shall be sent a copy of their schedule at least thirty (30) days prior to the semester for which the schedule is made". Noto contends that, while he was expecting GTEA to assist him with a grievance challenging his class cancellation under this provision, GTEA was taking steps merely to ensure that he would receive 4.38 workload points as the prorated portion of the class he taught before it was cancelled. Noto asserts that GTEA's misdirection and resulting failure to assist him with what he viewed as the real issue constituted a breach of its duty, but there are several problems with this position. First, while Noto has cited Article V, Section 9(c) of the Agreement to articulate a theory that his class cancellation violated the Agreement, he has not met his burden to show that this was a sufficiently viable theory to create an obligation for GTEA to pursue it in a grievance. On the contrary, the record suggests that GTEA had a rational basis for proceeding as it did with regard to this issue. While the Agreement between GTC and GTEA does not address what happens when an instructor's class is cancelled, the record indicates that it was the practice between GTC and GTEA to workload instructors for the actual time they spent teaching courses prior to their cancellation. Henken testified that, in her tenure, GTEA never has filed a grievance seeking workload for an entire class that the instructor did not finish teaching. The following e-mail message of December 5, 2008, from Zaher to Noto, indicates that this practice was the basis for GTEA's handling of his class cancellation issue:

> You received the prorated workload points for the timeframe that the one student was in the section alone while KUSD made scheduling changes moving the student to the other section. This transfer left your section vacant and then they cancelled it. As I told you in person, management has the right to cancel classes any time they want especially when they are empty from any students. The GTEA would be able to question the decision if the cancelation [sic] did lead to underload which clearly was not the case.

As established, a union has considerable latitude in handling grievances, and it does not breach its duty of fair representation by settling a grievance short of arbitration even if it does so against the wishes of a grievant. MAHNKE V. WERC, 66 WIS. 2D AT 531; SEIU LOCAL NO., 150 V. WERC, 328 WIS. 2D 447, ¶ 20, *citing* VACA V. SIPES, SUPRA. Based on these standards, it was not arbitrary for GTEA to resolve the class cancellation in the way that it did, even over Noto's objection. The other flaw in Noto's claim is that Noto has not shown that he suffered any loss due to GTEA's handling of the class cancellation issue. It is true that the total number of Noto's workload points was reduced in the spring of 2008 semester because of the class cancellation – he received 4.38 of the 21 workload points he had been scheduled to receive from that class. Nevertheless, a full-time workload covers a range of points from 190 to 210,

and there is no evidence indicating that the reduction in the Noto's workload points impacted his full-time status or reduced his full-time pay and benefits. Noto does not appear to have been prejudiced at all.

Putting aside the sufficiency of GTEA's resolution of the class cancellation issue, there also is no evidence to support Noto's claim that GTEA was deficient in its processing of the class cancellation issue. On March 13, 2008, Noto notified Burton that his class had been cancelled. At the March 18 meeting five days later, GTEA worked with Noto to establish the number of prorated points he was entitled to receive for the portion of the class he had taught. Two days after that, on March 20, Noto received an e-mail showing that GTC had been informed that he was entitled to the 4.38 workload points for the course. In other words, Noto's class cancellation issue was resolved, to the extent GTEA had the ability to resolve it, within seven days.

To the extent Noto perceived and continues to assert that GTEA violated its duty in its processing of this issue, that perception seems to have been based on confusion related to the nature of a grievance that was filed in March of 2008, rather than any act or omission by GTEA. The LOE grievance never had anything to do with Noto's class cancellation issue. Noto became improperly associated with the grievance for two reasons. First, although he attempted to have a discussion with Burton regarding whether his situation fit with the grievance before he signed up for it, Burton was out of the office for the last two weeks of March, 2008. Second, the system by which names were added to the grievance was one in which employees were asked to self-identify as having situations that fit with the grievance, and GTC took responsibility later for evaluating whether those individuals actually had any claim. Noto has not claimed that either of these circumstances should form the basis for a finding that GTEA breached its duty, and it seems there would be no basis for making such a claim.

The LOE grievance was settled in May of 2008. Noto argues that GTEA's representation was deficient because it failed inform his about the grievance settlement until October of 2008. I disagree, because I believe GTEA had a rational basis, under the circumstances, for not making a point to communicate with Noto about the resolution of the grievance. Noto's name was included on the grievance response sent to GTEA by Henken in May of 2008, because his name had been included on the original grievance. Still, Noto's situation had not fit with the grievance, and he did not actually receive anything as a result of its resolution. So GTEA had no settlement information to share with Noto. The information pertaining to Noto contained in Henken's response to the grievance merely recounted the fact that Noto had received two extended contracts as a result of the work GTEA had done on his workload miscalculation issue several months prior to that. Noto already knew about that, so there was nothing to communicate with regard to that point either.

Arguably GTEA should have made a point, before October of 2008, of telling Noto that his situation had not fit with the grievance, but its failure to do so does not rise to the level of a breach of its duty. The failure to keep a grievant informed about the status of a grievance is not

in and of itself a breach of the duty of fair representation. SEIU LOCAL NO., 150 V. WERC, 328 WIS. 2D 447, ¶ 47. That conclusion is particularly fair under these circumstances, where the grievance had no applicability to Noto's situation. The status of the grievance and the failure to keep Noto informed about it had absolutely no impact on Noto. Moreover, the period five months during which GTEA did not tell Noto that his situation did not fit with the grievance was not a significant amount of time, particularly given the intervening summer months and the fact that there were no communications at all between Noto and GTEA about the issue.

Noto's third contention is that GTEA breached its duty by failing to provide him with any concrete answer as to whether he was paid under the settlement, how much he was paid, and how he was paid. In his post-hearing arguments, Noto purports still to not know the answers to these questions. In light of a record that clearly establishes that Noto never was included in the LOE grievance and that the response from Henken referred only to the unrelated extended contracts, about which Noto already knew and under which Noto already has received pay, it is difficult to know how to respond to this claim. To the extent that GTEA had a duty to communicate with Noto about these issues, it has met that obligation.

Bad Faith

Noto also argues that GTEA acted in bad faith in its handling of his issues. Specifically, Noto contends that at the November, 2008 meeting he attended to discuss his concerns with Zaher and Barker, Zaher stated to Noto that he could either file a lawsuit regarding the issues and lose or file a lawsuit and win and get fired. Zaher denies ever having made such a statement. Noto has no other proof in support of his claim that Zaher made the statement. Nor has Noto introduced any proof of an improper motive that would have prompted Zaher to make such a statement. The evidence as it exists is simply not a sufficient basis for a finding of bad faith.

Conclusion

Noto has failed to meet his burden to show GTEA breached its duty of fair representation. Based on this conclusion, the complaint filed in this matter has been dismissed.

Dated at Madison, Wisconsin, this 21st day of July, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

gjc
32752-B