

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TERESA A. BROWN, Complainant,

vs.

**MILWAUKEE BOARD OF SCHOOL DIRECTORS and
ADMINISTRATORS AND SUPERVISORS COUNCIL**, Respondents.

Case 475
No. 69650
MP-4578

Decision No. 33029-A

Appearances:

Teresa A. Brown, 4637 North 78th Street, Milwaukee, Wisconsin 53218, appearing on her own behalf.

Donald Schriefer, Assistant City Attorney, City of Milwaukee, City Hall, 200 East Wells Street, Room 800, Milwaukee, Wisconsin 53202-3551, appearing on behalf of Respondent Milwaukee Board of School Directors.

Mark Sweet, Sweet and Associates, LLC, Attorneys at Law, 2510 East Capitol Drive, Milwaukee, Wisconsin 53211, appearing on behalf of Respondent Administrators and Supervisors Council (ASC).

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DISMISSING COMPLAINT**

On March 5, 2010, Teresa A. Brown filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the Milwaukee Public Schools and the Administrators and Supervisors Council (ASC). The complaint alleged that the District had violated the collective bargaining agreement with the ASC when it demoted her and that the ASC had violated its duty of fair representation to her in its handling of her two grievances. The complaint contended that these actions, in turn, violated Sec. 111.70(3), Stats. On May 5, 2010, the Commission formally appointed Raleigh Jones, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. On July 8, 2010, the Milwaukee Public Schools filed an answer. On July 12, 2010 the

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Administrators and Supervisors Council filed an answer. Hearing on the complaint was held on July 19, 2010 in Milwaukee, Wisconsin. At the end of that hearing, both Respondents made motions that the complaint be dismissed. The Examiner orally granted those motions dismissing the complaint. On August 23, 2010, the Examiner received a copy of the hearing transcript. The following Findings of Fact, Conclusions of Law and Order Dismissing Complaint formalizes the Examiner's decision announced at the hearing.

FINDINGS OF FACT

1. At all relevant times herein, Complainant Teresa A. Brown was an employee of the Milwaukee Public Schools. She has been an employee of the District since 1986.

2. Respondent Milwaukee Public Schools, hereinafter referred to as the District, is a municipal employer which operates a public school system in Milwaukee, Wisconsin. Its offices are located at 5225 West Vliet Street, Milwaukee, Wisconsin. Its legal name is the Milwaukee Board of School Directors, so the caption of this decision has been changed to reflect same.

3. Respondent Administrators and Supervisors Council is a professional organization which represents the principals, assistant principals and supervisors who work for the Milwaukee Public Schools. Its offices are located at 811 North Hawley Road, Suite 110, Milwaukee, Wisconsin 53213. John Weigelt has been its Executive Director for the past 12 years. The Milwaukee Board of School Directors has voluntarily recognized ASC as the exclusive bargaining agent for the District's principals, assistant principals and supervisors since 1971. ASC represents employees who are not subject to the Municipal Employment Relations Act (MERA).

4. The Milwaukee Board of School Directors and the ASC were parties to a contract for the period of July 1, 2007 through June 30, 2009. It contained the following provisions:

Part II

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B. ADMINISTRATIVE PROCEDURES AND BOARD POLICIES

The Board recognizes the unique nature of the ASC and its involvement as part of the administrative and management team. As a unit composed of administrators and supervisors, it is possible to enter into a collective bargaining relationship on matters primarily related to wages, hours and conditions of employment. However, because administrators and supervisors are an important component in the management team, an important part of the

relationship cannot be prescribed contractually. The ASC, as well as individuals within the unit, will continue to be involved, where appropriate, in the development of administrative procedures and Board policies. Where appropriate, representatives of the ASC will be invited to the superintendent's council. This paragraph shall not be subject to the grievance procedure.

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Part IV

WORKING CONDITIONS

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F. EVALUATION OF BARGAINING UNIT MEMBERS

1. Employees in the unit shall be evaluated periodically by their supervisors in accordance with the rules established by the Board and/or according to the needs of the particular job. The purpose of evaluation shall be to document the quality and quantity of performance, improve performance, and to discipline, demote, discharge, or non-renew where appropriate.

2. The general procedure of formal evaluations shall consist of the following:

a. Evaluations shall be conducted annually during the first five years of employment in a position. Thereafter, they shall be conducted at least once every two years.

b. The evaluator and the person being evaluated shall be identified by name and by title.

c. Evaluations shall be based on personal observations and/or personal knowledge.

d. Evaluation shall include identification of goals and objectives; progress toward identified goals and objectives, strengths and weaknesses, and recommendations for improvement where appropriate.

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J. DISCIPLINARY MATTERS

1. No tenured or non-probationary member of the bargaining unit shall be given a written reprimand, suspended, discharged, or demoted for disciplinary reasons, except for just cause . . .

. . .

Part VIII

GRIEVANCE PROCEDURES

. . .

C. DEFINITIONS

A grievance is an issue concerning the interpretation or application of the items as defined in Section B above or compliance therewith provided it relates primarily to wages, hours, or conditions of employment. However, it shall not be deemed to apply to any order, action, or directive of the superintendent or of anyone acting on his/her behalf, or to any action of the Board which relates or pertains to their respective duties or obligations under the provisions of the state statutes.

. . .

The last step of the grievance procedure is final and binding arbitration.

5. Prior to April, 2007, Brown was a tenured teacher in the District. Teachers in the District are represented by the Milwaukee Teachers Education Association. When Brown was a teacher, she was in the teacher bargaining unit.

6. On April 17, 2007, Brown was appointed to be School Improvement Facilitator (SIF) at the District's Madison Academic Campus. The Madison Academic Campus is a charter school. The SIF job description contains the following "Position Summary and Purpose":

POSITION SUMMARY and PURPOSE: Position funded through a grant from the Bill & Melinda Gates Foundation which supports district administrators in the First Things First/Small Learning Communities initiative. The positions, currently located at Pulaski High School and Bradley Tech, work directly with all staff in the school, school administrators and central services and will become part of the school leadership team.

The SIF position is represented by the ASC. Brown's appointment to an SIF position was a promotion. This promotion took her out of the teacher bargaining unit. In her new SIF position, Brown was subject to a three-year probationary period. While an employee is on probation, they can be discharged at will by the superintendent. The superintendent's termination of probationary status is final and cannot be appealed to the School Board. Additionally, the termination of probationary status is not grievable under the ASC contract and, as a result, cannot be arbitrated by the ASC. That has been the case for many years.

7. Brown was not formally evaluated by her supervisor during either the 2007-08 or 2008-09 school years. She had different supervisors each year.

8. Sometime in 2009, the District decided to eliminate the SIF position. The district superintendent effectuated that decision for Brown via a letter dated September 10, 2009. In that letter to Brown, District Superintendent William Andrekopoulos wrote that he had decided "not to continue your service as a probationary, non-tenured School Improvement Facilitator at James Madison Academic Campus in the Milwaukee Public Schools." The letter then went on to say:

You have, however, acquired tenure as a teacher. Therefore, you are reassigned to a teaching position in the Milwaukee Public Schools effective September 18, 2009.

9. On September 15, 2009, Brown appealed the Superintendent's decision to the School Board. On September 22, 2009, Board Clerk Lynne Sobczak sent the following letter to Brown:

I have received your letter dated September 15, 2009, requesting an appeal to a decision made on September 15, 2009 (sic), by Superintendent Andrekopoulos to deny you additional tenure as a School Improvement Facilitator. As a result, you were reassigned to your last tenured position. In accordance with Administrative Policy 6.25, Probation and Tenure: Staff, this decision of the Superintendent is not appealable.

10. Brown subsequently talked to and met with ASC Executive Director John Weigelt about the action referenced in Findings 8 and 9. When that occurred, Weigelt knew that the just cause provision contained in the ASC contract with the District applies only to non-probationary employees, and that Brown was a probationary employee. He told that to Brown. He also told Brown that in all likelihood, the superintendent's decision was not going to be overturned because he has never been successful in getting the superintendent's decision relative to a probationary employee overturned, but that he would still file a grievance regarding same.

11. On September 28, 2009, Brown sent the following letter to Weigelt:

This letter comes as a formal request for representation by ASC and as a formal request for a grievance to be filed resulting from a decision on September 22, 2009 whereby Superintendent William Andrekopoulos denied additional tenure to me as a School Improvement Facilitator.

I am seeking to grieve this decision under the 2007-2009 ASC Contract, Evaluation of Bargaining Unit Members, page 65. It states that employees in the unit shall be evaluated periodically by their supervisors in accordance with the rules established by the Board and/or according to the needs of the particular job. The purpose of evaluation shall be to document the quality and quantity of performance, improve performance, and to discipline, demote, discharge or non-renew where appropriate.

I was appointed to a position of School Improvement Facilitator in April, 2007. I was not evaluated during the 2007 – 2008 school year nor was I evaluated during the 2008- 2009 school year. If there are any other steps to make this grievance formal, please let me know.

12. On October 19, 2009, Weigelt filed a grievance with the District on Brown's behalf. The grievance contended that by its conduct toward Brown, the District had violated Part IV, F (Evaluations) of the ASC contract. This grievance was denominated as Grievance 09/131.

13. On October 29, 2009, the District's labor relations office notified ASC that it was "not going to accept the grievance for Teresa A. Brown, dated October 19, 2009, because she is a probationary employee."

14. On December 10, 2009, Weigelt filed a second grievance with the District on Brown's behalf. This second grievance, which was denominated as Grievance 09/161, contended that the District should accept and process Grievance 09/131. On February 19, 2010, Deborah Ford, the District's Executive Director for Human Resources, denied Grievance 09/161. Her stated basis for doing so was as follows: "Grievance 09/131 was not processed because the action being grieved, the termination of probationary status, cannot be appealed or grieved."

15. On May 19, 2010, Board Clerk Lynne Sobczak sent a letter to Weigelt regarding Grievance 09/131 and Brown's demotion/involuntary transfer. It provided thus:

Re: Grievance #09-131 Teresa A. Brown Demotion/Involuntary Transfer

In response to a letter dated September 15, 2009, from Ms. Brown regarding the matter of reassignment of Ms. Brown from SIF to a Teacher, a position in which she has tenured status, is an action that is neither grievable nor arbitrable. The matter is not considered a disciplinary matter.

The district has consistently taken the same position where an ASC represented employee is returned from a probationary position to a position in which they have tenure status. As the matter is neither grievable nor arbitrable, no hearing will be scheduled with the Board of School Directors.

16. ASC's conduct in processing either of Complainant's grievances does not reflect arbitrary, discriminatory or bad faith conduct on its part toward Complainant.

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

CONCLUSIONS OF LAW

1. Complainant Teresa A. Brown, while employed by Milwaukee Public Schools as a School Improvement Facilitator, was not a "municipal employee" within the meaning of Sec. 111.70(1)(i), Stats.

2. Respondent Milwaukee Public Schools, whose legal name is the Milwaukee Board of School Directors, is a "municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. Respondent Administrators and Supervisors Council (ASC) is not a "labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

4. Notwithstanding Conclusion of Law 1 above, if Complainant Brown was a municipal employee within the meaning of Sec. 111.70(1)(i), while employed as a School Improvement Facilitator who could file a duty of fair representation complaint under MERA against the Respondent ASC, Brown did not establish that Respondent ASC, through its representation of Brown on two grievances, acted in an arbitrary, discriminatory or bad faith fashion toward Brown and therefore did not prove her allegation that ASC violated its duty of fair representation within the meaning of Sec. 111.70(3)(b)1, Stats.

5. Notwithstanding Conclusion of Law 3 above, if Respondent ASC is a labor organization within the meaning of Sec. 111.70(1)(h), subject to duty of fair representation complaints under MERA, Complainant Brown did not establish that Respondent ASC, through its representation of Brown on two grievances, acted in an arbitrary, discriminatory or bad faith fashion toward Brown and therefore did not prove her allegation that ASC violated its duty of fair representation within the meaning of Sec. 111.70(3)(b)1, Stats.

6. Inasmuch as Complainant Brown did not prove her allegation that Respondent ASC violated its Sec. 111.70(3)(b)1 duty of fair representation to Brown by its conduct herein, the Wisconsin Employment Relations Commission will not exercise its Sec. 111.70(3)(a)5, Stats., jurisdiction over Respondent Milwaukee Board of School Directors to determine the merits of Complainant Brown's grievances that Respondent Board violated the ASC contract by their actions herein.

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

ORDER

The complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 26th day of August, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

MILWAUKEE BOARD OF SCHOOL DIRECTORS

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

The complaint alleged that ASC violated its duty of fair representation to the Complainant by its actions herein. The complaint also alleged that the District violated the applicable collective bargaining agreement with ASC by their actions relative to the Complainant. Both ASC and the District denied committing any prohibited practices by their conduct herein.

DISCUSSION

The Examiner dismissed the Complainant's complaint for the following reasons. First, while she was a School Improvement Facilitator (SIF), Brown was not a municipal employee within the meaning of MERA. Second, ASC is not a labor organization within the meaning of MERA. Third, assuming for the sake of discussion that Brown was a municipal employee within the meaning of MERA who could file a duty of fair representation complaint against ASC, and further assuming that ASC is a labor organization within the meaning of MERA subject to duty of fair representation complaints, Brown did not establish that ASC violated its duty to fairly represent her on her two grievances. Finally, since Brown did not prove her allegation that ASC violated its duty to fairly represent her, I am precluded from determining the merits of her grievances that the District violated the ASC contract by their actions herein. These points will be addressed in the order just listed.

MERA (the Municipal Employment Relations Act) does not apply to everyone. It only applies to "municipal employees", "municipal employers" and "labor organizations" as those terms are defined therein. If someone is not a "municipal employee" under the meaning of that law, they cannot avail themselves of that law. Section 111.70(1)(i) defines a "municipal employee" as "any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employee." Brown was a "municipal employee" when she worked for MPS as a teacher because she did not fall into any of the statutory exclusions. However, the fact that Brown was a "municipal employee" at one time does not mean she somehow became vested as a lifelong "municipal employee" under MERA. Someone is a "municipal employee" under MERA only so long as they meet the definition set forth above. This complaint does not involve Brown's employment status while she was a teacher for MPS. Instead, it involves her employment status while she was a SIF. That's the focus of her complaint. When she was a SIF, she was not in the teacher bargaining unit. Instead, she was in the employee group represented by ASC. For reasons that will be elaborated on in more detail later, this fact conclusively establishes that Brown, like anyone else who is represented by ASC, is not a "municipal employee" within the meaning of MERA. Since Brown was not a municipal employee while she was a SIF, she was not within MERA's coverage. As a result, she lacked standing to bring a complaint against either ASC or the District.

Next, ASC is a professional organization which represents the principals, assistant principals and supervisors who work for the Milwaukee Public Schools. It represents employees who are not subject to and covered by MERA. In a 1979 decision involving the ASC, specifically MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NOS. 13787-G and 16009-D (WERC, 11/79), the Commission ruled “that inasmuch as the membership of the Administrators and Supervisors Council is primarily composed of administrators and supervisors in the employ of the Milwaukee Board of School Directors. . . .said organization is not a labor organization within the meaning of MERA.” (Conclusion of Law No.3, pp. 4-5). Thus, the Commission determined that ASC is not a “labor organization” within the meaning of MERA. In a subsequent case involving ASC, specifically MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 25608-A (Jones, 8/1988), aff’d by operation of law (WERC, 9/1988), the instant examiner followed the Commission’s prior holding. These decisions have not been overturned. Additionally, insofar as the Examiner knows, the finding made in those cases that the ASC is not a labor organization within the meaning of MERA has not been changed by legislative action. Since ASC is not a labor organization within the meaning of MERA, that means it is not subject to MERA duty of fair representation complaints.

Notwithstanding the findings made above (i.e. that Brown was not a municipal employee within the meaning of MERA while she was a SIF and that ASC is not a labor organization within the meaning of MERA), the next part of the discussion assumes the opposite. In other words, it is assumed for the sake of discussion that Brown was a municipal employee covered by MERA who could file a duty of fair representation complaint against ASC, and further that ASC was a labor organization covered by MERA subject to duty of fair representation complaints.

Duty of fair representation claims under MERA are covered by Sec. 111.70(3)(b)1. In order to prove a violation of the duty of fair representation, it is necessary for the complainant to show, by a clear and satisfactory preponderance of the evidence, that the “union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.” MAHNKE V. WERC, 66 Wis. 2D 524, 531 (1975) (quoting VACA V. SIPES, 386 U.S. 171, 190 (1967)). Under this standard, a union does not breach its duty of fair representation simply by negligently processing a grievance, simply by failing to communicate with a grievant, simply by making unwise or improvident decisions about the merits of a grievance, or simply by settling a grievance against the wishes of the grievant. Imperfections in representation are permitted the union, with one important caveat: “. . .subject always to complete good faith and honesty of purpose in the exercise of its discretion.” HUMPHREY V. MOORE, 375 U.S. 335, 349 (1964). Additionally, the standard just referenced does not require the union to arbitrate all grievances because “a union has considerable latitude in deciding whether to pursue a grievance through arbitration.” E.g., MAHNKE, *supra*, 66 Wis. 2D at 531 (quoting HUMPHREY V. MOORE, 375 U.S. 335, 349 (1964)).

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

It is exceedingly difficult for an individual bargaining unit member to establish a breach of the duty of fair representation, and properly so. Decades of experience under federal and state labor relations laws have demonstrated the wisdom and necessity of maintaining this exceptionally high bar. It acknowledges that unions have limited resources, that grievances may be handled by relatively unsophisticated fellow employees or union staff, who as human beings sometimes make mistakes of judgment or are negligent, that a union's resources come from dues and fees paid by employees, that the union is a collective enterprise that must serve the interests of the overall group, that serving those collective interests frequently comes at the cost of a particular individual's real or perceived interests, and that a union must have discretion to make these decisions without being subjected to expensive second-guessing by agencies or courts.

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

In this case, Brown offered no proof whatsoever to buttress her contention that ASC breached its duty of fair representation to her. Here's what the evidence shows. After Brown did not make it off probation, she asked ASC to file a grievance on her behalf, and Weigelt did just that. When the District refused to accept that grievance, Weigelt filed a second grievance over the same matter. Weigelt filed these grievances even though he knew, based on his 12 years of experience as director of ASC, that the superintendent's termination of probationary status is final and cannot be appealed to the School Board. Additionally, he knew that this action (i.e. termination of probationary status by the superintendent) is not grievable and cannot be arbitrated by ASC.

In the context of this case, the legal standards identified above require Brown to show with objective evidence that Weigelt acted unlawfully. Here, the record contains no evidence that would cast doubt on his "good faith and honesty of purpose" in representing Brown. See MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 31602-C, at 13, citing HUMPHREY V. MOORE, 375 U.S. 335, 349 (1964). The record evidence does not show any improper or perfunctory conduct or wrongdoing by Weigelt toward Brown. In so finding, it is specifically noted that there is nothing in the record establishing that Weigelt had any bias, negative feelings or predisposition against Brown. Additionally, there is nothing in the record showing that Weigelt somehow disregarded the merits of Brown's situation or grievances.

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

Finally, the focus turns to Brown's claim that the District violated its contract with ASC by its conduct toward her. Under MERA, such claims are covered by Sec. 111.70(3)(a)5. That provision makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement. The traditional mechanism for enforcing a collective bargaining agreement is grievance arbitration. Where a collective bargaining agreement contains a grievance arbitration procedure, it is presumed (absent an express provision to the contrary) to be the exclusive method of settling contractual disputes. MAHNKE, *supra*. If the union has control over the contractual grievance arbitration procedure and elects not to take a grievance to arbitration, an employee may not pursue a claimed breach of the agreement under Sec. 111.70(3)(a)5, Stats., unless it is proven that the union violated its duty of fair representation to the employee.

Brown asks the Examiner to review the merits of her grievance. There is a basic jurisdictional problem with my doing so and deciding the merits of her grievance. It is this. It has long been the Commission's practice not to exercise its collective bargaining agreement enforcement jurisdiction regarding a dispute that is subject to resolution under an agreed-upon and presumptively-exclusive grievance procedure like the one contained in the 2007-09 contract between the District and ASC. See, for example, MILWAUKEE COUNTY, DEC. NO. 28525-B (Burns, 5/98) at 12, *aff'd* -C (WERC, 8/98). This means that the Commission will only decide the merits of a grievance if it is shown that the complainant's access to the applicable grievance procedure is being prevented by a union failure to fairly represent the employees' interests on the subject through the grievance procedure. MILWAUKEE COUNTY, *supra*. In other words, in order for a contract claim to be addressed in this type of case, a complainant must first show that the union violated its duty of fair representation to the employee.

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

...

In sum then, it is concluded that even if Brown was a municipal employee under MERA who could file a duty of fair representation claim against ASC, and even if ASC was a labor organization under MERA subject to duty of fair representation claims, ASC did not violate Secs. 111.70(3)(b)1, Stats., by its conduct herein. Given that finding, I have not exercised the

Commission's jurisdiction under Sec. 111.70(3)(a)5, Stats., to determine if the District violated its contract with ASC relative to its action toward Brown. The complaint has therefore been dismissed.

Dated at Madison, Wisconsin, this 26th day of August, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner