2008 Legal Seminar

ASSOCIATION OF WISCONSIN SCHOOL ADMINISTRATORS

WORKING EFFECTIVELY WITH UNIONS

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I. Introduction

Every school district in Wisconsin has at least one group of employees represented by a labor organization. As a result, building administrators often come in contact with the representative for the labor organization. In some instances, the representative may be a local representative who is also employed by the school district. In other instances, the representative may be an individual who is working at the local, at the UniServ, or at a statewide organization (Wisconsin Education Association Council or Wisconsin Federation of Teachers). Regardless, building administrators must be able to work effectively with the representative on a variety of matters, including investigations of employee misconduct and grievances related to the administration of the collective bargaining agreement. This presentation will address the rights of the labor organization representative, limitations on those rights, and strategies for success in working with the representative.

II. Duty of Fair Representation

Building administrators must understand that labor organization representatives have a duty to fairly represent all members of the bargaining unit. This duty exists even in situations where the building administrator believes the employee involved has clearly violated work rules.

A. In General

1. The "duty of fair representation" is a function of the exclusive representation of municipal employees by a labor organization concerning their wages, hours and conditions of employment. Accordingly, pursuant to Wis. Stat. § 111.70(4)(d)1., a labor organization owes a "duty of fair representation" to all employees within the bargaining unit they represent.

    a. The duty of fair representation applies to both the negotiation of a collective bargaining agreement and the administration of a collective bargaining agreement by the processing of grievances. *Chippewa County*, Dec. No. 24922-A (Engmann, 5/88).

    b. The scope of the duty of fair representation allows the labor organization a wide range of discretion, subject always to complete good faith and honesty of purpose, in the exercise of this discretion. The law recognizes that a labor organization is made up of many diverse interests, each of which has its own narrow perspective, and that, inevitably, the interest of one person or group will come into conflict with the interest of another. The labor organization has to reconcile conflicting views and, in doing so, it may adopt a position adverse to one person or group, but this does not by itself establish a breach of the duty. *Id.*

2. The duty of fair representation, and the liability for failing to comply with that duty, rests with the labor organization. "A breach of the statutory

duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171 (1967); s*ee also Mahnke v. WERC*, 66 Wis.2d 524, 225 N.W.2d 617 (1975).

3. If this duty is breached, an employee can sue the labor organization for damages. *Fray v. Amalgamated Meat Cutters*, 9 Wis. 2d 631, 101 N.W.2d 782 (1960).

4. Nonmembers are owed the same duty of fair representation based on their bargaining unit status. Thus, even if a nonmember does not pay labor organization dues, the same duty is owed to that nonmember.

5. "An attorney who is handling a labor grievance on behalf of a labor union as part of the collective bargaining process is not considered the attorney for each individual member of the union as a matter of law." *See also Security Bank v. Klicker*, 142 Wis.2d 289, 418 N.W.2d 27 (Ct. App. 1987). As a result, there is no attorney-client relationship between the attorney for the labor organization and the employee. Such an attorney client relationship is a condition precedent to a viable claim of attorney malpractice. Without any such relationship, attorneys for labor organizations are immune from lawsuits brought by labor organization members alleging malpractice. *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985). Accordingly, any claim brought by an employee against an attorney representing the labor organization may be regarded as frivolous. *Nelson v. Haus, Roman, & Banks LLP*, 2006 WI App 223, 296 Wis. 2d 934, 724 N.W.2d 273.

B. Fair Representation in Various Contexts

1. Grievance Processing

    a. A labor organization's duty to an individual, while created by statute, is defined and structured by the contractual meaning of "grievance" in the collective bargaining agreement. *Milwaukee Board of School Directors*, Dec. No. 11280-B (WERC, 12/72); *University of Wisconsin Hospital and Clinics*, Dec. No. 29784-D (WERC, 11/00).

    b. As applied in grievances, the duty of fair representation requires, at a minimum, that the exclusive bargaining representative do the following:

        i. Upon a request from a bargaining unit member for assistance, a labor organization must explain the steps of the contractual grievance procedure;

ii. The labor organization must discuss the facts of the potential grievance with the aggrieved employee;

iii. After meeting with the bargaining unit employee, the labor organization must undertake an initial investigation of the situation; and

iv. If requested to do so by the bargaining unit employee, the labor organization must represent the grievant at the initial meetings provided for under the collective bargaining agreement.

Bloomer Joint School District No. 1, Dec. No. 16228-A (Rothstein, 8/80).

c. Given the discretion associated with its duty, a labor organization is not under any absolute duty to pursue even a meritorious grievance and proof that an underlying grievance was meritorious is insufficient, in itself, to establish a violation of the duty of fair representation. *Wisconsin State Employees Union, Council 24*, Dec. No. 28735-A (Gallagher, 10/96).

d. A labor organization's failure to provide legal counsel to the complainant for disciplinary meetings was not a violation of the duty of fair representation. *Milwaukee Public Schools*, Dec No. 32143-A (Jones, 2/08).

e. In determining whether a labor organization violated its duty of fair representation, the Commission must determine whether: (1) a grievance existed; (2) the labor organization failed to pursue the grievance through the grievance procedure; (3) the labor organization's failure to process the grievance prejudiced the employee's rights; and (4) there is some reason to believe that the labor organization's failure to pursue the grievance was arbitrary or discriminatory or resulted from bad faith. *Wisconsin State Employees' Union, Council 24*, Dec. No. 21854-A (Nielsen, 9/84).

f. The Commission concluded that the union violated its duty of fair representation by unlawfully handling a grievance related to the employee's claim that the employer discharged her without just cause. As a result, the Commission ordered the union to pay the employees' attorneys fees and costs in her claim against the employer. In her claim against the employer, the hearing examiner concluded that the employer had terminated the employer without just cause and ordered the employer to reinstate her with back pay to the date she was discharged. The employer argued that the union contributed significantly to any backpay that accrued and therefore some of the backpay should be assessed against the

union. The Commission refused to assess any such damages against the union. *Milwaukee Public Schools*, Dec. No. 31602 (WERC, 8/08).

2. Collective Bargaining

a. A labor organization has a broad range of discretion in negotiating with an employer. Absent some showing of arbitrariness, discrimination or bad faith, the mere fact that some employees, who might logically be beneficiaries of an agreement, are excluded from the bargaining process does not constitute a breach of the duty of fair representation. *See*, *Ford Motor Co. v. Hoffman*, 345 U.S. 330 (1953); *City of Greenfield*, Dec. No. 24776-B (Crowley, 3/88) *aff'd* Dec. No. 24776-C (WERC, 2/89).

b. The selection of an eligibility date which excluded the complainant from the benefits of a settlement agreement was the result of good faith negotiations and was part of a logical, non-discriminatory administrative system for implementing the agreement. There was no evidence that the labor organization violated its duty of fair representation, nor that the labor organization or state in any way sought to discriminate against the Complainant individually or as a member of any discrete class of employees. *Department of Employee Relations*, Dec. No. 23486-A (Nielsen, 7/86), *aff'd* Dec. No. 23486-B (WERC, 12/86).

c. The labor organization did not violate its duty to fairly represent nonmembers of the bargaining units by deciding to pursue fair share as a top priority bargaining demand without their knowledge or participation in that decision which affects only them. The labor organization is not duty bound to conduct its own pre-contract referendum on the fair share issue. The development of bargaining priorities and strategies or the delegation of such decision-making to agents is a matter for the members of the organization certified or recognized as the majority representative unless a broader voting enfranchisement is effected in the documents (e.g., constitution and bylaws) governing the organization's operations. *Waukesha County*, Dec. No. 16515 (WERC, 8/78).

d. The labor organization, pursuant to its duty of fair representation, is required to ascertain the wishes of nonmembers and to take them into account. This may be done by a general familiarity with the working environment and there is no requirement of formal procedures for communication access for employees with a divergent view. The ratification of an agreement cannot be motivated solely by the self-interest of the labor organization members without regard to the views of nonmembers. This, however, did not mean that the bargaining representative cannot

insist on a fair share agreement which impacts solely nonmembers. Nothing in this case indicated that the labor organization arbitrarily ignored nonmember wishes or that ratification by members was motivated solely by self-interest. *Sauk Prairie School District*, Dec. No. 19467-B (Crowley, 3/83).

III. Labor Organization Representatives and Collective Bargaining

Once a labor organization becomes the exclusive bargaining representative for a bargaining unit in a school district, building administrators will often interact with the labor organization representative on issues that affect collective bargaining. Collective bargaining encompasses reaching an agreement over the bargaining unit's wages, hours and working conditions.

A. Collective Bargaining

1. The duty to bargain commences with the date the WERC certifies the election results. *Green County*, Dec. No. 26798-B (WERC, 7/92)

2. Pursuant to Wis. Stat. § 111.70(1)(a), an employer is obligated to bargain over wages, hours and conditions of employment with the representatives of the collective bargaining unit. Those matters that are "primarily related" to wages, hours or conditions of employment are termed as mandatory subjects of bargaining. Collective bargaining is required with regard to all mandatory subjects of bargaining. Whether a matter is primarily related to wages, hours or conditions of employment is determined on a case by case basis. *Unified School District No. 1 of Racine County v. WERC*, 81 Wis.2d 89, 259 N.W.2d 724 (1977).

3. Permissive subjects of bargaining are those matters that primarily relate to the management and direction of the governmental unit. In this respect, state statute provides that municipal employers "shall <u>not</u> be required to bargain on subjects <u>reserved to management</u> . . . except insofar as the manner of exercise of such functions affects the wages, hours and conditions of employment of the municipal employees in a collective bargaining unit." Wis. Stat. § 111.70(1)(a) (emphasis added). An employer has no duty to bargain over permissive subjects of bargaining. Absent a written contractual provision, "an employer is free at any time to refuse to deal with the union and/or discontinue dealing with the union about non-mandatory subjects of bargaining. *Madison Metropolitan School District*, Dec. No. 31345-D (WERC, 5/06). In fact, it is a prohibited practice to insist on bargaining over a permissive subject of bargaining. *City of Lake Geneva*, Dec. No. 12208-B (WERC, 5/74).

4. The selection of representatives or the composition of either party's bargaining team is a permissive subject of bargaining about which the parties may voluntarily agree to bargain. However, absent unusual circumstances, such as a conflict of interest or gross misconduct, it is a

prohibited practice in violation of Wis. Stat. § 111.70(3)(a)4 for either party to refuse to meet with the other party's duly authorized representative or representatives. *Racine Unified School District*, Dec. No. 13876-B (Fleischli, 4/78).

B. Bargaining the Impact

1. When a particular issue is primarily related to a matter that falls squarely within the realm of management rights, the municipal employer may still be required to bargain over the impact of the proposal. For example, in *Dodgeland School District*, Dec. No. 29490 (WERC, 1/99), the WERC noted that the impact upon the wages, hours and conditions of employment of teachers who would not receive a specified amount of preparation time was a mandatory subject of bargaining, even though the determination of the amount of preparation time itself was a permissive subject of bargaining.

2. The labor organization cannot prohibit the employer from implementing the permissive subject of bargaining until the parties bargain and reach agreement on the impact because it "might well prevent the municipal employer from taking actions that are essential to the fulfillment of its basic government function." *Milwaukee Sewerage Commission*, Dec. No. 17025 (WERC, 5/79).

3. However, the employer should notify the labor organization of its decision to implement a permissive subject of bargaining and, if requested, attempt to negotiate the impact with the labor organization as early as possible. In *Racine Unified School District,* Dec. No. 27972-C (WERC, 3/96), the WERC held that the employer did not act unlawfully by implementing a year round school program because on three occasions over the course of four years it sought negotiations with the labor organization, but received only one proposal. Thus, the WERC concluded that the District satisfied its obligation to bargain impact before implementation.

4. The WERC will look at various factors when determining whether the employer engaged in good faith bargaining by implementing its permissive decision in light of its obligation to bargain the impact of the decision. In *City of Milwaukee,* Dec. No. 32115 (WERC, 5/07), the WERC held that the employer was not required to reach an agreement over the impact of a permissive decision to adopt an early intervention or tracking program system, designed to identify performance problems, prior to its implementation. However, the WERC noted that, depending on the circumstances, though the employer may be within its right in implementing the permissive decision, the WERC will look at the circumstances surrounding the implementation, including (1) the extent to which good faith bargaining has or could have taken place prior to implementation, and (2) the urgency of the employer's concerns.

C. Dues Deduction for Labor Organization Members

1. The labor organization's constitution and bylaws determine matters relating to the payment of dues, fees and assessments, such as the obligation to pay them and the effect of nonpayment.

2. Employees in the bargaining unit who voluntarily choose to join the certified bargaining representative (labor organization) pay labor organization dues for the privilege of membership. Some employees pay labor organization dues directly to the labor organization in either a lump sum payment or on a periodic basis; however, most employees sign a dues deduction authorization thereby requesting the employer to make deductions from paychecks and transmit the monies deducted to the labor organization for the payment of dues.

3. The Wisconsin statutes state that it is a prohibited practice for a municipal employer to deduct labor organization dues from an employee's earnings unless the employer has been presented with an individual order, signed by the municipal employee personally, and terminable by at least the end of any year of its life or earlier by the municipal employee giving at least thirty days written notice of such termination to the municipal employer and to the representative organization. Wis. Stat. § 111.70(3)(a)6.

4. Many collective bargaining agreements provide for the deduction of dues by the employer from the pay of the employee. The employer then delivers the dues deduction to the labor organization.

5. It is highly advisable that municipal employers seek to negotiate a dues deduction indemnification agreement, whereby the labor organization indemnifies and holds the employer harmless against any and all claims, demands, suits or other form of liability, including the cost of litigation, that may arise out of any action taken or not taken by the employer for the purpose of complying with the provisions of the dues deduction agreement.

D. Fair Share for Nonmembers

1. The rights of a municipal employee include "the right to refrain from any and all such [labor organization] activities <u>except</u> that employees may be required to pay dues in the manner provided in a fair-share agreement." Wis. Stat. § 111.70(2) (emphasis added). Thus, a municipal employee may choose not to be a member of the labor organization, but they are still obligated to pay "fair share."

2. The basis for determining what "fair share," nonmembers can be charged is set forth by Wis. Stat. § 111.70(1)(f), which defines a fair share agreement as:

> An agreement between a municipal employer and a labor organization under which all or any of the employees in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employees affected by said agreement and to pay the amount so deducted to the labor organization.

3. The Wisconsin court of appeals has held that the statute is plain on its face: the employer is barred from making fair share deductions where there is no fair share agreement in effect with the labor organization in a collective bargaining agreement. *AFSCME v. WERC,* 148 Wis.2d 392, 434 N.W.2d 850 (Ct. App. 1988).

4. The United States Supreme Court has recognized that fair share provisions implicate nonmembers' First Amendment rights of freedom of association and freedom of expression. *Chicago Teachers Union, Local No. 1, AFT, AFT-CIO v. Hudson*, 475 U.S. 292 (1986). Consequently, fair share provisions must be accompanied by carefully tailored internal labor organization rebate procedures to ensure that nonmembers pay only for the costs of collective bargaining activities and not also for ideological activity such as political contributions.

5. The United States Constitution requires that labor organizations deducting security fees from nonmembers must avoid using the fees of objecting nonmember, even temporarily, for purposes unrelated to collective bargaining and contract administration. Therefore, if a labor organization does not have an independent audit of its expenditures, it must escrow all nonmember security fees, or the portion of the security fees that will be rebated on request and the portion that is reasonably in dispute as relating to collective bargaining and contract administration, during the period when nonmembers can request a rebate of security fees that are unrelated to collective bargaining and contract administration, and/or challenge the union's calculation of the amount related to those purposes. *Teachers Assistants' Association*, Dec. No. 32388 (WERC, 3/08).

6. It is highly recommended that municipal employers seek to negotiate a fair share indemnification agreement, whereby the labor organization indemnifies and holds the employer harmless against any and all claims, demands, suits or other form of liability, including the costs of litigation, that may arise out of any action taken or not taken by the employer for the purpose of complying with the provisions of the fair share agreement.

E. Individual Bargaining

1. Individual bargaining is defined as negotiations that occur between an employer and an employee. *St. Croix County*, Dec. No. 28791-A (Crowley, 5/97). It is a violation of Wis. Stat. § 111.70(1)(a) for a municipal employer to circumvent the bargaining unit representative and negotiate directly with an employee. *See* Wis. Stat. § 111.70(3)4.

2. If the employer wants to seek to modify the wages, hours and conditions of employment for the purposes of collective bargaining over these matters, the employer is obligated to make the offer only to the labor organization representative. It is then up to labor organization representative to decide how to respond to the offer. Thus, when employers bargain directly with the employees, they do so in violation of Wis. Stat. § 111.70(3)(a)4. *Random Lake School District*, Dec. No. 29998-C (WERC, 8/02).

3. When the employer ignores the collective bargaining representative and makes an offer directly to the employees, the authority and standing of the collective bargaining representative is clearly undermined and an employer thereby unquestionably has interfered with employees' Wis. Stat. § 111.70(2) right "to bargain collectively through representatives of their own choosing . . . ." *Random Lake School District, supra.*

4. Absent other indicia of bad faith, an employer does not engage in unlawful individual bargaining simply by telling "their employees what they have offered to their labor organization in the course of collective bargaining." *Ashwaubenon School District*, Dec. No. 14774-A (WERC, 10/77). However, this presupposes that the employer's communication with the labor organization preceded the employer's communication with the individuals, so as not to interfere with the labor organization's ability to provide a considered response to the employer's proposal. *Northcentral Technical College*, Dec. No. 31117-C (WERC, 2/06).

5. Discussions held between the district principal and the labor organization president concerning additional pay for three special education teachers who engaged in teaching activities during their designated prep time did not constitute individual bargaining because the bargaining included the labor organization president. *Prairie Du Chien School District*, Dec. No. 30301-A (Jones, 3/03) *aff'd by Prairie Du Chien School District*, Dec. No. 30301-C (WERC, 1/04).

6. By creating an advisory committee that included bargaining unit members, but excluded the labor organization, and by surveying the Speech and Language Clinicians concerning the continued value of Support Services Week, the district engaged in individual bargaining with its employees, despite the fact that Support Services Week qualified as a permissive subject of bargaining. The examiner concluded that although the district

may act unilaterally with respect to permissive subjects of bargaining, it may not circumvent the labor organization and deal directly with the employees in addressing the subject. *Madison Metropolitan School District*, Dec. No. 31345-B (Emery, 3/06). The District appealed the decision directly to state circuit court. After the appeal was filed in the circuit court, however, the WERC issued a decision in which it essentially reviewed the Hearing Examiner's decision. In its decision, the WERC expressly "disavowed" the prior decision by the hearing examiner. *Madison Metropolitan School District*, Dec. No. 31345-D (WERC, 3/07). The circuit court has remanded this case to the WERC for further proceedings including an evidentiary hearing on the mandatory/permissive issue. *Madison Metropolitan School District v. WERC*, Case No. 06CV1661 (Dane Cty. Cir. Ct., August 13, 2007). The circuit court's decision has been appealed and is currently pending before the Wisconsin Court of Appeals.

7. Where it does not appear that a nonrepresented employee or minority group seeks to bargain or offer to enter into any bargaining with a Board of Education, or that the individual is authorized by any other employees to enter into any agreement on their behalf, there is no basis for concluding that statements to a Board by the individual/minority group constitute "negotiation" with the Board. Thus, the Board cannot be found to have violated state statute requiring that it bargain exclusively with the majority union when it allows an individual or minority group to express a position related to on-going negotiations with the majority union at a public meeting. *City of Madison Joint School District No. 8 et al. v, WERC*, 429 U.S. 167 (1976).

IV. <u>Grievances and the Labor Organization Representative</u>

Building administrators are often required to work with the labor organization representative to resolve disputes that arise under the collective bargaining agreement. Such disputes are typically resolved through a grievance procedure. Accordingly, it is important for building administrators to understand the grievance procedure process.

A. Overview

1. Most collective bargaining agreements contain grievance procedures. Grievance procedures are creatures of contract and are an extension of the collective bargaining process. Elkouri & Elkouri, *How Arbitration Works*, pp. 198, 201 (6th ed. 2004).

2. Wis. Stat. §111.70(1)(a) defines "collective bargaining" as the performance of a mutual obligation of a municipal employer, through

> its officers and agents, and the representative of its municipal employees in a collective bargaining unit, to meet and confer at reasonable times, in good faith, with the

> intention of reaching an agreement, or to resolve questions arising under such an agreement with respect to wages, hours and conditions of employment . . .

3. A grievance procedure is a method for employees, labor organizations and the employer to process disputes through the chain of command without resorting to a work stoppage. *How Arbitration Works*, *supra*, p. 199.

B. Typical Components of a Contractual Grievance Process

1. The term "grievance" is generally defined in the collective bargaining agreement. The definition can be narrowly or broadly worded. For example, a "grievance" may be defined as "any complaint arising out of the employment relationship." Alternatively, a "grievance" may be only defined as "any question concerning the interpretation or application of the labor agreement."

2. "Grievant" is also typically defined in the collective bargaining agreement. Again, the definition can be narrowly or broadly worded. For example, the term "grievant" may be defined as "one or more teachers of the labor organization." Alternatively, a "grievant" may be defined as "as a teacher, a group of teachers or the Association on behalf of the group of teachers."

3. Typically, grievances also involve steps or levels that are taken within a certain time frame. *How Arbitration Works*, *supra*, pp. 213-16. Such levels may include: (1) immediate supervisor; (2) district administrator; (3) board of education; and (4) grievance arbitrator or WERC prohibited practice hearing examiner. An immediate supervisor's resolution of a grievance can be binding on the entire district even without the consent of the district administrator or the board. *Id.*

4. A grievance procedure may also provide for time limits for filing and processing each step of the grievance. *How Arbitration Works*, *supra*, pp. 217-227. Under a good grievance procedure, the union's failure to process results in the grievance being dismissed and the employer's failure to respond to the grievance constitutes a denial of the grievance. Typically, grievance procedure time limits are expressed in days. It is important to determine whether the days are calendar days, week days or work days.

C. Role of the Labor Organization Representative

1. Inherent to the labor organization representative's role as collective bargaining representative is the duty to protect the integrity of the negotiated agreement by resolving any questions or disputes arising under that agreement. Thus, the labor organization representative may reject the grievance outright, attempt to settle the grievance, and/or pursue the grievance to arbitration.

2. The labor organization has a duty of fair representation to process grievances on behalf of employees in the bargaining unit, but the labor organization representative has considerable latitude in deciding whether to pursue a grievance through arbitration. Thus, even if an employee claim has merit, a labor organization representative may properly reject it unless its action is arbitrary or taken in bad faith. *Mahnke v. WERC*, 66 Wis.2d 524, 225 N.W.2d 617 (1975). The employee has no absolute right to arbitration and the mere fact that a labor organization, through its representative, settles a grievance short of arbitration does not, without more, mean that it has breached its duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 194 (1967).

D. Settlements

1. An oral grievance settlement is a "collective bargaining agreement." *See, e.g., Kenosha County*, Dec. No. 17384-A (Lynch, 10/80) and *City of Prairie du Chien*, Dec. No. 21619-A (Schiavoni, 7/84). Oral grievance settlement agreements are enforceable, but difficult, because the terms are not committed to writing.

2. A written grievance settlement agreement is negotiated and then committed to writing. It may contain different labels, such as a Memorandum of Understanding, a Side Bar Agreement, or a Grievance Settlement Agreement. Written grievance settlement agreements are easier to enforce than oral grievance settlement agreements.

3. The parties are obligated by Wis. Stat. § 111.70 (MERA) to abide by grievance settlement agreements. The parties may include a waiver of all claims in a grievance settlement agreement. The parties must decide whether the grievance settlement will occur on a precedential or a non-precedential basis.

4. While an individual employee may waive his or her right to bring a cause of action under state and/or federal statutes as part of an agreement settling a grievance filed under the grievance procedure of a collective bargaining agreement, such waiver is an agreement only between the individual and the employer, is not a "collective bargaining agreement" within the meaning of Wis. Stat. § 111.70(3)(b)4., and therefore, it cannot be enforced by the WERC under Wis. Stat. § 111.70(3)(b)4. *Thomsen v. WERC*, 2000 WI App 90, 234 Wis.2d 494, 610 N.W. 2d 155.

5. A labor organization representative's settlement efforts on behalf of an employee demonstrates an ongoing effort by the labor organization to provide the employee with fair representation. That effort alone, however, even if proven successful, cannot be the basis for determining that the labor organization fulfilled its duty of fair representation when it

previously decided to drop the grievance. *Marathon County*, Dec. Nos. 25757-C and 25908-C (WERC, 3/91)

V. Role of Labor Organization Representative During Investigations

The interaction between building administrators and labor organization representatives often occurs during investigations of misconduct by employees who are members of the labor organization. In these instances, it is important for building administrators to understand the rights of labor organization representatives and the limitations on those rights during such investigations.

A. Right to Representation

1. Under MERA, an employee has a right to labor organization representation where (1) the employee reasonably believes that disciplinary action could result from a mandatory meeting with management; (2) the employee requests labor organization representation for the meeting; and (3) the exercise of the employee's right would not unreasonably interfere with legitimate employer prerogatives. *Thorp School District*, Dec. No. 29146-B (WERC, 5/98).

2. The WERC has adopted the standard set forth under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) for interpreting the requirements of MERA. *City of Milwaukee*, Dec. Nos. 14973-B, 14875-B, 14899-B (WERC, 10/80). Under *Weingarten*, an employee has a right to labor organization representation when (1) the employee reasonably believes that disciplinary action may be the result of an investigatory interview with the employer's representative and (2) the employee requests representation. In this respect, the WERC has also stated as follows:

    a. The reasonableness of an employee's belief that disciplinary action could result from a meeting is measured objectively given the specific circumstances surrounding each meeting, and not against the subjective views of the employee;

    b. A labor organization-represented employee may participate in an investigatory interview without a labor organization representative if the employee fails to request one; and

    c. An employer has no obligation to continue with an investigative interview once labor organization representation is requested. The employer does not have to justify its refusal and can continue its investigation without questioning the employee. The employee then foregoes any benefits that may be derived from participating in an interview. *Thorp School District*, Dec. No. 29146-B (WERC, 5/98).

3. Under MERA, an employee is entitled to labor organization representation at any meeting that could lead to discipline. *City of Milwaukee*, Dec. Nos. 14973-B, 14875-B, 14899-B (WERC, 10/80).

   a. Whether a right to representation exists depends on the purpose of the employer-employee interaction and whether protected rights could reasonably be impaired by denying representation in such circumstances. *Waukesha County*, Dec. No. 14662-A (Gratz, 1/78), *aff'd* Dec. No. 14662-B (WERC, 3/78).

   b. An employer's refusal to permit representation is considered interference with protected employee rights if an employee has requested representation and the scheduled interaction could reasonably affect a decision to discipline or discharge. *City of Milwaukee*, Dec. Nos. 14973-B, 14875-B, 14899-B (WERC, 10/80).

   c. An employee is also entitled to labor organization representation if a meeting's purpose is to determine whether an employee should be retained. *Boscobel Area School District*, Dec. No. 18891-B (WERC, 12/83).

   d. A teacher has a right to labor organization representation at a private conference requested by the teacher pursuant to the non-renewal statute. *Waterloo Joint School District No. 1*, Dec. No. 10946-A (Fleischli, 8/73), *aff'd* Dec. No. 10946-B (WERC, 9/73).

   e. The private conference in the teacher nonrenewal process set for in Wis. Stat. § 118.22 is an extension of the collective bargaining process and the duty in that regard is to meet at reasonable times and places. *Horicon Joint School District No. 10*, Dec. No. 13765-B (WERC, 1/78)

   f. By limiting the number of representatives a teacher could have to assist him in the presentation of his case at a private conference and at a grievance meeting, the school district did not commit a prohibited practice within the meaning of Wis. Stat. § 111.70(3)(a)1., 4., and 5. *Boscobel Area School District,* Dec. No. 18891-B (WERC, 12/83).

4. An employee does not have a right to representation, when:

   a. The employee is directed to attend a meeting involving a review of merit evaluation. Although the review may directly affect wages, the value of labor organization representation is outweighed by the interference such representation would have on the efficiency of the employer's employee evaluation and motivation process.

Waukesha County, Dec. No. 14662-A (Gratz, 1/78), *aff'd* Dec. No. 14662-B (WERC, 3/78).

b. The employee is directed to attend a meeting with administrative personnel to discuss criticism of job performance, especially where the right is waived by not being timely requested by the employee. *Id.*

c. The employee is directed to attend a meeting called to impose previously determined discipline because the value of representation to the employee is outweighed by an employer's right to maintain employee discipline and operational efficiency. *Id.*

d. A supervisor contacts an employee merely to seek information for administrative purposes (such as payroll or accounting). *Id.*

B. The Role of the Labor Organization Representative

1. Each employee has the right to effective labor organization representation. At investigatory meetings, labor organization representatives have the right to actively participate in order to provide employees with the concerted protection to which they are entitled. *City of Appleton*, Dec. No. 27135-A (Greco, 7/92), *aff'd* Dec. No. 27135-B (WERC, 7/92).

2. Employees have the right to confer with their union representative prior to the investigatory meeting. Thus, the employer violated Wis. Stat. § 111.70(3)(a)(1) when it denied the labor organization representative's request to confer the employee prior to an investigatory meeting that was conducted approximately two hours after the employee was involved in an altercation with another employee. *Columbia County*, Dec. No. 32415-A (Jones, 9/08).

3. The role of the representative, the representative's specific level of participation, and the protection afforded to the employee during the investigatory meeting will be determined by the specific circumstances surrounding each meeting. However, the collective bargaining agreement may require representation in other contexts as well.

4. To determine the extent of representation and the proper role of a labor organization representative in a meeting with an employee, the WERC has suggested that several questions be asked:

a. What is the purpose of the meeting?

b. What participation is expected of the employee during the meeting?

c. Is it reasonable to expect a representative to undertake the task contemplated by the meeting procedure given the reason for the meeting?

d. What level of representation is required to ensure an employee adequate representation, while at the same time preserving the investigatory setting and the procedures used by the employer to conduct the investigation or interview? *City of Milwaukee*, Dec. Nos. 14873-B, 14875-B, 14899-B (WERC, 10/80).

5. A labor organization representative does not have a right to answer factual inquiries on behalf of an employee being interviewed or to instruct an employee not to answer a specific question. A labor organization representative may clarify employer questions, but may not obstruct the investigatory process. *City of Milwaukee, supra.*

6. An employer may not instruct labor organization representatives that they may not interrupt or interject during the meeting, or threaten to remove the representatives from the room if they speak. This interferes with the employee's right to effective labor organization representation. A labor organization representative has the right to actively participate in order to provide employees with the concerted protection to which they are entitled. *City of Appleton*, Dec. No. 27135-A (Greco, 7/92), *aff'd by operation of law*, Dec. No. 27135-B (WERC, 1992).

   a. An employer told a labor organization representative that he was not to interrupt, interject, or provide responses on behalf of the employee. The employer also stated that there would be no interruptions of any kind.

   b. The WERC found that the employer's instructions to the representative not to interject or respond on behalf of the employee impaired the representative's right to participate in the interview to the extent necessary to represent the employee. Despite the employer's assertion that he would have permitted the employee to stop the interview and consult with the representative, the WERC also found that the employer's statement that there would be no interruptions also prevented the employee from obtaining effective representation.

   c. The WERC concluded that the representatives functioned only as observers and the employee did not receive the active representation she was entitled to. The WERC ordered the employer to cease and desist making similar statements at future interviews.

7. WEAC publishes a bulletin advising union representatives as to the role they may play during the investigatory interview. The bulletin

acknowledges that “the law only requires the employer to permit the union representative to take notes, witness the meeting, and state the employee’s position at the end of the meeting.” However, the bulletin also suggests that the representative should take certain steps to serve as the employees advocate, by:

a. Asking clarifying questions;

b. Bringing out mitigating circumstances or exculpatory facts; or

c. Raising any issues relating to unequal treatment.

Employers are <u>NOT</u> required to permit the labor organization representative to engage in such tactics.

C. *Garrity* Warnings

1. Generally, when a public employee’s conduct is in question, the employee can be compelled to testify about his or her job performance and can be disciplined or discharged for refusing to respond. *Oddsen v. Board of Fire & Police Commissioners*, 108 Wis. 2d 143, 321 N.W.2d 161 (1982).

2. However, under the Fifth Amendment to the U.S. Constitution, an employee has the right not to make potentially incriminating statements. Therefore, a conflict is created when an employer asks an employee to make statements about his or her job performance pursuant to an internal investigation that could also be incriminating.

3. The U.S. Supreme Court resolved this conflict by holding that an employee’s statements, made pursuant to an internal investigation and under threat of termination for refusal to cooperate, are not admissible in any subsequent criminal proceedings against the employee. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

4. The Wisconsin Supreme Court adopted *Garrity* in Wisconsin, holding that where an employee is forced to choose between making potentially criminally incriminating statements and being terminated, those statements cannot be used in a subsequent criminal prosecution. *Oddsen, supra.*

5. The Wisconsin Supreme Court adopted a two-pronged subjective/objective test for determining whether statements made during an employer’s investigation are coerced and involuntary, and therefore subject to suppression under *Garrity*. Under this test, an employee must:

   a. Subjectively believe that he or she will be terminated for asserting the privilege against self-incrimination, and

   b. The belief must be objectively reasonable.

6. An express threat of job termination or a statute, regulation, rule or policy in effect at the time of the questioning which provides for the employee's termination for failure to answer the questions posed will nearly always form the basis for an objectively reasonable belief. *State v. Brockdorf*, 2006 WI 76, 291 Wis. 2d 635, 717 N.W.2d 657.

7. The Seventh Circuit Court of Appeals has held that an employer that wants to ask a public employee potentially incriminating questions must first inform the employee of his or her immunity under *Garrity. Atwell v. Lisle Park District*, 286 F.3d 987 (7th Cir. 2002).

8. Whether an investigation is considered to be in the criminal context depends on the underlying conduct. If an employee is being questioned about potentially criminal conduct for which criminal proceedings have been or may be brought, the employer must provide a *Garrity* warning. *Baxter v. Palmagiano*, 425 U.S. 308, 316 (1976); *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 389 (7th Cir. 1995).

D. Requests for Specific Representatives

1. The employer has a duty to schedule meetings with employees at a reasonable place and time to allow a labor organization representative to be present. *Horicon Joint School District No. 10*, Dec. No. 13765-B (WERC, 1/78).

2. The employee does not have the right to have a specific representative present, but an employee's stated preference for a particular representative should be honored when possible. *City of Beloit (Fire Department)*, Dec. No. 27990-B (Shaw, 1995) *aff'd* Dec. No. 27990-C (WERC, 7/96).

3. An employer may preclude use of a particular labor organization representative for valid business purposes. *Department of Corrections*, Dec. No. 30340-A (Nielsen, 8/03).

VI. Labor Organization Representatives and Concerted Activity

A municipal employee's right to engage in lawful concerted activities also extends to the labor organization representatives, including both representatives from the organization and representatives who are also employees.

A. The Right to Engage in Lawful Concerted Activity

1. The rights of municipal employees in Wisconsin are set forth under Wis. Stat. § 111.70(2), which provides:

> Municipal employees shall have the right of self-organization, and the right to form, join or assist labor

organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, and such employees shall have the right to refrain from any and all such activities except that employees may be required to pay dues in the manner provided in a fair-share agreement.

2. It is a prohibited practice under Wis. Stat. § 111.70(3)(a)1., for a municipal employer to interfere with, restrain, or coerce municipal employees in the exercise of their rights guaranteed in Wis. Stat. § 111.70(2), as stated above.

3. It is a prohibited practice under Wis. Stat. § 111.70(3)(a)3., for a municipal employer to encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment.

B. The Parameters of Lawful Concerted Activities

1. As long as communications are not deceptive, misleading, or threatening, do not directly disparage the labor organization, are limited to the factual content of offers already made to the Association, and do not explicitly or implicitly offer a better deal to the individual employees, they are within an employer's legitimate sphere of communication. Further, the employer is entitled to state the results of a prospective settlement, as long as the statement is based upon demonstrable realities and is not pretextual for or reflective of unlawful animus. *School District of Kettle Moraine,* Dec. No. 30904-D (WERC, 4/07).

2. An employer committed a prohibited practice when it stated that things would improve if the Association chose a different professional representative, coupled with an explicit offer of assistance in making that happen. This unsolicited offer of assistance in selecting a different representative pushed the conversation beyond what the parties might take with a grain of salt and into an area where a reasonable labor organization representative would feel unease and coercion. *School District of New Berlin,* Dec. No. 31243-B (WERC, 4/06).

3. Although an employee's conduct may be vocal, and perhaps even condescending and disrespectful, it nevertheless can still fall within the protection of the law. Although violent and threatening behavior are examples of activities that will likely lose their protection, employees' rights to engage in lawful, concerted activity are often exercised in tense, chilly or hostile atmospheres, because by its very nature, such activity involves challenging the employer's authority. *Clark County*, Dec. No. 30361-B (WERC, 11/03).

4. A labor organization president engaged in lawful concerted activity when he contacted an employee about her allegations that a co-worker had sexually harassed her during an employer investigation into the matter. Consequently the employer could not lawfully prohibit that communication. However, if the union president attempted to coerce the employee into recanting her allegations, then the concerted activity loses its protection under the law, and the employer may discipline the labor organization president for that conduct. The employer may warn the labor organization president not to attempt to coerce employees and may interrogate the labor organization president about his contacts and conversations with the employees at issue, but only if the employer has a substantial and reliable basis for believing that coercion or some other misconduct occurred. *Department of Corrections*, Dec. No. 30340-B (WERC, 7/04).

C. Labor Organization's Use of Electronic Devices

1. Policies that regulate concerted activities on the employer's time and premises are presumed to be valid so long as they are facially non-discriminatory and applied uniformly.

2. The University of Wisconsin Hospital and Clinics Authority (Hospital) began blocking the non-employee labor organization representative's email communications in the midst of heated contract negotiations. The Hospital never informed the labor organization that its messages were being blocked. The only other external addresses that were blocked came in response to complaints of harassment and pornographic solicitation. The labor organization argued that the Hospital's action constituted an unlawful interference with protected labor organization activity. The Hospital argued that its decision was promulgated by concerns over work efficiency, employee productivity and the potential for computer viruses. The WERC concluded that because the record demonstrated that the Hospital had singled out labor organization communications as a target, the hospital had no "objective basis for its concern" and its policy was "aimed largely at protected activity." Accordingly, the WERC concluded that the Hospital did not have a sufficient business justification to interfere with protected labor organization activity. *University of Wisconsin Hospital and Clinics Authority*, Dec. No. 30202-C (WERC, 4/04).

D. Labor Organization's Use of Mailboxes

1. A collective bargaining agreement may exclude a minority union's access to an interschool mail system and to teacher mailboxes without violating the First Amendment or the Equal Protection Clause. The U.S. Supreme Court emphasized that the use of school mail facilities enables a majority union to perform effectively its statutory obligations as exclusive representative of all teachers. However, because minority unions have no official responsibility in connection with a school district, the Court

reasoned that they do not need to be entitled to the same rights of access to school mailboxes and mail systems. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).

2. Employers are not required to carry within its mail system communications to and from the labor organization regarding the administration and enforcement of the collective bargaining agreement, education workshops and seminars, and other non-educational matters. The Seventh Circuit Court of Appeals ruled that such communications are not exempt from the postage requirements because they do not qualify as the "current business" of the school district. *Fort Wayne Community Schools v. Fort Wayne Education Association, Inc.*, 977 F.2d 358 (7th Cir. 1993).

E. Labor Organization's Use of Employer Facilities and Property

1. A school district's policy restricting the employee's use of the district's phone and fax machine to district business and emergencies, thereby prohibiting employees from using the devices to conduct labor organization business, was permissible because the district had a valid business reason for its actions. *Racine Unified School District*, Dec. No. 29074-B (Gratz, 4/98) *aff'd* Dec. No. 29074-C (WERC, 7/98).

2. If a collective bargaining agreement provision granting the labor organization access to the school district's property has a significant relationship to the Association's ability to serve as the exclusive bargaining representative, and prohibits a significant detrimental impact on educational policy and/or the district's ability to manage and control its facilities, then the provision is a mandatory subject of bargaining. *Janesville School District*, Dec. No. 21466 (WERC, 4/84).

3. If the collective bargaining agreement provision granting the labor organization access to the district's property fails to guarantee that the labor organization's use of the district's building or equipment will not interfere with school functions or activities, or previously scheduled community activities, then the provision is a permissive subject of bargaining. *Shullsburg School District*, Dec. No. 20120-A (WERC, 1984).

VII. <u>Prohibited Practices and Enforcement</u>

The statutes provide enforcement mechanisms for labor organizations when they believe that their rights have been violated. Specifically, labor organizations may bring a prohibited practice complaint to enforce their rights. These prohibited practice complaints can be brought for various violations.

A. Interference, Restraint or Coercion under Wis. Stat. § 111.70(3)(a)1.

1. It is a prohibited practice for a municipal employer, individually, or in concert with others to interfere with, restrain or coerce municipal employees in the exercise of their rights. Wis. Stat. § 111.70(3)(a)1.

2. The standard for determining an independent violation of Wis. Stat. § 111.70(3)(a)1. demands that the complainant demonstrate, by a clear and satisfactory preponderance of the evidence, that the employer's conduct had a reasonable tendency to interfere with employees' exercise of rights granted under Wis. Stat. § 111.70(2). It is not necessary for the complainant to prove that the employer intended to interfere with the exercise of such rights, or that there was actual interference. *Waupaca County (Highway Department)*, Dec. No. 24764-A (McLaughlin, 7/88).

3. The clear and satisfactory preponderance of the evidence established that the district administrator, by email, made statements indicating that a decision by the labor organization to have its executive director attend the contract negotiation sessions between the labor organization and the district would have an adverse impact upon contract negotiations, including a lower monetary settlement. Such statements contained a threat of reprisal which would tend to interfere with, restrain or coerce employees in the exercise of their Wis. Stat. § 111.70(2) rights. The district had no legitimate operational basis or valid business reason for the administrator's statement that the cost of the district's negotiator would be taken from the amount of money that the district had set aside for this contract settlement. Thus the district's conduct violated Wis. Stat. § 111.70(3)(a)1. *Clear Lake School District*, Dec. No. 31627-B (Burns, 10/06) *aff'd by operation of law* Dec. No 31627-C (WERC, 11/06).

4. A school district did not coerce, intimidate or restrain municipal employees in the exercise of their rights by having the car driven by the executive director of a labor organization ticketed and towed away during a mediation session involving the district and the labor organization after the executive director had parked the car in a space reserved for the district's board of education. *Racine Unified School District*, Dec. No. 20736-A (Shaw, 7/84) *aff'd by operation of law*, Dec. No. 20736-B (WERC, 10/84).

B. Interference with Formation or Administration under Wis. Stat. § 111.70(3)(a)2.

1. It is a prohibited practice for a municipal employer, individually, or in concert with others to initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it. Wis. Stat. § 111.70(3)(a)2.

a. "Domination" involves the actual subjugation of the labor organization to the employer's will. A dominated labor organization is so controlled by the employer that it is presumably incapable of effectively representing employee interests. *Barron County*, Dec. No. 26706-A (Jones, 8/91) *aff'd by operation of law* Dec. No. 26706-B (WERC, 9/91).

b. "Interference" is conduct of such magnitude that it threatens the independence of a labor organization as the representative of employee interests. An example of interference would be negotiating with a rival labor organization during the pendency of an election petition. *Waukesha County*, Dec. No. 30799-B (WERC 11/04)

2. By stating to a labor organization official that the school district could resolve more disputes if the labor organization obtained a different representative, and by offering to assist the labor organization in obtaining a different representative, the school district interfered with the internal administration of the association in violation of Wis. Stat. § 111.70(3)(a)2. *School District of New Berlin*, Dec. No. 31243-B (WERC, 4/06).

3. A school district did not interfere with the administration of the labor organization by refusing to grant a teacher a leave day to confer with her labor organization representatives. The refusal, did, however, violate the express terms of the collective bargaining agreement in violation of Wis. Stat. § 111.70(3)(a)5. *Turtle Lake School District*, Dec. No. 22219-B (McLaughlin, 6/85) *aff'd by operation of law*, Dec. No. 22219-C (WERC, 7/85).

C. Discrimination Under Wis. Stat. § 111.70(3)(a)3.

1. It is a prohibited practice for a municipal employer, individually, or in concert with others to encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. Wis. Stat. § 111.70(3)(a)3.

2. To prevail on a retaliation/discrimination claim under Wis. Stat. § 111.70(3)(a)3., the labor organization must establish, by a clear and satisfactory preponderance of the evidence, the following four elements: (1) that the employee has engaged in lawful concerted activity (or was believed to have so engaged); (2) that the employer was aware of (or believed it was aware of) such activity at the time of the adverse action; (3) that the employer bore animus toward the activity; and (4) that the employer's adverse action against the employee was motivated at least in part by that animus, even if other legitimate factors contributed to the employer's adverse action. *Wisconsin Rapids School District,* Dec. No. 30965-A (Gratz, 1/08).

3. Although the nonrenewed teacher had been the president of the labor organization and had pressed a successful grievance against the Board, the complainant offered no proof that any agent of the district bore any animus toward the teacher for engaging in either of those activities. Moreover, even if it was assumed that the district violated the terms of the staff cut procedure, the reasons given for the teacher's nonrenewal and the other evidence taken together, did not support a finding of animus. *Mineral Point Unified School District*, Dec. No. 14970-C (WERC, 10/78).

4. A middle school principal's refusal to meet with the school's representative council prior to a teacher's transfer from the school and the principal's conduct to force two teachers to transfer from the school, including his summoning the police to the school, were based in part on his hostility toward the exercise of lawful, concerted activity and thus violated Wis. Stat. § 111.70(3)(a)3. *Milwaukee Board of School Directors*, Dec. No. 30720-A (McLaughlin, 7/06) *aff'd by operation of law* Dec. No. 30720-B (WERC, 8/06).

D. Refuse To Bargain Under Wis. Stat. § 111.70(3)(a)4.

1. It is a prohibited practice for a municipal employer, individually, or in concert with others to refuse to bargain collectively with a representative of a majority of its employees. Wis. Stat. § 111.70(3)(a)4.

2. The county violated the agreement and its statutory duty to bargain with the exclusive representative of the labor organization by failing to afford the labor organization the opportunity to be present at the step three meeting that the county had with an employee to discuss the employee's grievance, where it could not reasonably be inferred that the labor organization's chief steward knew of the meeting, or that the chief steward acquiesced in having that meeting conducted in the absence of a labor organization representative. *Columbia County*, Dec. No. 22683-B (WERC, 1/87)

3. A meeting between the school district superintendent, the high school principal and a teacher, in the absence of a labor organization representative, during which the teacher was offered a one-year assignment as head wrestling coach for the upcoming school year in exchange for a letter of resignation as head wrestling coach at the close of that year, constituted individual bargaining in violation of Wis. Stat. § 111.70(3)(a)4. *Amery School District*, Dec. No. 26138-A (McLaughlin, 2/90) *aff'd by operation of law* Dec. No. 26138-B (WERC, 3/90).

E. Violation of the Collective Bargaining Agreement Under Wis. Stat. § 111.70(3)(a)5.

1. It is prohibited practice for a municipal employer, individually, or in concert with others to violate any collective bargaining agreement

previously agreed upon by the parties with respect to wages, hours and conditions of employment. Wis. Stat. § 111.70(3)(a)5.

2. The failure of the district to process a grievance, unless other procedures are provided in a collective bargaining agreement, does not constitute a refusal to bargain, but rather involves a possible violation of the agreement in violation of Wis. Stat. § 111.70(3)(a)5. *Sheboygan Joint School District*, Dec. No. 11990-B (WERC, 1/76).

VIII. Strategies For Working Successfully with the Labor Organization Representative

A. Maintain Respect.

School districts and labor organizations are each parties in a long standing labor relationship. If the relationship is to be productive, there must be a mutual respect between the parties. Generally speaking, when the building administrator treats his or her counterpart with respect and consideration, the labor organization representative will reciprocate, thereby laying the foundation for a productive working relationship.

B. Listen and Be Objective.

1. Building administrators should not predetermine outcomes before discussing the issue with the employee and his or her representative.

2. There are many times when an employee merely wants to be heard. Thus, disputes can be avoided and resolved by providing an objective forum in which the employee may voice his or her concerns.

C. Understand the Role of the Labor Organization and the Representative.

1. Building administrators must be aware of what the representative can and cannot say or do under both the applicable law and the collective bargaining agreement.

2. Building administrators should familiarize themselves with the collective bargaining agreement, past practice, and school district policy.

D. Communicate.

1. An open-door policy of communication facilitates interaction, which in turn establishes an atmosphere of mutual respect and consideration.

2. Communications with employees and labor organization representatives should be documented so as to avoid the potential for miscommunications and misunderstandings.