STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SANDRA BREWER, Complainant,

vs.

OREGON SCHOOL DISTRICT and OREGON EDUCATION ASSOCIATION and CAPITAL AREA UNISERV (CAUS) NORTH, Respondents.

Case 47
No. 70215
MP-4622

Decision No. 33664-B

Appearances:

Sandra Brewer, 4410 Vale Circle, Madison, Wisconsin 53711, appearing on her own behalf.

James Ruhly and **Douglas Witte**, Attorneys, Melli Law, 10 East Doty Street, Suite 900, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Respondent Oregon School District.

Randall Garczynski and **Joanne Huston**, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of Respondents Oregon Education Association and CAUS North.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 30, 2010, Complainant Sandra Brewer filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the Oregon School District. The complaint alleged that her (i.e. Brewer's) discharge from her teaching position with the District violated the collective bargaining agreement between the District and the Oregon Education Association. This complaint was filed by Attorney Nola Cross. Cross subsequently withdrew as Brewer's attorney. On February 18, 2011, Complainant Brewer filed an amended complaint with the Wisconsin Employment Relations Commission. This amended complaint added the Oregon Education Association and Capital Area UniServ (CAUS) – North as Respondents and alleged that they had violated their duty to fairly represent Brewer in the underlying matter. This amended complaint was filed by the Law

Office of Arthur Heitzer. After the complaint and amended complaint were filed, conciliation ensued, but did not resolve the matter. On February 6, 2012, Complainant's counsel requested that the matter be set for hearing. On February 15, 2012, 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. That same day, Jones issued an Order Bifurcating Proceedings, Decision No. 33664-A. That order found that hearing would be bifurcated as follows: the first hearing in this matter would deal with just the alleged violation of the duty of fair representation and a second hearing (which would deal with the District's alleged breach of the contractual just cause provision) would be held only if a violation of the duty of fair representation was found. On April 4, 2012, both Respondents filed an answer. On April 16, 2012, Attorney Heitzer withdrew as Brewer's attorney in this matter. On April 20, 2012, Brewer notified the Examiner and the Respondents that she was representing herself in this matter. From that point forward, the Examiner and the Respondents dealt directly with Brewer. Brewer then sent numerous e-mails to the parties prior to the hearing. During the course of those e-mail exchanges, the Examiner sent Brewer a copy of the WERC's "Complaint Processing Booklet". On April 23, 2012, Jones signed seven subpoenas at Brewer's request. One subpoena was for WEAC President Mary Bell, another was for the legal file of WEAC Legal Counsel Steve Pieroni, and another was for Attorney Nola Cross. On April 26, 2012, WEAC filed four motions in this matter: the first motion was to quash the subpoena for Mary Bell, President of WEAC; the second motion was to quash the subpoena Duces Tecum for the legal file of WEAC Legal Counsel Steve Pieroni; the third was a motion in limine to bar certain testimony of Attorney Nola Cross relating to this matter; and the fourth was a motion to dismiss Capital Area UniServ (CAUS) - North as a named party respondent. Brewer and the District subsequently filed written responses to WEAC's four motions. On May 2, 2012, the Examiner ruled on WEAC's four pending motions. The rulings were as follows: the Motion to Quash the Subpoena Duces Tecum for the entire file of Steve Pieroni, Attorney for OEA, was granted; the Motion to Dismiss Capital Area UniServ (CAUS) – North as a named respondent was denied; the Motion to Quash Subpoena for Mary Bell, President of WEAC, was taken under advisement by the Examiner; and the Motion in Limine to bar certain testimony of Attorney Nola Cross was taken under advisement by the Examiner. Hearing on the complaint was held on May 3, 4 and 8, 2012 in Madison, Wisconsin. During the course of the hearing, the Examiner addressed those two motions referenced above which were taken under advisement: a resolution was reached concerning the subpoena for Mary Bell, and the motion to bar certain testimony of Attorney Nola Cross was denied. Following the hearing, the parties filed briefs and reply briefs by July 17, 2012. Based on the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Sandra Brewer, hereinafter referred to as Brewer, was hired as a teacher by the Oregon School District in 1976. She was employed by the District as a middle school teacher for 33 years until she was discharged on June 8, 2010. Prior to being discharged, she had not been previously disciplined.

2. Respondent Oregon School District, hereinafter referred to as the District, is a municipal employer which operates a public school system in Oregon, Wisconsin. Its offices are located at 123 East Grove Street, Oregon, Wisconsin.

3. Respondent Oregon Education Association, hereinafter referred to as the OEA, is a labor organization with its offices in care of its president. When this matter arose, it was the exclusive collective bargaining representative for the District's teachers. At the time she was discharged, Brewer was a teacher and thus was included in the OEA bargaining unit.

4. Respondent Capital Area UniServ (CAUS) – North, hereinafter CAUS – North, is also a labor organization. Its offices are located at 4800 Ivywood Trail, McFarland, Wisconsin. CAUS – North is a UniServ unit which services about two dozen local affiliates of the Wisconsin Education Association Council (WEAC). One of the local affiliates which CAUS – North services is the OEA. At all times relevant herein, the UniServ Director of CAUS – North was Adam Birnhak. Birnhak is now deceased. He had a law degree, but was not licensed to practice law in Wisconsin when he died. Birnhak was not employed as a WEAC attorney.

5. The District and the Association were parties to a 2009-2011 collective bargaining agreement. That agreement provided in pertinent part that unresolved grievances could be appealed to arbitration.

6. By her own admission, Brewer had strained and eroded work relationships with numerous teachers in the middle school. Some of Brewer's conflicts and grudges with co-workers go back 20 years. Brewer blamed her co-workers for these conflicts and they, in turn, blamed her. She had a history of hassling and bullying teachers who disagreed with her. Because of these past conflicts, Brewer was isolated – both professionally and personally – from other teachers in the middle school. As one example, multiple teachers told a new teacher that associating with Brewer would be harmful to her career.

That history provides some context to the matters which follow.

7. About ten years ago, Brewer served as President of the OEA for a couple of years. Because of that experience, she was familiar with the OEA's internal politics as well as the Association's collective bargaining agreement with the District. In 2006, when she was not Association president, she served on the OEA's bargaining team. While she was on that bargaining team, other members of the bargaining team complained to the OEA Executive Board about Brewer's behavior as a member of the bargaining team. The OEA Executive Board subsequently took the unusual step of removing Brewer from the OEA's bargaining team. The minutes from the OEA's Executive Board May 8, 2006 meeting say that the OEA Executive Board took this action against Brewer (i.e. removed her from the OEA's bargaining team) because she allegedly: failed to follow OEA (bargaining) ground rules, engaged in bargaining for personal gain, breached negotiating team confidentiality and committed other (unspecified) infractions.

8. In the 2008-2009 school year, Brewer thought she should have been given two extra-curricular positions known as Homework Club and Detention Club. She sought assistance in this matter from the OEA, but the record does not indicate what specific assistance she sought. In any event, Brewer felt the OEA leadership was not supporting her on this matter. This angered her. Brewer subsequently went to WEAC headquarters in Madison wherein she sought, and received, a meeting with WEAC President Mary Bell. In their short meeting, Brewer expressed frustration about working with the OEA's leadership on this matter, to which Bell advised Brewer to contact her UniServ Director about problems with the local leadership.

9. Brewer filed an age discrimination complaint with the Wisconsin Equal Rights Division (ERD) against the District over the matter referenced in Finding 8. She asked WEAC to represent her in this individual discrimination claim, but a WEAC attorney declined to do so on the grounds that WEAC typically does not provide legal representation to members for individual discrimination claims. The District subsequently settled this claim with Brewer by paying her $500.

10. In August, 2009, Oregon Middle School Principal Chris Telfer selected about a dozen teachers and support staff for the Positive Behavior Intervention and Support Committee (hereinafter PBIS Committee). Brewer was one of those selected. When some of the other teachers on the PBIS Committee learned that Brewer was going to be on that committee, they approached Telfer and asked that Brewer not be on that committee. Their reason for making this request was as follows: in their opinion, Brewer had a history of being divisive, uncooperative, disruptive, unprofessional and driven by her own agenda (rather than the group agenda). Principal Telfer informed this group that the appropriate protocol was for them to discuss whatever conflicts they had with Brewer and if they could not work it out, then come back to him. A couple of teachers from that group subsequently talked to Brewer about the concerns of the larger group. Brewer told them that it was a brand new school year and she was a brand new person, and because of that, their past disagreements and conflicts would not be repeated. These statements were relayed to the larger group of teachers that had talked to Telfer, and the larger group decided to not seek Brewer's ouster from the PBIS Committee.

11. The PBIS Committee met for several months in the fall of 2009. As those meetings progressed, conflict began to build between Brewer and some members of the committee.

12. This finding deals with what happened at the November 17, 2009 PBIS meeting. According to those in attendance at the meeting, the conflict between Brewer and others on the committee was palpable. During the meeting, Brewer proposed that a new teacher, Amy Bintliff, address the entire school on the topic of restorative justice. While on its face that topic would not seem like an incendiary topic, as is often the case with inter-office politics, there was a history to the topic that made it part of something bigger. The history was this: the previous year, Bintliff had been selected for an open school position over a veteran teacher who had applied for the position. Brewer was on the interview committee, and had favored

Bintliff over the veteran teacher (who was someone Brewer had previously clashed with). From the perspective of those teachers who favored the veteran teacher for that position, Brewer was revisiting that past hiring controversy and gloating over her perceived victory in that matter. Consequently, Brewer's proposal was not well received by the group. In the ensuing confrontation, angry and heated words were exchanged between Brewer and Sara Kissling. Brewer's actions at the meeting so frustrated some committee members that they got up and left.

13. Following the meeting, five teachers who were on that committee – Deb Van Steenderen, Katie Port, Sara Kissling, Kim Walker and Rick Fleming – went to Principal Telfer and again asked him to remove Brewer from the PBIS Committee. They collectively told Telfer what Brewer had just done at the PBIS Committee meeting and repeated the assertions they had previously made against Brewer (i.e. that in their opinion, Brewer had a history of being divisive, uncooperative, disruptive, unprofessional and driven by her own agenda (rather than the group agenda)). This time, Telfer acquiesced to their request, and subsequently removed Brewer from the PBIS Committee. Telfer officially removed Brewer from the PBIS Committee for "unprofessional behavior" on December 8, 2009.

14. Brewer objected to being removed from the PBIS Committee and subsequently filed a grievance seeking to be restored to that committee. She filed this grievance on her own volition without consultation with, nor approval of, the OEA.

15. On February 17, 2010, Brewer sent an e-mail to District Superintendent Brian Busler wherein she (Brewer) demanded mediation with the five teachers who had made the complaint against her which led to her removal from the PBIS Committee.

16. After Brewer made this demand for mediation with these five teachers, Lindsey talked with the five affected teachers. They expressed frustration and resentment toward Brewer, felt threatened and bullied by her, viewed her as unstable and were fearful of her. Some of them had been through mediation with Brewer ten years ago. As a result, none of the five wanted to go to mediation with Brewer, and they all wanted Lindsey to keep mandatory mediation with Brewer from occurring. When Lindsey told them that he thought it was in everyone's interest to sit down and air out the underlying problems, they were all angry and upset with him (Lindsey) because they did not want mandatory mediation with Brewer. Lindsey then met with Brewer and spent an entire class period talking with her about her grievance referenced in Finding 14 and her demand for mandatory mediation with her five fellow teachers. At the end of their meeting, Lindsey asked Brewer why she was trying to force these individuals to participate in mandatory mediation when it seemed (to him) to just make matters worse. Brewer's response was that she felt she had been hurt personally and professionally by them, and she wanted "revenge" to get back at them. Lindsey subsequently told the five teachers who Brewer wanted mediation with that Brewer had told him that she wanted mediation for "revenge".

17. The next day (February 18, 2010), Superintendent Busler responded to Brewer's request for mediation with the five teachers who wanted her removed from the PBIS Committee. In his e-mail response, Busler stated that it was his reading of the collective bargaining agreement that conflicts in the workplace between teachers could only go to mediation on a voluntary basis and that the District could not force mediation (between teachers). Brewer disagreed with Busler's interpretation of the contract language, and wanted mediation to be mandatory. The reason Brewer wanted mediation to be mandatory was because if it was voluntary, she knew that the five teachers would not agree to mediation with her because of their past conflicts. Brewer then called Busler and told him that she disagreed with his interpretation of the mediation language in the contract. Busler stood by his interpretation of the language. Busler described Brewer as being loud and angry in their phone call.

18. Following her phone call with Busler, Brewer sent an e-mail to Adam Birnhak, the UniServ Director for CAUS-North, wherein she asked him whether he agreed with Busler's interpretation of the applicable contract language. Birnhak replied in an e-mail the next day (February 19, 2010) that he agreed with Busler's interpretation of the mediation language in the contract and that any participation by other staff members with Brewer in mediation was going to have to be voluntary. Birnhak's response greatly irritated Brewer because, as previously noted, she wanted mediation with her co-workers to be mandatory.

19. This finding deals with Brewer's subsequent phone call to Birnhak. Later that same day, February 19, Brewer called Birnhak from her classroom during her planning period. Since it was Brewer's planning period, no students were in the classroom. The only two people who heard the entire conversation were Brewer and Birnhak. The phone call was brief and heated. In that phone call, Brewer expressed her frustration to Birnhak over the fact that she could not force the other teachers to have mediation with her. Brewer's voice was so loud and agitated that the teacher who had the classroom next to Brewer heard Brewer yelling and came over and closed Brewer's classroom door. At the end of the phone call, Brewer said to Birnhak: "What do I have to do to get someone's attention – get a gun and shoot someone?" Then Brewer added: "but that wouldn't be a good idea, would it?" Birnhak replied, "No, it wouldn't." With that, Brewer hung up the phone on Birnhak.

20. Even though Birnhak did not believe it was likely that Brewer would get a gun and shoot someone, he felt it was his duty - given the recent history of violence in schools in America - to report Brewer's "gun" statement to the Administration so it could take whatever action it believed necessary to protect its students and staff. To that end, he called Superintendent Busler, but was not successful in reaching him. Birnhak then called OEA President Lindsey and told him what Brewer had just said to him on the phone. Lindsey knew that the Middle School principal was not on the premises at that time, so he suggested Birnhak report his conversation with Brewer to Andy Weiland, the District's second in command. Birnhak subsequently talked to Weiland by phone and told him what Brewer had said to him. Afterwards, Weiland called the police.

21. After the police were notified, two officers reported to the Middle School. They had the building's administrator at the time, Keri Modjeski, go get Brewer from her classroom and escort her back to the office. There, Brewer was interviewed by the police officers. During her interview, Brewer was asked about the phone call she had had with Birnhak earlier that day. Brewer admitted that during that phone call, she said words to the effect of: "What do I have to do? Get a gun and shoot somebody?" When the police asked Brewer why she had made that statement, she responded that she was upset, frustrated and venting about teachers who serve on a committee with her. When the police asked her if she intended to act on her threat, she responded in the negative. She also said that she regretted making the comment.

While Brewer was being interviewed by the police, Modjeski contacted Lindsey and told him of Brewer's ongoing police interview. She did so because Lindsey is the OEA President and the parties (meaning the District and the OEA) have a practice of making sure that employees have union representation available in those situations of potentially serious misconduct. She asked Lindsey to be Brewer's representative at the interview. Lindsey then went into the interview room. When he did so, he told Brewer he was there as her union representative and advised her to stop talking with the police until legal counsel arrived. Unbeknownst to Lindsey, the interview had essentially concluded just before he came into the room.

22. The police subsequently talked to Birnhak about what Brewer had said to him. He told police that after Brewer made the first part of her statement (i.e. "What do I have to do? Get a gun and shoot someone?"), she said: "but that wouldn't be a good idea, would it?", to which he replied, "No, it wouldn't". He also told police – as noted in Finding 20 – that while he did not believe it was likely that Brewer would act on her threat, he felt compelled – given current events – to report Brewer's "gun" statement to the District.

23. After the police had interviewed Brewer, but before they had talked with Birnhak, they briefed Superintendent Busler on Brewer's interview. Busler then met briefly with Brewer and placed her on administrative leave pending an investigation by the District. The Administration then had Brewer escorted from the building. The person who they designated to do this (i.e. escort Brewer from the building) was OEA President Lindsey. As they walked out of the building, Brewer was laughing and appeared nonchalant and lighthearted. This caused Lindsey concern because he thought Brewer's conduct and demeanor did not reflect the gravity of the situation.

24. After Brewer left the building, word spread quickly among the staff and others that Brewer had made a threat of some kind. The exact nature of the threat was subject to speculation. A wave of uneasiness spread among the staff.

25. At the end of the school day, Lindsey talked with the teachers who were on Brewer's teaching team. He told them that Brewer had been placed on administrative leave. Then, he told them about Brewer's phone call to Birnhak and her "gun" statement. Discussion

ensued. One aspect of that discussion involved Brewer's mental health. In that portion of the discussion, Lindsey said that he hoped Brewer got the mental health help that she needed.

26. That night and over the weekend, four of the teachers that Brewer wanted mandatory mediation with contacted Superintendent Busler. All were emotional and upset. They told him that they felt threatened and targeted by Brewer's "gun" comment and were fearful and scared of Brewer. One of them talked to Busler for an hour and a half.

27. The following Monday morning, February 22, Lindsey requested a staff meeting to tell staff members what was going on. His request was granted and a meeting was held. At that meeting, Lindsey urged staff members to keep discussions about Friday's incident within the school to protect Brewer, as well as the "entire learning community".

28. That same day, the District sent an e-mail to the parents of all students in the District informing them of the Friday afternoon incident at the middle school. That e-mail said that the District was investigating the matter, that the teacher involved had been placed on leave, and that the District was taking precautionary measures to keep the school safe.

29. That same day, the District commenced its investigation into the matter. Six teachers were interviewed that day to find out what they knew about Brewer's "gun" comment. These initial interviews were conducted by the high school principal and assistant principal. They were not transcribed. While Lindsey was present for these interviews, neither the District nor the OEA had legal counsel present at these interviews.

30. That same day, Birnhak informed the WEAC general counsel of Brewer's "gun" statement. Since Birnhak was the person to whom the statement was made and who reported it to the District, WEAC and the OEA decided to assign separate counsel for the OEA to handle any potential discipline imposed on Brewer by the District. Veteran WEAC legal counsel Steve Pieroni was assigned to represent the OEA. Pieroni subsequently informed Brewer in writing that he was the attorney for the OEA and that he would also be looking out for her interests during the investigation. Pieroni followed up his first letter with another letter to Brewer which stated that although he did not believe there was any conflict of interest between the OEA and herself, if she was concerned or felt there was a conflict at any point she should bring it to his attention.

31. In the days that followed, some teachers made changes to their routine work behavior. Some took time off to stay away from the middle school; some took other cars to the school; and some took alternate routes to school. The teachers that made these changes to their routine work behavior did so because they were scared and fearful of Brewer and what she conceivably could do.

32. The six teacher interviews referenced in Finding 29 convinced the Administration that Brewer's "gun" statement to Birnhak had to be evaluated in the context of other cumulative abusive behavior by Brewer to other teachers in the middle school. The

Administration therefore expanded the scope of its investigation to also address other cumulative abusive behavior by Brewer. The investigation was conducted by Superintendent Busler. He utilized legal counsel to assist him in the investigation. This investigation was conducted at the direction of and under the terms established by the District. During the investigation, the Administration asked many of the interviewees, including Brewer, if there were any other individuals they should speak with to get a complete and accurate picture. The District ultimately interviewed five additional people who Brewer identified. In March, 2010, the District interviewed 21 people who were witnesses or affected parties. Those interviewed were Brewer, Birnhak, Administrators Telfer and Modjeski, twelve teachers and five support staff members. All these interviews were recorded by a court reporter. As already noted, the District's Administration controlled the investigation and determined who was allowed to attend the interviews. The only people who attended the interviews for the two administrators and the five support staff members were District legal counsel Jim Ruhly and Superintendent Busler. For the other 14 interviews, the District determined that those who could attend were Ruhly, Busler, WEAC Attorney Pieroni, and UniServ Director Birnhak. Neither side objected to Birnhak being present at the interviews. In addition, Lindsey attended one interview and Nate Mahr attended one interview. At these interviews, Pieroni was the OEA's named representative and Birnhak was an observer. In the two interviews that they attended, Lindsey and Mahr were also observers. As the OEA's named representative, Pieroni was given the chance to ask clarifying questions (after Ruhly had questioned the witness). Birnhak was not normally given the chance to ask questions. In Deb Van Steenderen's interview, Birnhak tried to ask a question, and Ruhly said that he expected a "non-participatory role" (for Birnhak). Pieroni subsequently questioned the witness. A review of the twelve interviews that Birnhak attended show that he did end up asking some questions at these interviews. Most of his questions can fairly be characterized as clarifying questions. He also objected to a few of the questions which Attorney Ruhly asked. It was Superintendent Busler's view that Birnhak did not say or do anything in these interviews that interfered with the District's investigation.

33. While the District was conducting its investigation, Brewer became uncomfortable with Pieroni's involvement in the case. On March 23, 2010, Brewer sent Pieroni a letter which stated that she thought Pieroni had a conflict of interest and asked WEAC to pay for a separate attorney. A few days later, Brewer hired Attorney Nola Cross. On April 2, Cross notified the parties that henceforth she would be representing Brewer's interests. From that point forward, Pieroni was no longer involved in the case and the OEA was represented by OEA President Lindsey and UniServ Director Birnhak.

34. On May 5, 2010, the District conducted a "Loudermill" hearing before the Oregon Board of Education. At that hearing, the District presented a summary of its evidence and allowed Brewer to respond. At the hearing, Brewer was represented by Attorney Cross. Lindsey and Birnhak were present on behalf of the OEA. Special counsel Mike Julka represented the school board. After the evidence was presented, Superintendent Busler argued that Brewer's "gun" statement was an egregious threat; that her "gun" statement caused real fear and concern among the middle school teachers; and that the majority of teachers in the middle school did not want her back. Based on that, he recommended that the Board terminate

Brewer. Cross argued that Brewer's "gun" statement was not serious; that she made her statement to a non-District employee; that Brewer thought her statement with Birnhak was confidential and covered by attorney-client privilege; and that Brewer had a good work record. Based on that, she recommended that the Board not terminate Brewer. The school board adjourned that evening without reaching a decision with respect to Brewer's continued employment.

35. As noted in Finding 34, Superintendent Busler recommended to the Board that Brewer be discharged. Busler's decision was not dictated by Birnhak. It was Busler's view that Birnhak did not try to get Brewer fired.

36. Over the next several weeks, the District and Attorney Cross engaged in an effort to settle the matter. At Brewer's request, the District and Brewer entered into a confidentiality agreement which kept any offers which were being made from being disclosed to the OEA. Because of that confidentiality agreement, the OEA was not involved in these settlement discussions and as a result, did not know what options were being explored. The settlement effort was not successful.

37. On June 8, 2010, the Oregon School Board voted to terminate Brewer's employment. She was notified of that action verbally and it was subsequently confirmed in writing by the School Board President.

38. The next day, the OEA scheduled an Executive Board meeting for the sole purpose of deciding whether to pursue a grievance challenging Brewer's termination. The meeting was held the next day, June 10, after school ended. That was the last day of school. 18 members of the OEA Executive Board attended the meeting. Lindsey was a member of the Executive Board and was present. None of the five teachers who sought Brewer's removal from the PBIS Committee – and who Brewer subsequently sought mandatory mediation with – were on the Executive Board. Most of those Executive Board members in attendance taught at schools other than the middle school and as a result, did not have much history with Brewer. Nola Cross (Brewer's attorney) did not attend the meeting. At the start of the meeting, Brewer gave a statement concerning what had happened. Then, she answered questions asked of her by the Board members. After she was done, she left the meeting knowing that other individuals would be presenting information to the Executive Board. Some Board members were disappointed that Brewer did not stay for the entire meeting as they felt it was a very important decision. After Brewer left, the individuals who made statements were Birnhak and Lindsey as well as middle school teachers Jason Symes and Nathan Mahr. The Executive Board asked questions of all individuals who made presentations. A discussion followed concerning the merits of Brewer's case and the impact of her actions on other OEA members. At the conclusion of the two and a half hour meeting, the OEA Executive Board voted 18-0 not to proceed with a grievance challenging Brewer's termination. This vote was taken by a secret paper ballot. Birnhak did not vote because he was not on the OEA Executive Board. Five OEA Executive Board members who were at that meeting testified that neither Birnhak nor

Lindsey advocated for the abandonment of Brewer's grievance or tried to influence the Executive Board's decision.

39. As is its normal practice, the OEA secretary took minutes of the meeting. The minutes of that meeting, which are about four single space pages long, are as follows:

OEA Executive Committee
Special Meeting
June 10, 2010

Members present: Lindsey, Bliefernicht, Leutenegger, Martinelli, Sundstrom, Lebwohl, Hauser, Scmit, Kirchdoerfer, Ellestad, Leikness, Symes, Mahr, Klein, Mierendorf, Knowles (left before the vote), Fishwild, Jones, Dave Hanson.

Also present: Birnhak, Sandy Brewer

The meeting was called to order at 4:03. The purpose of the meeting was the consideration of the arbitration status of a member and the OEA. Sandy Brewer appeared at the meeting on her own behalf without counsel. A quorum must be present when a vote is taken; there is no provision to temporarily suspend a bylaw. Members present were advised of the importance of staying until the end of the meeting.

Birnhak explained the procedure. There are 3 options to consider: 1. OEA supports Brewer in arbitration and thus would provide her with a WEAC attorney. 2. OEA will not provide an attorney, but will allow her to use our arbitration clause at her own expense. 3. Because she has been terminated, OEA won't support her in arbitration. (In the case of the last option, Brewer can sue us for breach of fair representation.)

Procedure/Time limits:

1. Brewer will present her case (20 min.)
2. OEA (Lindsey, Birnhak, Mahr, Symes) will present its case (20 min.)
3. Brewer's response (10 min)
4. OEA response (10 min)
5. Deliberation.

Brewer requested to go first as she will need to leave soon after that step. Leutenegger moved to accept the procedure, 2nd by Lebwohl. Motion carried. Hanson moved to enter closed session, 2nd by Knowles. Motion carried. Minutes will be taken during closed session because a record needs to exist.

Symes moved that the group return to open session for any motions and voting, 2nd by Klein. Motion carried.

Statement from Brewer:

She has been a union member for 33 years. She filed an age discrimination suit 2 years ago because she was not hired for homework club supervision. The District settled with her. She has shown no violence, and considers herself to be a kind person.

She called Birnhak on 2/19/10 to talk about a mediation between her and her colleagues that had not been granted. In this situation, her colleagues had asked for her removal from a committee. She grieved it, argued, lost patience, was frustrated. She had helped write that language for the contract, and knew that the first session is mandatory. During this call, she said to Birnhak, "Adam, what is it going to take to get help here? Do I have to get a gun and shoot somebody? That wouldn't be a good idea, would it?" He replied, "No, it wouldn't."

She had no intentions to cause harm, and the statement came out of frustration. It is in the police report, and she thought she had taken it back. She made no direct threat against any person. She doesn't recall saying anything about revenge. She was asking for help with her colleagues because she felt she needed it. She compared it to the telephone game, because it got completely off track. Birnhak did not call police; Brewer asserts that if he had, they would have dealt with it and this meeting wouldn't be happening. The police saw no intent, the DA didn't press charges. With Lindsey present, Dr. Busler told her she was on administrative leave. She feels this is not enough to cause a 33-year teacher to lose her job. The administration took depositions. The positive, negative, and neutral responses were evenly distributed. Those teachers had tried to work with her, but the administration did nothing and emotions escalated. Letter said BOE would terminate, tried to settle. She state that she did not fire her WEAC lawyer, she merely changed attorneys. She went to Nola Cross to because she felt a conflict of interest with the WEAC lawyer and needed a "fighter". When the BOE went to termination, she asked for open session so that her mother could attend. The meeting was postponed. This gave her lawyer a chance to "hammer" the BOE. Her case will cost $60-80K. She has paid dues to be protected by the union. She would fight for any other member.

Questions from OEA:

1. **Were you under the influence of drugs or alcohol when you made the threats?** No.

2. **Would you be willing to submit proof of a drug test?** Yes.

3. **How was your relationship with your colleagues at OMS before this situation occurred?** It was not good with 5 or 6 teachers, due to her removal from the PBIS committee.

4. **Why do you want to continue your employment in the OSD given the aftermath of this situation?** She feels she is a great teacher and can reach kids.

5. **Do you feel you could continue to be an effective teacher and why?** She knows her reputation is ruined. She quoted, "Evil persists when good men do nothing." She feels the administration is evil, but she can fight them and win.

6. **Do you believe you could establish a professional working relationship with the other teachers in your assigned building as well as in the district? How would you achieve this?** This is give and take, it's not just a "Sandy" problem. Would they be willing to work at it? She carries no grudges and can start anew.

7. **Would you be willing to work through counseling and submit documentation as to the nature of your stability as a teacher and staff member?** Yes. She has the documentation now but no one has asked for it.

8. **Would you be willing to take anger management, stress management, or peaceful conflict resolution classes?** Yes.

9. **What have you done thus far for restitution for the teachers and other staff members of OMS? Do you have plans for restitution, if not?** She is under orders not to contact people. She would have lost her job had she tried, so she can't make restitution. She holds no grudges against Birnhak. In general, she has not thought about it, but she would like to be able to explain her position.

10. **What changes have you decided to make in yourself?** She has made a resolution that she would go to her colleagues to solve issues, and would ask for mediation.

11. **Would it be sufficient for the Executive Committee to say we'll give you a WEAC attorney?** Yes, but that WEAC attorney must fight for Brewer, not Birnhak or Lindsey.

12. **From May 5 (when the BOE meeting wasn't held)-June 8, did you have any contact with BOE attorney Jelka?** (sic) Yes. Brewer was offered various options: 1. Teach summer school. 2. Be on call until January 15 for offsite tutoring. 3. Help Jane Peschel with curriculum. She wanted a year, agreed not to be at staff meetings, was willing to give up classroom teaching. She lost 4 years of health insurance and her National Teacher Certification grant ($10,000; they offered to reimburse her for $4,000).

13. **Why wasn't retirement option a good one?** She had just fought for age discrimination. She is not ready to retire for financial reasons.

14. **What about moving to the high school?** Brewer had written a letter requesting the transfer, but Lindsey took the position. Lindsey responded that he was involuntarily transferred. Brewer was not aware of this.

15. **Are you sorry?** She state that yes, she is sorry and deeply humiliated, and wishes she could take it back.

Brewer excused herself from the meeting at this point (5:10).

Statement from Lindsey:

Transcripts reflect a long history of harassment by Brewer of colleagues, so this is not only about the event of 2/19. Sometime during the week of 2/19, she told Lindsey that she wanted help with mediation with the PBIS committee. Members reported that it is "unbearable to serve on a committee with Sandy." She made it difficult to get anything accomplished. Members of the committee went to her with their concerns.

Brewer sued the district twice for discrimination, and both times initially bypassed the OEA. In the first one, she was told by WEAC that she had no case, and with the second one she went on her own. They settled. She had not solicited help until that point. She felt that her interpretation of contract was right. When asked what she really wanted out of it, she responded that they must pay for their mistreatment of her, and stated, "I want revenge."

On 2/18, committee members were angry that Lindsey was insisting on mediation. They felt they were going into a threatening environment. In fact, no two colleagues are mandated to go to mediation. Birnhak was the messenger for that interpretation, hence the phone call. He didn't know what to do with

what she said during that call, but knew that kind of language needs to be taken seriously.

Extensive investigations were conducted by Jim Ruhly, the BOE's attorney. (Our attorneys were also allowed to participate.) On 5/8, a Loudermill hearing was held. Evidence was presented, but the BOE did not come to a decision. They scheduled 2 mediation sessions. Brewer was unwilling to negotiate. Communications to her from the district went unanswered. The district made a reasonable offer and gave her a deadline of 6:00 p.m. of 6/8. At that time the decision was made to terminate her.

Statement by Birnhak:

Brewer doesn't deal with disagreement well. Her wording of the incident is inaccurate. She hung up on him. The decision to call Oregon Police was made by Andy Weiland. Birnhak urged Brewer to wait for Lindsey to represent her when she spoke to the police, but by the time Lindsey reached her, she had already talked.

There has been a visceral reaction by some OMS teachers to this incident. They felt threatened, and took what she said seriously. People have been displaying symptoms similar to Post Traumatic Stress Disorder. For example, one person changed their route to school, another drove a different car. Birnhak sees her as being egocentric, throwing anyone aside for her own best interest.

He stated that the safest decision would be for the Executive Committee to stay out of the arbitration and make her pay for it. That way we are not involved and she can't claim conflict of interest. If the group supported her and provided a WEAC attorney, sooner or later there would be a conflict of interest.

Birnhak acknowledges that there had been little administrative intervention all along. They did not create Brewer's pathology, but should have acted sooner.

Several years ago, when Linda Barrows was still superintendent, a retired teacher was rehired to work with Sandy. She lied to the OEA board, saying he was negotiating his own contract, but she knew why he was there.

Finally, she was removed from the negotiating team because it was felt she negotiated in bad faith.

Statement by Mahr and Symes (representing OMS)

Brewer is at the heart of a long-standing fear that is pervasive in the building. There have been many instances where she states one thing and fully intends to do another.

Discussion

- Brewer's WEAC lawyer wanted to get her the best settlement, but when he told her that going back to teaching was not a viable option, she changed attorneys.
- If the arbitrator reinstates her, the district places her wherever they want.
- By giving her access to arbitration, her attorney can question her colleagues and they may even have to testify.
- In arbitration, the district has the burden of proof. If it's her lawsuit, she has the burden of proof.
- Her attorney has already said she won't take a lawsuit.
- Under the circumstances, Brewer may have a hard time finding an attorney who will take it.
- She can sue us for any option we choose.
- OEA has legal representation in place should that happen.
- Regardless of what we decided, we should include a statement encouraging her to continue with counseling, anger management, etc.
- A preliminary vote was taken by ballot. The results were: Option 1 – 1, Option 2 -3, Option 4 (sic) 14.
- Our goal should be to protect her colleagues from her.

Kirchdoerfer moved to return to open session, 2nd by Leikness. Motion carried. The group returned to open session at 6:23.

Of the three options considered in the Sandy Brewer case, **the vote was unanimous to deny her arbitration (Option 3).** A declaration of communication will be composed by Jones and Mierendorf recognizing Brewer's years of service, wishing her well, and encouraging her to continue with counseling.

> This will be done by Monday, 6/14. Birnhak must review it before it is sent. He will contact her attorney. Lindsey will send a separate letter on behalf of the Executive Committee with the decision.
>
> Hanson moved to adjourn, 2nd by Schnmid. Motion carried. The meeting was adjourned at 6:30 p.m.
>
> Respectfully submitted,
>
> Kay Bliefernicht, OEA Secretary

40. Brewer subsequently filed a grievance challenging her termination without the OEA's involvement. That grievance was processed to the Board of Education who denied the Step 3 grievance as being without merit. Brewer did not appeal that decision to arbitration nor indicate any intention or desire to do so.

41. About two months later, Brewer filed a prohibited practice complaint which accused the District of terminating her without just cause. The complaint was subsequently amended. The amended complaint accused the OEA and CAUS-North of violating its duty of fair representation to Brewer.

42. Lindsey's actions in this matter do not reflect arbitrary, discriminatory or bad faith conduct toward Brewer.

43. Birnhak's actions in this matter do not reflect arbitrary, discriminatory or bad faith conduct toward Brewer.

44. Pieroni's actions in this matter do not reflect arbitrary, discriminatory or bad faith conduct toward Brewer.

45. Bell's actions in this matter do not reflect arbitrary, discriminatory or bad faith conduct toward Brewer.

46. The OEA's decision not to proceed with a grievance challenging Brewer's discharge does not reflect arbitrary, discriminatory or bad faith conduct toward Brewer.

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

CONCLUSIONS OF LAW

1. Unless the Oregon Education Association breached its duty of fair representation to Sandra Brewer as to her June 8, 2010 discharge, the grievance arbitration

procedure contained in the collective bargaining agreement between the Oregon Education Association and the Oregon School District is the exclusive means by which alleged violations of that agreement can be litigated.

2. Neither the Oregon Education Association, nor Capital Area UniServ (CAUS) – North, nor its representatives breached its duty of fair representation to Sandra Brewer as to her June 8, 2010 discharge and thus did not commit a prohibited practice within the meaning of Sec. 111.70(3)(b)1, Stats.

3. Because neither the Oregon Education Association nor Capital Area UniServ (CAUS) - North breached its duty of fair representation to Sandra Brewer as to her June 8, 2010 discharge, the grievance arbitration procedure contained in the collective bargaining agreement between the Oregon Education Association and the Oregon School District is the exclusive means by which alleged violations of that agreement can be litigated. Therefore, the Wisconsin Employment Relations Commission will not assert its jurisdiction to determine whether the Oregon School District violated the collective bargaining agreement and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats.

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 14th day of September, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

OREGON SCHOOL DISTRICT (Sandra Brewer)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant Brewer

Brewer's DFR claims can be divided into two parts. In the first part, she raises claims against Lindsey, Birnhak, Pieroni and Bell. In the second part, she challenges the OEA's decision not to proceed with a grievance challenging her discharge.

Her claims against Lindsey are as follows.

First, for the purpose of providing some context, Brewer asserts that Lindsey interfered with the age discrimination suit she filed against the District in 2009. The interference she's referring to is that Lindsey (and Birnhak) talked to Busler about her age discrimination case. She maintains that by doing that, it made it harder for her "to negotiate with the District for the remedy she sought."

Second, Brewer faults Lindsey for his actions relating to the PBIS teachers. Brewer acknowledges that there was animosity between her and the PBIS teachers. According to Brewer, Lindsey fueled that fire via his actions. Her first criticism deals with what he did say to them, namely that he told the PBIS teachers that the reason she wanted mediation with them was for "revenge". As Brewer sees it, Lindsey should not have told them that (i.e. that the reason she wanted mediation with them was for "revenge"). Her second criticism concerns what Lindsey failed to say to the PBIS teachers. According to Brewer, Lindsey did not tell the PBIS teachers that she was deeply hurt by their conduct in getting her kicked off the PBIS Committee, and that's why she wanted mediation with them. As Brewer puts it in her initial brief, Lindsey just gave the PBIS teachers "his one-sided recollection. He should have presented both sides of the conversation." It's Brewer's view that if Lindsey had not omitted this important fact when he talked to the PBIS teachers, they would have decided to participate in mediation with her. She also faults Lindsey for not telling the PBIS teachers that he personally favored engaging in mediation with Brewer. She also faults Lindsey for not doing enough "to bring the conflicting parties together" (i.e. her and the PBIS teachers). She also argues that Lindsey was just plain wrong in his testimony about the dates that he talked to her and the PBIS teachers. She implies that that is significant. Finally, she alleges that when Lindsey testified during the course of the District's investigation, he repeated Brewer's "revenge" statement. Brewer alleges that when he did that, he harmed Brewer's integrity and professional reputation and presented a false picture to the Administration about her. Brewer maintains that she never authorized him (Lindsey) "to talk with the Superintendent about topics pertaining to her."

As part of this claim, Brewer also argues that if the five PBIS teachers felt frightened, fearful, targeted or terrorized, those feelings were caused by Lindsey, not her. According to Brewer, Lindsey pushed them over the edge, not her. She maintains that if Lindsey had simply told them the "truth", "they would have been less worried about their safety." To the extent that there was what Brewer called "mass hysteria" at the school on February 19, the staff fears were caused by Lindsey, and were not caused by her "gun" statement. She also alleges that Lindsey told the PBIS teachers that she (Brewer) "was going to bring a gun and shoot them."

Next, Brewer contends that Lindsey engaged in inappropriate conduct on February 19.

First, at the hearing, Brewer noted that she had clashed with Lindsey in the past. Given that history, she questioned why Lindsey acted as her union representative on that day. Aside from that, she alleges that Lindsey failed to protect her during the police interview because he (Lindsey) "was not in the room" (during the interview).

Second, Brewer faults Lindsey for talking to the members of her teaching team and others later that same afternoon, for not telling them the entire background of how her "gun" statement came about (i.e. her mediation efforts) and for talking about her mental health. In her view, Lindsey should not have talked about any of these matters, or engaged in what she calls "malicious gossip", but instead should have protected her rights. Brewer is especially critical of the fact that Lindsey talked about her mental health to her team members. She characterizes Lindsey's statements about her mental health that day (i.e. that she had supposedly had several past mental breakdowns) as not only defamatory, but also false and inaccurate. She also avers that Lindsey did not have her permission to violate her privacy and share any of her medical information with her colleagues. She also contends that after Lindsey made statements about her mental health to her team members, that led/caused other teachers to make similar statements about her mental health during their interviews.

Brewer also faults Lindsey for what he didn't say to fellow teachers later that day. Specifically, she points out that he didn't tell the teachers to calm down, or not talk about the incident, or tell them that Brewer "wasn't going to do anything". She avers in her initial brief that if Lindsey had said those things "then the 'mass hysteria' might not have been as large or not have occurred at all."

Finally, Brewer contends that Lindsey engaged in inappropriate conduct during the course of the District's investigation. First, she alleges that Lindsey "never stopped spreading false statements" about her and "gossiping". She also faults him for telling other teachers that he didn't want her (Brewer) to return to teaching in the middle school. Brewer asserts that by saying that, Lindsey acted improperly as the OEA president and failed to protect her rights. Brewer maintains that it also shows that Lindsey was "hostile" to her. Second, she faults Lindsey for not conducting his own investigation and piggy-backing off the District's investigation. Third, Brewer argues that the reason Lindsey did all the foregoing was because he wanted to get rid of her. Brewer implies that because Lindsey and Birnhak were friends,

they conspired to get rid of her. According to Brewer, their conspiracy (to get rid of her) goes back years. She also claims that the District was part of this conspiracy to terminate her teaching career.

In sum then, Brewer maintains that Lindsey's conduct (specifically, his spreading false rumors about her and frightening teachers) meets the requirements of arbitrary, discriminatory and bad faith conduct.

Her claims against Birnhak are as follows.

First, she faults him for repeating her "gun" statement to the District. In her view, what Birnhak should have done instead (rather than calling the District) was ". . .taken a deep breath. . .called it a long week, and. . .just moved on." Brewer opines that that is what she did. As part of her argument on this point, she also contends that Birnhak should have known that she (Brewer) was not serious and was using hyperbole when she made her "gun" statement. To support that contention, she alleged that she did not own a gun, did not have access to one, did not have a concealed carry permit, did not have any military weapons training and does not like guns. Building on the foregoing, it's her position that what she said was not a threat. She also points out that after her conversation with Birnhak was over, she discussed her phone call with Birnhak with four different middle school staff members. She avers that in none of those (four) conversations did she talk about "violence toward anyone." She believes that is significant. Brewer also implies that if Birnhak felt he had an obligation to report the "gun" statement to someone, then he should have called the police. He didn't though; instead, he called the District. According to Brewer, the reason Birnhak did that was to get her fired. Brewer contends that was a despicable act on Birnhak's part. Brewer also takes issue with Birnhak's not calling her back (after she made the "gun" statement and hung up on him). As Brewer sees it, Birnhak should have called her back. She believes it was not her responsibility to call him (Birnhak) back. Finally, as part of this claim, Brewer also faults Birnhak for sharing what she called "confidential" information with others (with the "confidential" information being her "gun" statement). According to Brewer, her "gun" statement was privileged because Birnhak was a lawyer and that meant that her conversation with him was covered by an attorney-client relationship.

Second, Brewer contends that Birnhak had a conflict of interest in this case because he was a witness to what she said. According to Brewer, his (Birnhak's) status as a fact witness should have disqualified him from being involved in this case as the OEA's representative. Brewer maintains that Birnhak should have stepped aside and let somebody else in the UniServ office or WEAC represent the OEA.

Another aspect of Brewer's contention that Birnhak had a conflict of interest involves the fact that Birnhak was present at many of the teacher interviews. According to Brewer, Birnhak was a "member" of the "investigatory panel". Building on that premise, she maintains that Brewer should not have been (a "member" of that panel). She further contends

that Birnhak's "membership" on the "investigatory panel" was a violation of her 14th Amendment due process and equal protection rights.

Brewer also objects to the fact that Birnhak asked some questions during the interviews that he attended. As she sees it, Birnhak was not a mere observer; he was an active participant who asked numerous questions. To support that premise, she points to a chart she created in her initial brief which, in her view, shows that Birnhak made comments or asked questions 34 times. She specifically objects to the fact that Birnhak used the term "babysit" to describe her during Katie Port's interview. According to Brewer, that was inappropriate because it degraded her and made it look like she couldn't do her job. Also, as Brewer sees it, the fact that Birnhak said anything at all during the interviews meant that he interfered with the District's investigation.

Third, Brewer contends that the real reason that Birnhak reported her "gun" statement to the District was because he was "out to get" her fired. Thus, he "plotted" against her. She cites two different statements Birnhak made to support her premise.

The first statement she cites is the one that Birnhak said to Nola Cross during the "Loudermill" hearing. The statement was that Birnhak told Cross that he (Birnhak) had been waiting ten years for Brewer to slip up so he could "get rid" of her. She notes that at the hearing, Cross testified that Birnhak made such a statement to her. Brewer asserts that Cross was a credible witness and a non-interested party under the Deadman Statutes.

The second Birnhak statement that Brewer cites to support her contention that Birnhak "plotted" against her arose at a Problem Solving Round Table meeting held sometime after the February 19, 2010 incident. At the meeting in question, Birnhak expressed his opinion to Superintendent Busler that Brewer's employment should be terminated. As Brewer sees it, that statement shows that Birnhak was biased against her.

Her claims against Pieroni are as follows.

First, she claims that Pieroni's representation of the OEA's and her interests at the same time was a conflict of interest. As Brewer sees it, Pieroni should not have been involved from the get-go.

Next, Brewer argues that Pieroni did not protect her rights and that she was prejudiced by his representation. She cites the following to support these contentions. First, she notes that Pieroni discussed "her" case with OEA President Lindsey and UniServ Director Birnhak. In her view, that shows bias against her and favoritism toward the OEA. Second, Brewer faults Pieroni for "allowing" Birnhak to be a "member" of the "investigatory panel". As already noted, it's her view that Birnhak should not have been allowed to attend the interviews because he was a "witness". Third, Brewer also criticizes Pieroni for not objecting to questions or entering evidence on her behalf during the teacher interviews. As part of this contention, Brewer faults Pieroni for not showing the "Pyle" letter to either Lindsey or Busler.

Brewer avers that by doing that, Pieroni withheld medical information. She also faults Pieroni for not objecting to some of the things that Birnhak said or questions that he (Birnhak) asked during the interviews. Brewer contends that because of the foregoing, the District's investigation was unfair and that, in turn, led to her termination.

Next, she faults Pieroni and the OEA for not giving her the second round of teacher interview transcripts. Brewer notes in this regard that she ultimately paid for the transcripts herself. According to Brewer, the Association had the money to pay for the transcripts and should have (rather than having her pay for them).

Last, she avers that the legal representation she received from Pieroni was perfunctory and that he should have done more than he did.

Finally, Brewer claims that WEAC President Bell committed a duty of fair representation violation. According to Brewer "Bell should have conducted an investigation and not just given a standard answer to go back to Mr. Birnhak."

The second part of Brewer's DFR claims involve the OEA Executive Board meeting. She contends that when Birnhak and Lindsey spoke to the Executive Board, they gave the Board false, incorrect and improper information. Building on that premise, she alleges that the OEA Executive Board did not have what Brewer calls the "proper information" to make a "good decision". She opines further that because the Executive Board acted without the "true" facts, its decision was ipso facto bad faith and a breach of the duty of fair representation.

In her initial brief, Brewer contends that the minutes contain 23 false or partially false statements. This is a higher number than was alleged at the hearing. The higher number is attributable to the fact that Brewer gave multiple listings for one issue. For example, items 2, 3 and 4 in her brief all deal with the ERD filing matter. (Note: In the summary of her argument which follows, the Examiner has consolidated her contentions into a smaller number). First, Brewer disputes Lindsey's statement that the PBIS teachers she wanted mediation with were intimidated, bullied and/or threatened by her. According to Brewer, she wanted to mediate with those teachers concerning her removal from the PBIS Committee. As part of this contention, Brewer also asserts that if the "Pyle" letter had been shown to the PBIS teachers, it would have negated their fears and "proved" that she was not a threat to anyone. Also, Brewer maintains that this letter is a medical record which proves that she is not a threat. Second, Brewer contends that Lindsey's statement to the Board that she had sued the District twice for discrimination was not true. Third, Brewer contends that when Lindsey told the Board about her "revenge" statement, he didn't tell them why she wanted mediation with the PBIS teachers. She also faults Lindsey for not telling the Board that she had been harassed by her colleagues for years. Fourth, Brewer claims that when Birnhak gave his statement to the Board, he implied that there was something wrong with Brewer. She disputes that implication and avers in her reply brief that she "has no deviant behavior pattern or mental defect." Fifth, Brewer claims that Birnhak's statement that he urged Brewer to wait for Lindsey to represent her when she spoke to the police but by the time Lindsey reached her she had already talked

was untrue. Sixth, Brewer claims that Lindsey's statement that she refused a reasonable offer to settle is false. Seventh, Brewer contends that Lindsey's statement that communications to her went unanswered was not true. Eighth, Brewer disputes Birnhak's account of what happened in 2006 when she was removed from the Association's bargaining team. According to Brewer, the meeting where she challenged a tentative agreement was not a ratification meeting but rather an informational meeting. She sees that as significant. Next, Brewer disputes seven of the eleven statements included as bullet points in the **DISCUSSION** section of the minutes. Finally, Brewer notes that the minutes don't reflect that there was any discussion of the merits of her case.

In sum then, it's Brewer's view that when all the foregoing is considered, it proves that the OEA and CAUS-North, and its representatives, violated their duty of fair representation. As a remedy for this duty of fair representation violation, Brewer seeks attorney's fees and costs (including transcripts and filing fees). She also seeks a cease and desist order.

Respondents OEA and CAUS-North

The OEA and CAUS-North, hereinafter collectively referred to as the Association, contend that neither it nor its representatives breached its statutory duty of fair representation to Brewer by its conduct in connection with her discharge. It points out that under the Mahnke decision, in order to make a cognizable claim in a statutory duty of fair representation case, the complainant has to show that the union's conduct against the employee was arbitrary, discriminatory or in bad faith. The Association alleges that Brewer did not meet that standard.

Before it addresses the merits, the Association makes the following preliminary points. First, it notes that many of Brewer's allegations were not set forth in the pleadings. Second, it asserts that much of her argument is predicated on "speculation" and what it calls unfounded "conclusory statements that are contravened by the credible evidence."

That said, the Association first addresses Brewer's claims against its representatives. It responds as follows to Brewer's claims against Lindsey.

First, the Association addresses Brewer's objection to the fact that when Lindsey was trying to deal with Brewer's PBIS grievance, he told the group of PBIS teachers that she wanted "revenge" against them. The Association submits that the fact that Lindsey truthfully reported to other teachers the statements he heard Brewer make about wanting revenge is not evidence of an improper motive. Rather, it was an effort on his part to make sure individuals affected by Brewer's statement were fully informed of what had transpired. The Association further asserts that Brewer's own acts, not Lindsey reporting her "revenge" statement to them, led to fear among the PBIS teachers. According to the Association, the PBIS teachers "certainly had justification to feel 'targeted' by Ms. Brewer well before Lindsey reported Complainant's declaration to him that she was seeking mediation as 'revenge.'" As for Brewer's contention that if the "Pyle" letter had simply been shown to the PBIS teachers it

would have "proved" she was never a threat to anyone, the Association maintains that Brewer misrepresents the "Pyle" letter and draws inappropriate inferences from it.

Second, the Association notes that Brewer did not request union representation before she spoke with the police. The Association further notes that as soon as Lindsey arrived at the interview, he advised Brewer to stop talking with the police investigator. As the Association sees it, Lindsey counseled Brewer appropriately.

Third, the Association addresses the fact that on the afternoon of February 19, Lindsey had discussions with some teachers about Brewer's mental health. As the Association sees it, that was acceptable conduct because Lindsey simply expressed concern for Brewer's mental health. Aside from that, the Association avers that Brewer's "unstable emotional responses were well known prior to any comment by Lindsey." Building on that premise, it's the Association's view that concerns about Brewer's emotional stability pre-existed any statements by Lindsey.

Overall, it's the Association's view that Lindsey's conduct in this matter was not in bad faith, and thus did not violate the Union's duty of fair representation.

The Association responds to Brewer's claims against Birnhak as follows.

First, the Association addresses Brewer's contention that Birnhak should not have reported her "gun" statement to the District. According to Brewer, Birnhak should have concluded that Brewer was not serious about her "gun" statement and just "moved on". The Association disagrees with Brewer and agrees with Birnhak who reported it to the District. The Association opines that given the recent history of violence in schools in America, a statement about getting a gun and shooting someone is not something that can be taken lightly. According to the Association, the fact that Birnhak reported the statement to the District does not show any improper motive on his part, nor was it part of "an insidious plot to 'get rid' of Brewer." Instead, it simply reflects a legitimate and genuine concern that he and the District needed to proceed with caution concerning Brewer's "gun" statement.

Next, the Association addresses Brewer's contention that Birnhak should not have participated at all in any of the teacher interviews. It disagrees. In responding to this contention, the Association first gives some background. It notes that the investigation was conducted by Superintendent Busler, who utilized legal counsel to assist him. This investigation was conducted at the direction of and under the terms established by the District. Having given that background, the Association contends that Birnhak was not a "member" of the "investigatory panel" as alleged by Brewer. The Association contends that Birnhak was present as an observer at the interviews as a professional courtesy. Here's why. The District has a practice of involving the OEA in matters where the OEA members' rights could be at issue. In this case, Brewer's rights and future employment were a potential issue and allowing the OEA to sit in on the investigation was consistent with that practice. In that sense then, allowing Birnhak to sit in on the interviews was standard operating procedure in the District.

Also, many of the teachers who were being questioned by the District wanted to have either Birnhak or Lindsey present when they were being questioned about activities concerning a fellow union member. As for the fact that Birnhak asked some questions at these interviews, the Association argues that does not taint his status or his role in this matter. While Brewer claims – via the chart in her initial brief that Birnhak made comments or asked questions 34 times – the Association avers that a review of the transcripts of those interviews shows that his questions were designed to elicit clarification or allow the witness to explain themself more clearly. The Association argues that Birnhak's questions/comments in these interviews don't come close to exhibiting bad faith "other than in the dark reaches of a paranoid imagination." The Association further submits that Brewer did not establish that Birnhak did or said anything during these interviews that materially affected the outcome of the District's investigation. Finally, the Association maintains that there is no evidence drawing a nexus from Birnhak's comments to Brewer's termination, nor the actions of the OEA's Executive Board.

Third, the Association addresses Brewer's claim that Birnhak had a conflict of interest in this case because he was a witness. It disputes that contention. In responding to this claim, the Association notes that this is not a case where there is substantial disagreement about the underlying facts. It notes in this regard that Brewer admitted to the police and later in her District interview that she did indeed make her "gun" statement to Birnhak. As the Association sees it, the fact that Birnhak was the other participant in the phone conversation is really of no import as there is no factual dispute about what was said. Building on the foregoing, the Association maintains that Birnhak's status as a potential witness is not relevant.

Fourth, the Association addresses Brewer's claim that Birnhak also had a conflict of interest because he was present at many of the teacher interviews. The Association contends that Brewer was present at those interviews because the District decided he could be there. After all, he was the UniServ director and had a longstanding relationship with the District and many of the teachers. Additionally, as already noted, a number of teachers wanted him there. The Association argues that the fact that Birnhak was present at the interviews did not create a conflict or show bad faith.

Fifth, the Association disputes Brewer's contention that Birnhak was part of a conspiracy to get her fired. The Association characterizes this allegation as unfounded and lacking proof.

As part of this claim, the Association responds to Brewer's contention that Birnhak (supposedly) made a statement to Attorney Nola Cross to the effect that he had been waiting ten years for Brewer to slip up so he could get rid of her. The Association contends that this hearsay statement is inadmissible pursuant to Sections 885.16 and 885.17, Stats., which prohibits a witness from testifying about transactions with a deceased when they have an interest in the outcome of the litigation. It notes in this regard that Birnhak is both a deceased principal/defendant of CAUS-North under Section 885.16 and a deceased agent of OEA under Section 885.17. The Association asserts that "it is unquestionable that Cross was the attorney/agent for Ms. Brewer, acting as her alter ego/advocate. It is unquestionable that

Ms. Brewer would be the direct beneficiary of this testimony by her alter ego (i.e. Ms. Brewer would gain or lose by the direct legal operation and affect of the judgment.") The Association argues in the alternative that even if Cross' statement is admitted into evidence, its credibility still must be weighed. It contends that it is not credible for the following reasons. First, it notes that in Birnhak's responsive e-mail, he denied Cross' allegation and then made an indictment of her credibility and general veracity in which he stated: "Obviously, anything more I say to you will be twisted, taken out of context and used against me and/or the OEA." The Association further asserts that "Cross' unreliability as a reporter of facts" is reflected in the very next statement in her e-mail when, in attempting to impugn the OEA she alleges: "In addition, Mark Lindsey [OEA President] has sought and obtained the transfer to the high school to which Ms. Brewer would otherwise be entitled". The Association notes that at the hearing, it was stipulated by the parties that that statement was false because Brewer was never "entitled" to any transfer, and the transfer of Lindsey was not voluntary, but dictated by the Administration. The Association contends that the "truth" did not prevent Cross from making a statement to the contrary. It further notes that when Cross was confronted about her use of hyperbole in this case, and her claims at the "Loudermill" hearing that there was not a thorough investigation done by the District, "her blithe response was 'I don't think so at all, because none of those statements were actually relevant to the incident at issue.'" According to the Association, "Such hyperbole and reckless treatment of the factual truth should not be condoned by a person acting as attorney or advocate." The Association therefore maintains that Cross' testimony is simply not credible. It argues that Cross' testimony as to Birnhak's alleged statement "should either be barred as a matter of law or weighed as simply not credible."

Overall, it's the Association's view that Birnhak's conduct in this matter was not in bad faith, and thus did not violate the Union's duty of fair representation.

The Association responds to Brewer's claims against Pieroni as follows.

First, it disputes Brewer's claim that Pieroni had a conflict of interest. It notes in this regard that after he was appointed to be involved in this case, Pieroni sent letters to Brewer which made it clear that he represented the OEA (and not her personally). The Association cites case law for the proposition that "an attorney who is handling a grievance on behalf of a labor union as part of a collective bargaining process is not considered the attorney for the individual member as a matter of law." The Association argues that just because Pieroni represented the OEA and her interests at the same time does not constitute evidence of bad faith.

Second, the Association points out that Pieroni only represented the OEA from February 22 to March 23, 2010, when Brewer informed Pieroni and the OEA that she had retained Nola Cross, a private attorney, to represent her personal interests. After Brewer retained Cross as her personal counsel, Pieroni no longer represented the OEA. Subsequently, Birnhak, in his capacity as CAUS-North UniServ Director, represented the OEA.

Third, the Association addresses Pieroni's conduct at the teacher interviews. For background purposes, the Association notes again that it is not uncommon during any investigation for a union representative to be allowed to ask clarifying or follow-up questions. The Association asserts that a review of the questions Pieroni asked shows that they were generally designed to clarify answers. Pieroni did not engage in cross examination at the interviews because this was not the appropriate venue to do so. The time for Brewer to make her case was at the "Loudermill" hearing. At that hearing, Brewer was represented by her own personal attorney, Nola Cross.

Finally, the Association contends that Brewer failed to show how any action taken by Pieroni favored the OEA over her interests and that she was prejudiced in any way by his representation.

Overall, it's the Association's view that Pieroni's conduct in this matter was not in bad faith, and thus did not violate the Union's duty of fair representation.

Next, the Association addresses what happened at the OEA Executive Board meeting on June 10, 2010. It notes that at that meeting the Board heard from Brewer, Birnhak, Lindsey, and two Oregon Middle School teachers. Each of those individuals was given time to present relevant information and then was questioned by the Executive Board. After hearing all of the testimony, the Board made a unanimous decision not to pursue Brewer's grievance. The Association avers that the Board understood that by failing to pursue Brewer's termination grievance, the OEA could have a DFR suit filed against it. However, even faced with this consequence, the Executive Board unanimously decided that it could not pursue Brewer's grievance at the expense of the other teachers at the middle school who feared Brewer because of her threatening and harassing behavior. The Association notes that the uncontradicted testimony of the Board members was that they weighed the competing considerations before they concluded that the interests of the remaining Oregon Middle School staff and the protection of their interests outweighed Brewer's interests in having the OEA prosecute her termination grievance. As for the fact that Lindsey was a Board member who voted that night, the Association notes that there is no evidence that he influenced individuals to vote in a particular manner; in fact, the Executive Board members who testified stated just the opposite was true. The Association asserts that since the vote not to proceed with a grievance challenging Brewer's discharge was unanimous, any bad faith Lindsey is alleged to have had did not impact the decision of the Executive Board as a whole. As for Birnhak's presence at the meeting, the Association notes that he was not a member of the OEA Executive Board, and thus did not vote. The Association also asserts that there is no evidence that he influenced any member of the OEA Executive Board on how to vote concerning this matter. Building on that, the Association reasons that any bad faith he is alleged to have had did not impact the decision of the Executive Board as a whole.

Next, the Association contends that the Board made a "good decision" when it decided not to proceed with a grievance challenging Brewer's discharge. It notes in this regard that in the Mahnke decision, the court gave the "touchstones for the 'proper information' to be

considered in determining whether the duty of fair representation had been met." The Association emphasizes that the court referred to the monetary value of the claim (and corresponding costs to prosecute it), the effect on the employee, the likelihood of success of arbitration and the weighing of the "relevant factors". It asserts that the uncontradicted testimony of the Board members who were at the meeting was that they considered the foregoing points. It cites the following record evidence to support that contention. First, it notes that the Board members considered the fact that WEAC had initially supplied a legal representative in this case (i.e. Pieroni), but that Brewer had rejected that legal representation and had instead hired a private, personal attorney on her own volition. At the Board meeting, Brewer told the Board that she wanted the Association to pay Cross' attorney's fees, which she estimated would be between $60,000 and $80,000. The Board knew that the OEA's legal defense fund was about $5,000. Second, the Executive Board decided that the School Board had made a "reasonable" settlement offer to Brewer which she (Brewer) had rejected. During the meeting, Brewer told the OEA Board that the School Board's settlement offer was that she (Brewer) would be allowed to finish the school year in a non-student contact position; there would be no termination and therefore, she would be entitled to retire with full benefits. According to the Association, it "had the right to review that offer as to its 'reasonableness' and to accept a reasonable offer to resolve the case and avoid the costs and risk to the member and association of litigating a weak case." It notes that Brewer prevented union review though by "entering into a confidentiality agreement with the District which kept the information from the union." The Association avers that contrary to Brewer's assertion, "reasonableness" of an offer is not determined solely by the member. Third, the Board members considered the merits of Brewer's case and "universally found it lacking." The Association contends that when the Board members considered Brewer's "gun" comment in light of all the underlying circumstances (including her longevity), they felt that her case was not winnable. As part of that consideration, the Board also considered the "toxic atmosphere" that Brewer had created at the middle school, as well as "the negative personal and professional impact on other members of the OEA if this grievance were pursued."

Next, the Association addresses Brewer's claim that the OEA Board members made their decision based on "inaccuracies" which were presented to them at the Board meeting by Birnhak and Lindsey. According to Brewer, the Board members were not given the "proper information" to make a "good decision"; and therefore, *ipso facto*, the OEA Executive Board did not act in good faith when it decided not to grieve Brewer's termination. The Association disputes that contention.

Before addressing the alleged inaccuracies, the Association makes the following preliminary comments. First, it asserts that "Brewer strings together a series of irrelevant arguments to support her conjecture that the Executive Committee was fed 'false' information, which led to the result that she disagreed with." Second, the Association notes that Brewer's claimed inaccuracies are all taken from the minutes of the June 10 Board meeting. It points out that as was noted by the Examiner at the hearing, the bullet points in the discussion section of the minutes – upon which Brewer relies – are just a paraphrasing of other's remarks. The Association contends that Brewer mischaracterizes the bullet points as complete factual

statements. It also notes that Brewer did not call or question any member of the OEA Executive Board to challenge the minutes or anything that was said about the June 10th meeting. Third, even if some inaccuracies were presented, the Association notes that at the meeting, Brewer had an opportunity to hear what others had to say and rebut/respond to it as she saw fit. However, she chose to leave the meeting after she presented her information. It points out that "Her glib response when questioned about this at hearing was an incredulous, 'I didn't know it was a requirement to stay.'"

As for the 23 alleged inaccuracies in the OEA's minutes, the Association responds as follows.

First, the Association addresses Brewer's contention that Lindsey's statement that she had sued the District twice for discrimination was not true. For background purposes, the Association notes that Brewer had filed an ERD age discrimination claim against the District for removing her from Homework Club and Detention Supervisor. It also points out that Brewer filed a grievance against the District concerning her removal from the PBIS Committee. The Association submits that Lindsey's confusion over the number of filings is understandable. The Association also characterizes it as a *de minimis* inadvertent mistake. Aside from that, the Association maintains it is not clear how the difference between suing the District once or twice for other claims is relevant to the decision of whether to support her grievance in this matter. Additionally, the Association points out that there is no evidence from any Board member that their testimony was impacted by this minor mischaracterization.

Second, the Association addresses Brewer's contention that Lindsey was wrong when he told the Executive Board that she (Brewer) was responsible for the "threatening environment" at the middle school. According to Brewer, others were responsible for it; not her. The Association disagrees, and contends that the "credible evidence educed at hearing supports the fact that Brewer is wrong in her assertion that others were not threatened by her." The Association cites the interviews of the PBIS teachers to support the proposition that they all felt bullied and fearful of Brewer.

Third, the Association addresses Brewer's contention that Lindsey's statement that she refused a reasonable offer to settle is false. At the hearing, she declared: "How could he say a reasonable offer was refused when they didn't even know 'our' offer?" As the Association sees it, her offer was not the issue; instead, the offer of the School Board was the issue. The Association notes that Brewer disclosed the offer of the School Board when she was questioned about it at the OEA Executive Board meeting. Lindsey testified that he asked Brewer about it because "of the shroud of secrecy in which Brewer had cloaked her negotiations with the District." As previously noted, Brewer told the OEA Board that the School Board had offered to allow her (Brewer) to finish the school year in a non-student contact position; there would be no termination and therefore, she would be entitled to retire with full benefits. The Association concluded that this settlement offer was "reasonable" under the circumstances.

Fourth, the Association addressed the situation in 2006 when Brewer was removed from the OEA's bargaining team. Brewer claims that Birnhak's reported statement that she was removed from the negotiating team (in 2006) because she had negotiated in bad faith was untrue. As Brewer sees it, she knew what the union membership wanted (and implied that the negotiations committee did not). The Association cites the OEA's Executive Board minutes for the proposition that Brewer was removed from the Association's bargaining team back then because "she failed to follow OEA ground rules, engaged in bargaining for personal gain, breached negotiating team confidentiality and committed numerous other infractions." That being so, it's the Association's view that Birnhak's statement about the 2006 matter is supported by credible evidence. Aside from that, the Association maintains that Brewer "established no nexus between it and the decision of the OEA Executive Committee regarding her grievance."

As for the remaining alleged inaccuracies that Brewer referenced in her initial brief, it's the Association's view that it has already addressed and commented on them earlier. The Association's response as to those alleged inaccuracies that remain is as follows:

> #1, which involves an alleged non-statement which Claimant alleges should have been made to counter a statement that was never made to the Executive Committee in the first place, #11 which doesn't exist (numbering error by Complainant); #12, which is hopelessly confused and seems to irritate Complainant mainly because of the use of the term "babysit" in an interview with Katie Port; however, there is no evidence that term was ever used by the OEA Executive Committee on June 10th; and #14, which references purported vague statements by Symes and Mahr to the Executive Committee on June 10th.

In sum then, the Association contends that it and its representatives acted in good faith, considered all the relevant factors under Mahnke and Vaca, and did not breach its duty of fair representation in refusing to proceed with Brewer's grievance. It therefore requests that Brewer's claims be denied, her case dismissed, and that it be awarded attorney's fees and costs.

Respondent District

The District's position is that Brewer did not prove a Union violation of its duty of fair representation. The District submits that Brewer had the burden of establishing that the Union's conduct towards her was arbitrary, discriminatory or in bad faith. The District argues that "despite the length and number of issues raised", she did not satisfy that burden.

Before it addresses that contention, it makes the following preliminary points.

First, it notes that because Brewer represented herself at hearing, the Examiner granted her leeway in attempting to present her case. It notes that when she questioned witnesses though, she had a tendency to make speeches and argue with the witnesses. As the District

sees it, her speeches were not evidence but rather were arguments. It maintains that separating the two (i.e. evidence from the speeches) is a difficult task.

Second, the District avers that "Brewer's brief is full of inaccurate statements, misquotes, and improper use of parentheses and formatting which makes it nearly impossible to determine when she is quoting from certain transcripts and when she is just giving her argument or opinion." The District also asserts that "her lack of citation to the record, her use of parentheses to 'explain' what she thinks was meant and her unclear formatting makes it almost impossible to determine in many instances when she is making an argument and when she is trying to set forth what she believes are relevant facts." The District also asserts that Brewer makes significant mistakes with respect to dates, times, or statements. The District opines that Brewer's focus on the minutia in this case should not detract the Examiner from the larger issue and that pertains to the decision of the Executive Board on June 10, 2010.

Third, the District addresses the scope of this case. In its initial brief, the District avers that the "sole issue to be decided" is the OEA's decision not to pursue a grievance challenging Brewer's termination. As the District sees it, everything else can be ignored.

Next, notwithstanding the point just referenced, the District understands that Brewer faults the conduct of Lindsey, Birnhak and Pieroni. Accordingly, it addresses her contentions regarding those individuals and their (allegedly) improper conduct.

Last, it addresses what it characterizes as the three major themes of Brewer's case, "none of which accurately reflects the law or is supported by competent evidence." As the District sees it, the first theme seems to be that "any time the OEA made any decision or took any action which did not have as its sole purpose the exoneration of her and her threatening statement about getting a gun to shoot someone", it somehow violated the duty of fair representation. The District contends that is not an accurate statement of DFR law and ignores the relevant facts of this case. Next, the District maintains that Brewer's second theme seems to be that the Association and its membership "engaged in a conspiracy going back at least ten years to get rid of her." According to the District, "Brewer's belief that there was a conspiracy taints not only her brief but her entire recollection of facts related to this case." To that end, Brewer claimed that "virtually every slight she suffered during her employment in Oregon was part of this ever-expanding conspiracy and amounted to bad faith by the OEA Executive Committee." Next, the District asserts that Brewer's third theme seems to be that in any situation in which there is a conflict of testimony or evidence, the Examiner should credit her testimony over that of any other witnesses at the hearing and ignore documents which are contrary to her version of the facts. The District opines that "even if the Examiner were to credit her entire version of every event, it still does not add up to a violation of the duty of fair representation."

The District responds to Brewer's claims against Lindsey as follows.

First, the District addresses the fact that at the hearing, Brewer questioned why Lindsey acted as her union representative on February 19. The District asserts that the answer to that question is because Lindsey was the OEA President and was present in the Oregon Middle School on February 19th when Brewer made her "gun" comment. Once the Oregon police were contacted, the District contacted Lindsey as the District has a practice of making sure employees have representation available in situations of potentially serious misconduct. As union president, Lindsey was the natural choice. Also, Brewer did not request a different representative.

Second, the District addresses Brewer's objection that when Lindsey was trying to deal with Brewer's PBIS grievance, he told the group of PBIS teachers that she wanted "revenge" against them. The District submits that the fact that Lindsey truthfully reported to other teachers what Brewer said to him is not evidence of an improper motive. Rather, it was an effort on his part to make sure individuals affected by Brewer's statement were fully informed. It notes in this regard that Lindsey represented all the teachers, not just Brewer.

Third, the District addresses Brewer's contention that in the afternoon of February 19, Lindsey should not have had any discussions with any teachers about her (Brewer's) mental health. The District disagrees. It opines that the fact that "discussions arose concerning Brewer's mental health is not shocking given the gravity of the statement she made and her history of conflict with her colleagues."

Overall, it's the District's view that Lindsey's conduct in this matter was not in bad faith, and thus did not violate the Union's duty of fair representation.

The District responds to Brewer's claims against Birnhak as follows.

First, it addresses Brewer's claim that Birnhak should not have told the District about Brewer's "gun" statement since it was privileged because of an attorney-client relationship. The District asserts that just because Birnhak had a law degree, that does not mean he was also acting as Brewer's personal attorney when she made her "gun" statement to him. Obviously, he was acting in his capacity as a UniServ representative. That being so, the District asserts that no attorney-client relationship was established or existed.

Second, the District addresses Brewer's contention that Birnhak should not have reported her "gun" statement to the District. As Brewer sees it, Birnhak should have known that Brewer was not serious about her "gun" statement. However, the District notes that Birnhak obviously felt differently, because he reported it to the District. The District notes that at the hearing, even Brewer acknowledged she probably would have reported the statement if it had been made to her. The District opines that "a statement about getting a gun and shooting people at a school is not something that can be taken lightly in America today." According to the District, the fact that Birnhak reported the statement to the District does not show any improper motive on his part. Instead, it reflects a legitimate and genuine concern.

Third, the District avers that it commenced its investigation on the Monday following the Friday "gun" statement. That investigation began with administrators interviewing some teachers to find out what they knew about Brewer's "gun" statement. Those initial interviews persuaded the Administration that there was much more to the situation than just that one statement, and needed to be evaluated in a broader context. The District therefore expanded its investigation to investigate additional abusive behavior by Brewer. That investigation was conducted by Superintendent Busler, who utilized legal counsel to assist him. This investigation was conducted at the District's direction. That investigation persuaded the Administration that Brewer's "gun" statement was part of a pattern of bullying and hostility to which she had subjected her co-workers at the middle school. Following the investigation, Busler was tasked with making a recommendation to the School Board concerning Brewer's employment. The District contends that there is no evidence either Lindsey or Birnhak influenced Busler's decision in any way.

Fourth, the District contends that contrary to Brewer's claim, there was no "investigatory panel" convened (during the course of the District's investigation). As for Birnhak's presence during the interviews, the District contends that it allowed the OEA to have representatives attend the interviews because the District has a practice of involving the OEA in matters where the OEA members' rights could be at issue. In this case, Brewer's future employment was at issue and allowing the OEA to sit in on the investigation was consistent with the custom and practice between the District and the OEA. In other words, allowing Birnhak to sit in on the interviews was standard operating procedure in the District. Also, many of the teachers who were being questioned by the District wanted to have either Birnhak or Lindsey present when they were being questioned about activities concerning a fellow union member. As for the fact that Birnhak asked some questions during these interviews, the District argues that does not taint his status in this matter. While Brewer claims – via the chart in her initial brief that Birnhak made comments or asked questions 34 times – the District avers that a review of the transcripts of those interviews shows that his questions were designed to elicit clarification or follow-up to make sure he understood the facts of the case.

Fifth, the District addresses Brewer's claim that Birnhak had a conflict of interest in this case because he was a witness. In responding to this claim, the District notes that this is not a case where there is substantial disagreement about the underlying facts. It notes in this regard that Brewer admitted to the police and later in her District interview that she did, in fact, make a statement regarding getting or buying a gun and shooting someone or shooting up the school. As the District sees it, the fact that Birnhak was the other participant in the phone conversation is really of no import as there is no factual dispute about what was said. It contends that the fact that Birnhak ultimately might have been called to testify in a proceeding does not somehow disqualify him. He would have an obligation to tell the truth, as would any witness. Building on the foregoing, the District believes that Birnhak's status as a potential witness is not relevant.

Sixth, it addresses Brewer's claim that Birnhak also had a conflict of interest because he was present at many of the teacher interviews. The District submits that the fact that it allowed

Birnhak to sit in on the interviews, and to occasionally make a statement or ask a question did not create a conflict of interest. The District avers that the reason it allowed him to sit in on the interviews was because he was the UniServ director and had a longstanding relationship with the District and many of the teachers. Additionally, as already noted, a number of teachers wanted him there. The District argues that the fact that it allowed Birnhak to be present at the interviews did not create a conflict or show bad faith.

Seventh, the District disputes Brewer's contention that Birnhak was part of a conspiracy to get her fired. The District characterizes this allegation as unfounded and lacking proof.

As part of this claim, the District first addresses Brewer's contention that Birnhak supposedly made a statement to Attorney Nola Cross that he had been waiting ten years for Brewer to slip up and now he had found a way to get rid of her. The District contends that if Birnhak did say that, it is barred by Wisconsin's Dead Man statute. It notes in this regard that Birnhak was involved as an agent of the OEA and CAUS-North, both named respondents in this matter. He passed away after Brewer was terminated, but before the hearing in this case. The District asserts that any statements he is alleged to have made should be excluded pursuant to that statute. The District argues in the alternative that even if this alleged statement is admitted into evidence, it alone does not show that the OEA Executive Board acted with an improper motive or in bad faith. It notes in this regard that Birnhak was not a member of the OEA Executive Board, he had no vote in the decision not to pursue Brewer's grievance to arbitration, and there is no evidence that he influenced any member of the Executive Board on how they should vote concerning this matter. The District also submits that Birnhak's actions and other statements make it unlikely he even made such a statement in the first place. For example, at the "Loudermill" hearing (when he was alleged to have made this statement), he also reportedly told Cross that he did not believe the District had sufficient cause to terminate Brewer's employment. He also told the OEA's Executive Board about the various options and risks depending on the decision they made. Some of those choices would make it harder to "get rid of" Brewer. The District argues that if Birnhak's motive was to "get rid of" Brewer, he would have hidden those choices. He didn't. Finally, it notes that Birnhak was the individual who informed the police about the second part of Brewer's "gun" statement (i.e. "but that wouldn't be a good idea, would it?"). The District notes that Brewer did not tell the police this or recall making that statement when interviewed by the police initially. It submits that if Birnhak was looking for an opportunity to get rid of Brewer, he would not have told the police that.

Next, the District addresses the fact that sometime after the February 19 incident at a "Problem Solving Round Table", Birnhak expressed a desire that Brewer's employment be terminated due to what Busler characterized as Birnhak's concern for the "divisive nature" of Brewer's behavior. The District contends that there is no evidence that Busler's decision to recommend termination was influenced by Birnhak's perspective, or that any Executive Board member voted to not represent Brewer because of Birnhak's personal perspective.

Overall, it's the District's view that Birnhak's conduct in this matter was not in bad faith, and thus did not violate the Union's duty of fair representation.

The District responds to Brewer's claims against Pieroni as follows.

First, it disputes Brewer's claim that Pieroni had a conflict of interest. To support that premise, it notes that after Pieroni was appointed to be involved in this case, he sent letters to Brewer which made it clear what his role was in this matter and who he represented. Those letters also said that if Brewer believed there was a conflict of interest she should raise the issue with Pieroni. She later did so and ultimately determined that she wanted to be represented by private counsel. However, just because Pieroni represented the OEA and her interests at the same time does not constitute evidence of bad faith. The District also asserts that Brewer failed to show how any action taken by Pieroni favored the OEA over her interests and that she was prejudiced in any way by his representation.

Second, it addresses Pieroni's conduct at the teacher interviews. For background purposes, the District notes again that it is not uncommon during any investigation for a union representative to be allowed to ask clarifying or follow-up questions. The District asserts that a review of the questions asked by Pieroni of the witnesses the District interviewed shows that Pieroni's questions were generally designed to clarify answers. Pieroni did not engage in cross examination because this was not the appropriate venue to do so. That would come later if needed.

Next, the District addresses what happened at the OEA Executive Board meeting on June 10, 2010. It notes that at that meeting the Board heard from Brewer, Birnhak, Lindsey, and two Oregon Middle School teachers. Each of those individuals – including Brewer – was given time to present relevant information to the Executive Committee and then was questioned by the Executive Board. After hearing all of the testimony, the Board made a unanimous decision not to pursue her grievance. The District avers that the Board understood that by failing to pursue Brewer's termination grievance, the OEA could be sued and it might cost money in attorney's fees if it was determined their decision (not to challenge her discharge) was wrong. However, even faced with this consequence, the Executive Board unanimously decided that it could not pursue Brewer's grievance at the expense of the other teachers at the middle school who feared Brewer because of her threatening and harassing behavior. The District notes that the uncontradicted testimony of the Board members was that they weighed the competing considerations before they concluded that the interests of the remaining Oregon Middle School staff and the protection of their interests outweighed Brewer's interests in having the OEA prosecute her termination grievance. The District emphasizes that the scope of the duty of fair representation allows unions a wide range of discretion. Building on that, it contends that in this case, the Board's decision was not arbitrary, discriminatory or in bad faith. It notes in this regard that while Lindsey was a Board member who voted, the District points out that he was just one of the 18 individuals who voted that night. According to the District, there is no evidence that Lindsey influenced anyone to vote in a particular manner. The District also asserts that since the vote not to pursue Brewer's termination grievance was

unanimous, any bad faith Lindsey is alleged to have had did not impact the decision of the Executive Board as a whole. As for Birnhak's presence at the meeting, the District points out that he was not a member of the OEA Executive Board, and thus did not vote. The District also asserts that there is no evidence that he influenced anyone to vote in a particular manner.

Next, the District addresses Brewer's claim that the OEA Board members made their decision based on "inaccuracies" which were presented to them at the Board meeting. Before doing that though, it makes the following preliminary comments. First, to the extent there was any inaccurate information presented, the District submits that such information was minor and did not have a bearing on the major issue that drove the Executive Board's decision.

Second, the District notes that Brewer's claimed inaccuracies are all taken from the minutes of the June 10 Board meeting. It points out that as was noted by the Examiner at hearing, these minutes are just a paraphrasing of other's remarks. It emphasizes that Brewer did not call or question any member of the OEA Executive Board to challenge the minutes or anything that was said about the June 10th meeting.

Third, assuming that some inaccuracies were presented, the District notes that at the meeting, Brewer had an opportunity to hear what others had to say and rebut/respond to it as she saw fit. However, she chose to leave the meeting after she presented her information. According to the District, "Brewer has a history of not sticking around to present her side of the story when potential action may be taken against her." To support that contention, it cites the 2006 situation where she was removed from the OEA bargaining committee. It notes that after a series of correspondence to her informing her that possible action could be taken against her by the Executive Board, she did not remain at the critical decision-making meeting to rebut information or present her side. It further notes that while Brewer claimed at the hearing that she did stick around for that Executive Board discussion, the minutes indicate otherwise.

As the District sees it, at the hearing Brewer identified three main inaccuracies that she believed may have influenced the Executive Board's decision and which, in turn, produced a "bad faith" decision by the Board. First, she claims that Lindsey's statement that she wanted "revenge" against the teachers with whom she wanted mediation was not true. In response, the District notes that when Brewer made her presentation to the Executive Board, she addressed this matter stating "she doesn't recall saying anything about revenge." Brewer testified that "revenge" was not a word she used so she does not believe she said it. The District opines that just because there was conflicting evidence about whether Brewer did or did not use the word "revenge" does not establish improper motive or bad faith. To support that view, it points out that there was no testimony in this proceeding that the "revenge" comment influenced any Board member's ultimate vote.

Second, Brewer claimed a statement to the committee that she had sued the District twice for discrimination was not true. In response, the District points out that Brewer had filed an ERD age discrimination claim against the District for removing her from Homework Club and Detention Supervisor. It also points out that Brewer filed a grievance against the District

concerning her removal from the PBIS Committee. The District opines that the fact that Lindsey may have described these two separate actions to the Board as two lawsuits is hardly misleading information. Aside from that, the District maintains it is not clear how the difference between suing the District once or twice for other claims is relevant to the decision of whether to support her grievance in this matter. Additionally, the District points out that there is no evidence from any Board member that their vote was impacted by this minor mischaracterization.

Third, Brewer's claim that Birnhak's statement that he urged Brewer to wait for Lindsey to represent her when she spoke to the police but by the time Lindsey reached her she had already talked was untrue. The District points out that Brewer chose to speak to the police without any representation. By the time Lindsey got to the District conference room, Brewer's interview with the police was essentially completed. Nonetheless, when Lindsey arrived he did urge Brewer to be careful about what she said. The District avers that even if Birnhak did not have a conversation with Brewer in which he urged her to wait for representation before speaking to the police, his statement has little if anything to do with the decision of the OEA Executive Board. To support that premise, the District points out that nothing Brewer told the police was disputed. Building on that, it's the District's view that Birnhak's alleged misstatement, even if inaccurate, was inconsequential and does not establish bad faith.

In sum then, it's the District's view that none of the named Respondents, nor their representatives, violated the duty of fair representation by their conduct herein.

DISCUSSION

The original complaint contends that the District violated Sec. 111.70(3)(a)5 by discharging Brewer. The amended complaint raised a duty of fair representation claim against the OEA and CAUS-North. As will be noted below, such claims are covered by Sec. 111.70(3)(b)1. These sections will be reviewed separately below. The discussion on each section is essentially divided into two parts: in the first part, I identify the applicable legal standards and in the second part, I apply those legal standards to the facts. I will address the Complainant's (3)(b)1 claim against the OEA and CAUS-North first.

Alleged Violation of Sec. 111.70(3)(b)1

A. The Legal Standards Applicable to DFR Cases

Section 111.70(3)(b)1, Stats. states that it is a prohibited practice for a municipal employee, individually or in concert with others "[t]o coerce or intimidate a municipal employee in the enjoyment of the employee's legal rights, including those guaranteed in sub. (2)." The reference in Sec. 111.70(3)(b)1, Stats., to "a municipal employee. . .in concert with others" has historically been interpreted to extend the prohibitions in Sec. 111.70(3)(b)1, to labor organizations. Racine Unified School District, Dec. Nos. 14308-D, 14389-D, 14390-D (WERC, 6/77). Section (3)(b)1 has also been held to incorporate a labor organization's duty

to fairly represent those in the bargaining unit for which it serves as the exclusive collective bargaining representative. See Milwaukee Public Schools, Dec. No. 31602-C (WERC, 1/07). 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. A "good decision" under the law (i.e. a decision which does not violate the union's duty of fair representation), does not have to be one that the employee agrees with. A "good decision" can even be a "negligent" decision. Humphrey v. Moore, 375 U.S. 335, 349 (1964). Thus, a decision to abandon a grievance, even though the grievance is later found to be with merit, can still be a "good decision" under the law. Mahnke, *supra*. These 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, *supra*. 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, *supra*).

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.

B. Application of Those Legal Standards to the Facts

Brewer contends that the OEA and CAUS-North and its representatives breached its duty of fair representation to her in numerous respects.

My discussion is structured as follows. In Section I, I will address her claims against Lindsey, Birnhak, Pieroni and Bell. In Section II, I will address her claims involving the OEA's decision not to proceed with a grievance challenging her discharge.

I.

Before I delve into Brewer's charges against various individuals, I've decided to begin with the following general comment. Throughout her briefs, Brewer recites various facts and then ends her statement with the assertion that the Association representative "did not protect or defend Ms. Brewer." It's apparent from this that Brewer's perspective is that all Association actions should have been taken exclusively to protect her rights or defend her interests. However, that is not what the duty of fair representation requires. As noted by the Commission in Milwaukee Public Schools, *supra*., a union is a collective enterprise that serves the interests of the overall group. Serving those collective interests frequently comes at the cost of a particular individual's real or perceived interest. That's essentially what's involved in this case. Brewer wanted the Association to defend just her interests, and ignore the interests of the overall group. The problem with that contention is that the union's duty of fair representation extends equally to everyone in the bargaining unit.

Lindsey

Brewer contends that Lindsey acted inappropriately in the following respects.

First, Brewer faults Lindsey for his actions relating to the PBIS Committee matter. Here's the pertinent background. After Brewer sought mandatory mediation with the five teachers who were responsible for her getting kicked off the PBIS Committee, Lindsey first met with the five teachers. As noted in Finding 16, none of the five wanted to go to mediation with Brewer. When Lindsey tried to get them to have mediation with Brewer anyway, they were all angry and upset with him because they did not want mandatory mediation with Brewer. Lindsey then talked with Brewer about the matter. In the course of doing so, he asked Brewer why she wanted to have mediation (with people who did not want to meet with her). Brewer's response was that she had been hurt personally and professionally by them and she wanted "revenge" to get back at them. Lindsey subsequently told the five PBIS teachers that Brewer had told him that she wanted mediation with them for "revenge". Brewer avers that Lindsey should not have told those teachers that (i.e. that the reason she wanted mediation with them was for "revenge"). It's not surprising that Brewer didn't want that word repeated, because it certainly puts her, and her stated rationale for mediation, in a negative light. However, it was Brewer herself who used that word, and all Lindsey did was repeat it

verbatim to the five PBIS teachers. In and of itself, his doing that does not establish either bad faith or an improper motive.

Brewer also argues that if the five PBIS teachers felt fearful, targeted or terrorized, those feelings were caused by Lindsey, not her. As Brewer put it in her brief, "Mr. Lindsey pushed them over the edge, not Ms. Brewer." (See Complainant's brief, p. 16). The record facts belie that assertion. To the extent that there was what Brewer called "mass hysteria" at the school on February 19, the staff fears were caused by Brewer herself, not any statements Lindsey made. One more comment about this claim is in order. In her initial brief, Brewer alleges that Lindsey supposedly told the PBIS teachers that she (Brewer) "was going to bring a gun and shoot them." (emphasis added). (See Claimant's initial brief, p. 20). However, nowhere in the record is there evidence that Lindsey told the PBIS teachers that Brewer was going to shoot them. That is a gross misrepresentation of the facts.

Next, Brewer contends that Lindsey engaged in inappropriate conduct on February 19.

First, at the hearing, Brewer noted that she had clashed with Lindsey in the past. Given that history, she questioned why Lindsey acted as her union representative on that day. The simple answer to that is because Lindsey was the local union president. Also, he was present in the middle school on the day in question. While Brewer never asked for union representation to be present during her interview with the police, the District nevertheless decided to supply it. Here's why. The parties had a practice of making sure employees have union representation available in situations of potentially serious misconduct. As union president, Lindsey was the natural choice to provide representation. There was no reason for the District, the union, or Lindsey to question why he was the representative who showed up at the police questioning or why he was the individual who was directed to escort Brewer out of the building. Also, Brewer did not request a different representative. Finally, as soon as Lindsey arrived at the interview, he advised Brewer to stop talking with the police until legal counsel arrived. Whether Brewer wanted his assistance or not, Lindsey tried to help, warn and/or protect Brewer's interests in her interview with the police.

Second, Brewer faults Lindsey for talking to the members of her teaching team later that same afternoon, for not telling them the entire background of how her "gun" statement came about (i.e. her mediation efforts) and for talking about her mental health. While Lindsey's statements in that regard displeased Brewer, the fact that Brewer didn't like what Lindsey said or did on that eventful day does not prove either bad faith or improper motive. Here's why. It is not an everyday occurrence when a teacher is questioned by police and escorted from the building. After Brewer was removed from the middle school building on February 19, all kinds of information floated around the school about what had been said or what was threatened to be done. Some of the rumors were that Brewer had threatened to shoot specific people, that there was a list of people that she was going to shoot, or that there was a bomb in the school. As President of the OEA, Lindsey was a natural choice for people to seek out information or to express concern. Not surprisingly, he was bombarded with questions from fellow employees about what was going on and why the police were there. Lindsey had

no prior experience dealing with such matters. At the time Lindsey did all the things Brewer complained about above, he was simply trying to defuse a volatile situation and at the same time hear concerns of OEA members who were legitimately frightened that a fellow teacher would make a "gun" threat. Obviously, someone who makes a statement, joking or not, about getting a gun and shooting somebody raises an immediate red flag about why that person would make such a statement in today's society. The fact that questions and discussions arose when Lindsey talked to Brewer's team members about Brewer's mental health is neither surprising nor malicious given the gravity of her "gun" statement and her extensive history of conflict with her co-workers.

Even if Lindsey was indiscreet in talking about Brewer's mental health with the teachers who were on Brewer's teaching team on February 19, the record shows that other teachers also expressed the same type of comments about Brewer's mental health based on their own independent experiences with her. Some of their descriptions were that Brewer was "crazy as hell", "off the wall", "irrational" and "unstable". These and related comments made by numerous witnesses establish that Brewer's history of unstable emotional responses were well known by her fellow teachers prior to any comment Lindsey made regarding same on the afternoon of February 19.

Third, Brewer contends that Lindsey worked together with Birnhak to bring about her termination. She implies that because they were friends, they had devised a grand scheme which would result in her termination. The problem with Brewer's conspiracy theory is that it lacks an evidentiary basis in the record. Simply put, there is no evidence in the record that Lindsey and Birnhak worked together (or independently) to bring about Brewer's termination.

Even when all the foregoing matters are considered collectively, there still is insufficient evidence to show that Lindsey acted in bad faith, or in a discriminatory or arbitrary manner.

. . .

Brewer's claims about Lindsey's conduct at the OEA Executive Board meeting will be addressed in Section II.

Birnhak

Brewer contends that Birnhak acted inappropriately in the following respects.

First, she faults him for repeating her "gun" statement to the District. In her view, what Birnhak should have done instead (rather than calling the District) was ". . .taken a deep breath. . .called it a long week, and . . .just moved on." (Complainant's initial brief, p. 7). Brewer opines that that is what she did. Later in her initial brief though, she contradicts herself on this point and acknowledges that "gun statements", in general, "should be reported to school officials." (Complainant's initial brief, page 31). Of these two views, it suffices to

say that the latter has more public support than the former. As part of her argument, Brewer also contends that Birnhak should have known that she (Brewer) was not serious when she made her "gun" statement. To support that contention, she alleged that she did not own a gun, did not have access to one, did not have a concealed carry permit, did not have any military weapons training and does not like guns. Even if all those assertions are true, neither Birnhak nor the District knew that on the day Brewer made her "gun" statement to Birnhak. While Brewer felt that Birnhak should not have reported her "gun" statement to the District, Birnhak obviously felt differently. The fact that he reported it to the District does not show any improper motive on his part, nor does it prove that his motive for reporting Brewer's "gun" statement was part of an insidious plot to "get rid" of her. Rather, it reflects a legitimate and genuine concern that he and the District needed to proceed with caution. Brewer also contends that if Birnhak felt he had an obligation to report the "gun" statement to someone, then he should have called the police rather than the District. However, even if Birnhak had called the Oregon Police Department (and not the District), it can be surmised that the Police Department would then have called the School District, which would then have commenced its investigation. The result would have been the same even if the order of notification would have been different.

Brewer also takes issue with Birnhak's not calling her back (after she made the "gun" statement and hung up on him). What is interesting about this claim is that it shows how Brewer lays blame at the feet of others for her own conduct. It was her own actions that spawned this case. After she hung up on Birnhak, she could have called him back to apologize for the statement, clarify it, let him know that she was not serious, and/or regretted making the statement. She did none of those things. Instead, in the time between her hanging up the phone on Birnhak and the beginning of the next class hour, she spoke to four middle school staff members. In none of those conversations did she tell them what she had said to Birnhak regarding a gun, try to explain the comment she made, or explain that she was using "hyperbole" when she made her "gun" statement. Rather, her sole focus was that she was upset that, in her view, the Association had sold her out and agreed with the District's interpretation that mediation between staff members was voluntary under the labor agreement.

Brewer also faults Birnhak for sharing what she called "confidential" information with others (with the "confidential" information being her "gun" statement). According to Brewer, her "gun" statement was privileged because Birnhak was a lawyer and that meant that her conversation with him was covered by an attorney-client relationship. The problem with this contention is that Birnhak was acting in the capacity of a UniServ representative and not Brewer's personal attorney. Therefore, no such attorney-client relationship was established or existed.

Second, Brewer contends that Birnhak had a conflict of interest in this case because he was a witness. There's no question that Birnhak was the other participant in the phone call with Brewer on February 19. While in some cases involving a phone call there could be a disagreement over what was said, that's not the situation here. In this case, Brewer admitted to the police on the day of the incident and later admitted in her interview to the District that

she did indeed make her "gun" statement to Birnhak. The fact that Birnhak was the other participant in the phone conversation is really of no import here as there is no factual dispute. His status as a potential fact witness does not somehow disqualify him from being involved in this case as the OEA's representative. Also, fact witnesses are often involved in disciplinary type cases (such as this one). When they are, they are not disqualified from further participation in the case. Assume for example that Brewer had made her "gun" statement to someone else, say Superintendent Busler. If that had happened, Brewer's argument (since Busler was a witness to her statement) would be that Busler should not have participated in the District's investigation or made a recommendation to the School Board concerning her employment status. However, there's no requirement that Busler would have to step aside from either of those tasks just because he was a witness to Brewer's statement. Simply put, it just doesn't work that way. In a disciplinary type case (such as this one), one side cannot dictate who participates on the other side.

Another aspect of Brewer's contention that Birnhak had a conflict of interest involves the fact that Birnhak was present at many of the teacher interviews. According to Brewer, Birnhak was a "member" of the "investigatory panel". That characterization of Birnhak's status is inaccurate. While Birnhak did, in fact, sit in on twelve of the teacher interviews, he was not the investigator. As noted in Finding 32, the District Administration ran the investigation. In the course of doing so, they decided to allow Birnhak to sit in on some of the interviews. They did so because he was the CAUS-North UniServ director and the OEA is part of CAUS-North. As such, Birnhak had a longstanding relationship with the District and many of the District's teachers, including Brewer. Additionally, it was established that the District has a practice of involving the OEA in matters where the OEA members' rights could be at issue. In this case, Brewer's rights and future employment were a potential issue and allowing Birnhak to sit in on the interviews was consistent with the custom and practice between the District and the OEA. Furthermore, many of the teachers who were being questioned by the District wanted to have either Birnhak and/or Lindsey present because they expressed some level of comfort in having an Association representative present when they were being questioned about activities concerning a fellow bargaining unit member. Thus, Birnhak was permitted to be present during the Administration's interviews as a professional courtesy, but he was not a "member" of the "investigatory panel".

Brewer also objects to the fact that Birnhak asked some questions during the interviews that he attended. In her briefs, Brewer tries to paint Birnhak as an active participant who asked numerous questions. To support that premise, she points to a chart she created in her initial brief which purports to show that Birnhak made comments or asked questions 34 times. That assertion is misleading because a review of the twelve interviews that Birnhak attended establish that most of the questions he asked or comments he made can fairly be characterized as clarifying questions which were intended to elicit clarification or allow the witness to explain themself more clearly. He had a right and a duty to do that to gain information. While Brewer implies that Birnhak's questions and comments somehow interfered with the District's investigation, she did not prove it. Specifically, she did not establish that Birnhak did or said anything during the investigative interviews that materially affected the outcome of the

investigation. In fact, Superintendent Busler testified that Birnhak did not say or do anything in these interviews that interfered with the District's investigation. Finally, even if it is assumed that some of Birnhak's questions and/or comments were inappropriate – such as when he used the term "babysit" during Katie Port's interview – there still is no evidence drawing a nexus from those comments to the Administration's termination of Brewer, nor the actions of the OEA's Executive Board.

Given the foregoing, I find that the fact that Birnhak was allowed to sit in on some of the interviews and ask some questions did not create a conflict of interest or show a bad faith breach of the duty of fair representation. Moreover, it does not taint his status or role in this matter. Additionally, it does not lead to the conclusion that the District was influenced by his presence at the interviews in any way. Finally, the fact that the OEA piggy-backed on the District's investigation does not represent bad faith but rather represents a conservation of resources while at the same time protecting Brewer's rights and assuring other members that their interests were being considered as well.

Third, Brewer contends that Birnhak was "out to get her" and "plotted" against her. She cites two statements Birnhak made (or allegedly made) to support her premise.

The first statement Birnhak is alleged to have made supposedly occurred during a sidebar discussion that Birnhak and Nola Cross had during the "Loudermill" hearing. The alleged statement was that Birnhak told Cross that he (Birnhak) had been waiting ten years for Brewer to slip up so he could "get rid" of her. Cross testified that Birnhak made such a statement to her. Birnhak did not testify because he is now deceased. Before he died though, he essentially denied Cross' allegation that he made such a statement. He did so in an e-mail exchange he had with Cross on June 10, 2010 which he concluded with the following barb directed at Cross: "Obviously, anything more I say to you will be twisted, taken out of context and used against me and/or the OEA." (Complainant Ex. 20). I find that Birnhak's denial, when coupled with the following actions, make it unlikely he made such a statement. First, at the "Loudermill" hearing when he was alleged to have made this statement, he also reportedly told Cross that he did not believe the District had sufficient just cause to terminate Brewer's employment. Rhetorically speaking, if Birnhak had a motive and opportunity to get rid of Brewer, then why would he have made such a statement supporting her? He wouldn't have. Second, at the hearing, Cross acknowledged that at the "Loudermill" hearing, Birnhak took no actions which undermined Brewer or her case. Third, at the June 10 OEA Executive Board meeting (which will be addressed in detail in Section II), Birnhak told the Executive Board members about the three options they could take. Specifically, he said they could (1) let Brewer go to arbitration over her discharge, but she would have to use a WEAC attorney instead of a private attorney; (2) let her go to arbitration over her discharge with a private attorney, but she would have to pay her own attorney's fees; or (3) deny her request for arbitration over her discharge (and subsequently face a duty of fair representation claim). If it was Birnhak's goal to get rid of Brewer as she alleged, then one would think that he would have either hidden these choices or advocated for the choice which best suited his goal. That didn't happen though. Instead, Birnhak said at the Board meeting that he thought option (2)

(i.e. let Brewer go to arbitration over her discharge with a private attorney, but she would have to pay her own attorney's fees) was the safest route for the OEA because that would avoid a duty of fair representation claim. While the OEA Executive Board ultimately did not follow Birnhak's suggestion, the fact that he urged the OEA Executive Board to go that route meant that Birnhak took the same position as Brewer did (namely, that Brewer should be allowed to have her discharge reviewed by an arbitrator and allowed to use a private (non-WEAC) attorney). That fact certainly undercuts Brewer's contention that Birnhak was out to get her. Still another fact that undercuts Brewer's assertion that Birnhak was out to get her is this: when Birnhak was interviewed by the police about Brewer's "gun" statement, he was the one – not Brewer – who brought up the second part of her statement (i.e. the part where she said "but that wouldn't be a good idea, would it?", and he replied, "no, it wouldn't"). Brewer did not include this part of her statement when she was interviewed by the police. If Birnhak was looking for an opportunity to get rid of Brewer, he would not have offered up any sort of statement which could be considered mitigating. However, that's exactly what he did when he told the police the second part of Brewer's "gun" statement (i.e. he offered information that was supportive of her). As noted by the Association in their initial brief, "a witness who provides a party with potentially mitigating and/or exculpatory recollections is generally not a witness attempting harm."

The second Birnhak statement that Brewer cites to support her contention that Birnhak "plotted" against her arose at a Problem Solving Round Table meeting held sometime after the February 19, 2010 incident. The record indicates that labor relations issues are discussed at these meetings and perspectives are shared. At the meeting in question, Birnhak expressed his opinion to Superintendent Busler that Brewer's employment should be terminated because of her conduct on February 19 when considered in conjunction with her overall divisive behavior. While that is what ultimately happened, that outcome was not dictated by Birnhak. It was Busler, and he alone, who made that call. While Birnhak's statement at that meeting obviously shows Birnhak's personal perspective, a review of the investigative interviews shows that many of Brewer's fellow teachers shared the same view. They were all entitled to their views. What is absent from the record, though, is evidence that Busler's decision to recommend Brewer's termination was in any manner influenced by Birnhak's perspective, or that any OEA Executive Board member voted not to represent Brewer because of Birnhak's personal perspective. That's significant, especially in light of Busler's stated view that Birnhak did not try to get Brewer fired.

Notwithstanding what I just found, next I'm going to assume for the sake of discussion that Birnhak was indeed "out to get" Brewer as she alleged. Even if that was the case, that still does not prove that the OEA Executive Board acted with an improper motive or bad faith. Here's why. Birnhak was not a member of the OEA Executive Board. As such, he had no vote in the decision that the OEA Executive Board made. While he did make a recommendation concerning same, it's significant that the OEA Executive Board did not accept Birnhak's recommendation (to let Brewer go to arbitration with a private attorney, but make her pay her own attorney's fees). Instead, the OEA Executive Board decided not to proceed with a grievance challenging Brewer's discharge.

Based on the foregoing, I find that there is insufficient evidence to prove that Birnhak acted in bad faith, or in a discriminatory or arbitrary manner.

. . .

Brewer's claims about Birnhak's conduct at the OEA Executive Board meeting will be addressed in Section II.

Pieroni

Brewer claims that Pieroni's representation of the OEA's and her interests was a conflict of interest. I find otherwise for the following reasons. It's undisputed that Pieroni was appointed by the WEAC General Counsel as attorney for the OEA. In the labor relations community, it is well known that an attorney who handles a grievance on behalf of a labor union as part of a collective bargaining process is not considered the attorney for the individual member – rather the Union is the client. Even if Brewer originally did not know that, Pieroni made this point crystal clear to Brewer when he sent her letters which explained what his role was in this matter and who he represented. In his letters, he clearly stated that he represented the OEA and not her personally, but he would be attempting to protect Brewer's interests as they derive from the collective bargaining agreement. Those letters further made it clear that if Brewer ever believed there was a conflict of interest she should raise the issue with Pieroni and discuss it. She did so in her response to Pieroni. Ultimately, she determined that her interests were better represented by outside counsel. That was her decision to make. However, the fact that Pieroni was involved and represented the OEA and her interests at the same time does not constitute evidence of bad faith.

Next, Brewer argues that Pieroni favored the OEA over her own interest, and that she was prejudiced by his representation. She cites the following to support these contentions.

First, she notes that Pieroni discussed "her" case with OEA President Lindsey and UniServ Director Birnhak. In her view, that shows bias against her. What Brewer is missing with this contention is that Pieroni had to communicate with Lindsey and/or Birnhak because officially, they were the client's representatives. Thus, Pieroni had every right to discuss this case with Lindsey and Birnhak.

Second, Brewer faults Pieroni for "allowing" Birnhak to attend the teacher interviews. As already noted, it's Brewer's view that Birnhak should not have been allowed to attend the interviews because he was a "witness". The problem with this contention is that Pieroni didn't "allow" Birnhak to attend the interviews – the District did. As noted in Finding 32, the District's Administration controlled the investigation and determined who was allowed to attend the interviews. The District decided that for seven of the interviews, just District legal counsel Ruhly and Superintendent Busler would attend. For the other 14 interviews, the District decided that Pieroni and Birnhak would also attend. Additionally, it allowed Lindsey and Mahr to attend one interview each. Once again, the District decided who would attend –

not Pieroni. As a result, Brewer's contention that Pieroni mistakenly "allowed" Birnhak to attend some of the interviews misses the mark.

Third, Brewer also criticizes Pieroni for not objecting to questions or entering evidence on her behalf during the teacher interviews. The problem with this contention is that it mischaracterizes Pieroni's role during the investigative interviews. As already noted, the Administrative investigation was under the complete control of the Administration. Pieroni was allowed to attend and, out of professional courtesy, allowed to ask clarifying questions. However, it was neither the time nor place to "make" Brewer's case. That came later at the "Loudermill" hearing. By that time though, Pieroni was off the case and Brewer was represented by her own personal attorney, Nola Cross. As part of this contention, Brewer also faults Pieroni for not objecting to some of the things that Birnhak said during the interviews. However, it wasn't Pieroni's responsibility to police what Birnhak said in the interviews. That wasn't his role. As previously noted, Pieroni's job was to ask clarifying questions, and that's what he did. A review of the questions asked by Pieroni of the witnesses the District interviewed shows that his questions were generally designed to clarify certain answers which had been given or to obtain a fuller understanding of a factual situation which had been described by the witness.

In light of the foregoing, there is no basis of support in the record for any of Brewer's claims against Pieroni. Consequently, her claims of improper or perfunctory conduct by Pieroni lack merit. I therefore find that Pieroni's conduct toward Brewer was not arbitrary, discriminatory or in bad faith, and he at all times fairly represented her.

Bell

Finally, Brewer claims that WEAC President Bell committed a duty of fair representation violation. As was shown in Finding 8, Bell played a very small role in this saga. Assuming for the sake of discussion that Bell owed Brewer the duty of fair representation, Brewer did not prove that Bell violated that duty via the conduct referenced in Finding 8.

II.

The OEA Executive Board had a hard decision to make at the June 10, 2010 meeting that involved competing interests. On the one hand, Brewer wanted her job back, and she wanted to go to arbitration to make that happen. On the other hand, if the Association pursued a grievance on her behalf to arbitration, and was subsequently successful in getting Brewer reinstated to her old job, that decision would have an adverse impact on multiple teachers at the middle school who didn't want Brewer back in their building. They were fearful of her due to her history of bullying and unstable emotional behavior, coupled with her "gun" statement. When looked at that way, the question was whether to favor the interest of one (i.e. Brewer) or the interests of the many (i.e. the bargaining unit as a whole). The OEA Executive Board chose in favor of the overall interests of the bargaining unit (and specifically the

teachers at the middle school) and contrary to Brewer's interests. The fact that Brewer did not like this result does not raise that result to a violation of the duty of fair representation. I find that the OEA's decision not to pursue a termination grievance on Brewer's behalf resulted from careful consideration of its duty to represent all of its members and act in the best interests of the entire bargaining unit. Consequently, I find no violation of the Union's duty of fair representation.

The following discussion explains why I reached this conclusion.

First, let's look at the composition of the Executive Board that made that decision. It would be one thing if the Executive Board was packed with people who had previously clashed with Brewer and had it in for her, so to speak. However, even Brewer acknowledges that was not the case. Also, none of the five PBIS mediation teachers were part of the group that voted. While Lindsey was one of the 18 who voted, there is no evidence that he attempted to influence or convince individuals to vote in a particular manner; in fact, the Executive Board members who testified stated just the opposite was true. Finally, as previously noted, Birnhak did not vote because he was not an OEA Executive Board member. Like Lindsey, there is no evidence that Birnhak attempted to or did influence any member of the OEA Executive Board on how to vote that evening. The logical inference which can be drawn from the foregoing facts is that even if Birnhak and/or Lindsey arguably acted in bad faith, their conduct did not impact the decision of the Executive Board as a whole.

Second, let's look at the format used at the meeting. The Committee initially gave Brewer an opportunity to make whatever statement she wanted. Then the Committee asked questions of her. Then Birnhak, Lindsey, Symes and Mahr made statements to the Committee. Then discussion ensued. There's nothing about this format that raises any red flags. The Board's purpose in hearing from all these people was simply to find out as much as it could before it decided whether to support Brewer in a grievance challenging her termination.

The focus now turns to what occurred during the OEA Board meeting. While Brewer testified about what happened while she was there, she left the meeting after she finished speaking. What was odd about that was that Brewer knew that the individuals which followed her were going to make statements adverse to her, but she nonetheless chose to leave the meeting after she finished speaking. Had she stayed, she could have replied and/or challenged anything they said. That didn't happen though.

It's Brewer's view that when Birnhak and Lindsey spoke to the Executive Board, they gave the Board false, incorrect and improper information. Building on that premise, she alleges that the OEA Executive Board did not have what Brewer calls the "proper information" to make a "good decision". She opines further that because the Executive Board acted without the "true" facts, its decision was *ipso facto* bad faith and a breach of the duty of fair representation.

Before I review the alleged "inaccuracies", I've decided to note that all of the alleged "inaccuracies" come from the minutes of the OEA Executive Board meeting (see Finding 39). The author of those minutes was the OEA's secretary. In drafting the minutes of that meeting, she first attempted to summarize the statement of each person who spoke to the Board. Then, she attempted to encapsulate all of the items that were discussed by using the device of bullet points. Each bullet point listed in the discussion section of the minutes is her summary of what somebody said during the deliberations. There is no way to determine – by looking at those bullet points – who said what.

In her initial brief, Brewer contends that the minutes contain 23 false or partially false statements. This is a higher number than was alleged at the hearing. The higher number is attributable to the fact that Brewer gave multiple listings for one issue. For example, items 2, 3 and 4 in her brief all deal with the ERD filing matter. While I considered all of her contentions in reaching my decision herein, I'm not going to address all of the 23 allegedly false or partially false statements herein. Instead, I'm just going to address the ones that I consider the most important, even though some have a very tenuous relevancy to this matter.

First, Brewer disputes Lindsey's statement that the teachers she wanted mediation with were intimidated, bullied and/or threatened by her. Notwithstanding Brewer's contention to the contrary, the record conclusively demonstrates that Brewer's co-workers were indeed intimidated, bullied, fearful and/or threatened by her. That being so, Brewer's assertions that she wanted to mediate with teachers concerning her removal from the PBIS committee must be examined through this pattern of conduct showing she is interested in speaking her mind but is less interested in hearing from others. Brewer argues in the alternative that even if there was a "threatening environment" in the middle school, she did not cause it; others did. If that was indeed the case, one would think that Brewer would have had some teachers testify in her defense. None did. The obvious inference which can be drawn from this is that Brewer reaped what she had sown for years.

As part of this contention, Brewer also asserts that if the "Pyle" letter had been shown to the PBIS teachers, it would have negated their fears and proved that she was not a threat to anyone. I find otherwise. Here's why. The letter just referenced is a two line letter signed by a social worker (Anne Pyle). It provided thus:

> To Whom It May Concern:
>
> Sandra is being treated for work related stress. She is not suicidal or homicidal. She is ready to return to her teaching duties.

While Brewer advances this letter as a medical record which proves that she is no threat, it is self-evident the letter is not a medical record in any conventional sense (i.e. it has no history, evaluation, diagnosis, record of tests, etc.) and it is not from a medical doctor, psychiatrist or even a psychologist, but rather a social worker. Aside from that, the letter does not address,

in any way, the propriety of Brewer's "gun" statement, the effect that statement had on staff members, or the toxic environment Brewer's "gun" statement created.

Second, Brewer contends that Lindsey's statement to the Board that she had sued the District twice for discrimination was not true. Brewer is correct in that she filed one discrimination complaint, not two. (See Findings 8 and 9). That said, Finding 14 shows that Brewer did file a grievance against the District concerning her removal from the PBIS Committee. Both of these cases were filed without union support. Lindsey was obviously trying to tell the Board members that Brewer acted as she chose. The fact that Lindsey lumped these two matters together, and characterized them to the Executive Board as two discrimination lawsuits is understandable even though it's not completely accurate. Moreover, even Brewer once told an OEA official that she had filed two claims against the District on her own. Aside from that though, Brewer never showed how the difference between suing the District once or twice for other claims is relevant to the decision of whether to support her grievance in this matter. Thus, Lindsey's minor and/or inadvertent mistake on this point is of no legal consequence and does not establish fad faith.

Third, Brewer claims that Birnhak's statement that he urged Brewer to wait for Lindsey to represent her when she spoke to the police but by the time Lindsey reached her she had already talked was untrue. Assuming for the sake of discussion that Birnhak did not have a conversation with Brewer in which he urged her to wait for representation before speaking to the police, this statement had little if anything to do with the decision of the OEA Executive Board. Nothing Brewer told the police that day was disputed. That being so, Birnhak's alleged factual misstatement, even if inaccurate, was not a factor in the Board's decision. It therefore is of no legal consequence and does not establish bad faith.

Fourth, Brewer claims that Lindsey's statement that she refused a reasonable offer to settle is false. To support that contention, she declared at the hearing: "How could he say a reasonable offer was refused when they didn't even know 'our' offer?" It's true that the OEA Executive Board did not know what Brewer wanted as a settlement because she kept that information from the OEA. However, her settlement offer was not the issue; the School Board's offer was. Brewer disclosed the School Board's settlement offer during the question and answer session. The School Board's settlement offer was this: Brewer would be allowed to finish the school year in a non-student contact position; there would be no termination and therefore she would be entitled to retire with full benefits. While this offer was not what Brewer wanted as a settlement, that is not a basis for finding a union breach of the duty of fair representation. Here's why. The OEA Executive Board members considered the School Board's settlement offer in light of all the underlying circumstances and concluded it was reasonable. They had the right to do those things (i.e. review the School Board's settlement offer and decide on its "reasonableness"). Contrary to Brewer's assertion, "reasonableness" of an offer is not determined solely by the member. A union has no duty to proceed to arbitration in the face of a "reasonable" settlement offer, especially when the union determines the grievance is of questionable merit. West Salem School District, Dec. No. 32696-H (WERC, 6/11).

Fifth, Brewer contends that Lindsey's statement that communications to her went unanswered was not true. Assuming for the sake of discussion that Lindsey's statement was inaccurate, this statement had little if anything to do with the decision of the OEA Executive Board. It therefore is of no legal consequence and does not establish bad faith.

Finally, Brewer addressed what happened in 2006 when she was removed from the Association's bargaining team. According to Brewer, the meeting where she challenged a tentative agreement was not a ratification meeting but rather an informational meeting. The Executive Board minutes which were made at the time do not support her contention. While the nexus between Brewer getting removed from the Association's bargaining team in 2006 and the Board's decision concerning her discharge grievance is not readily apparent, there is a connection that Brewer overlooks. It's this. In the 2006 incident, the OEA Executive Board decided – based on the underlying facts which need not be reviewed here – that it was in the best interests of the bargaining unit as a whole to remove her from the Association's bargaining team. That's what the OEA Executive Board was faced with here as well (i.e. whether Brewer's interest in saving her job outweighed the interests of the remaining bargaining unit members – particularly those members working at the middle school – in having her reinstated and whether the Association would fight for that result). The OEA Executive Board's decision was that the middle school staff would be better off without Brewer's return and the OEA was not going to fight for her return.

After reviewing all the foregoing, as well as considering Brewer's remaining arguments, I disagree with Brewer's conjecture that the Executive Board was fed "false" information by Lindsey and Birnhak. In reaching that conclusion, I acknowledge that some of the statements included in the minutes are incorrect, and that not everything that Lindsey and Birnhak said to the Executive Board was accurate. Overall, though, their mistakes and inaccuracies were minor and did not have a bearing on the major issue that drove the Executive Board's decision. Additionally, there is no evidence from any Executive Board member that their vote was impacted by any of these mistakes and inaccuracies.

. . .

The focus now turns to the deliberations which occurred at the Board meeting. The only Executive Board members who testified about those deliberations were called by the Association and their testimony was consistent. They testified that their deliberation was thoughtful, intense and gut wrenching. Everyone understood that a teacher's job was on the line. While the minutes don't reflect it, the testimony of those present established that the Executive Board considered the following factors in their deliberations.

First, they considered the cost of using a private attorney to litigate Brewer's discharge before an arbitrator. If Pieroni had still been involved in the case (i.e. the WEAC attorney originally assigned to the case), the local's cost to litigate Brewer's discharge would have been minimal. However, Brewer had rejected the WEAC supplied legal counsel and decided instead to retain her own private attorney (Nola Cross). Brewer told the Board that she estimated the

legal fees to pay Cross would be between $60,000 and $80,000. The Board understood that Brewer wanted the OEA to pick up the entire tab. The Board further knew that the entire legal defense fund contained in the OEA budget was about $5,000. These considerations relating to paying for Brewer's outside legal counsel were legitimate considerations under Vaca and Mahnke.

Second, they considered the fact that the School Board had made a settlement offer to Brewer which she had rejected. As previously noted, it was the Executive Board's view that that (rejected) settlement offer was reasonable in light of all the underlying circumstances. Thus, the Executive Board considered the fact that Brewer had rejected what they considered a reasonable settlement offer. That was a legitimate consideration under Vaca and Mahnke.

Third, they considered the merits of Brewer's case. Sometimes in discharge cases, the facts are disputed. Here, though, the facts about what happened were essentially undisputed because Brewer admitted to the OEA Executive Board that she had indeed made the "gun" statement to Birnhak. While Brewer felt that her statement was not a threat, and had been blown out of proportion, that's not how the members of the OEA Executive Board saw it. They felt it was a threat which should not have been said. They also thought it was inexcusable. They further thought that is how an arbitrator would view it too. Thus, they concluded that a grievance challenging her discharge was not winnable. That was a legitimate consideration under Vaca and Mahnke.

Fourth, they considered Brewer's longevity with the District and the fact that she had served the OEA and CAUS-North in a variety of roles (including local president). Then, they weighed those mitigating considerations against the fear and anxiety Brewer's "gun" statement had had on other bargaining unit members at the middle school, the fact that many of Brewer's co-workers felt terrorized by her and the toxic atmosphere her actions had caused. After considering all of the foregoing, the Board decided to favor the interests of the remaining teachers at the middle school as opposed to Brewer's interest as an individual. That was also a legitimate consideration under Vaca and Mahnke.

It would be one thing if the Executive Board had made its decision herein without considering all the relevant facts. That didn't happen though. The record conclusively demonstrates that the Executive Board carefully considered the various factors set forth in Vaca and Mahnke in deciding whether to favor Brewer's interest or the interests of the bargaining unit as a whole. It chose the latter rather than the former. That decision passes muster with this examiner. In so finding, I specifically find that the Board's decision (not to proceed with a grievance challenging Brewer's discharge) was not arbitrary because the Board used a thorough and thoughtful process to reach its decision. I further find that the Board's decision was not discriminatory either because it was not predicated on her membership or standing in any sort of protected classification. Finally, I find that the Board's decision was not made in bad faith either because it was not made with an improper motive. To the contrary, the Board acted in good faith when it made that call and decided not to proceed with

a grievance challenging Brewer's discharge. Given those findings, it follows that Brewer did not prove that the Association breached its duty of fair representation to her.

Alleged Violation of Sec. 111.70(3)(a)5

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer "to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees. . ." This 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 the union has violated its duty of fair representation when deciding not to take the grievance to arbitration. Mahnke, *supra.*

In her original complaint, the Complainant asked the Examiner to review the merits of her discharge. However, there is a basic jurisdictional problem with my doing that (i.e. reviewing the merits of her discharge). 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 parties' 2009-11 collective bargaining agreement. 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 employee's 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 OEA's and CAUS-North's conduct toward Brewer was not arbitrary, discriminatory or in bad faith and that neither of those Respondents violated 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 contract claim (i.e. the merits of her discharge grievance).

Conclusion

Since Brewer failed to establish that the OEA and CAUS-North, and its representatives, breached its duty of fair representation, no violation of Secs. 111.70(3)(b)1, Stats., has been

found. 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 collective bargaining agreement with the Association by discharging Brewer. The complaint has therefore been dismissed. Given that action, Brewer's request for attorney's fees and costs is denied. The Association's request for attorney's fees is also denied.

Dated at Madison, Wisconsin, this 14th day of September, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

REJ/gjc
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