STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CAMPBELLSPORT EDUCATION ASSOCIATION, Complainant,

vs.

CAMPBELLSPORT BOARD OF EDUCATION and CAMPBELLSPORT SCHOOL DISTRICT, Respondents.

Case 28
No. 70200
MP-4620

Decision No. 33168-A

Appearances:

Melissa Thiel Collar, Legal Counsel, Wisconsin Education Association Council, 2256 Main Street, Green Bay, Wisconsin 54311, appearing on behalf of the Complainant.

Michael Cieslewicz, Kasdorf, Lewis and Swietlik, Attorneys at Law, One Park Plaza, 11270 West Park Place, Fifth Floor, Milwaukee, Wisconsin 53224, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On September 22, 2010, the Campbellsport Education Association filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the Campbellsport Board of Education and the Campbellsport School District. The complaint alleged that the District committed a prohibited practice when it insisted that a Step 3 grievance meeting between it and the Association be held in open session; previously such meetings had been held in closed session. The Association contended that this action constituted bad faith bargaining in violation of Sections 111.70(3)(a)1 and 4, Stats. After the complaint was filed, it was held in abeyance pending efforts to resolve the dispute. Those efforts were unsuccessful. On November 10, 2010, the Commission appointed Raleigh Jones, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided for in Secs. 111.07(5) and 111.70(4)(a), Stats. On December 8, 2010, the Respondents filed an

answer denying the allegations. Hearing on the complaint was held on December 15, 2010 in Campbellsport, Wisconsin. Following the hearing, the parties filed briefs and reply briefs by March 8, 2011. Having considered the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Campbellsport Education Association, hereinafter referred to as the Association, is a labor organization which maintains its offices in care of Winnebagoland UniServ, 325 Trowbridge Drive, Fond du Lac, Wisconsin.

2. The Campbellsport School District, hereinafter referred to as the District, is a municipal employer which operates a public school system in Campbellsport, Wisconsin. Its offices are located at 114 West Sheboygan Street, Campbellsport, Wisconsin. The District's Administrator is Dan Olson. The District has a Board of Education. The President of the Campbellsport Board of Education is Jay Miller. While the District and the Board are technically different entities, in the context of this case, the terms District and Board are used interchangeably.

3. The Association is the exclusive collective bargaining representative for all full-time employees of the District engaged in teaching, including classroom teachers, librarians, school psychologists and school counselors.

4. The Association and the District have been parties to a series of collective bargaining agreements setting forth the wages, hours, and conditions of employment of the employees in the bargaining unit referenced in Finding 3. The parties have historically bargained such agreements in a closed meeting for purposes of Wisconsin's Open Meeting Law, Wis. Stat. ch. 19. They have never bargained an agreement in open session but for the statutorily-required initial exchange of proposals. The parties' most recent collective bargaining agreement was in effect from July 1, 2007 through June 30, 2009. It contained the following pertinent provisions:

ARTICLE V
GRIEVANCE PROCEDURE

. . .

A. General

1. A grievance is defined as an alleged violation concerning the interpretation or application of a specific article or section of this agreement. Such grievance shall be submitted to the following grievance and arbitration procedures.

. . .

B. Step One

Within fifteen (15) days of the time a grievance arises, the grievant will orally present the grievance to the principal during lunch; break periods, or after working hours. Within three (3) days after presentation of a grievance, the principal shall give his/her answer orally to the grievant.

C. Step Two

1. If the grievance is not resolved in Step One, the grievant or the CEA representative may, within fifteen (15) days of receipt of the principal's answer, submit to the District Administrator a written "Statement of Grievance" and shall name the employee involved, shall state the facts giving rise to the grievance, shall identify all the provisions of this Agreement alleged to be violated by appropriate reference, shall state the contention of the grievant with respect to those provisions, and shall indicate the relief requested.

2. The District Administrator or his/her designated representative shall give the representative an answer in writing no later than fifteen (15) days after receipt of the written grievance. If further investigation is needed, additional time may be allowed by mutual agreement of the District Administrator and the CEA.

D. Step Three

If the grievance is not resolved in Step Two, the Board and the grievant and/or CEA representative shall meet within a reasonable time, not to exceed fifteen (15) days unless a longer time is mutually agreed upon between the parties, outside of working hours, to discuss the grievance.

F. Step Four

1. If the CEA is not satisfied with the disposition of the grievance at Step 3, or if no decision has been rendered within ten (10) school days, the CEA may, within ten (10) school days submit the grievance to binding arbitration.

. . .

ARTICLE VI
OTHER PROVISIONS

. . .

H. Insurance

1. Effective July 1, 2006 and thereafter, the District will pay ninety-one percent (91%) of the single and family health and dental insurance premium. The Board shall notify the CEA of any proposed change in the insurance carrier. The CEA shall have the opportunity to discuss the change and to make recommendations. In the event the Board determines it will change carriers, coverage's of the new plan shall be governed by paragraph 2 of this Article.

2. The School Board shall make final disposition of the carrier. The coverage shall be equivalent in the case of a change in carrier.

. . .

5. Effective July 1, 2006, the health insurance plan referenced in paragraph 1, above, shall have a three (3) tier prescription drug card ($5/$10/$15).

. . .

5. Tina Trumbower is a veteran high school business education teacher for the District, and is a member of the Association. She has served in various leadership positions for the Association, including chief negotiator, president, building representative and most recently as a grievance co-chairperson. In her position as grievance co-chairperson, Trumbower assists members with issues arising under the collective bargaining agreement.

6. Trumbower routinely attends Board of Education meetings. Regularly scheduled Board meetings are held twice a month. The Board may call special meetings when it desires to meet at a time other than the regularly scheduled meetings. Given that she regularly attends such meetings, Trumbower receives a "Board Packet". The Board Packet is a compilation of information provided to the members of the Board, including the agenda and supporting materials. Trumbower is not provided with all of the information that is provided to the Board members in such packet. Trumbower only receives such packets for regular meetings; she does not receive a Board Packet prior to special meetings. Thus, she is not provided an advanced copy of the agenda prior to special meetings.

7. In addition to attending Board meetings, in her various Association leadership positions, Trumbower has represented the Association and its members at such meetings when

the Association has met with the Board pursuant to Step 3 of the grievance procedure. During Trumbower's tenure as grievance co-chairperson, the Association appealed at least five grievances to Step 3 of the grievance procedure: one involved Sue West, one involved Oran Nehls and three involved Gene Matthews.

8. The Step 3 grievance meetings between the Association and the Board on the five grievances referenced in Finding 7 were held in closed session. Prior to August 9, 2010, the Board had never requested nor required the Association to meet with it pursuant to Step 3 of the grievance procedure in open session.

9. Discussion of grievances at Step 3 grievance meetings with the Board have been held at both regular and special meetings. Whether the Step 3 grievance is presented at a regular or special meeting, it is not Trumbower's practice to review the meeting agenda prior to the meeting as such meetings have always been held in closed session. Typically, prior to the meeting with the Board, Trumbower had some correspondence with the District Administrator, Dan Olson, regarding the procedure for the Step 3 meeting.

10. In the late spring, early summer of 2010, the Association learned that the District intended to unilaterally change the existing health insurance carrier (i.e. the WEAC Trust) effective July 1, 2010. On June 15, 2010, Trumbower filed a grievance on behalf of the Association alleging that the District violated the Agreement by unilaterally changing the health care provider from the WEAC Trust to the WCA Group Health Trust. Hereinafter, this grievance will be referenced as the health insurance grievance.

11. At the time of the filing of the health insurance grievance, Winnebagoland UniServ, the UniServ servicing the Association, was experiencing a change in the UniServ Director assigned to the Association. Sherri Jones had just replaced longtime UniServ Director Armin Blaufuss, who was retiring. Due to the transition of UniServ Directors, WEAC Negotiations Specialist Dennis Eisenberg assumed responsibility for the processing of the health insurance grievance.

12. After receiving the health insurance grievance, the District's legal representative, Tony Renning, contacted Eisenberg regarding the grievance. Renning proposed that the parties bypass Steps 2 and 3 of the grievance procedure and proceed directly to arbitration, Step 4 of the grievance procedure. Eisenberg later responded to the District's request and told Renning that the Association was willing to bypass Step 2, but did not want to bypass Step 3 (i.e. the meeting with the Board) because it wanted to meet with the Board to discuss the health insurance grievance. At no time during the course of such discussions did Renning tell Eisenberg that the Board was going to insist that such meeting and discussion be held in open, public session. The parties subsequently agreed to meet for purposes of discussing the Step 3 grievance on August 9, 2010.

13. Prior to the August 9, 2010 Board meeting, the District posted the agenda for the (upcoming) August 9, 2010 Board meeting. The notice indicated that at that meeting, the

Board was going to "hear a grievance". The notice then provided that the Board would adjourn into closed session to deliberate, after which it would then reconvene to open session to take action on the grievance. Collectively, those statements meant that the Board was going to "hear" the Association's presentation on the grievance in open session, and then adjourn to closed session to deliberate on the grievance, and then return to open session to take action on the grievance. The District posted this notice on its website and in two local newspapers.

14. Prior to the August 9, 2010 Board meeting, the District released information related to the health insurance grievance and the Step 3 grievance meeting to the news media. After that information was released, District Administrator Olson was interviewed about the grievance and the upcoming Step 3 meeting by the local news media.

15. Prior to the August 9, 2010 Board meeting, the Association prepared information to discuss with the Board. Given that the grievance alleged that the District's unilateral change in health insurance carriers resulted in insurance coverage that was not equivalent to the previous coverage, and that the relevant contract provision (Article VI, H, 2) requires any replacement insurance carrier to be "equivalent" to the existing insurance carrier, the Association planned to provide information related to such disparate coverage. Specifically, the Association intended to have a member discuss the negative effect that the change in carriers had on her, including a discussion about her personal, protected health information. While the member was willing to talk to the Board on behalf of the Association, she was reluctant to do so. In addition to her discussion, the Association intended to provide supporting documentation which contained the member's protected health information.

16. Because the August 9, 2010 Board meeting was a special meeting, Trumbower did not receive a Board Packet, nor did she receive any agenda prior to such meeting. Unlike the previous grievances in which she was involved, prior to the health insurance grievance Step 3 meeting, Olson had no correspondence with Trumbower regarding the procedure for the Step 3 grievance meeting. Prior to that meeting, Olson did not tell Trumbower that the upcoming meeting would be in open session (contrary to prior Step 3 grievance meetings). Additionally, prior to that meeting, Trumbower did not see the agenda for the August 9, 2010 special meeting in the local newspaper or on the District website.

17. Upon arriving at the special Board meeting on August 9, 2010, Renning told Eisenberg that the Board was going to hold the Step 3 grievance meeting in an open, public session. This was the first that the Association became aware that the Board was going to hold the discussion of a Step 3 grievance in an open, public session. Upon learning that the Board was insisting that the grievance meeting be held in open session, the Association member prepared to discuss her personal health information with the Board was no longer willing to do so, in part because several reporters were in attendance at the meeting. Reporters are not typically present for Board meetings.

18. At the outset of that meeting, a discussion ensued between Eisenberg, Renning and School Board President Jay Miller. Renning and Miller said that the issue involved in this

grievance (i.e. the District's unilateral change in the health insurance carrier) was of significant public/district wide concern, so the Board/District was insisting that the (Association's) presentation be made in open session so that the public could understand and participate. Eisenberg objected to the meeting being held in open session. He said that in order to fully advise the Board as to why the Association believed the Agreement to have been violated, it needed to present protected health information to the Board and it could not do so in open, public session. Eisenberg also said that the first the Association was informed that the Board wanted to discuss the grievance in public session was only minutes prior to the meeting. Eisenberg then offered to reschedule the meeting so that the meeting could be posted as a closed meeting. Renning declined to reschedule the meeting, and also declined to have any discussion with the Association regarding the grievance without such discussion being held in open, public session. As an alternative to discussing the grievance in private session, Renning indicated that the Association need not present the protected health information in the course of such discussion given the Association's privacy concerns. Eisenberg responded to that offer by saying he was not going to present protected health information in an open, public session where members of the media were present. He further said that the Board's insistence on hearing the grievance in an open session precluded the Association from presenting an effective argument regarding the change in health insurance carrier absent a discussion of the member's protected health information. After Eisenberg finished making these statements, he made no presentation to the Board on the grievance (meaning he did not present any evidence, argument or documentation in support of the Association's grievance).

19. The Board then went into closed session to deliberate on the grievance. The Board deliberated on the grievance in closed session and subsequently voted to deny the grievance.

20. The Association subsequently appealed the health insurance grievance to arbitration per Step 4 of the contractual grievance procedure.

21. Following the actions referenced above, the Association filed the instant prohibited practice complaint.

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

CONCLUSION OF LAW

By insisting that the Association meet with it in an open, public session regarding the health insurance grievance, and refusing to discuss that grievance in closed session, the District engaged in bad faith bargaining. That action, in turn, violated Sec. 111.70(3)(a)4, and derivatively, Sec. 111.70(3)(a)1, Stats.

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

ORDER

As a remedy for the violation noted in the Conclusion of Law, the District shall immediately:

(a) Meet with the Association in closed session regarding the health insurance grievance.

(b) Cease and desist from insisting that Step 3 grievance meetings be held in open, public session, absent extraordinary circumstances.

(c) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

(1) Notify members of the bargaining unit represented by the Association by posting copies of the attached "APPENDIX A" in the manner in which notices to bargaining unit employees are typically made. The Notice shall be signed by an official of the District and shall remain posted for 30 days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

(2) Notify the Wisconsin Employment Relations Commission within 20 days of the date of this Order as to what steps have been taken to comply with this Order.

Dated at Madison, Wisconsin, this 12th day of April, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

APPENDIX "A"

NOTICE TO EMPLOYEES OF THE CAMPBELLSPORT SCHOOL DISTRICT REPRESENTED BY CAMPBELLSPORT EDUCATION ASSOCIATION

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL meet with the Association in closed session to discuss the health insurance grievance.

Henceforth, WE WILL NOT insist that Step 3 grievance meetings be held in open, public session, absent extraordinary circumstances.

Dated this _____ day of _____, 2011.

CAMPBELLSPORT SCHOOL DISTRICT

By _____

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED OR COVERED BY ANY OTHER MATERIAL.

CAMPBELLSPORT SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

As noted in this decision's prefatory paragraph, the complaint alleged that the District committed a prohibited practice when it insisted that a Step 3 grievance meeting between it and the Association be held in open session. The Association contends that this action constituted bad faith bargaining in violation of Sections 111.70(3)(a)1 and 4, Stats. The District disputes that assertion.

Association's Initial Brief

The Association contends that the Board's conduct in refusing to discuss the health insurance grievance in accordance with the parties' negotiated grievance procedure in anything other than an open, public session constitutes bad faith bargaining and as such, violates Sections 111.70(3)(a)4 and 1. According to the Association, Commission precedent has established that it is bad faith bargaining for one party to insist that collective bargaining be done in open, public session and as an extension, refuse to bargain in a closed session. While the case precedent in question involves collective bargaining, and not a grievance, the Association believes that distinction does not matter because the grievance procedure is an extension of the collective bargaining process. Building on that premise, the Association maintains that a party's refusal to discuss a grievance in closed session, and instead demand that such discussion occur in an open, public session, constitutes bad faith bargaining. Additionally, the Association argues that there is no support in either the parties' collective bargaining agreement or the parties' prior treatment of Step 3 grievances for the Board's position that it can require the Association to meet in open, public session for the discussion of a Step 3 grievance. It elaborates on these contentions as follows.

As just noted, the Association argues that it is bad faith bargaining for an employer, or a union for that matter, to require a grievance meeting to be held in open, public session. To support that contention, the Association cites the Commission decision in CITY OF SPARTA, DEC. NO. 14520 (WERC, 1976). As the Association sees it, that case stands for the proposition that a party bargains in bad faith when it insists that a collective bargaining session or meeting be held in open session. While that case involved collective bargaining, it's the Association's view that the principle established therein (i.e. that a party cannot insist that collective bargaining be conducted in public session) applies to a grievance so that an employer, or even a union for that matter, cannot insist that a grievance meeting be conducted in a public forum. To support that premise, the Association cites various court cases which have held that the grievance procedure is an extension of collective bargaining. It also cites a Wisconsin Attorney General opinion, namely 67 Wisc. Op. Atty. Gen. 276 (1978), which held that grievance meetings are not subject to the open meeting requirements. Putting all the foregoing together, the Association opines that "the policy reasons as identified by the Commission in finding that traditional negotiations sessions are presumed to be closed are equally applicable to the presumption that grievance meetings are to be closed sessions."

Next, the Association puts what happened here in the following context. It notes that the Board refused to meet with the Association in anything other than an open, public forum to discuss the health insurance grievance. Likewise, the Board refused to have any discussion with the Association in a closed session. Thus, if the Association wanted to discuss its position on the health insurance grievance with the Board, it was required to do so in an open, public session. As the Association sees it, the Board's conduct prohibited the Association from engaging in collective bargaining (i.e. that being the presentation of the Step 3 grievance to the Board). The Association expounds on this point with the following two arguments. First, it acknowledges that at the meeting, the Board's attorney told Eisenberg that he did not need to present the affected teacher's protected health information. The Association calls his doing that "disingenuous" because the Employer does not get to decide what evidence the Association will offer in support of its position during such discussion, or what the Association's most effective argument is for that matter. The Association submits that if the Employer was permitted to dictate what evidence a collective bargaining representative could offer in the course of a grievance meeting, then the Association's due process would be seriously undermined. Second, the Association asserts that the subject matter of the grievance is immaterial to the statutory presumption that grievance meetings are assumed to be held in closed session. As the Association sees it, the grievance did involve the coverage of a member's protected health status by a health insurance provider, and thereby involved a member's protected health information. The Association submits that in order to illustrate the Association's argument that the new insurance carrier did not provide equal coverage, the member would have shared information regarding her diagnosis, the prescribed treatment for such diagnosis and potential medication for such treatment. According to the Association, "it is not unreasonable that an individual would not want such protected health information to be disclosed to the public and the media." The Association argues that the Board's actions placed it in a "Catch-22 position" whereby it was forced to either proceed with a sub-par grievance argument so as not to publicly expose a member's protected health information, or in the alternative, was forced to disclose a member's protected health information to the public at large to support its grievance. In the Association's view, that is not good faith bargaining.

Next, the Association contends that the Board offered no evidence as to any legitimate "extraordinary circumstances" for its conduct (i.e. unilaterally holding the Step 3 grievance meeting/discussion in open, public session). The Association expounds on this point with the following three arguments. First, the Association asserts that the Board made "no demonstration that there were inadequate means by which the public could have been provided accurate and complete information as to the position of the parties." It notes in this regard that the Board had already so informed the public of such information by and through its discussion with the media prior to the August 9, 2010 meeting. Second, the Association anticipates that the Board will contend that because this grievance was a matter of "global" concern and one that involved "taxpayer dollars", such factors constitute extraordinary circumstances permitting it to unilaterally determine to hold the meeting in a public forum. The Association argues there is no support in law for these contentions, once again relying on CITY OF SPARTA. The Association opines that each grievance is an extension of the collective bargaining process and entitled to be discussed in private session, free from public grandstanding. Third, the

Association addresses the fact that the Board has a policy – posted on the District website – of conducting its business in open session. As the Association sees it, the Board's actions here were inconsistent with this policy because while the Board wanted the Association to present its argument in support of the grievance in open session, the Board decided that it would hold its own discussion of the grievance in closed session.

Next, the Association submits that the prior practice of the parties in the treatment of Step 3 grievances is not relevant here as this is a question of law. The Association first opines that a grievance is a grievance is a grievance, so it should not matter that the health insurance grievance pertains to what the District called a "global concern", while the previous grievances involved what the District called "staffing issues". The Association notes in this regard that there is just one contractual grievance procedure, and it does not contain one track for "global concerns" and one track for "staffing issues". Instead, it contains just a single track for all grievances, and it does not contemplate a public forum at any of the steps. The Association argues that if the Commission finds that the Board has the authority to unilaterally insist that Step 3 meetings be held in open session, that will rewrite the contract language and give the Board a right it does not possess. Second, the Association argues that if the Commission does consider the parties' prior treatment of Step 3 grievances, the evidence demonstrates that of the five grievances that have been advanced to Step 3 of the grievance procedure, all five Step 3 grievance meetings have been held in private, closed session – not public, open session. As the Association sees it, the parties' practice offers no support for the Board's position. Third, the Association contends it never acquiesced to the Board meeting being conducted in open session. While the Association acknowledges that it failed to realize – prior to the August 9, 2010 Board meeting – that this meeting was going to be held in open session, it does not see that as significant or that it somehow gave the Board authority to meet in open session.

Finally, while the Association's main focus in this case is that noted above, the Association also argues that the Board's conduct at the August 9, 2010 Board meeting unilaterally interfered and restrained at least one Association member from participating in the third step grievance meeting (namely, the Association member who was going to discuss her personal health information with the Board). The Association notes that by insisting on holding the meeting in open session, that Association member was no longer willing to do so.

Based on the above, the Association asks the Examiner to find that the District violated Sections 111.70(3)(a)4 and 1 by its conduct here. As a remedy, the Association asks that the Examiner order the Board to meet with the Association in closed session regarding the health insurance grievance; order a cease and desist order prohibiting the Board from insisting that Step 3 grievance meetings be held in open, public session, absent extraordinary circumstances; and award attorney's fees and costs to the Association.

District's Initial Brief

The District's position is that it did not violate MERA when it addressed the Association's health insurance grievance at Step 3 in an open session. It elaborates as follows.

While the point will be expounded on in more detail below, the District sees the issue herein as being whether the District's refusal to hold the August 9, 2010 Step 3 hearing in closed session violated a past practice of the parties to the collective bargaining agreement. Having framed the issue that way, the District answers that question in the negative. It avers that the Association has failed to establish a past practice which is clear and unequivocal and readily ascertainable over a period of the time that all Step 3 grievance meetings are to be held in closed session. Building on that premise, it's the District's view that it could hold the Step 3 grievance meeting on the insurance grievance in open session.

Before addressing that matter further, the District believes it's important to consider the matter in the following factual context. First, it notes that the Campbellsport School District Board of Education has an open meeting policy which states: "All meetings of the Board of Education shall be open to the public, except when the Board is meeting in closed session as authorized by the law. All actions of the Board shall be taken openly and deliberations leading to Board actions shall likewise be conducted openly." According to the District, this policy comports with the Declaration of Policy in Wisconsin's Open Meetings Law. Second, it notes that the Board agenda for the meeting on August 9, 2010 indicated that the Board would hear a grievance under the master agreement between the District and the Association and that the matter would then be deliberated in closed session of the Board. It also points out that this agenda was posted on the District's website approximately a week prior to the August 9, 2010 meeting. However, the Association representatives never checked the meeting agenda prior to the meeting of August 9, 2010 and therefore were unaware that the meeting would be held in open session until the Association representatives' arrival just prior to the meeting. Third, it notes that at the August 9, 2010 Board meeting, the Association's representative was not the regular uniserv director, but rather was Negotiation Specialist Eisenberg, who was brought in because of the "unique nature" of the health insurance grievance. The Employer points out that Eisenberg had never previously attended a Step 3 grievance meeting in the Campbellsport School District. Fourth, the District acknowledges that at the August 9, 2010 Board meeting, Eisenberg planned to offer evidence concerning a teacher's individual health care situation, but did not do so because of confidentiality concerns. The District notes in this regard that the record contains a redacted copy of that teacher's specific condition. Fifth, the District also acknowledges that at the Board meeting, Board President Miller and District lawyer Renning told Eisenberg that the reason the Board wanted the meeting held in open session (rather than in closed session) was because this particular grievance was of "significant public/district wide concern", so the District wanted the Association's presentation on the grievance made in open session "so that the public could understand and participate." Sixth, the District notes that Eisenberg would not proceed with the discussion of the grievance in open session, and made no presentation to the Board at that meeting.

Next, the District reviews the language contained in the parties' contractual grievance procedure. After doing so, it contends that nothing therein requires a Step 3 grievance "hearing" to be held in closed session before the Board. Conversely, it further acknowledges that the language does not require the Step 3 grievance "hearing" to be held in open session either. Putting these two points together, the District avers that the contract is silent in

whether Step 3 grievance "hearings" are to be conducted in open or closed session. The District asserts that since the contract does not say one way or the other whether Step 3 meetings are to be open or closed, it has "the sovereign right" (as the Employer) to decide whether its Step 3 grievance meeting is open or closed. In this case, it exercised that right and decided to have the meeting in open session. It maintains that the contract does not "dictate otherwise".

Next, the District contends that nothing in state statute or state law requires a Step 3 grievance hearing to be held in closed session either. In making this argument, the District reviews the Attorney General Opinion cited by the Association in its complaint, namely 67 Wisc. Op. Atty. Gen. 276 (1978). After doing so, the District summarizes that decision as saying that "the meeting on a grievance may be either open or closed, unless the contract terms specify whether the meeting should be open or closed." Building on that premise, the District repeats its prior assertion that the contract is silent on whether Step 3 grievance meetings have to be open or closed.

Having framed the matter as noted above (namely, that nothing in the collective bargaining agreement or state law requires the Step 3 grievance hearing to be held in closed session), the District submits that this case is essentially a past practice case. Building on that premise, the District argues that the Association failed to prove that the parties had a practice which clearly and unequivocally required that the Step 3 grievance hearing on the issue before the Board on August 9, 2010 had to be held in closed session. The District expands on this contention with the following arguments. First, while it characterized Association representative Eisenberg as an experienced negotiator for WEAC, it avers that his experience with grievance meetings in other school districts (where the grievance meetings were always held in closed session) should be considered irrelevant to this matter. Second, with regard to the grievances that were previously processed to Step 3 in the last several years, it's the District's view that one was for Sue West, one was for Oran Nehls and three were for Gene Matthews. It's the District's position that the Gazzola and Killinger grievances were not appealed to Step 3. While the District acknowledges that the West, Nehls and Matthews grievances were heard by the Board in closed session, the District implies that that number is not large enough to create a binding past practice. Aside from that, the District emphasizes that the grievances just noted were what the District called "highly individual to a particular teacher's conduct or employment situation." Said another way, the District characterized them all as involving "individual teacher issues". In contrast though, the District sees the insurance grievance as being different from those just referenced because it involves the Association as a whole. To support that contention, the District notes that the contractual grievance procedure says that "the persons affected by the grievance shall be identified in their written grievance." While past grievances identified individual teachers, the insurance grievance was different in that it named no individual teacher. As the District sees it, this made the insurance grievance "materially different" from the other grievances which were heard by the Board in closed session. As the District Administrator put it at the hearing, the insurance grievance was a "policy" grievance.

The District therefore asks the Examiner to find no violation and dismiss the complaint.

Association's Reply Brief

The Association begins its reply brief by opining about what it believes this case is and is not about. It avers that this case is about parties' rights under the *law*; it is not about parties' rights pursuant to a contract. More specifically, this case is about whether under the *law*, an employer can unilaterally set the rules for a contractual grievance procedure. This case is not about whether any sort of past practice provides such authority. This case is about the *presumption* that such grievance meetings are to be held in *closed* session. The Association contends that the District has not overcome the presumption that a grievance meeting is to be held in closed session. Thus, the District engaged in bad faith bargaining.

The Association contends that the Board misstated the law to support its position (that it was permitted to unilaterally decide to hold the grievance meeting in open session). First, with regard to the Attorney General Opinion which it cited in its initial brief, the Association quotes the Employer's summary of that opinion as being: "the meeting on the grievance may be open or closed *unless the contract terms specify whether the meeting should be open or closed.*" The Association asserts that contention is not accurate. As the Association sees it, the Attorney General's Opinion provides that the Open Meetings Law does not grant authority for a governing body to unilaterally determine to hold meetings for collective bargaining, such as grievance meetings, in open session. Rather, such meetings are not subject to open meetings laws. The District erroneously extends such opinion, claiming that only when a collective bargaining agreement *expressly* provides that meetings for purposes of collective bargaining *e.g.*, grievance meetings, shall be in closed session, does a school board have to meet in closed session. Second, the Association quotes the following statements from the District's initial brief: the Board "certainly has the sovereign right to control its own meeting being either open or closed, unless state statute or contract dictate otherwise" [and] neither "law nor the collective bargaining agreement mandate that the Step 3 grievance be held only in closed session." According to the Association, both statements ignore the applicable WERC case law, namely CITY OF SPARTA. The Association reads that decision to say that it is presumed that such meetings will be held in closed session, absent extraordinary circumstances. It also avers that the Board set forth no evidence to overcome such presumption.

Next, the Association addresses the Board's contention that the reason it held the grievance meeting in open session was "so that the public could understand and participate." The Association calls that contention "disingenuous" and responds as follows. First, it contends that the Board offered no evidence to prove, much less demonstrate, that absent the meeting being held in open session the public would not understand the issue. As the Association sees it, the record evidence is to the contrary, noting that the District had already provided information about this issue to the media prior to the meeting. Building on that, the Association opines that "it is illogical to contend that by meeting in closed session, the public would be prevented from understanding the issue." Second, even if the public were confused about the issue, the Association submits that nothing precluded the Board from going back to

the public to further clarify the issue after meeting with the Association. Third, nothing precluded the Board from taking public comment on the matter prior to or after meeting with the Association in closed session. The Association also asserts that aside from the newspaper reporters, no member of the public was present at the meeting. That being so, it's the Association's view that any supposed public participation "is pure conjecture".

The Association repeats the contention it made in its initial brief that this is not a past practice case. According to the Association, the Board's focus on the parties' past practice (relative to Step 3 grievance meetings) is just an attempt to confuse and misconstrue the issue herein. The Association emphasizes in this regard that the claim it filed against the District herein is a statutory claim, not a contractual claim. The Association maintains that the concept of of "past practice" is a creature of contract, not law, and is not a necessary element to establish a bad faith bargaining violation. Thus, the Association believes that whether the parties did or did not have a past practice of holding such meetings in closed session is irrelevant to the question of whether MERA permits one party to insist that a grievance meeting be held in open session.

Even if past practice were relevant, the Association submits that the evidence here unequivocally demonstrates a practice of holding Step 3 grievance meetings in closed session. Where grievances have gone to Step 3 of the grievance procedure, *all* grievances have been heard in *closed* session – that is, until August 9, 2010.

In sum then, the Association asks the Examiner to find that the District violated Sections 111.70(3)(a) 4 and 1 by its conduct herein.

District's Reply Brief

The District begins by repeating the contention it made in its initial brief that the collective bargaining agreement is silent as to whether Step 3 grievances have to be held in open or closed session. Building on that premise (i.e. that the collective bargaining agreement is silent on that matter), it's the District's view that in order for the Association to prove that the District had to meet with the Association in closed session to discuss the health insurance grievance, the Association needs to prove the existence of a past practice concerning same (i.e. that the parties had a past practice of holding Step 3 grievance meetings in closed session). According to the District, the Association did not prove the existence of same (i.e. a past practice of holding Step 3 grievance meetings before the Board in closed session). The District maintains that there is a high standard for establishing a past practice (i.e. that the practice be clear and unequivocal over a long period of time) and the Association's proof (namely, Trumbower's testimony) simply did not meet it. The District avers that is fatal to the Association's case.

Next, the District repeats the contention it made in its initial brief that there is nothing in state law either that requires the District to meet with the Association in closed session on a grievance.

As part of its argument on this point, it addresses the Commission's decision in CITY OF SPARTA. In doing so, it focuses on the reference in that decision to "extraordinary circumstances". The District reads that case to stand for the proposition that as a matter of law, a grievance meeting "may be held in open session for an extraordinary circumstance". It notes that in that decision, the Commission did not define the parameters of "extraordinary circumstances." That being so, the District supplies its own definition. The District contends that the insurance grievance which the Board held at its August 9, 2010 meeting qualifies as an "extraordinary circumstance" for the following reasons. First, the District maintains that the subject matter of the hearing on August 9, 2010 (i.e. the Employer's switch in insurance carrier) was unique and had not previously been the subject of a grievance hearing before the District. The District opines that switching insurance carriers had district-wide implications for teachers, taxpayers and the public at large. As part of its argument in this regard, the District cites the *Random House Dictionary* definition of "extraordinary" as being ". . .beyond what is usual, ordinary, regular or established. . .exceptional in character. . .noteworthy". The District essentially maintains that the "extraordinary" nature of the insurance grievance should be self-evident. Second, the District asserts that the Association offered no explanation as to why it could not have presented its case and other exhibits during an open meeting, as well as present a redacted copy of the letter regarding teacher C.D. It notes in this regard that Eisenberg conceded that the individual teacher's name and identity was not the point to be made; rather, the gravamen of the exhibit was the condition which she was expressing in relation to the change in health care. Third, the District submits that the Association's "not so veiled hint" that the Board was engaged in grandstanding by holding this meeting in public is unsupported by the record. Based on the foregoing, it's the District's view that the Board hearing on August 9, 2010 was unique and out of the ordinary and, as a result, could be held in open session.

In sum then, the District asks the Examiner to dismiss the complaint.

DISCUSSION

Normally, my discussion in a MERA complaint case follows the following format: the applicable legal framework is identified and then that legal framework is applied to the facts. Oftentimes, there is no question about the applicable legal framework, and the dispute centers on the facts. In this case though, the situation is just the converse. What I mean is that in this case, the facts are essentially undisputed. Instead, what's disputed herein is what I earlier called the applicable legal framework and what it requires of the Employer. That being so, I've structured my discussion so that the previously identified format is reversed. Thus, I will address the facts before looking at the applicable legal framework.

As was noted in the Findings, the District switched insurance carriers, and the Association grieved. The District's Board of Education had a special meeting on August 9, 2010 to discuss the grievance. When the Association representatives arrived for the meeting, they learned that the Board intended to hold the meeting in open session. The Association objected to holding the meeting in open session and asked that the meeting instead be held in

closed session, even if that meant rescheduling the meeting. The Board refused to hold the meeting in closed session, and insisted that the meeting be held in open session.

It's the last fact just referenced (i.e. the Board's refusal to hold the meeting in closed session) that's at the heart of this case. The legal issue which is presented is whether the Board's actions violated MERA. The Association contends that it did, while the District disputes that contention.

Before I address that issue though, I'm first going to address the District's past practice contention. The District avers that the collective bargaining agreement is silent as to whether Step 3 grievances have to be addressed in open or closed session. Building on that premise (i.e. that the collective bargaining agreement is silent on that matter), the District contends that in order for the Association to prove that the District had to meet with the Association in closed session to discuss the health insurance grievance, the Association needs to prove the existence of a past practice concerning same (i.e. that the parties had a past practice of holding Step 3 grievance meetings in closed session). According to the District, the Association did not prove the existence of same (i.e. a past practice of holding Step 3 grievance meetings before the Board in closed session). The District argues that is fatal to the Association's case.

I find that the District's past practice contention misses the mark for the following reason: this is a statutory case, not a contractual case. It's a statutory case because the complaint herein alleges that the Board violated MERA by refusing to meet in closed session. That's a statutory question, not a contractual question. The concept of past practice (broadly speaking, what the parties have done previously) is, for the most part, related to the interpretation of labor agreements. While there are some MERA cases that involve past practice (such as Sec. 111.70(3)(a)5 violation of contract cases and Sec. 111.70(3)(a)4 status quo cases), this is not such a case. While it will be addressed in more detail below, this case raises a bad faith bargaining claim. Simply put, bad faith bargaining claims don't involve the concept of past practice. Thus, whether the parties have a past practice, or conversely don't have a past practice of holding Step 3 grievance meetings in closed session is irrelevant to the question of whether MERA permits one party to insist that a grievance meeting be held in open session.

Notwithstanding the conclusion just made, the next part of my discussion assumes the opposite. In other words, for the sake of discussion, it is assumed that the concept of past practice is relevant to this case. Based on that assumption, the rhetorical question to be answered is this: how have past Step 3 grievance meetings been held? Specifically, were they held in open or closed session? Findings 7 and 8 demonstrate that in five grievances that went to Step 3 of the grievance procedure during Trumbower's tenure as grievance chairperson, all those meetings were held in closed session. Thus, prior to the Board's Step 3 grievance meeting on August 9, 2010 (i.e. the meeting involved here), the Board had never required the Association to meet in open session. Instead, the meetings were held in closed session. That being so, the parties' prior experience of holding Step 3 grievance meetings in closed session does not support what the Board did here (namely, insist on holding the insurance grievance Step 3 meeting in open session).

. . .

Having so found, the focus now turns to the statutory question of whether the Board's insistence on holding the Step 3 grievance meeting with the Association in an open, public session – instead of a private, closed session – violated MERA.

My discussion begins with the following overview. MERA sets forth various requirements for both parties in collective bargaining, including that each party bargain in good faith. This good faith requirement is found in Sec. 111.70(1)(a), wherein it provides:

> (a) "Collective bargaining" means the performance of the mutual obligation of a municipal employer, through its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, *in good faith*, with the intention of reaching an agreement, *or to resolve questions arising under such an agreement, with respect to wages, hours, and conditions of employment*. . .
>
> (Emphasis added)

MERA further provides, in Sec. 111.70(3)(a)4, that it is a prohibited practice for a municipal employer to refuse to bargain collectively with a collective bargaining representative. Such refusal includes a failure to bargain in good faith.

Over the years, the agency that administers MERA (the WERC) has had various opportunities in its caselaw to apply the requirement that the parties bargain in good faith. One such case was CITY OF SPARTA, DEC. NO. 14520 (WERC, 1976). For reasons that will become apparent below, it is important that that case be reviewed in detail.

CITY OF SPARTA involved collective bargaining between a city and its employees, In that case, the employer adopted a resolution that all negotiations should be open to the public and news media. CITY OF SPARTA, at 1. The union objected to such procedure, indicating that it would not attend negotiation sessions that were open to the public and news media. *Id*. The employer subsequently refused to attend any bargaining sessions that were not open to the public and media. *Id*. The Commission found that an employer's insistence on negotiating in a public session contrary to the union's objections constituted bad faith bargaining. *Id*. at 2. In so finding, the Commission noted:

> It is the considered judgement of the Commission that the statutory duty to meet and confer at reasonable times, in good faith imposes a duty on the parties to be willing to meet in private, bilateral discussions since it is the Commission's experience that collective bargaining sessions are normally more successful when conducted in private, bilateral discussions.
>
> CITY OF SPARTA, at 3.

The Commission further found that this holding (i.e. that a party bargains in bad faith when it insists that a collective bargaining session or meeting be held in open session) extended to both collective bargaining representatives and municipal employers, finding:

> The Commission recognizes that its decision in LAKE GENEVA and WALWORTH COUNTY were based primarily on its conclusion that the question of whether negotiations should be conducted in public was not a question involving wages, hours and conditions of employment. In those cases, the proposal to hold public negotiation sessions was made by the employee organization which does not enjoy the statutory power to determine whether negotiations will be conducted in public. Although the Commission reaffirms its conclusion in those cases that the question of whether negotiations should be conducted in public is not a mandatory subject of bargaining the decision herein is premised as well on a finding that a municipal employer, which admittedly has the statutory power to determine whether negotiations will be held in public, violates its duty to meet at reasonable times in good faith if it exercizes [sic] that power without adequate justification, and the rationale of the Commission in LAKE GENEVA and WALWORTH COUNTY cases is modified to that extent.
>
> CITY OF SPARTA, at 3, fn. 2.

Thus, neither side is permitted to insist that bargaining be held in open, public session. The Commission then went on to say that the statutory presumption is that negotiation sessions are to be held in private, closed session unless the parties agree otherwise. CITY OF SPARTA, at 4. Stated alternatively, "[g]overnmental bodies may no longer decide unilaterally to conduct collective bargaining sessions in public or private." *Id.* at 5. Specifically:

> [E]xcept for extraordinary circumstances, neither governmental bodies nor labor organizations who are parties to a collective bargaining relationship can unilaterally insist that collective bargaining sessions be conducted in public. Such sessions may be conducted in public with the consent of both parties.
>
> *Id*. at 5.

In finding that the good faith requirement prohibited either party from requiring that collective bargaining occur in public, the Commission recognized that a public policy reason for this was to eliminate grandstanding and posturing. The Commission opined thus:

> [T]hrough private bilateral collective bargaining, said governmental bodies and the labor organizations which represent their employees may explore and consider a myriad of problems without having to make commitments and decision on all alternative solutions which may surface. The process of exploratory problem-solving, which is an essential ingredient to effective and successful collective bargaining, in many cases might be frustrated if the collective bargaining process were conducted in a public forum.

CITY OF SPARTA, at 5.

Although the CITY OF SPARTA decision was issued 35 years ago, it is still good case law in that it has not been reversed or modified by either the Commission or the courts. Accordingly, the Examiner relies on it as the basis for the findings which follow.

. . .

Next, while the CITY OF SPARTA case applied to collective bargaining, the Examiner finds that the reasoning articulated therein also applies to factual situations which involve a grievance procedure. That is because a grievance procedure is an extension of the collective bargaining process. This principle was established by the U.S. Supreme Court in one of the *Steelworkers Trilogy* cases, namely STEELWORKERS V. WARRIOR & GULF NAVIGATION CO., 363 U.S. 574 (1960) wherein the Court held:

> The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement. . .The grievance procedure is, in other words, a part of the continuous collective bargaining process.

Id. at 581.

Further support for this notion that the grievance procedure is an extension of collective bargaining is a 33 year old Attorney General opinion, namely 67 Wis. Op. Atty. Gen. 276 (1978) (OAG 83-78). The facts which pertained to the opinion were these: an employer insisted that a grievance meeting be open to the public. *Id.* The union objected, contending that the meeting should be closed unless the employee and union agreed to have it open. *Id.* The Attorney General held that grievance meetings are not subject to the open meetings requirement, because an employer "is engaged in collective bargaining when it hears and decides the type of dispute referred to [here, a grievance] and hence is not a 'governmental body' when meeting for that purpose and that most portions of the open meeting law are not applicable to that given situation." The Attorney General further opined:

> The statute [Wis. Stat. §111.70] contemplates that collective bargaining does not terminate when a contract is reduced to writing and is signed but may be utilized to resolve questions arising under the agreement, even where the procedure to resolve such questions is, at least in part, controlled by the agreement.

Id.

Thus, the Open Meetings Law does not grant authority for a governing body to unilaterally determine to hold meetings for collective bargaining, such as grievance meetings, in open session. In its brief, the District erroneously extends that opinion, claiming that only when a collective bargaining agreement *expressly* provides that meetings for purposes of collective

bargaining, *e.g.*, grievance meetings, shall be in closed session, does a school board have to meet in closed session. That contention is not supported by the opinion itself.

Finally, it is noted that the public policy reason which the Commission identified in CITY OF SPARTA for presuming that collective bargaining sessions should be closed (i.e. that "the process of exploratory problem-solving . . .might be frustrated" by conducting such business in a public forum) is equally applicable to grievance meetings because, as previously noted, they are an extension of collective bargaining.

The matters just referenced (i.e. 1) the holding from the Commission's CITY OF SPARTA decision; 2) the U.S. Supreme Court's finding that the grievance process is an extension of collective bargaining; and 3) the Attorney General's opinion finding that grievance meetings held pursuant to a grievance procedure are not subject to the Wisconsin Open Meetings Law), undercut the District's contention that "nothing in. . .state law requires the Step 3 grievance hearing to be held in closed session." Instead, the legal presumption is just the opposite – namely, that grievance meetings, like collective bargaining, are to be conducted in closed session. Said another way, the legal presumption is that an employer cannot insist on holding a grievance meeting in open, public session.

However, as already noted, that's what the Board did here (namely, insist on holding the health insurance grievance meeting in an open, public session and refuse to discuss the grievance with the Association in closed session). That being so, the focus now turns to the various defenses proffered by the District to justify its refusal to discuss the grievance with the Association in closed session.

Before I delve into those defenses though, I'm first going to address the question of whether an employer can ever deviate from the legal presumption just noted and insist on discussing a grievance at an open meeting. The short answer to that question is yes. Once again, the Commission's decision in CITY OF SPARTA provides guidance. Therein, the Commission found that a party may be permitted to insist on an open meeting if "extraordinary circumstances" existed. The Commission elaborated on this point as follows:

> [T]he objectives of the MERA and the Open Meetings Statute can best be effectuated and reconciled by finding that *except for extraordinary circumstances*, neither governmental bodies nor labor organizations who are parties to a collective bargaining relationship can unilaterally insist that collective bargaining sessions be conducted in public. Such sessions may be conducted in public with the consent of both parties. In addition, *if it can be demonstrated that there are no adequate alternative means* by which the public can be provided accurate and complete information as to the position of the parties and the status of collective bargaining between governmental bodies and the labor organizations which represent public employees, insistence upon public negotiations by either party might be found to be justified by the Commission.

CITY OF SPARTA, at 5-6 (emphasis added).

Given that holding, the next question is whether "extraordinary circumstances" existed here which allowed the Board to unilaterally decide that the Step 3 meeting on the insurance grievance would be held in open session. Based on the rationale which follows, I answer that question in the negative. The District's first justification for holding the meeting in open session was "so that the public could understand and participate." However, the record evidence does not support that contention. In fact, the record evidence is to the contrary, because the District had already provided information about the issue to the media (and thus to the public) prior to the meeting. Specifically, the District Administrator had told the media not only the District's position, but also that of the Association. That being so, the District's claim that meeting with the Association in closed session would thwart public participation is conjecture. The District did not show how it would have been prevented from fully informing the public of this matter if it had a closed meeting discussion with the Association regarding the grievance. Said another way, it did not show what information it would have been prevented from relaying to the public as the public already was aware of the parties' positions. Second, the District did not prove its contention that because the health insurance grievance involved "taxpayer dollars", that constituted "extraordinary circumstances" permitting it to unilaterally determine to hold the meeting in a public forum. Aside from that, what is curious about the District's contention is that negotiations of the collective bargaining agreement always involve taxpayer dollars. There is no evidence that the Board has bargained collective bargaining agreements in anything other than closed sessions. It is inconsistent for the District to maintain that contract negotiations are conducted in closed session, but when it comes to the continuation of this bargaining (via discussing a grievance involving the health insurance provision), further discussions of that provision must be done in public session. Also, notwithstanding the Board President's statement that he believed the grievance to be a "matter of significant public concern", the District proffered no testimony from any member of the public with respect to the matter. Third, another District justification for holding the Step 3 grievance meeting in open session, and refusing to meet with the Association in closed session to discuss the health insurance grievance, is that the Board has a local policy of conducting its business in open session. That contention is misplaced and does not justify the Board's action. Simply put, statutory law trumps board policy – not vice-versa. Fourth, another District justification for holding this meeting in open session was that the insurance grievance pertained to what the District called a "global concern", whereas all previous grievances which had advanced to Step 3 involved what the District called "staffing issues". Even if that is so, the problem with the District's contention is that there is not one grievance procedure for grievances of "global concern" and another for "staffing issues". Instead, there's just one grievance procedure. All grievances are processed through this one grievance procedure. Furthermore, that procedure does not contemplate a public forum. The following shows this. The public is not invited to be present when the Association initially meets with the building level principal at Step 1 of the grievance procedure. Nor is the public invited to be present when the Association meets with the District Administrator at Step 2 of the procedure. Step 3 is no different from Steps 1 and 2 with respect to the private nature of the grievance step. Additionally, it is noteworthy that Step 3 is a meeting designed to resolve grievances. It is not

a hearing, nor a public comment session. Thus, that grievance procedure did not give the District the authority to unilaterally decide that the Step 3 grievance meeting concerning the health insurance grievance was to be held in an open, public session. Based on the above then, it is held that the District did not show that there were "extraordinary circumstances" present here that permitted it to unilaterally hold the Step 3 grievance meeting in an open, public session.

Given that finding, the previously identified legal presumption (that meetings are to be held in closed session) applies. Since that did not happen, the Board engaged in bad faith bargaining at the August 9, 2010 meeting when it held the meeting in open, public session. That, in turn, violated MERA, specifically, Sec. 111.70(3)(a)4 and (derivatively) Sec. 111.70(3)(a)1. Having found a derivative violation of Sec. 111.70(3)(a)1, it is my view that I need not decide, in this particular case, whether an independent violation of Sec. 111.70(3)(a) 1 also occurred.

. . .

The remedy does not warrant extensive discussion. The Examiner has issued an order directing the Board to meet with the Association in closed session regarding the health insurance grievance, as well as a cease and desist order prohibiting the Board from insisting that Step 3 grievance meetings be held in open, public session, absent extraordinary circumstances.

Finally, the Association's request for attorney's fees and costs is denied. In CLARK COUNTY, DEC. NO. 30361-B at 19, the Commission stated:

> Regarding attorney's fees, the Commission has long construed this remedy to be limited to certain duty of fair representation cases and to cases where an extraordinary remedy is appropriate.

I find no "extraordinary remedy" is appropriate here under CLARK COUNTY.

Dated at Madison, Wisconsin, this 12th day of April, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

REJ/gjc
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