

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

:

RIPON EDUCATION ASSOCIATION and :

DONALD GREGOR, :

:

Complainants, : Case 11

: No. 48382 MP-2662

vs. : Decision No. 27665-A

:

SCHOOL DISTRICT OF RIPON, :

:

Respondent. :

:

Appearances:

Mr. Stephen Pieroni, Staff Counsel, with Ms. Mary E. Pitassi, Associate Counsel on the brief, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Ripon Education Association and Donald Gregor.

Mr. James K. Ruhly, with Mr. Christopher B. Hughes on the brief, Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, 119 Martin Luther King, Jr. Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the School District of Ripon.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Complainants filed a complaint of prohibited practice with the Wisconsin Employment Relations Commission (Commission) on November 24, 1992, alleging that the Ripon School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats. After an unsuccessful attempt to reach a voluntary resolution of the matter through a Commission Mediator, the Complainants, in a letter filed with the Commission on March 10, 1993, requested that the matter be set for hearing before a Commission Examiner. The Complainants repeated this request in a letter filed with the Commission on April 28, 1993. On May 26, 1993, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec 111.70(4)(a) and Sec. 111.07, Stats. Hearing on the matter was held on June 30, 1993, in Ripon, Wisconsin. The parties filed briefs and reply briefs, the last of which was received by the Commission on November 8, 1993.

FINDINGS OF FACT

1. Ripon Education Association, which is referred to below as the Association, is a labor organization which maintains its offices in c/o WinnebagoLand UniServ, Post Office Box 1195, Fond du Lac, Wisconsin 54936. The Association is the exclusive collective bargaining representative for certain teaching personnel employed by the District. One of the District teachers represented by the Association is Donald Gregor, whose address is 425 Eureka Street, Ripon, Wisconsin 54971. Gregor and the Association are collectively referred to below as the Complainants.

2. The School District of Ripon, which is referred to below as the District or as the Respondent, maintains its offices in c/o Post Office Box 991, Ripon, Wisconsin 54971. The District's Superintendent is Michael Heckman.

Among the facilities utilized by the District to provide educational services are six elementary schools. Melanie Oppor is one of two Elementary Principals employed by the District. Myra Misles-Krhin is the other. Each Elementary Principal is in charge of three elementary schools.

3. Gregor is employed as a fifth grade teacher at the District's Central School. He has been employed by the District for roughly thirty-one years. Central is one of the three elementary schools supervised directly by Oppor. Oppor became Elementary Principal in the 1990-91 school year.

4. Oppor issued Gregor a note, dated October 1, 1990, concerning his lesson plans. That note reads thus:

Thank you for turning in your lesson plans in a timely fashion. I have really appreciated our ability to talk frankly with each other. As I read through your plans for this week, I was seeking more specific details. For example, in social studies on Wednesday, you listed pp. 40-41. Please indicate which objective you wish to accomplish, the planned procedures and/or activities to achieve that objective, and the materials which will be used. I have made additional comments on the copy of your plans. Thank you for your cooperation!

Gregor submitted a more detailed lesson plan. Oppor acknowledged receipt of this in a note to Gregor dated October 8, 1990. She also placed a question in the note seeking further specificity. In a note dated December 10, 1990, Oppor sought "more detail in your plans" from Gregor. He responded by reiterating certain portions of his previously filed lesson plan. In a note to Gregor dated April 1, 1991, Oppor asked Gregor to "(p)lease plan to include objectives in future lesson plans." Sometime in the Spring of 1991, Oppor and Gregor discussed Oppor's concerns with certain aspects of Gregor's teaching style. Oppor summarized her concerns in a letter, dated May 2, 1991, which reads thus:

. . . Of primary concern is the daily competition between boys and girls. This type of activity undermines the principles of equity which our district

continually strives to maintain. Based on our discussion, this type of competition would be eliminated from daily activities.

A second area of concern is student behavior. Students in your classroom have consistently had acceptable behavior. However, appropriate student behavior is motivated, in great part, by authoritative control which you provide . . . You agreed to work with students to help them control their own behavior.

Third, added sensitivity to student needs is crucial. You have addressed students' intellectual needs to district standards. However . . . sensitivity to students' emotional and special health needs are of equal importance . . .

Gregor prepared a written rebuttal to the May, 2, 1991, letter, and dated the typewritten portion of the rebuttal May 13, 1991, and the handwritten portion of the rebuttal May 17, 1991. In the rebuttal he elaborated on his fundamental conclusion that "I do not agree with the negatives. . . ." He did not formally file the rebuttal with the District. He did stop using direct boy/girl competitions in response to Oppor's concerns, but noted in his written rebuttal that "I have found it to be extremely rewarding and a motivating teaching technique." In a memo to Gregor dated May 14, 1991, Oppor stated her opinion that Gregor had "refused to cooperate in helping" to distribute "information regarding the status of the proposed D.A.R.E. program." She noted, in that memo, that "(a) copy of this letter will be placed in your employee file." Gregor returned the memo with a roughly two page rebuttal dated May 20, 1991. In that rebuttal, Gregor stated, among other points, that "I totally disagree with your comment that I didn't cooperate with you and need to comply with administrative requests." He concluded the body of his rebuttal thus:

In conclusion, I feel, your request for me to immediately poll my fellow teachers was unfair, poorly handled and very unprofessional, because I refused to discuss a program that I had no information of, with my colleagues. I find myself asking, would you discuss a program with others that you had no background or knowledge of? I doubt it, and yet that's exactly what you demanded that I do.

Near the end of the 1990-91 school year, Gregor installed an air conditioner he owned in his classroom. Oppor, at the close of the 1990-91 school year, denied his request to keep the air conditioner in his classroom. Gregor discussed the matter with a building custodian and with a School Board member. Oppor, in a letter to Gregor dated September 3, 1991, reiterated her denial of the request, stating, among other points, that "the current electrical system at Central Elementary School could not service an air conditioner in each classroom" and that "mechanical devices not owned by the school district could not be adequately regulated or district maintained." She also stated her position that "(a) school board member should never be placed in the awkward position of handling school district related concerns during a purely social or personal interaction."

5. Heckman became District Superintendent in July of 1984. Heckman coordinated an effort involving teachers and administrators to create a

teaching performance evaluation (TPE) system. That system was first implemented in the 1986-87 school year. Broadly speaking, under that system non-probationary teachers are evaluated at least once every three years. During the teacher's evaluation year, an evaluator formally observes the teacher instruct at least three different classes. Other informal observations may also take place. Ultimately, the formal process culminates in the preparation of a summative evaluation report. The system also contemplates a year-end meeting between the evaluator and the evaluated teacher. The Summative Evaluation Report was developed by administration and teacher representatives. The Summative Evaluation Report document is divided into four Performance Areas: Productive Teaching Techniques; Organized, Structured Class Management; Positive Interpersonal Relations; and Professional Responsibilities. Each Performance Area is broken into separately identified Criteria, and the Criteria are broken down into separately identified and numbered Descriptors. Roughly speaking, the Performance Areas are broad statements of desired qualities with the Criteria and Descriptors pointing to specific behaviors comprising the Performance Area. Typically, a non-probationary teacher can expect to be evaluated once every three years. There have, however, been exceptions. During Heckman's tenure, twenty-one teachers have been evaluated more often than once every three years.

6. The 1991-92 school year was Gregor's "evaluation year" in the three year cycle noted in Finding of Fact 5. Oppor was Gregor's evaluator. During the 1991-92 school year, Gregor served on a committee established to modify the District's forms for report cards. That committee met throughout the school year. It did not formally issue any final conclusions. It did, however, vote to review District implemented changes to the report cards after a one year trial period in the 1992-93 school year. Gregor felt the Administration was not open to teacher concerns during the 1991-92 school year. Oppor, who also served on the committee, felt Gregor did not communicate his disagreement with proposed changes in a constructive manner. In January of 1992, Oppor formally observed a Health class led by Gregor. The class concerned the functioning of the eye, and involved the dissection of cow eyes. Oppor's "Comments and Suggestions" are roughly three typewritten pages long. Illustrative of her comments are the following:

. . . Your lesson was a fine example of providing hands-on exploration and experimentation as it relates to the understanding of the various parts of the eye . . .

You provided students with an understanding of health concerns when dealing with a dissection activity . . .

. . . Additionally, you had described a component of the lesson where students were to place the lens on newsprint to observe the magnification. This did not occur during the one hour lesson . . .

In this lesson, no summary strategy was used . . . It is very important to bring closure to this sort of activity in order to reinforce your objective and check for student understanding . . .

It is evident that your students know what you expect of them. Parameters are clearly stated at the beginning of class . . .

Twice during the dissection, you asked students to stop their work momentarily so that you could give additional advice and instructions. Approximately 75-80% of the students were not attending while you were speaking. The information you were providing was important . . . Some teachers get all students' attention by flashing the lights and waiting until all students' eyes are focused on the teacher. This is only one of many techniques you might want to try.

You have a very special rapport with your students. I have observed you spending extra time working with students who are having difficulties . . .

If there is a concern about student sensitivity it would be in the competitive nature of some of your activities. Please be sure that competitive groups are a blend of males and females . . .

Final note--- As you continue to grow as a professional, I would encourage you to use your leadership abilities to help parents and colleagues to become familiar with current research. I think the report card committee offers you the opportunity to set a fine example of an educator who is willing to access new information and take steps to be progressive in the field of student assessment and reporting systems.

Gregor filed a six page, handwritten response. Illustrative of his comments are the following:

I thank you . . . for allowing us to have an interesting and valuable lesson taught in a different manner. Our class of students looked forward to this and worked hard for this experience and graded this experience an "A." . . .
On the issue of removing the lens and placing it over fine print to see the magnification, I did observe teams doing this in class and my two adult helpers . . . both agreed that this took place. I then surveyed my class and all students claimed their team did this, or because of the condition of the lens, they observe another team's lens . . .

I did run into a time crunch . . . and continued our discussion the following period.

. . . (I)t was mentioned that 75-80% of the students were talking while I tried to give information. This figure is not truthful as this did not happen . . . I need to see names in order to accept a figure of 75-80%.

In this same section, you had suggested I get their attention by turning off the lights, but in my experience of teaching, one does not turn off the lights because of the danger of them having an accident and having a lawsuit on our hands, especially since they were using razor blades.

. . . You're right, I do care immensely about my class of students and will go beyond limits to save them if the need occurs . . . On the issue of competitiveness, you informed me last year not to have groups of "boys versus girls" which had been successful in the past by myself and others, however I respected your wishes and have never had them since. In their present seating arrangements, they have two girls and two boys in their pod and it was explained to them about the value of working with the opposite sex. Students are also taught the value of understanding feelings for others in all situations. . .

On the FINAL NOTE, I am on the report card committee to find the best way to report progress to the parents. That's why I requested information from fifteen schools in our conference, in our area and progressive ones in the state. It is hoped that all sides have an input in this decision . . .

7. On February 26, 1992, the District provided an in-service at which an outside speaker gave a presentation on the use of literature as a teaching tool. During that meeting, Oppor observed Gregor writing on "green sheet" forms. She passed him the following note:

I do not find your working on the green sheets as an acceptable task during this workshop. I would hope to see you gathering info. to begin using tradebooks in your classroom.

The handwritten note ended with the signature "Melanie." She provided Gregor a blank line for his signature and the date. Oppor also observed other teachers not paying attention to the speaker. Those teachers were from schools supervised by Mises-Krhin. She spoke, during the presentation, to Mises-Krhin about those teachers. Sometime after the inservice day, Gregor filed the following written response with Oppor:

I hope that all the teachers and principals that were talking, not paying attention and disturbing others were given a written notice by you.

As you noticed, I even moved away from some talkers so I could hear the speaker. At least 8-10 people were talking at all times. You even waited for the majority to stop talking in order to introduce the speaker.

Yes, I do use literature books in my reading class.

What I find incredible is that a fifth grade teacher sat 2 feet away from you and spent the entire time working on her budget, as witnessed by three of us, and she never was written up, was she?

Therefore, upon the advice of counsel, I refuse to sign this.

I scheduled a meeting to talk to you on this at 3:20 pm March 4, 1992 (Wed.) but you canceled.

I then talked to you after 4 pm later that same day to arrange a meeting time. You okayed us to meet Friday, March 6, 1992 at 3:45 pm with no penalties as far as time limits.

8. In a memo to Gregor dated February 28, 1992, Oppor responded to Gregor's request to be released early from school to travel with the Wrestling team on certain "away" meets. In her memo she stressed that "all leave time is to be made up . . . (and that) I will require a note from you each time you make up time." She also noted that he could not be released for a meet which would conflict with a Central Elementary School staff meeting. She noted "(y)our participation in the sharing and decision making process is integral to unifying the staff and enhancing our collegial team attitude."

9. On March 6, 1992, Oppor met with Gregor and Jim Borell, a teacher who acted as an Association representative. During the course of this meeting, Gregor asked Oppor if her February 26, 1992, memo was to be placed in his personnel file at the Superintendent's office. Oppor responded, in essence, that she had originally intended only to pass him the note, secure his signature acknowledging receipt, and let the matter end, having communicated to him her displeasure at his working during the inservice. She stated that his demanding a formalized response with an Association representative had effectively escalated the situation and required her to file the February 26, 1992, note with Heckman.

10. In a memo to Heckman dated March 17, 1992, Mary Park, the Chair of the Association's grievance committee, submitted a step 2 grievance memo to Heckman, challenging the February 26, 1992, note as a "written reprimand" which lacked just cause. Heckman met with various Association representatives to discuss the grievance on March 23, 1992. Heckman issued a written response, dated April 3, 1992, to the Association concerning the grievance. In that response, Heckman formulated a series of questions posed by the grievance, and stated his response to those questions. He phrased one of those questions thus:

Does the principal's action in this matter represent a case of discipline being applied to an employee or is the action representative of the sharing of information?

He answered that the memo should be considered "Information-sharing -- and not disciplinary action". He also, in this memo, denied the grievance.

11. On April 29, 1992, Oppor observed Gregor's instruction of a Reading class. Her formal "Comments and Suggestions" for that class consist of roughly four typewritten pages. Her comments offered praise and highlighted areas needing improvement. Included among the former type of comments was the following: "I was highly impressed with the quality of the lesson plan you developed for the formative evaluation report." Included among the latter type of comment was the following:

At a recent report card committee meeting, a number of dramatic changes have been discussed as the committee has worked to develop a new pilot report card for next year. As a member of that committee, I have heard you speak your mind regarding your reaction to the proposed changes. However, I would want to suggest that you look for positive ways to make recommendations as to the things that we can do as opposed to the things we either can't or don't want to do.

She also reiterated a concern for more detailed lesson plans. On May 15, 1992, Oppor observe Gregor's instruction of a Mathematics class. Her formal "Comments and Suggestions" for that class consist of roughly two typewritten pages. Her comments offered both praise and certain suggestions for improvement.

12. In a memo dated May 15, 1992, Heckman advised the Association that the Board of Education "declined to consider the grievance" concerning the February 26, 1992, note, and that the collective bargaining agreement permitted the Association to appeal the matter to grievance arbitration "within fifteen (15) school days after receipt of this answer." The Association responded to

this memo in a memo advising the District that "The fifteen (15) school day (emphasis added) deadline for the call for binding arbitration . . . extends to Tuesday, August 25, 1992."

13. In a memo dated May 22, 1992, Oppor reminded Gregor that he had not yet filed his "School within a school" placement forms, based on parent-teacher conferences. Gregor had not yet held the conferences. Such forms were necessary to identify students who might encounter problems in successfully moving through the sixth grade.

14. On May 27, 1992, Oppor and Gregor conducted the Summative Evaluation Conference of the TPE process. Oppor noted, on the Summative Evaluation Report, that Gregor "Meets High District Standards" on most of the areas of evaluation. She did note he "Needs Improvement" in certain areas. The areas identified by Oppor as needing improvement was Descriptor 2 of Criterion A of Productive Teaching Techniques. That descriptor reads thus: "Writes instructional objectives that are related to long-range goals." Her written comments state: "Instructional objectives need to be a part of your weekly lesson plans on a regular basis. You show a great deal of creativity in planning student activities for the lessons which were observed." Also included in the "Needs Improvement" category were Descriptors 7, 8 and 13 of Criterion A of Positive Interpersonal Relations. Those descriptors read thus:

7. Deals in a professional manner with other teachers.
8. Deals in a professional manner with administrative staff.
13. Exhibits positive approach to job challenges.

Her written comments state:

Working together (staff & administration) cooperatively is imperative in a school setting. Collegial planning among teachers for the selection of reading tradebooks school related decision-making, etc. is highly valued & encouraged. When faced with challenging decisions or differences of opinion, a positive, productive attitude must be maintained. Emphasis should be placed on the things we can do to continue to improve ourselves & our school.

The next area of the "Needs Improvement" category was Descriptor 4 of Criterion A of Professional Responsibilities. That descriptor reads thus: "Completes work-related duties promptly." Her written comments state:

Delays in completing the School within a school parent conferences & related forms (over 1 month late) caused concerns for middle school staff who need the information for scheduling purposes. You are a member of the math committee & the report card committee. In your leadership role, more open communication with your colleagues has been requested as well as a positive attitude toward accomplishing school/district goals in

the best interest of all students.

The final area of the "Needs Improvement" category was Descriptor 1 of Criterion B of Professional Responsibilities. That descriptor reads thus: "Accepts responsibility for implementation and complies with policies and regulations applicable to his/her position." Her written comments state: "When not attending scheduled meetings, please alert the principal in advance & make arrangements to acquire all pertinent information."

15. Sometime in June of 1992, Heckman and Oppor discussed personnel challenges confronted by Oppor during the 1991-92 school year. Oppor discussed with Heckman her concerns with Gregor, and her thought that she might place him on a second year of TPE. Heckman advised her the choice was hers, and that she should make the decision based on her view of the best interest of the District's instructional program.

16. In a memo to Heckman dated August 24, 1992, Park and Gilbert J. Stoeberl, the Association's President, stated the Association's position on "the processing of the R.E.A./Donald Gregor grievance." In that memo, the Association noted it had "decided not to pursue this grievance to arbitration." The Association stated its reasons thus:

1. The Superintendent of Schools has determined that Principal Melanie Oppor's action in this matter has not been identified as an act of discipline against Donald Gregor . . .
2. The District is not now pursuing any form on nonrenewal/discharge action . . .
3. The matter doesn't warrant a move to binding arbitration since the situation was/is a minor matter that was escalated in intensity due to Ms. Oppor's unfortunate reaction to Mr. Gregor's rebuttal of her note presented to him during the early portion of the 2/26/92 in-service meeting.
4. This and Mr. Gregor's response to the matter will constitute a substantial rebuttal which will effectively neutralize the impact of her actions should the District attempt to use this incident in future disciplinary acts against Donald Gregor which have the potential of becoming a part of nonrenewal/discharge actions against him.

The Association also noted, in this memo, a series of "substantial concerns regarding how this matter was handled by the administration." It stated those concerns thus:

1. It is our belief that Melanie Oppor retaliated against Donald Gregor for exercising his protected rights under Chapter 111.70, Wis. Stats. . . .
2. Melanie Oppor could have handled Mr. Gregor's

exercising of his protected rights in a more sensitive and less threatening manner. She could have verbally reminded him that his actions were not appropriate. If she needed something in writing, she could have placed the note passed to him in her anecdotal file within her office - then, if she observed his compliance during future situations, she could remove the reference as being of no further concern.

3. We believe that this matter could have been resolved at Step 2 between Ms. Oppor and Mr. Gregor. You acted only as a "factfinder" and chose not to bring the principal parties together. This attitude means that the grievance procedure must be sued exclusively as an adversarial procedure rather than as a "problem-solver" procedure . . .

The Association closed by stating, among other points, that it "reserves the right to pursue a challenge to any efforts . . . to use this situation in future acts of discipline against Donald Gregor."

17. In early September of 1992, Oppor decided to place Gregor on a second year of TPE for the 1992-93 school year. In a memo dated September 4, 1992, to "Staff on the 1992-93 Evaluation Cycle & Mike Heckman," Oppor noted a meeting set for September 9, 1992, for orientation of "staff members on the 1992-93 evaluation cycle to the Teacher Performance Evaluation Document." Gregor's name was listed on the second page of this memo. Gregor received the memo, but did not expect to be affected by it, and did not notice his name on the memo's second page. Gregor learned of his inclusion in the memo from other teachers. He felt shocked and humiliated to be given a second year of TPE. Gregor missed the September 9, 1992, meeting, and went to Oppor's office during the school day on September 10, 1992, to learn why he was set for a second year of TPE. He asked Oppor why he was being included, and understood Oppor to state that it was her right to do so. He perceived she smiled as she stated this point, and he left the room, angered. Oppor was, at the time Gregor approached her, typing a memo to him asking him to set a meeting to discuss his missing the September 9, 1992, meeting. She completed that note in handwritten form after he left, and set a meeting with him to explain his placement on the TPE cycle. She met with Gregor on September 14, 1992, and summarized that meeting, in a letter dated September 23, 1992, thus:

. . . This meeting was intended to orient staff members scheduled for evaluation to the Teacher Performance Evaluation document. You invited Lars Clement to the meeting as an REA representative; Dr. Mary Drecktrah was present as well.

The two primary goals to be accomplished during this meeting were: a) to provide explanation as to why you were being placed on the evaluation cycle for the second year in a row, and b) to review the Teacher Performance Evaluation document . . .

We began by reviewing the purpose of this second cycle of evaluation within two consecutive school years.

First, the point was made that this particular evaluation cycle was to offer you the opportunity for improvement based on the summative evaluation dated May 27, 1992. It was found that there were three criteria areas where needs improvement levels of performance were indicated . . .

Based on . . . the Teacher Performance Evaluation Document . . . the experienced teacher must be rated in one of the does not meet district standards on four or more of the fifteen evaluative criteria in order to be considered to be significantly below district standards, thereby, providing for the opportunity to participate in the Intensive Assistance Program. Although you were weak in three criteria areas, it seems as though some form of added professional assistance would be called for at this particular time.

Dr. Mary Drecktrah offered her professional expertise in the area of curriculum as well as supervision in order to provide you with additional information to supplement the information that I will be providing to you over the course of this year. Dr. Mary Drecktrah did agree to providing you with three formative observation opportunities . . .

At this time in the meeting, you were offered the opportunity to choose Dr. Drecktrah to work with you on those formative observations or to choose to asked me . . . (Y)ou requested Dr. Drecktrah . . . and she agreed.

You inquired as to whether or not there were expectations related to this formative evaluation cycle during the 1992-93 school year. It is my firm intent that since this assistance is being provided to you with the support of two administrative team members that there will be significant improvement noted in the three criteria areas showing needs improvement assessment. I would fully expect that you would take every opportunity available during the course of this school year to find ways to enhance professional skill development . . . Dr. Drecktrah and I will work cooperatively to complete the summative evaluation which will be conducted no later than May 15, 1993, in a three-way conference format.

The second purpose of this meeting was to review the Teacher Performance Evaluation document as well as high-lighting 1992 refinements . . .

The philosophy of education . . . of the TPE seems to summarize the intent of our evaluation cycle in a most succinct way. It states that improvement of instruction is the key focus of evaluation which allows for decisions as to appropriate employment, placement, and/or professional growth of employees. Further, it says that the evaluatee is expected to be open to constructive suggestions, committed to improvement and growth, and appreciative for the need to satisfy district criteria for job performance. Over the course of this school year, I would encourage you to take advantage of every opportunity to show your support for the philosophy of evaluation to which district staff members subscribe. Should there be any means by which I can provide you with help or support throughout your professional growth efforts, please do not hesitate to contact me. I feel that an important part of my role as an educational leader is to foster a supportive, encouraging relationship with all staff members.

18. Prior to her employment with the District, Oppor served for six years as an elementary school teacher in the School District of Manawa. While a teacher at Manawa, Oppor was a member of the Manawa Education Association, a labor organization affiliated with the Wisconsin Education Association. During her last two years at Manawa, Oppor served as the President of the Manawa Education Association. Gregor has been counseled in the past regarding "a continuing negative attitude in our faculty meetings." Concerns on this point reached a head in the 1970-71 school year. Gregor has, since that time, been commended by parents and administrators for his teaching.

19. The March 6, 1992, meeting between Oppor, Borell and Gregor was a formal grievance meeting. Prior to the September 14, 1993, meeting, the District had not communicated any reason to Gregor or the Association for placing Gregor on TPE in the 1992-93 school year. Teachers generally perceive

an off-cycle evaluation as a stigma, and linked to inadequate teaching performance. Heckman and Oppor do not so view off-cycle evaluations. At the start of the 1992-93 school year, in the absence of any articulated basis for placing Gregor on TPE for 1992-93, Association represented employees could reasonably have viewed that placement as linked to Gregor's role in processing the grievance concerning Oppor's February 26, 1992, note. The District did not take any employment action toward Gregor based, in part, on hostility to his exercise of lawful, concerted activity.

CONCLUSIONS OF LAW

1. Gregor is a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.
2. The Association is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.
3. The District is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.
4. The District did not take employment action toward Gregor based in part on Gregor's assertion of rights protected by Sec. 111.70(2), Stats. The District has not, therefore, committed a violation of Sec. 111.70(3)(a)3, Stats.
5. At the time Gregor learned of his placement on TPE for the 1992-93 school year, neither he nor any Association representative was aware of the District's reasons for doing so, and thus could reasonably conclude that the District's action might have been based on the filing and processing of Gregor's grievance. The District's failure to communicate its reasons for the placement thus had a reasonable tendency to interfere with the assertion of rights protected by Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

ORDER 1/

1. The complaint is dismissed as to allegations of District violation of Sec. 111.70(3)(a)3, Stats.
2. To remedy its violation of Sec. 111.70(3)(a)1, Stats., the District shall take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:
 - a. Notify teachers represented by the Association by conspicuously posting the attached APPENDIX "A" in places where notices to such employes are customarily posted, and take reasonable steps to assure that the notice remains posted and unobstructed for a period of thirty days.
 - b. Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the District has taken to comply with this Order.

Dated at Madison, Wisconsin, this 4th day of January, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

(Footnote continued on Page 15.)

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

1/ (Footnote continued from Page 14.)

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

APPENDIX "A"

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

As ordered by the Wisconsin Employment Relations Commission, the Ripon School District notifies you as follows:

1. In the circumstances existing at the start of the 1992-93 school year, the placement of Donald Gregor on Teacher Performance Evaluation could reasonably have been viewed as retaliation for his role in the processing of a grievance.
2. The Ripon School District has not, as determined by the Wisconsin Employment Relations Commission, retaliated against Donald Gregor for his role in the processing of a grievance.
3. To remedy any perception that the Ripon School District has acted against any Association represented employe for the assertion of rights

protected by the Municipal Employment Relations Act, the Ripon School District formally declares that it did not place Donald Gregor on Teacher Performance Evaluation for disciplinary reasons, or to in any way punish him for his role in the processing of a grievance.

RIPON SCHOOL DISTRICT

By _____
 Name Title

 Date

THIS NOTICE IS TO REMAIN POSTED FOR 30 DAYS AND IS NOT TO BE COVERED OR OTHERWISE OBSTRUCTED OR DEFACED.

SCHOOL DISTRICT OF RIPON

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

The Complainants' Initial Brief

After a review of the factual background, the Complainants assert that it must, by a clear and satisfactory preponderance of the evidence, meet four elements of proof to establish the Respondent violated Sec. 111.70(3)(a)3, Stats. The Complainants then note that only the third and fourth elements can be considered in doubt, which require the Complainants to demonstrate "the employer's hostility to Gregor's protected, concerted activity in filing a grievance, and the motive of the employer, at least in part, to discourage protected activity."

The Complainants then assert that it has met this burden, "(s)ince the evidence reveals that Oppor initially placed her directive from the in-service in Gregor's personnel file in retaliation for his challenge to the appropriateness of that directive, and then placed Gregor on a second consecutive year of TPE in retaliation for his filing of a grievance." The Respondent's claim that Oppor acted for valid business reasons is, according to the Complainants, "(a) pretext for its discriminatory conduct."

Noting that wrongful motivation is best determined by "a careful examination of the totality of an employer's conduct relating to the employee's protected acts," the Complainants assert that "there is no credible explanation for Oppor's behavior toward Gregor that does not include retaliation for his protected activity." Oppor's statement that she sought to provide Gregor with a supportive environment in his second year of TPE is, the Complainants argue, irreconcilable to her conduct. More specifically, the Complainants assert that Oppor's summative evaluation of Gregor in May of 1993, gives no indication that a second year of TPE was a viable option. Beyond this, the Complainants note Oppor did not communicate her decision to Gregor directly, but buried what was a significant decision in a two page memo issued the following school year. The second year of TPE was, the Complainants contend, an "extremely unusual" course of action to take with an experienced and capable teacher. The Complainants conclude Oppor sought to humiliate Gregor, to teach him a lesson for challenging Oppor's authority.

Viewing the record as a whole, the Complainants contend that Oppor placed Gregor on a second year of TPE "due to his perceived tendency to disagree with administrators, rather than any legitimate concern about his classroom performance." An examination of the record demonstrates, the Complainants contend, that Oppor could not document any performance based concerns with Gregor's classroom performance, or with his performance on non-classroom activities, including the progress report committee. That Oppor chose not to place the February 26, 1992, memo into Gregor's personnel file until Gregor brought an Association representative into a conference on the point "(t)ellingly" demonstrates Oppor's hostility toward Gregor's exercise of a protected right, the Complainants conclude.

Even if the Respondent had valid concerns about Gregor's classroom performance, the Complainants contend that a second year of TPE was a grossly excessive remedy. The remedy is so excessive in relation to the admitted or perceived deficiencies that the Complainants conclude the only reasonable

conclusion to be drawn is that the Respondent's avowed basis for the remedy is pretextual.

The Complainants conclude that it has demonstrated that the Respondent's treatment of Gregor violates Secs. 111.70(3)(a)1 and 3, Stats.

The Respondent's Initial Brief

After a review of the record and the issues posed by the record, the Respondent contends that "Gregor was placed on a second year of TPE based on the performance areas which his 1991-92 TPE summative report indicated needed improvement, not because he filed a grievance."

More specifically, the Respondent asserts it has not violated Sec. 111.70(3)(a)1, Stats. After a review of the applicable standard, the Respondent argues that "complainant's case is premised on the faulty assumption that because Mr. Gregor was placed on a second year of TPE six months after he filed a grievance, the grievance was the cause of the second year of TPE." The Respondent argues both that it had valid reasons for placing Gregor on the second year of TPE and that those reasons predate the filing of a grievance by a considerable period. These concerns were, the Respondent concludes, both valid and amply documented and discussed with Gregor. To accept the Complainants' contentions on this record would, the Respondent argues, inhibit the District from "acting constructively on" its evaluation process, thus undercutting the reason for "having the evaluations in the first place." Beyond this, the Respondent argues "that placement of District staff on a second year of TPE is not uncommon"; that Gregor has experienced similar problems in the past; and that the District made no actual or constructive threat to Gregor by placing him on a second year of TPE.

The Respondent's next major line of argument is that it did not violate Sec. 111.70(3)(a)3, Stats. After citing the relevant legal standard, the Respondent notes that only the third and fourth elements of proof are in dispute. The Respondent asserts that the Complainants have met neither. Initially, the Respondent notes that "there is no evidence, either direct or inferential, that Ms. Oppor was hostile toward Mr. Gregor because he filed his grievance." Beyond this, the Respondent contends that Oppor's testimony manifested no hostility; that Heckman testified he perceived no such hostility on her part; that Oppor met often with Gregor, and spoke with him honestly regarding her concerns; and that Oppor's past experience shows no inclination toward anti-union animus.

Even if evidence of hostility existed, the Respondent contends that there has been no showing that it acted toward Gregor based on such hostility. More specifically, the Respondent argues that the reasons articulated by Oppor for the second year of TPE "are not pretextual." The "only evidence even suggesting" Oppor's rationale for her conduct is pretextual is, according to the Respondent, based on Gregor's "disputed testimony that Ms. Oppor made light of his situation when they discussed his second year of TPE." While not acknowledging Oppor acted in this fashion, the Respondent notes that any gesture on her part toward Gregor is more logically attributed to the awkwardness of the situation than to anti-union hostility. Beyond this, the Respondent questions which party was attempting to intimidate the other. The Respondent puts the point thus:

Gregor had never filed a grievance previously; the record suggests it was not mere coincidence that his first grievance came against his female principal in only her second year in the District, who he knew to have substantial concern about his performance.

The Respondent's final major line of argument is that if any violation is found, there is no basis for an award of attorney fees or costs, or for placing Gregor "on a three year evaluation cycle starting from the 1992-93 school year." On the latter point, the Respondent asserts "(a) remedy which would insulate Mr. Gregor from the District's lawful teacher evaluation practice would be inappropriate." The Respondent concludes, however, that the most appropriate result in this case is to dismiss the complaint.

The Complainants' Reply Brief

The Complainant contends that the valid business reasons asserted by the Respondent for putting Gregor on a second year of TPE "lack credibility" and "suggest an after-the-fact rationale designed to obscure the fact that Ms. Oppor was not sincere in her claimed motive of helping Mr. Gregor become a better teacher."

More technically, the Complainant contends its burden of proving a Sec. 111.70(3)(a)3, Stats., violation demands not that it demonstrate Oppor was solely motivated to punish Gregor for filing a grievance, but that Oppor was motivated in part to do so. Since, at a minimum, "Gregor reasonably believed that he was being interfered with, restrained, and coerced" for filing a grievance, the Complainant concludes that a Sec. 111.70(3)(a)1, Stats., violation has been proven.

The Complainant asserts that the second year of TPE "was not reasonably calculated to reach her stated goals, but to teach Gregor a lesson." Even assuming the best of Oppor's motives, the Complainant argues that "a second consecutive year of TPE seems to be a singularly wasteful and inefficient means

of achieving her stated goals." The assumption is strained, the Complainant concludes, because it is wrong. Her stated motives do not, the Complainant asserts, account for her conduct.

Beyond this, the Complainant argues that the placement of other teachers on an "off cycle" year of TPE is inapplicable to Gregor, because he, unlike those other teachers, was not a weak teacher. The Complainant further argues that Gregor had either corrected or refuted the weaknesses identified by Oppor. That some of those perceived weaknesses date from a prior school year means, the Complainants assert, no more than that Oppor revived her prior complaints as necessary to support her desire to punish Gregor.

The Complainant's next major line of argument is that "(t)he District's suggestion that Gregor used contractually provided grievance procedures to avoid remedial action by the District is not only groundless, but dangerous in the implications for employees wishing to engage in protected, concerted activity." More specifically, the Complainant contends that Parks' and Gregor's testimony that "both were shocked to learn of Gregor's placement on additional TPE" is unrebutted. There can be, then, no question that Gregor was somehow plotting to avoid the implications of an adverse evaluation, according to Complainants. Nor is there other credible evidence to support the Respondent's assertion, the Complainants contend. The Complainants note that at the time of the filing of the grievance, Gregor's evaluation was ongoing, and was proceeding on a positive note. Beyond this, the Complainant challenges the implications of the Respondent's line of argument. The Complainant states those implications thus:

(S)ince it is theoretically possible for a complainant to use the statutory protection of concerted activity as a shield against a district's legitimate concerns, such activity should be held to a higher standard of scrutiny than other actions the employee might take.

Acceptance of this theory would, according to Complainants, "contravene the legislature's very purpose in declaring concerted activity "protected" in the first place."

The Complainants conclude that violations of Secs. 111.70(3)(a)1 and 3, Stats., have been proven.

The Respondent's Reply Brief

The Respondent challenges "several misleading factual recitations and arguments" from the Complainants' brief. Initially, the Respondent contends that the Complainants have restricted their arguments to a derivative violation of Sec. 111.70(3)(a)1, Stats., since they "argue only that the District violated sec. 111.70(3)(a)3, Stats.

The Respondent then contends that Complainants' discussion of the February, 1992, inservice is "(m)isleading." Specifically, the Respondent notes that Complainants focus only on Gregor's perception that Oppor had singled him out, without noting that Oppor did not have direct supervisory authority over the other teachers who were not paying attention to the speaker.

The result, according to the Respondent, is an inaccurate focus on Gregor's "almost irrational resistance to Ms. Oppor's efforts to resolve the matter in an efficient and constructive manner."

The Respondent then challenges the Complainants' analysis of the March 6, 1992, meeting. That meeting, according to the Respondent, "was a step one grievance meeting regarding the February 26, 1992 note." From this it follows, according to the Respondent, that Oppor's placement of the February 26, 1992, note in Gregor's personnel file cannot have been "retaliation for attending the meeting with a union representative," but was simply "making a formal record of the interaction between herself and Mr. Gregor at step one of the grievance procedure." That the Association withdrew the grievance heightens, the Respondent argues, the weakness in Complainants' assumption that Oppor retaliated against Gregor for filing the grievance.

Beyond this, the Respondent contends that the decision to place Gregor on a second year of TPE was not made in the summer, 1992, meeting between Oppor and Heckman. The Respondent further contends that the TPE evaluation covers both classroom and non-classroom conduct. The Respondent's final main line of argument is that "Ms. Oppor was justified in believing that Mr. Gregor needed to improve as a Central School staff member," and that her professional judgement "should not be second-guessed on the basis of the flimsy record here." The Respondent concludes that the complaint must be dismissed.

DISCUSSION

The complaint alleges District violations of Secs. 111.70(3)(a)1 and 3, Stats. The Complainants have focused their arguments on Sec. 111.70(3)(a)3, Stats.

Sec. 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." To prove a violation of this section the Complainants must, by a clear and satisfactory preponderance of the evidence, 2/ establish that: (1) Gregor was engaged in activity protected by Sec. 111.70(2), Stats.; (2) the

2/ See Sec. 111.07(3), Stats., made applicable by the operation of Sec. 111.70(4)(a), Stats.

District was aware of this activity; (3) the District was hostile to the activity; and (4) the District acted, at least in part, based upon its hostility to Gregor's exercise of protected activity. 3/

In this case, the parties agree that the third and fourth elements of proof are at issue. More specifically, the parties dispute whether Oppor, by filing the February 26, 1992, note with Heckman and by placing Gregor on a second year of TPE, retaliated against Gregor.

While the evidence will support a conclusion that Oppor and Gregor experienced a personality clash, the evidence does not indicate this clash has Sec. 111.70(3)(a)3, Stats., implications. The personality clash between Gregor and Oppor is evident throughout the evaluation process. Oppor acknowledged this conflict, and noted the stress between them convinced her to allow Gregor a choice of evaluators for his second year of TPE. The issue for determination is whether this personal clash has labor law implications.

As the Complainants note, the presence of animus proscribed by Sec. 111.70(3)(a)3, Stats., must be inferred from the circumstances. The same is true of the absence of such animus. In this case, it is noteworthy that there is no apparent gain to the District from the retaliation the Complainants allege. Gregor was on the report card committee, but there is no persuasive evidence he was a key player in it, or that by silencing him the District somehow gained leverage on other teachers. Fully crediting Gregor's view of the committee means the District was going to implement its pilot program without regard to teacher input. If the outcome was never in doubt, it is not apparent what the District had to gain by silencing him. Nor is there any apparent gain to the District from retaliating for his filing of a grievance. Oppor's decision to file her February 26, 1992, memo with Heckman, if anything, provoked the further processing of the grievance. In no meaningful sense did it serve any District interest to silence Gregor or the Association. Beyond this, Oppor imposed the second year of TPE after the Association had dropped the grievance, and had alerted the District to the fact that further adverse action toward Gregor could produce further litigation. Any retaliation at this point would have been gratuitous and provocative.

More significantly, the District's conduct is irreconcilable to an effort to silence Gregor. None of the acts of retaliation the Complainants point to effectively conditioned a favorable employment outcome on his adopting Administration views or effectively conditioned an adverse employment outcome on his stating anti-administration views. In the formative and summative evaluation reports, Oppor encouraged Gregor's involvement in the report card and other committees. At most, the coercion involved was to compel Gregor to adopt a more "can do" approach. Any coercion from such comments was, at most, oblique. While the Complainants assert that the District employed subtle coercion, the subtlety involved is too great to be persuasively considered evidence of retaliation. The unpersuasively subtle nature of the coercion runs throughout the evaluation process. Oppor was unwilling to affirm, and Heckman expressly denied, that the February 26, 1992, note was disciplinary. Throughout the formative evaluation process, both preceding and following the February inservice, Oppor's comments consistently combined praise with specific suggestions for improvement. The summative evaluation report is itself hard to view as adverse in tone. The District, in its brief, notes that Oppor had noted enough "Needs Improvement" categories to place Gregor in a "significantly

3/ The "in-part" test was applied by the Wisconsin Supreme Court to MERA cases in Muskego-Norway C.S.J.S.D. No. 9 v. WERB, 35 Wis.2d 540 (1967) and is discussed at length in Employment Relations Dept. v. WERC, 122 Wis.2d 132 (1985).

below district standards" evaluation category. Oppor herself, however, refused to so characterize his evaluation, as reflected in her September 23, 1992, letter. It is impossible to divine an effort in this process to "set up" Gregor for adverse employment action such as discipline or non-renewal.

Nor does evidence of Oppor's or Gregor's employment history support a conclusion that Oppor was hostile to Gregor's concerted activity. While the worth of past conduct as a guide to present or future conduct is problematic, the Commission has looked to such evidence in determining the existence of animus proscribed by Sec. 111.70(3)(a)3, Stats. 4/ Oppor is a past President of a WEAC-represented local. This does not mean she is incapable of anti-union animus, but does underscore that she should not be viewed as coming into her position with such a bias. On the other hand, Gregor has had prior difficulty in effectively voicing his disagreements with other staff and administrators. Such difficulties date from the early 1970s and should not be overemphasized. However, it is not insignificant that he has experienced clashes, which did not involve protected activities, similar to that posed here.

The above points primarily focus on the District's conduct toward Gregor. It is also difficult to reconcile Gregor's course of conduct with the sort of retaliation sketched by Complainants. Oppor's concern with Gregor's lesson plans predate his formative and summative evaluation. Contrary to Complainant's assertion that this demonstrates a pretext to hide retaliation, it would appear both Oppor's and Gregor's conduct has been consistent over time. Oppor's concern with the lesson plans appeared early in her tenure. Gregor's unwillingness to respond also appeared early in her tenure. In the 1990-91 school year, he did not uniformly respond to her requests. At one point he simply resubmitted the lesson plans viewed by Oppor as inadequate. This set a consistent tone to their relationship. Gregor did not respond favorably to virtually any of the suggestions for improvement made by Oppor. While there are difficult issues of educational policy buried in this process, such as whether Gregor's structured approach to classroom conduct is more an asset than a liability, such substantial issues are buried under an extended process of less issue-based conflict. Gregor's written response to Oppor's suggestion that he turn lights on and off to get students' attention turned a simple suggestion into a safety issue.

Viewed as a whole, the record supports Heckman's assessment that Gregor responded to criticism by attacking the evaluator. Tellingly, this attitude surfaces in Gregor's response to Oppor's February 26, 1992, memo. While the Association viewed Oppor's conduct at the March 6, 1992, conference to escalate a minor incident, Gregor's written response to Oppor's note moved a request to pay attention during a speech into a grievable instance of discipline. Beyond this, while Gregor's response can be characterized as concerted activity, it is apparent Gregor was less concerned with the welfare of his fellow teachers than in defending himself from what he viewed as a personal attack from Oppor. He was more than willing to point to other teachers' conduct to excuse his own. This does not make his conduct unprotected. It underscores, however, that there is a line between a private personality clash and conduct protected by Sec. 111.70(3)(a)3, Stats. 5/ In this case, the conflict between Oppor and Gregor was personal in nature.

In sum, the conflict between Oppor and Gregor was, by February 26, 1992,

4/ See Monroe Water Department and Dale R. Neidl, Dec. No. 27015-B (WERC, 4/93).

5/ Cf. City of LaCrosse et al., Dec. No. 17084-D (WERC, 10/83).

well established and ongoing. Her memo to him and its aftermath focused that personality conflict more starkly. Neither the memo nor the District actions which followed it were, however, based in part on a desire to punish Gregor for his exercise of concerted activity. It follows that the third and fourth elements of proof to a Sec. 111.70(3)(a)3, Stats., violation have not been met.

The Commission has stated the standard governing violations of Sec. 111.70(3)(a)1, Stats., thus:

Violations of Sec.111.70(3)(a)1, Stats. occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights . . . If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere . . . (E)mployer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats. if the employer has valid reasons for its actions. 6/

Application of this standard poses the most difficult aspect of this case. As preface to examination of this aspect, it is necessary to address two points. The first concerns an Association waiver of the Sec. 111.70(3)(a)1, Stats., claim. The complaint alleges District violations of Secs. 111.70(3)(a)1 and 3, Stats. The same evidentiary record necessary to pose the derivative Sec. 111.70(3)(a)1, Stats., violation poses the independent Sec. 111.70(3)(a)1, Stats., violation. That the Complainants did not focus on the independent Sec. 111.70(3)(a)1, Stats., violation in its initial brief poses no basis to find the waiver of that argument sought by the District. The District was aware of, and forcefully responded to, this allegation in both of its briefs. To find such a waiver would add an element of formality to Commission procedure and practice having no solid support in the Commission's rules or case law. The second point concerns Gregor's use of a grievance as a shield. That he could have filed a grievance to shield himself from the evaluation process plays no role in this case. Whatever the possible ramifications of this may be in the abstract, it has no factual basis in this record. At the time Gregor filed the grievance, he had no reason to believe his evaluation put him at risk. There is no persuasive reason to doubt the good faith of the Association's or Gregor's advocacy of the grievance.

Oppor's referral of her February 26, 1992, note to Heckman cannot be considered to violate the standard noted above. Oppor's testimony indicates she determined Borell's presence at the March 6, 1992, meeting added a level of formality to the process requiring the note to be placed in Gregor's personnel file. Standing alone, this determination would violate Sec. 111.70(3)(a)1, Stats. Such a determination can reasonably be perceived to encourage individual employes to bargain with administrative personnel, and to punish those who do not. Beyond this, it poses the dilemma noted in the Association's August 24, 1992, letter by essentially banning the Association from playing any other than an adversarial role in the processing of employe complaints.

6/ Cedar Grove-Belgium Area School District, Dec. 25849-B (WERC, 5/91) at 11-12.

Oppor's determination does not, however, stand alone. Gregor's written response to Oppor's note states that the March 6, 1992 meeting was to be held "with no penalties as far as time limits." This statement confirmed that the meeting constituted a formal grievance meeting. While it is not entirely clear whether Oppor viewed this meeting in that light prior to the conversation prompting Gregor's note, it is clear that Gregor's statement formalized that the meeting was a grievance presentation. Against this background, it is impossible to question the reasonableness of Oppor's decision to forward the note to Heckman for placement in Gregor's personnel file. The matter was being formally processed, and potentially litigated.

Oppor's decision to place Gregor on a second year of TPE is the more closely disputed point by the parties. As discussed above, the record will not support a conclusion that the District intended to retaliate against Gregor by placing him on TPE for the 1992-93 school year. The Complainants have contended that intent aside, Gregor and Association representatives reasonably perceived that the District was punishing Gregor.

The Complainants' argument highlights a tension in the standard noted above. The final sentence of the standard arguably creates a "valid business reasons" exception to the "reasonable tendency to interfere" test stated in the first two sentences. Presumably, "the reasonable tendency to interfere" standard was established to avoid the chilling effect on the exercise of employe rights which employer actions might have, even if that effect was unintended. The Commission presumably did not intend that the exception swallow the rule, and intended that each sentence of the standard be given effect. Doing so in this case poses problems.

Although the record demonstrates considerable persuasive force to Complainants' contention that the District had less coercive alternatives to address Gregor's situation than a second year of TPE, the record will support the District's assertion that it had valid educational reasons for its action. More than twenty teachers have been evaluated off cycle during Heckman's tenure. Complainants forcefully note that such evaluations have been geared to weaker teachers than Gregor. However, the point remains that Gregor was, to put it mildly, resistant to any suggestion that his classroom or non-classroom based teaching performance could be enhanced. That Oppor saw a formal structure as the only effective means to communicate her desire to see Gregor improve his performance is defensible. That Oppor may not have chosen the most supportive option available to her is not a basis upon which a violation of Sec. 111.70(3)(a)1, Stats., can be grounded. The issue here is not whether the most appropriate educational policy choice has been made. Rather, the issue is whether the choice Oppor made, as a matter of labor law, is illegal. The record will not support such a conclusion.

To say Oppor chose a valid employment option without further elaboration would, on the facts posed here, read the "reasonable tendency to interfere" standard out of existence. Oppor chose not just to put Gregor on a second year of TPE, but to do so without informing Gregor or the Association of the action until well after his normal evaluation cycle had been completed. She and Heckman considered this option while Gregor's grievance was being processed, and she communicated her decision through a memo issued shortly after the Association dropped Gregor's grievance, stating its continuing concern over his case. Gregor was informed of the decision by other teachers, due in part to his own actions, but primarily due to District inaction. Off-cycle evaluation is the exception, not the rule in the District, and is perceived by teachers as a reflection of inadequate teaching. That Heckman and Oppor view the TPE cycle more expansively, as a means to enhance teacher performance was not communicated to Gregor at any time before September 14, 1992. At the time Gregor learned of his second year of TPE, then, neither he nor any Association representative knew of the non-disciplinary bases for doing so. Gregor and the Association could reasonably have perceived Oppor's undocumented decision as a hostile response to the conflict surrounding the grievance. The awkwardness of the setting at the start of the 1992-93 school year regarding Gregor's situation is highlighted by Gregor's September 10, 1993, meeting with Oppor. I am not convinced that the record supports a conclusion that she smiled, in a demeaning fashion, to Gregor to dismiss his concerns over his inclusion on the 1992-93 TPE cycle. I am convinced Gregor perceived her actions thus. I am also convinced that Gregor's perception is more reasonable than it need have been, due to the timing and manner of how Oppor communicated her conclusions with Gregor.

The conclusions noted above are, however, procedural. In terms of the standard noted above, the District had valid educational reasons to put Gregor on a second year of TPE. By belatedly communicating those reasons, however, the District permitted Gregor and the Association to reasonably conclude that there was no articulated basis for Gregor's second year of TPE. Against this background, Complainants' perception that Gregor was being punished for his filing of a grievance was not unreasonable. This perception could reasonably be expected to chill employe exercise of protected rights, in violation of Sec. 111.70(3)(a)1, Stats.

This violation is somewhat technical in nature. The remedy ordered above reflects this. The notice to be posted has been ordered to address any chilling effect the District's failure to timely discuss the second year of TPE may have had on Association represented employes. Gregor's name is included on the notice only to address any stigma unnecessarily attaching to his "surprise" inclusion on the list of teachers undergoing TPE for the 1992-93 school year. The wording of the notice takes at face value testimony that Gregor's second

year of TPE was imposed to enhance his teaching performance, and not for disciplinary reasons. No substantive action has been ordered regarding Gregor's second year of TPE. As noted above, the District had a valid educational basis for taking that action. Thus, the remedy stated above is limited to certain effects flowing from how the District implemented Gregor's second year of TPE.

No further remedy has been ordered. Complainants' request for attorney fees and costs is unpersuasive on this record. The District's defense to the complaint cannot be labelled frivolous in any respect. Thus, no award of fees and costs is appropriate. 7/

Dated at Madison, Wisconsin, this 4th day of January, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

7/ See Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90).