

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

- - - - -
ELCHO EDUCATION SUPPORT PERSONNEL :
ASSOCIATION, :
Complainant, : Case 22
vs. : No. 49857 MP-2797
ELCHO SCHOOL DISTRICT, : Decision No. 27904-A
Respondent. :
- - - - -

Appearances:

Mr. Stephen Pieroni, Staff Counsel, and Ms. Chris Galinat, Associate Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P. O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Complainant.
Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street, Suite 700, P. O. Box 8050, Wausau, Wisconsin 54402-8050, by Mr. Dean R. Dietrich and Mr. Jeffrey T. Jones, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 23, 1993, the Elcho Education Support Personnel Association filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging that Elcho School District violated Sec. 111.70(3)(a)1 and 3, Stats., by discharging an employee in retaliation for the employee's exercise of protected, concerted union activities. On December 28, 1993, the Wisconsin Employment Relations Commission appointed Coleen A. Burns, a member of its staff, as Examiner to conduct a hearing on the complaint and to make and issues Findings of Fact, Conclusions of Law and Order in the matter as provided in Secs. 111.70(4)(a) and 111.07, Stats. Hearing on the matter was held on February 17, 1994, in Elcho, Wisconsin. The record was closed on June 15, 1994, upon receipt of transcript and written argument.

Having considered the evidence and arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Elcho Education Support Personnel Association, hereafter Association or Complainant, is a labor organization located in Elcho, Wisconsin 54228 and represents a collective bargaining unit of support staff employees of the Elcho School District.

2. The Elcho School District, hereafter District or Respondent, is a municipal employer with principal offices located in Elcho, Wisconsin 54428.

3. The Elcho School District Board of Education, hereafter Board, is an agent of the District and has authority to control and direct the operations of the District. Following the April, 1993, elections, the Board consisted of the following five members: Richard Burby, Elsie Foreman, Cindy Raith, Tom Moore, and Hugo Pelzer. Prior to the April, 1993, election, the Board consisted of Burby, Raith, Randy Boomer, Dennis Schoeneck and Mary Alice Keen.

Boomer resigned in the late Fall of 1992 and, as a result of deadlock, the Board was unable to appoint a replacement. Hugo Pelzer is married to a member of the Elcho support staff bargaining unit. Pelzer abstains from discussing or voting on matters pertaining to the support staff. Sue Schuester, another support staff bargaining unit member, has a close personal relationship with Burby. At all times material hereto, the District has had two administrative employees, i.e., District Administrator Joseph Whitcomb and Principal Charles Kellstrom. At the time of hearing, Whitcomb was in his fourth year as District Administrator. During the 1992-93 school year, there was tension between the two administrators and members of the Board. During the 1992-93 school year, both administrators were regularly excluded from executive sessions of the Board. Burby believes that the Board has had little cooperation from administration in obtaining information and carrying out Board policies. On August 23, 1993, the District Administrator gave notice that he would retire effective June 30, 1994. Principal Kellstrom also resigned his employment during the 1993-94 school year.

4. Patricia Girtz worked full-time as a study hall aide for the 1992-93 school year. This position, wherein one person supervised the study hall throughout the day, had been in existence for several years. Girtz, however, commenced her employment with the District at the beginning of the 1992-93 school year. When filling this position, the District Administrator and the Principal looked for a disciplinarian who could maintain order in the study hall. The individual who previously had been in the study hall aide position had difficulty maintaining discipline. While the District Administrator did not have an expectation that Girtz would provide tutoring to students, Girtz did so with the knowledge and approval of the District Administrator. Girtz' study halls were in the cafeteria. During the 1992-93 school year, another aide, Elaine Artymiuk, also had study hall supervision. At the August 24, 1992 Board meeting, Burby moved that the Board assign responsibility to maintain the student activity account to Girtz. This motion was approved by the Board. Girtz received extra pay for performing the student activity account work, i.e., \$2.25 for 1/2 hour of work per day. The student activity account is in a single bank account, but is comprised of many different activity accounts. The student activity account was assigned to Girtz by the Board because the Bookkeeper had problems maintaining the student activity account. When Girtz received the student activity account, it did not balance and Girtz devoted a considerable amount of time to balancing the account. At the end of the 1992-93 school year, when the student activity account was audited, the account balanced. Girtz was a member of the Elcho School District Board of Education from 1978 to 1983.

5. Girtz became aware of the Elcho support staff organizing effort when she was introduced to WEAC employee Rick Schadewald. Amy Jacobs, one of the Presidents of the Elcho Teacher's Association, had contacted Schadewald to meet with the Elcho teachers. Schadewald met with the support staff at the end of February, 1993. At this meeting, which occurred in the Town Hall, Schadewald provided information on representation and the support staff employees informally approved representation by WEAC. Jacobs continued to act as a conduit for communication between Schadewald and the support staff. Frequently, Girtz was the first support staff employee to arrive at school and, as such, would be requested by Jacobs to communicate information to other support staff. As time went on, support staff would ask Girtz to contact Schadewald for information. Girtz, who did not want the other support staff to think that she was assuming liaison responsibility without authorization, asked Jacobs to call a meeting to obtain approval from the support staff to have Girtz recognized as the liaison. The meeting was held sometime in April of 1993 and Girtz was approved as the liaison. Thereafter, Girtz attended numerous Board meetings to remain informed on Board actions; contacted Schadewald to receive and communicate information on the representation

election process; contacted all of the seventeen eligible voters to explain the election process and urged employees to vote if they had strong feelings about the representation question. No other support staff employee was as active in coordinating information and discussing the organizing effort with other support staff members. Girtz never advised the Board that she had been designated as the support staff liaison and the Association never sent a letter to that effect. Girtz continues to meet with the support staff bargaining unit to prepare for the negotiation of the initial labor agreement.

6. The District Administrator became aware that the support staff was interested in organizing into a union when he was contacted by Schadewald. While the District Administrator cannot recall a specific date, he believes that this contact occurred in February or March of 1993. The District Administrator became aware that Girtz was the local contact person for WEAC when Girtz advised him of this fact. While the District Administrator recalls telling the Board that the support staff was interested in organizing a union, he does not recall the first date on which this was discussed with the Board. The District Administrator considered it to be common knowledge within the school community that Girtz was the leader of the support staff organizing effort and believes that the Board members knew that Girtz was the union point person. Kellstrom became aware of the support staff organizing effort when Whitcomb advised him of this fact. Kellstrom was at the March 22, 1993 Board meeting when Whitcomb advised the Board that the support staff informally approved representation by WEAC. Kellstrom recalls that Burby, who was Board President at that time, had a hostile reaction in that Burby indicated that the Board would not recognize the informal election and would force the support staff to have a regular election. Burby wanted the WERC to conduct an election among the support staff because the vote would be in secret, bargaining unit members would understand what was happening, and the unit membership would be defined. Kellstrom does not recall any member of the Board making any other comment about the organizing efforts of the support staff. Shortly after the March 22, 1993 Board meeting, Kellstrom became aware of Girtz' involvement with the organizing effort when Girtz discussed this with Kellstrom. The administrators did not advise the Board that Girtz was acting on behalf of the support staff association. Nor did the Association advise the Board that Girtz was acting in some sort of Association capacity. It is Kellstrom's opinion that Girtz' involvement with the organizing effort was general knowledge within his building. Foreman knew that Girtz was active in the support staff union organizing effort. In May, 1993, Schadewald, Whitcomb and Girtz met to certify the eligibility list for the representation election. On May 12, 1993, WERC Coordinator of Elections Douglas V. Knudson sent a copy of the following letter to Schadewald and the District Administrator:

This will confirm that the parties have agreed that the election in the above-entitled matter will be conducted by mail ballot. The ballots will be mailed to the eligible employees on or about May 19, 1993.

Also enclosed for your information is a copy of the Notice which will be sent to each employee as well as a sample of the ballot. You will note that the ballots will be opened and counted in the Commission's Madison office on June 3, 1993, beginning at 1:00 p.m.

The District Administrator sent copies of this letter to all of the Board members. Thereafter, an election was conducted and the WERC certified the Association as the bargaining representative of the District's support staff. On or about June 15, 1993, Schadewald sent the following letter to the Board members and the District Administrator:

My name is Richard Schadewald. I work for WEAC as an Educational Support Personnel Representative. I will be working with the newly organized Elcho Educational Support Personnel Association.

This letter is our request to begin negotiations with the Elcho School District for an initial collective bargaining agreement. Enclosed is your copy of the official document which is filed with the WERC.

The Association will be having a general assembly meeting soon. We will be able to tell you the members of our negotiating team after this meeting. We will be able to negotiate as soon after July 1st as you can. Please let us know possible meeting dates in both July and August.

We thank you in advance for your consideration and cooperation.

At the time that the Board received this request to commence negotiations, the Board did not know who was on the Association's bargaining team.

7. The minutes of the March 8, 1993 Personnel/Negotiation Committee meeting contains the following item III (2), reporting actions taken in closed session:

2. MOTION BURBY/RAITH AND INSTRUCTION FOR THE ADMINISTRATOR TO CARRY OUT THE FOLLOWING:

WITH THE INCREASED COST OF EDUCATING THE ELCHO STUDENTS AT A RATE OF ABOUT \$1,000.00 MORE PER PUPIL OVER THE ANTIGO DISTRICT AND AT A RATE OF ABOUT \$750.00 ABOVE THE STATE AVERAGE COST PER PUPIL AND DECLINING ENROLLMENTS AND FURTHERMORE, WITH THE STRONG POSSIBILITY OF STATE IMPOSED COST CONTROLS AT THE RATE OF ABOUT 3.2%, THE ADMINISTRATOR IS INSTRUCTED TO CONSTRUCT STAFFING PATTERNS WITHIN THE PARAMETERS OF A 3.2% BUDGET INCREASE (WHILE LEAVING OPERATIONAL COST, STUDENT SUPPLIES AND PHYSICAL PLANT FUNDING INTACT) USING THESE SPECIFIC ITEMS:

- A. NOT REPLACING THE POSITION VACATED BY THE DEATH OF MR. RADTKE.
- B. NOT REPLACING THE POSITION OF THE GIFTED/TALENTED TEACHER IF THAT POSITION BECOMES VACATED.
- C. RETURNING THE PRESENT ENGLISH/GIFTED & TALENTED TEACHER TO FULL-TIME ENGLISH INSTRUCTION.
- D. MOVE THE HIGH SCHOOL GUIDANCE COUNSELOR POSITION TO HALF

- TIME GUIDANCE AND HALF TIME TEACHING.
- E. MOVE THE ELEMENTARY GUIDANCE COUNSELOR POSITION TO HALF TIME GUIDANCE AND HALF TIME TEACHING.
 - F. TO REMOVE THE EQUIVALENCE OF 3 FULL TIME AIDE POSITIONS FROM THE BUDGET
 - G. FURTHER REDUCE SUPPORT STAFF AS IS NEEDED TO BRING IN A BUDGET INCREASE OF 3.2% OR LESS

IT IS FELT THAT THE DISTRICT MUST START MAKING SHORT AND LONG RANGE PLANS FOR STAFFING PATTERNS ESPECIALLY IN SPITE OF SPIRALING COSTS OF EDUCATING OUR CHILDREN. THESE STAFFING PATTERN PROJECTIONS ARE TO BE PRESENTED AT THE APRIL BOARD MEETING FOR FURTHER DISCUSSION, ALONG WITH SPECIFICS IN BUDGET REDUCTIONS, ETC. M/C.

The District Administrator understood that the Board was removing the three aide positions for only one reason, i.e., finance. Burby recalls that this action was taken because information from DPI projected that school districts would be under a 3.2% budget cap for the 1993-94 school year; projections showed that the District would be over budget by the end of the school year; and that the Board did not believe that it was appropriate to use fund equity to operate the District. The Board did not ask the District to focus on EEN or non-EEN aides when reducing positions. The minutes of the March 22, 1993 regular School Board meeting contain the following in item IX (B):

COMMITTEE UPDATE ON POSSIBLE STAFF REALIGNMENT AND COST SAVINGS NEEDED TO MEET GOVERNOR'S PROPOSED BUDGET GUIDELINES.

SUPPORT STAFF WOULD LIKE TO FORM A UNION. BURBY STATED THAT AN ELECTION IS TO BE HELD AS STATE STATUTES DIRECT.

The District Administrator does not recall that the discussion on the support staff union was a major issue, but does recall that the Board wanted a sanctioned election. The minutes of the April 26, 1993 regular School Board meeting contain the following item IX (F):

MOTION BURBY/PELZER TO HIRE PATTI HICKEY TO FILL IN FOR THE SCHOOL DISTRICT AIDE POSITION UNTIL THE END OF THIS SCHOOL YEAR AT 35 HOURS PER WEEK AND A 30 DAY PROBATIONARY PERIOD WITH APPROPRIATE BENEFITS AS PER POLICY. M/C.

Article X(B) of these minutes states:

MOTION PELZER/BURBY THAT THE ELCHO BOARD OF EDUCATION

SUPPORT GOVERNOR THOMPSON'S TAX LEVY FREEZE. M/C.
FURTHERMORE, THAT THE ADMINISTRATOR BE DIRECTED TO
CREATE THE 1993-94 BUDGET WITHIN A 5% CEILING INCREASE.

The minutes of the May 24, 1993 regular School Board meeting, item IX, Administrator's Report, contains the following:

MR. WHITCOMB REPORTED ON PROJECTED 1993/94 AIDS,
SUPPORT STAFF ELECTIONS, FAIR AIDS COALITION AND
PROPERTY TAXATION. ALSO, NOTED POSSIBLE LEGISLATIVE
FORUM TO BE HELD JUNE 19th FROM 7:00 to 9:00 P.M.

Item XIII of these minutes, reporting on actions taken in closed session, contains the following:

MOTION BURBY/MOORE THAT REASONABLE ASSURANCE BE GIVEN
TO THE FOLLOWING AIDES AND THEIR EMPLOYMENT FOR THE
1993/94 SCHOOL YEAR. PATTI HICKEY, VICKI PELZER, AND
CONNIE ERNST. SPECIFIC ASSIGNMENTS AND HOURS WILL BE
GIVEN AT A LATER DATE. FOREMAN AYE, PELZER ABSTAIN,
BURBY AYE, RAITH AYE, MOORE AYE. M/C.

Historically, the District's aides have not had a continuing employment contract with the District, but rather, have been hired one year at a time. The administration had advised the Board that if the aides were not given reasonable assurance of employment for the 1993-94 school year, then the District would be liable for unemployment compensation costs. The District Administrator and the Principal were not advised why the Board offered reasonable assurance to these three aides and not the remaining aides. Burby recalls that reasonable assurance was given to Ernst and Pelzer because they had been long-term employees, the Board needed EEN aides, and all three aides were in positions for which the District received reimbursement monies. Jennifer Benishek, who was off work during the 1992-93 school year, was also an EEN aide. Administration also considered Lori Klima to be an EEN aide and was attempting to have Klima approved by the State as an EEN aide. On May 24, 1993, Hickey was still in her probationary period. Hickey had been hired to work as a Fund 50 aide to record the adults and children who were taking hot lunch and to do the Fund 50 bookkeeping. Hickey received one day of training from a DPI consultant regarding her Fund 50 responsibilities. The Board did not ask the District Administrator for an evaluation of Hickey or a recommendation as to whether Hickey should be given reasonable assurance. Nor did the District Administrator make a specific recommendation on Pelzer or Ernst. In the latter part of May, 1993, in response to the Board's directive of March 8, 1993, the District Administrator and Principal Kellstrom prepared a five page document entitled "School District of Elcho: A Comprehensive Analysis of School Aides for 1993-94 School Year," which was provided to the Board in June of 1993. Kellstrom is the immediate supervisor of the aides. This document listed the following aides: Vicki Pelzer, Connie Ernst, Angie Reynolds, Joanne Wagner, Jennifer Forbes-Benishek, Lori Klima, Elaine Artymiuk, Patti Hickey, Jennifer Eckardt and Pat Girtz. This document also described the aides' 1992-93 duties. Pelzer's duties involved bus supervision, noon supervision, and 7-12 L.D. aide; Ernst's duties involved crossing guard supervision, playground rotation, E.D. aide, and E/C aide; Reynolds' duties involved crossing guard and noon playground rotation, library aide, and EEN secretary; Wagner's duties involved crossing guard and noon hour rotation and

Chapter I aide; Benishek's duties involved crossing guard, playground and noon hour supervision rotation and Elementary L.D. aide; Klima's duties involved crossing guard, noon hour and playground rotation and Second Grade EEN aide; Artymiuk's duties involved At-Risk breakfast and study halls and the 5th hour regular study hall; Hickey's duties were those of food service aide and she had two hours assignable; Eckardt's duties involved three hours as office aide; and Girtz' duties involved crossing guard rotation, 5th hour gym/hall supervision, study hall 1-4 and 6-8 hours, and activity accounts 3:15-3:45. This document included the following:

P L A N "A"

ALL AIDES TAKE ONE STUDY HALL

PROBLEMS:

1. CONFLICTS BETWEEN 7-12 AND K-6 SCHEDULES
2. MONETARY REDUCTION TO DISTRICT BY INVOLVING SP. ED. AIDES
3. LOSS OF CONTINUITY TO STUDY HALL PROGRAM AND STUDENT MANAGEMENT
4. DIFFICULTY SCHEDULING DUTY FREE LUNCH PERIODS AND PLAYGROUND ASSIGNMENTS

P L A N "B"

ONLY NON EEN AIDES WILL BE UTILIZED FOR STUDY HALLS.

PROBLEMS:

1. ONLY THREE (3) AIDES ARE NON EEN. THEY ARE: PATTI HICKEY, ELAINE ARTYMIUK & ANGIE REYNOLDS
2. PATTI HICKEY CAN ONLY BE SCHEDULED 1ST AND 8TH HOURS.
3. ELAINE ARTYMIUK ALREADY HAS A FULL STUDY HALL SCHEDULE. MOVING HER TO ADDITIONAL REGULAR STUDY HALLS IMPACTS NEGATIVELY ON THE "AT-RISK" PROGRAM.
4. UTILIZING ANGIE REYNOLDS WOULD NEGATIVELY IMPACT ON THE TOTAL LIBRARY OPERATION. MRS. KIEF DOES TEACH SOME ELEMENTARY LIBRARY CLASSES TO ALL ELEMENTARY STUDENTS ON A REGULAR BASIS.

P L A N "C"

LEAVE CURRENT AIDE ASSIGNMENTS AS THEY EXIST IN THE 1992/93 SCHOOL YEAR.

BENEFITS:

1. CONTINUITY IN STUDY HALLS
2. NO STATE AND REDUCTIONS
3. NO DAMAGE TO EXISTING SUCCESSFUL PROGRAMS
4. NO NEGATIVE IMPACT ON MASTER OR STAFF SCHEDULES
5. POSSIBLE REDUCTION IN TIME BY ASSIGNING STUDENT ACTIVITY ACCOUNTS TO THE BOOKKEEPER

Kellstrom and the District Administrator, rather than the Board, developed the three plans. The administrators intended to point out the weaknesses in Plans A and B so that the Board would adopt Plan C, the plan recommended by the two administrators. With respect to Plan "A," the conflict between 7-12 and K-6 schedules resulted from the fact that the K-6 elementary ran on block schedules and 7-12 ran on specific periods of time of 45 minutes in length; the monetary reduction by involving special ed aides is due to the fact that the District

receives approximately 50 percent categorical aides for special ed employees; and the difficulty scheduling duty free lunch periods and playground assignments is due to the overlapping time schedules of the elementary and junior-senior high schools. Plan B used only non-EEN aides for the study hall.

Girtz, Hickey, Artymiuk, and Reynolds are non-EEN aides. When the "Comprehensive Analysis" was reviewed by the Board, the Board decided to go with Plan B and Kellstrom was directed by the Board to develop the appropriate work schedule. At the regular School Board meeting of June 21, 1993, the District Administrator announced that the District had received a letter from WEAC requesting to start formal negotiations with the new support staff union in July. At that meeting, the Board did not give the District Administrator advice or direction regarding the commencement of negotiations, nor did it provide any other response. The June 21, 1993 Executive Minutes of the regular School Board meeting contain the following:

DISCUSSION HELD ON AIDE POSITIONS AND THE POSSIBLE
REDUCTION OF THE NUMBER OF AIDES WITHIN THE DISTRICT.

MR. WHITCOMB IS INSTRUCTED TO CONSTRUCT A COMPREHENSIVE
PLAN FOR THE DISTRICT AIDE POSITIONS WITHOUT USING THE
PRESENT FULL TIME STUDY HALL AIDE TO BE SUBMITTED
TUESDAY, JUNE 29. THE 1993/94 BUDGET IS TO REFLECT
THIS REDUCTION IN STAFFING.

IT IS SUGGESTED THAT MR. WHITCOMB LOOK AT DIVERTING THE
FOLLOWING AIDES TO BECOME STUDY HALL AIDES: PATTI
HICKEY, ANGIE REYNOLDS AND ELAINE ARTYMIUK.

THAT NO ACTION IS TAKEN ON THE KITCHEN AIDE POSITION
FOR 1993/94.

In response to the Board's request to present options for operating the study hall without having a full-time study hall aide, Kellstrom, with the assistance of Whitcomb, developed a "needs survey", which was presented to the Board by June 24, 1994. In the "needs survey," "Plan A" involved staffing the study halls and student supervision with Non-EEN aides: Patti Hickey, Elaine Artymiuk, and Angie Reynolds. Hickey was assigned to the 1st, 2nd, 7th and 8th period study halls. Artymiuk was assigned to the 3rd, 4th, and 5th(B) period study halls. Reynolds was assigned to the 5th(A) and (B) open rec and 6th period study hall. The "needs survey" was prepared under the signature of Kellstrom and contained the following:

PLAN A PROBLEMS

1. PATTI HICKEY WILL HAVE NO TIME TO ACCOMPLISH
FUND 50 PAPERWORK. THERE ARE ALSO A VARIETY OF TASKS
THAT MR WHITCOMB AND MISS SCHUESTER HAD NOT ASSIGNED TO
MRS HICKEY DURING THE SPRING PROBATIONARY PERIOD. IT
WAS THE DISTRICTS INTENTION THAT MRS HICKEY FOCUS ON
LEARNING AND DOING AN EXCELLENT JOB WITH THE FUND 50
RESPONSIBILITIES. THERE ARE NUMEROUS DUTIES IN THE
ADMINISTRATIVE OFFICE THAT NEED TO BE ATTENDED TO.
THESE WILL NOT BE ADDRESSED BECAUSE OF MRS HICKEYS
ASSIGNMENT TO STUDY HALL.

2. ANGIE REYNOLDS WILL NOT BE AVAILABLE TO
SUPERVISE PLAYGROUND DURING RECESSES OR LUNCH PERIOD.

THIS WILL CUT DOWN ON THE AVAILABLE STAFF TO SAFELY SUPERVISE THESE ACTIVITIES. REQUIRING THE OTHER AIDES TO ASSUME MORE OF THESE DUTIES WHICH IN TURN DIMINISHES THE TIME THEY HAVE AVAILABLE TO DO THAT FOR WHICH THEY WERE HIRED. MRS KIEF WILL HAVE TO RESTRICT THE USE OF THE LIBRARY SO AS TO SAFELY SUPERVISE EITHER ELEMENTARY OR SECONDARY STUDENTS.

3. ELAINE ARTYMUİK (sic) WILL LOSE THREE PERIODS OF AT RISK STUDY HALL. THIS IS VERY IMPORTANT TO THOSE STUDENTS WHO ARE ON THE VERGE OF FAILING. THIS PROGRAM WILL BECOME SO DILUTED AS TO BE MEANINGLESS.

In the "needs survey," "Plan B" assigned both EEN and non-EEN aides, i.e., Pelzer, Ernst, Reynolds, Benishek, Klima, Artymiuk, and Hickey, to student supervision and study halls and contained the following:

PLAN B
PROBLEMS

1. VICKI PELZER WILL NOT BE ABLE TO SERVE LD STUDENTS SECOND AND FIFTH PERIODS. MRS. ORY WILL HAVE TO RESCHEDULE SOME OF HER LD STUDENTS, POSSIBLY NOT MEETING ALL OF THE NEEDS AS PRESCRIBED IN EACH STUDENTS (sic) IEP.

2. LORI KLIMA WILL HAVE TO LEAVE THE THREE EEN STUDENTS UNATTENDED FOR ONE PERIOD. THIS IS CONTRARY TO THESE STUDENTS IEP AND NOT A SAFE, LEGAL, SUPPORTABLE, RESPONSIBLE POSITION FOR THE DISTRICT TO TAKE.

3. ANGIE REYNOLDS WILL NOT BE AVAILABLE TO SUPPORT MRS. KIEF IN THE LIBRARY DURING FOURTH PERIOD. MRS. KIEF WILL EITHER HAVE TO CLOSE THE LIBRARY TO THE HIGH-SCHOOL DURING FOURTH PERIOD SO THAT SHE CAN SERVE THE ELEMENTARY OR VISA/VERSA.

4. CONNIE ERNST WILL MISS HALF OF THE TIME THAT SHE IS ASSIGNED TO OUR EARLY CHILDHOOD PROGRAM. BECAUSE OF THE TYPE OF CHILDREN AND THE UNIQUE PROBLEMS THEY PRESENT THERE IS A SAFETY ISSUE HERE. IT IS QUESTIONABLE WHETHER MRS (sic) KELLER CAN ACCOMPLISH ALL THAT SHE TRIES TO ACCOMPLISH WITHOUT THE HELP OF HER AIDE.

5. JENNIFER BENISHEK WILL MISS 1/3 OF THE PM LD PROGRAM. THIS IS DIRECT SUPPORT FOR MRS. KIESLICK. THERE ARE CONCERNS ABOUT THE THOROUGHNESS OF THIS PROGRAM WITHOUT THE HELP OF THE AIDE.

6. ELAINE ARTYMUUK (sic) MISSES FIFTH HOUR AT RISK STUDY HALL. THIS HAS BEEN THE ESTABLISHED PRACTICE FOR THE 92-93 SCHOOL YEAR. IT IS NOT A GOOD PLAN, BUT OVERALL HAS ONLY DIMINISHED THE AT RISK PROGRAM ONE PERIOD PER DAY.

7. OVERALL THIS SPREADS OUR SUPPORT STAFF SO THIN THAT THEY WILL NOW BE SPENDING A MAJORITY OF THE TIME DOING DUTIES FOR WHICH THEY WERE NOT HIRED. ANY ILLNESS WILL PUT US IN A POSITION WHERE WE DO NOT HAVE A SAFE SITUATION, NOT JUST IN A RESPECTIVE JOB SITE BUT ACROSS THE BOARD. AS WE DO NOT PROVIDE SUBSTITUTES FOR AIDES ON A REGULAR BASIS, THE SITUATION COULD BECOME VERY UNSAFE FOR STAFF AND STUDENTS.

I DO NOT RECOMMEND EITHER OF THESE AS A SAFE, EXPEDIENT WAY TO SAVE ELCHO DISTRICT FUNDS.

Kellstrom understood that the Board was requesting this information because, throughout the Spring of 1993, the Board had been pursuing a need to cut staff.

Whitcomb and Kellstrom recommended to the Board that they maintain the status quo on the aide assignments. Whitcomb and Kellstrom advised the Board that the District would lose the ability to claim categorical aides for the time that the EEN aides were used for study halls. The categorical aides involve 40 to 50% of the EEN aides wage and benefits. The minutes of the Board Finance Committee of June 29, 1993 contains the following under Item III, taking action on items discussed in closed session:

MOTION BURBY/FOREMAN THAT ANGIE REYNOLDS, LORI KLIMA, AND ELAINE ARTYMIUK BE OFFERED EMPLOYMENT FOR THE 93/94 SCHOOL YEAR AT 7 HOURS PER DAY WITH APPROPRIATE BENEFITS PER BOARD POLICY AND THAT JOANNE WAGNER BE OFFERED EMPLOYMENT AT 3 1/2 HOURS PER DAY WITH NO BENEFITS. FURTHERMORE, WE ADVERTISE FOR THE POSITION OF L.D. AIDE (NEEDS PROPER CERTIFICATION AND EXPERIENCE) FOR 7 HOURS PER DAY AT \$6.00/HR. FOR 180 DAYS WITH APPROPRIATE BENEFITS AS PER BOARD POLICY; THAT THE STUDY HALL AIDE POSITION BE FURTHER EVALUATED WITH THE USE OF THE ABOVE AIDES TO FILL THAT POSITION

AND A COMPREHENSIVE HOURLY SCHEDULE BE PROVIDED TO THE BOARD. FOREMAN AYE, PELZER ABSTAIN, BURBY AYE, RAITH AYE, MOORE AYE. M/C.

MOTION BURBY/FOREMAN THAT JENNIFER FORBES-BENISHEK'S EMPLOYMENT BE TERMINATED AND THAT THE L.D. AIDE POSITION BE POSTED FOR 7 HOURS PER DAY AT \$6.00/HR. FOR 180 DAYS WITH THE APPROPRIATE BENEFITS AS PER BOARD POLICY. FOREMAN AYE, PELZER ABSTAIN, BURBY AYE, RAITH AYE, MOORE AYE. M/C.

The minutes of the July 20, 1993 meeting of the Finance Committee, which is a committee of the whole, contains the following in item III, referencing actions taken in closed session:

A. MOTION BURBY/FOREMAN TO RECOMMEND THAT THE BOARD ADOPT PLAN A (AIDE SCHEDULING) USING NON-EEN AIDES WITH ANGIE REYNOLDS BEING USED FOR THE FIRST STUDY HALL PERIOD AS WELL AS HER OTHER ASSIGNMENTS IN PLAN A. FOREMAN AYE, PELZER ABSTAIN, BURBY AYE, RAITH AYE. M/C

B. MOTION FOREMAN/BURBY TO RECOMMEND THAT THE BOARD ADOPT THE PLACEMENT OF ALL STUDY HALLS IN THE H.S. LIBRARY IF THE NUMBER IS LESS THAN 26 STUDENTS -WITH JUDGEMENT BEING USED ON ANY AMOUNT OF STUDENT NUMBERS IN EXCESS OF 25 TO PLACE THE STUDY HALL IN THE LIBRARY. FOREMAN AYE, PELZER ABSTAIN, BURBY AYE, RAITH AYE. M/C.

C. MOTION PELZER/FOREMAN THAT THE 5/6 GRADE POSITION AS ADVERTISED BE FILLED FROM IN-HOUSE AND THE FOLLOWING REASSIGNMENTS BE DIRECTED: MRS. CURRAN BE ASSIGNED TO THE 4TH GRADE, THAT MRS. FASBENDER BE ASSIGNED TO THE 1ST GRADE AND THAT MRS. WALKER BE ASSIGNED TO 5/6TH GRADE. ALL AYE.

As a response to proposed State budget limitations, the Board which was seated in April, 1993 determined that it was necessary to reduce staff for the 1993-94 school year. The Board could not lay-off teaching staff because the time limits for such action had passed by the time that the Board came into office. Given the May 15th deadline for teacher assignments, the Board was able to make some teacher reassignments. Additionally, the Board did not hire a replacement for Mr. Radtke, a teacher who had died during the 1992-93 school year. The Board did not accept the administration's recommendation to maintain the status quo on aide positions because it did not save any money. The Board did not consider the quality of any aide's work performance when it decided to eliminate the study hall aide position. The Board did give consideration to reducing non-EEN aide positions other than Girtz, e.g., Reynolds, Artymiuk, and Hickey, but decided that it would be most logical to eliminate the study hall aide position because it would provide a cost savings and would have the least impact upon the student body in that it did not involve working directly with students. EEN aides were not reduced because these aides work directly with children and/or are in programs that are reimbursed from outside sources. The portion of Reynolds position which involves the Special Education secretarial work receives reimbursement monies, as does the Fund 50 work performed by Hickey and the At-Risk work performed by Artymiuk. The Board terminated Eckardt at the end of the 1992-93 school year and did not fill this position

for the 1993-94 school year. Foreman believes that the student activity account should be handled by the District Bookkeeper and this belief was a consideration in her decision to eliminate Girtz' position. On July 27, 1993, The District Administrator issued the following letter to Patricia Girtz:

At a Regular School Board Meeting on Monday, July 26, 1993, the School Board determined that your services as a Study Hall Aide will not be needed for the 1993-94 school year.

Thank you for serving our children in a caring and compassionate manner.

May you experience success in all future endeavors.

In the opinion of the District Administrator, Girtz could perform all of the non-EEN aide assignments. The Board did not discuss the possibility of assigning Girtz to another aide position at the time that the Board made the decision to terminate Girtz' study hall position. Kellstrom and the District Administrator recall advising the Board of Girtz' tutoring activities. Kellstrom and the District Administrator considered Girtz' work performance to be excellent and recall advising the Board of this fact. While Kellstrom could not recall that the Board made any response to his remarks, which were made in the Fall of 1992, he did recall that Board Member Keen had told him that she was impressed with Girtz' work. The District Administrator did not have any discipline problems when Girtz was in the study hall and considered the continuity of having a single aide to be important in maintaining discipline. The District Administrator did have problems with the previous occupant of the study hall position. The District Administrator does not know whether the Board members understood how well Girtz was performing in the study hall. The District did not have a procedure for evaluating support staff and the administrators had not evaluated the support staff at the time that the Board made the decision to eliminate the study hall aide position and terminate Girtz' employment. At some point prior to the decision to eliminate the study hall aide position, the Board Personnel Committee had discussed reducing the number of study halls available to students. At that time, Burby discussed the fact that he had observed that students were resting with their heads down and not studying during one of Girtz' study halls. This discussion occurred in closed session. Girtz never saw Burby observing her study hall and believes that he could not have done so without being observed by her. Neither Burby, nor Foreman, recall being advised of Girtz' tutoring work. At the time that the Board decided to terminate Girtz' employment, the Board discussed Burby's complaint that Girtz was in the administrative office too much. Burby did not explain how he knew that Girtz was in the administrative office and did not elaborate on the nature of Girtz' visits to the administrative office. Girtz' normal work duties often required a visit to the administrative office. During the 1993-94 school year, the aides had difficulty maintaining discipline in the study hall and the Principal established a special training program for these aides. During the 1993-94 school year, the District Bookkeeper, who was paid more than Girtz, maintained the student activity account as part of her normal work duties. Burby and Foreman deny that Girtz' union activities were a consideration in the decision to eliminate the study hall aide position and terminate Girtz' employment. The Board did not give any consideration to Girtz' union activities when it decided to eliminate the study hall aide position and terminate Girtz' employment with the District. The decision to eliminate the study hall aide position and terminate Girtz' employment was made for legitimate business reasons.

8. At the beginning of the 1992-93 school year, the Board denied Kellstrom's request to hire a six hour aide to work in the office. In the Fall of the 1992-93 school year, the Board had received a DPI bulletin which indicated that there could be budget caps for the ensuing year and the Board was concerned that it would not stay within the 1992-93 budget. At the January 25, 1993 Board meeting, the District Administrator requested the Board to freeze spending to maintain the Fund 10 balance and discussed limiting travel and workshops. The minutes of the regular School Board meeting of January 25, 1993 contain the following Item VII(E):

BOARD ADVISED WHITCOMB TO SCRUTINIZE EXPENDITURE
REQUESTS AND FREEZE AS NEEDED BASED ON YEAR TO DATE
SPENDING SO THAT BUDGET WILL NOT BE OVERSPENT

The District's Fund 10 account is the operating fund. Historically, the Board and the District Administrator have recognized the importance of maintaining a surplus to meet any unanticipated expenses and to bridge the gap when revenues are not received in time to meet expenses. The regular school board minutes of February 22, 1993 contain the following in item XI, the Administrator's report:

WHITCOMB STATED THAT ALL MAJOR SPENDING WAS CUT IN
ORDER TO SAVE MONEY AND HOPES THAT SOME MONEY WILL
REMAIN AT THE END OF THE YEAR.

While the March 8, 1993 minutes of the Personnel/Negotiation Committee meeting refers to a 3.2% budget increase, the District Administrator believes that this was an error and that he was instructed to have no more than a 4% budget increase. The District's Financial Statement for June, 1993 reported the Fund 10 checking account balance to be \$566,883.42, which was approximately \$200,000 more than the previous year. The District Administrative Secretary received a 14% wage increase for the 1993-94 school year. The Bookkeeper was initially included in the support staff bargaining unit. After the representation election, and upon the request of the Bookkeeper, the Union and the Board agreed to exclude the Bookkeeper position from the bargaining unit. Thereafter, the Bookkeeper received a 12% increase. When approving these wage increases, the Board reviewed the Northbound Lakes Conference wages for similar positions and determined that the District wages were not comparable. The wage increases were discussed with Whitcomb, but Whitcomb did not make any recommendation with respect to the amount of the increases. Girtz considers the raises to these two non-union employees to be a message from the Board that they would have been good to the support staff if they had not unionized. At the time that the Board decided to terminate Girtz' employment, the Fund 10 surplus was sufficient to fund Girtz' position. The final 1993-94 budget represented a 3.3% increase over the 1992-93 budget. At the time of the August 9, 1993 Annual Meeting and Budget Hearing, the District Administrator did not know the effect of legislation which would limit revenues for the 1993-94 budget and understood that the District could increase the levy by \$140,000. The minutes of this Annual Meeting contain the following:

8. MR. WHITCOMB GAVE A REPORT ON THE BUDGET. HE EXPLAINED FUND 10 AND CUTS MADE; 6TH - GRADE - \$53,000; ONE HALF TIME GIFTED AND TALENTED - \$27,000; ONE AIDE POSITION - \$11,800; AND TEACHER REQUEST CUTS - \$160,000 TOTALLING \$252,000, LEAVING A FUND 10 BUDGET OF \$3,120,778; TAX LEVY OF \$2,744,343 (FUND 10) AND \$106,463 (FUND 30); TOTAL LEVY OF \$2,850,806; MIL RATE OF \$19.03.

The minutes of the August 23, 1993 regular meeting of the School Board contain the following under item VI:

- B. SECOND GRADE AIDE - DELETE
- C. ADMINISTRATOR INSTRUCTED TO PLACE A HOLD ON ALL PURCHASE ORDERS EXCLUDING TEXTBOOKS EFFECTIVE 8/23/93 UNTIL SUCH TIME AS THE BOARD AND/OR FINANCE COMMITTEE CAN REVIEW THE \$39,386 DEFICIT OR SHORT FALL

Subsequently, the Board learned that the District was \$98,115 over the state imposed revenue caps. As of the date of hearing, the Board has laid off all of the teachers and aides for the 1994-95 school year because of budget concerns.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Complainant Elcho Education Support Personnel Association is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

2. Respondent Elcho School District is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and the Elcho School District Board of Education is an agent of the Respondent Elcho School District.

3. Patricia Girtz is a municipal employe within the meaning of Sec. 111.70(1)(i), Stats.

4. The Elcho School District Board of Education's decision to terminate the employment of Patricia Girtz on July 26, 1993 was not motivated, in any part, by hostility toward Patricia Girtz for engaging in activity protected by Sec. 111.70(2), Stats., and therefore, Respondent Elcho School District has not violated Sec. 111.70(3)(a)3, Stats., or derivatively, Sec. 111.70(3)(a)1, Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

The complaint is dismissed in its entirety.

Dated at Madison, Wisconsin, this 13th day of August, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner

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

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

(footnote continued on Page 17)

1/ (footnote continued from Page 16)

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).

ELCHO SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 23, 1993, the Elcho Education Support Personnel Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the Elcho School District violated Sec. 111.70(3)(a)1 and 3, Stats., by terminating the employment of Patricia Girtz in retaliation for engaging in protected concerted union activities. Respondent Elcho School District denies that it has violated any section of the Municipal Employment Relations Act.

POSITIONS OF THE PARTIES:

Complainant

Patricia Girtz was actively involved in organizing the support staff and was the point person for the Association. District Administrator Whitcomb and Principal Kellstrom acknowledge that they were aware of Patricia Girtz' involvement with the support staff organizing effort.

In the opinion of the District Administrator, the Board of Education was also aware of the fact that Patricia Girtz was the point person in the Association's organizing effort. The District Administrator's opinion is supported by the fact that Patricia Girtz' organizational activity was common knowledge to the administrators and employees within the school building; the existence of a close personal relationship between two of the support staff employees and two of the Board members; and Board President Foreman's acknowledgement that she was aware of Patricia Girtz's Association activity.

The Commission has previously adopted the "small plant" doctrine. Thus, the small size of the Elcho community provides a reasonable basis to infer that the Board members did know that Patricia Girtz was the key person behind the support staff organizing effort.

Kellstrom's testimony demonstrates that, when the support staff union sought voluntary recognition, School Board President Burby's response was hostile. The inference that the Board terminated Patricia Girtz' employment in retaliation for engaging in protected activities is supported by the sequence of events, as well as the pretextual nature of the Board's reasons for eliminating Patricia Girtz's position. The use of inferences is appropriate for establishing the Board's union animus and illegal motive.

In February, 1993, the support staff had an organizational meeting and employees informally voted in support of the Association. Both Administrators were aware of this meeting and, by March 8, 1993, the Board was also aware of this meeting. Following the March 8, 1993 Board meeting, the School Board gave the District Administrator a set of guidelines for developing the 1993-94 budget. These guidelines included instructions "to remove the equivalence of three full-time aide positions from the budget" and "further reduce support staff as is needed to bring in a budget increase of 3.2% or less."

Although the Board chose to hire a part-time aide in January of 1993, less than two months later, the Board decided that it was necessary to eliminate three aide positions for the following year. Given the intervening event of the Association's organizational meeting, the timing of the Board's decision to reduce aide positions is suspect.

In response to the Board's directive, the District Administrator submitted three proposals to the Board. The Board, however, did not follow the Administrator's recommendation, i.e., maintain the status quo. Rather, the Board chose a proposal which involved having three other non-EEN Aides split the study halls. The two Administrators did not believe that this was a wise choice and advised the Board that they had concerns with respect to the other aides being diverted from their duties to take study halls. The District Administrator also feared that the loss of continuity in the study hall position would adversely affect discipline. As the testimony at hearing revealed, the aides have had trouble maintaining discipline in study halls during the 1993-94 school year.

During the time period in which the Association was petitioning the WERC to conduct a representation election, the Board proceeded in a piecemeal fashion to give support staff employees reasonable assurance of employment for the 1993-94 school year. As Patricia Girtz testified, the aides were concerned about this hiring pattern and believed it was designed to create dissension among the newly organized aides.

At the May 24, 1993 Board meeting, the Board gave reasonable assurance to only three aides: Patty Hickey, Vicki Pelzer, and Connie Ernst. While Burby testified that the Board gave reasonable assurance to these three aides because they were Special Education Aides and "those employees had been with us for a while," such a rationale is not supported by the evidence. Patty Hickey was neither a Special Education Aide, nor a long-term employee. Moreover, other Special Education Aides were not given reasonable assurance until early June of 1993, after the WERC had notified the Board that the Association had won the election.

Respondent suggests that Principal Kellstrom recommended that the Board give reasonable assurance to the three aides: Patty Hickey, Vicki Pelzer and Connie Ernst. However, Kellstrom advised the Board that if it did not provide reasonable assurance to the aides, the District would have to pay unemployment compensation. This recommendation was a general recommendation about all the aides.

Board President Foreman indicated that Patricia Girtz' study hall position was eliminated because Girtz, unlike the other aides, did not have student contact. However, Patty Hickey, was a hot lunch aide who had very little student contact. Moreover, this rationale ignores that fact that Girtz provided valuable tutoring to students in her study hall.

At the time that she received her reasonable assurance, Patty Hickey was a recently hired School Lunch Aide on a thirty day probationary period. As District Administrator Whitcomb testified, Patricia Girtz was capable of doing any of the non-EEN Aide jobs, including the duties performed by Patty Hickey. While Burby indicated that the District received reimbursement for Hickey, the federal funding insured the retention of a position and not the retention of a particular employee. The fact that the Board chose to retain Hickey, rather than Patricia Girtz, strengthens the inference that the Board's decision to terminate the employment of Patricia Girtz was in retaliation for her Association activities.

Foreman also stated that the bookkeeper should be handling the student activity account. As Kellstrom testified, however, Girtz had been given the activities account because the bookkeeper was not finding the time to perform the necessary paperwork. While Burby testified that he felt confident that the bookkeeper could perform the student activity account duties, a year earlier he had made the motion to transfer the account to Girtz.

The Board could have transferred the activity account to the bookkeeper without eliminating the study hall position. Indeed, the student activity account had not previously been assigned to the study hall aide.

Girtz's performance of the student activity account duties was exemplary. As was her conduct of the study hall. The fact that the layoff of Girtz jeopardized efficient and well-managed programs suggests a retaliatory motive. As does the sequence of the key events and the lack of any reasonable explanation for these events.

Initially, Burby stated that he did not know whether or not Girtz was doing a good job. Subsequently, he testified that he had received complaints that students were not studying in the study halls; that he had visited Girtz' study hall; that he had observed students resting with their heads down and no books on the table; and that these observations were a subject of discussion in closed session by the Board. Girtz, however, denied that Burby had ever been in one of her study halls. The fact that Burby felt the need to create reasons for the elimination of Girtz's position during his cross examination supports the inference that the real reason for her termination was retaliation for her union organizing activities.

In another of Burby's many inconsistencies, Burby testified at one point that he did not have information on how Hickey was doing, but then also testified that "Mrs. Hickey had turned around the hot lunch program." The most reasonable construction of the record evidence is that the Board had no idea whether Patty Hickey was doing a good job or not. The inconsistencies in Burby's testimony establishes that he is not credible.

Respondent misrepresents the record by repeatedly asserting that in November, 1992 and January, 1993, the District Administrator had concerns about being over budget for the 1993-94 school year. In fact, preparation of the 1993-94 budget did not commence until March, 1993, and the budget was not

finalized until August, 1993. The Board's reliance on budget concerns expressed at its August 23, 1994 meeting and during the 1993-94 school year are irrelevant because these concerns arose after the Board terminated Girtz.

In the face of a so-called "financial crisis," the Board decided to give raises of 12% and 14% to non-union support staff. The District's Bookkeeper received her raise after successfully petitioning for her exclusion from the Association's bargaining unit. In the opinion of the District Administrator, the District could afford to retain Patricia Girtz in her study hall position.

The Board did not begin the process leading to the elimination of Girtz's position prior to the point in time that the Association began to organize. The alleged financial reasons advanced by the District as justification for Patricia Girtz's layoff are pretextual.

The Board has given preliminary notice of non-renewal to all of the aides for the 1994-95 school year. Although Burby stated that the Board laid off each of the aides for financial reasons, the Board also chose to lay off those aides for whom funding was assured. The fact that the District would not save any money by eliminating positions which were fully funded gives cause to question Burby's compassion and motivation for the mass layoff.

A cynic might conclude that the mass layoff was an attempt to intimidate the support staff who are in the process of bargaining their initial contract. According to Burby, the Board proceeded this way because they wished to be fair to employees because there was a possibility of their not being rehired. If this is indeed the reason for the Board's en masse layoff, then such "compassion" is clearly lacking in the Board's dealing with Patricia Girtz when the Board waited until the end of July to advise her of her termination.

In conclusion, the rationale espoused for the termination of Patricia Girtz does not withstand close scrutiny. The School Board of the Elcho School District violated Sec. 111.70(3)(a)3, Stats., when it eliminated the position of Patricia Girtz and terminated her employment in retaliation for organizing activities on behalf of the Elcho Education Support Personnel Association. Patricia Girtz should be reinstated to her position and made whole for her wrongful termination.

Respondent

The District's administrative staff consists of Joseph Whitcomb, the District Administrator, and Charles Kellstrom, the Principal. During the 1992-93 school year, there was a lack of trust and confidence between the Board and the administrative staff with regard to recommendations and/or decisions.

Neither the District Administrator, nor the Principal, claimed to have advised members of the School Board that Girtz was involved in organizing the support staff or that she was acting as a liaison between the support staff and the Wisconsin Education Association Council. Kellstrom's testimony merely demonstrated that Girtz' organizational activity was general knowledge within the high school building. While Girtz assumed that the Board members were aware of her organizational activity, her testimony does not establish that any Board member had actual knowledge of this union activity. Richard Burby, the School Board Clerk, and Elsie Foreman, the School Board President, without refute, testified that the School Board had no knowledge of Girtz's union organizing activities at the time the Board eliminated her study hall aide position.

The Association is incorrect when it states that Burby indicated that the

Board was aware of the Association meeting by the March 8 Board meeting. Burby testified that in regard to the support staff organizing, he did not recall any specific information that the School Board had been given except which might have been provided through gossip.

The record is devoid of any evidence that the School Board's decision to eliminate Girtz's study hall position was motivated, to any degree, by anti-union animus. As Burby testified, when the School Board discussed eliminating the study hall aide position, there was absolutely no discussion by the School Board of Girtz's Association activities or the support staff seeking Association representation. This testimony was corroborated by Foreman. Even the Association's principal witness, Patricia Girtz, was unable to testify that the School Board had considered her Association activities in reaching its decision to eliminate her position.

The Association would have the Examiner infer "hostility" based upon Burby's response to their request for voluntary recognition. The Association, however, has overlooked Burby's testimony as to why he was opposed to voluntary recognition of the support staff. Burby did not oppose the support staff's organizing as a collective bargaining unit, but rather simply desired a Association election because an election would clearly define which employees would be included within the unit.

At the School Board meeting held on November 16, 1992, Whitcomb advised the School Board of the possibility of certain revenue limitations being imposed upon school districts by the State Legislature which, if adopted, would place the School District over budget. At that time, Kellstrom requested the filling of a six hour aide position for the School District's administration office, which request was denied by the Board.

At the next Board meeting, held on January 25, 1993, the Board advised Whitcomb to scrutinize District expenditures and "freeze" expenditures as needed so that the budget would not exceed the proposal revenue caps. At the February 22, 1993, School Board meeting, Whitcomb advised the School Board that all major District spending had been "cut" in order to reduce expenditures with the expectation that funds would be remaining at the end of the school year.

The Association's claim that the School Board hired a part-time school office aide at the January 25, 1993 meeting is misleading. At the meeting, the Board authorized the hiring of an individual to fill the position through May 28, 1993. Consequently, Kellstrom requested that the position be filled for the summer of 1993, but the Board denied this request and, subsequently, eliminated the position in its entirety.

At the next Board meeting, on March 8, 1993, the School Board instructed Whitcomb to (1) prepare a budget for the 1993-94 school year within the parameters of the 3.2 percent revenue caps then under consideration by the State Legislature and (2) construct staffing patterns within these parameters.

The Board specifically directed Whitcomb to not fill a vacant teacher position; not replace the gifted and talented teaching position if the position should become vacant; assign the present gifted and talented English teacher to full-time English instruction; assign the High School guidance counselor to work half time as a guidance counsel and half time as a teacher; assign the Elementary School guidance counselor to work half time as a guidance counselor and half time as a teacher; eliminate the equivalence of three full-time aide positions from the budget; and further reduce the District's support staff as needed to stay within the 3.2 percent or less budget increase. These actions of the School Board were taken before March 22, 1993, the date on which the School Board learned that the support staff was organizing as a collective bargaining unit.

The evidence demonstrates that the elimination of the study hall position commenced prior to the Association's organizing efforts and was completed long after the Association election and the unit was certified. The evidence further demonstrates that this elimination was undertaken for legitimate business reasons which had nothing to do with union organizing efforts. As the testimony of Burby and Foreman unequivocally demonstrates, these actions were taken to ensure that the District would not exceed its budget and to stay within the projected 3.2 percent revenue caps. As part of this process, the Board chose to eliminate the study hall position and assigned other aides to perform the duties of that position. Burby's testimony establishes that Pizl and Schuester received their wage increases because the Board had looked at comparable data in the Northbound Lakes Conference.

The School Board issued letters of reasonable assurance to Pelzer and Ernst based upon Kellstrom's recommendation that they be rehired for the upcoming school year because they were Special Education Aides and they were needed to serve special education students. As Special Education Aides, the School District was reimbursed for a portion of the costs of these positions.

With respect to Hickey, 50 percent of the cost of her position was funded by the State of Wisconsin. Furthermore, Hickey had been specifically trained by DPI to manage the District's hot lunch program. Burby explained why the Special Education Aides and other aides were retained and Girtz's position eliminated. The School Board gave reasonable assurance to Special Education Aides on dates when so recommended by the administrative staff. Through the winter and spring of 1992-93 school year, the Board was continuously reviewing staffing alternatives.

The Association alleges that Girtz was capable of performing any of the duties of the non-EEN aides, including those performed by Hickey. While this may be true, neither Girtz, nor the Association, ever requested to meet with the School Board to discuss why Girtz was selected for layoff and/or to request her reassignment to one of the other aide positions.

The Association claims that because the School Board waited until near the end of July, 1993, to determine Girtz's unemployment status, its actions in

eliminating her position are "suspect." It is obvious that preparing and reviewing options and determining how to provide monitoring for the District's study halls without a study hall aide simply took time.

The Association suggests that the layoff of all the District's aides for the 1994-95 school year was done to intimidate the support staff, and that the reasons for laying off are suspect since a number of the positions are fully funded. No aide position, however, is fully funded. The cost of fringe benefits attending a position, such as health insurance, are not reimbursed. Thus, the elimination of the aide positions would result in a cost saving.

At the start of the 1993-94 school year the School District had a projected \$98,000 deficit due to limits imposed by the revenue caps. Consequently, the School District has had to take even further budget cutting action to meet the State mandates.

There is no merit to the claim that the sequence of events in this matter demonstrates the School Board's anti-union animus. The School Board did not focus solely upon Girtz, in particular, or support staff employees, in general, when it took action to reduce costs. The sequence of events demonstrates that the School Board's actions were taken for legitimate business reasons.

The District has no reason to dispute the Association's claim that Girtz was more than adequately performing her duties as a study hall aide. However, Girtz's job performance is not an issue. Girtz's position was eliminated to reduce costs.

The Association's contention that the small plant doctrine should be utilized to infer that the School Board was aware of Girtz's Association activities is without merit. Even under the small plant doctrine, additional corroborating evidence is required. Generally, the WERC has applied the small plant doctrine to impute knowledge to an employer where: (1) no direct evidence of knowledge existed and (2) the employees' Association activities were carried out in such a manner that those activities and the employees' involvement could not have gone unnoticed.

While there is no question that Girtz was involved in Association activities, unlike the case relied upon by Complainant, there was absolutely no interaction between Girtz and School Board members. The School Board was never advised, either orally or in writing, that Girtz was acting as a liaison between the support staff group and WEAC. All of the Association activities occurred off school premises on off-duty time. Even then Girtz interacted solely with support staff personnel. Girtz did not engage in any overt Association activities such as obtaining signatures on Association cards, wearing Association buttons, appearing before the School Board in support of the Association, etc. In light of these facts, it is inappropriate to infer that the School Board had knowledge of Girtz's Association activities.

Under NLRB law, it is clear that the finding of knowledge can be based upon inferences drawn from circumstantial evidence, but such inferences must not be entirely speculative or improbable. In Hadley Manufacturing, the NLRB stated that the mere fact that the plant is of small size does not permit a finding that the employer had knowledge of the union activities of specific employees, absent supporting evidence that the union activities were carried on in such a manner, or at times that in the normal course of events the employer must have noticed them. It is not reasonable to infer from the fact that the administrative staff was aware of Association activities that the Board was aware of such activities. As the record demonstrates, the administrative staff never shared that information with the School Board.

It is inappropriate to "infer" knowledge of Association activities based upon personal relationships. Personal relationships exist in nearly all employment settings. If an employee's knowledge of another employee's union activities can be imputed to a third party based solely upon a relationship between the first employee and the third party, without any evidence that this knowledge was conveyed to the third party, an employer's knowledge of an employee's Association activities will, in general, always be found. More importantly, in this matter, the record is devoid of any evidence that Mrs. Pelzer advised Mr. Pelzer or that Ms. Schuester advised Mr. Burby of Ms. Girtz's Association activities. In fact, the evidence is to the contrary. At hearing, Burby explicitly testified that Schuester never advised him of Girtz's Association activities.

Schuester and Pelzer are bargaining unit members. If the Association wished to establish that Schuester had advised Burby of Girtz's Association activities or that Pelzer had advised Mr. Pelzer, the Association could have simply had Schuester and Pelzer testify at hearing.

The School District's fund 10 account is used to pay operating expense and always has a surplus to meet upcoming expenses. The surplus is necessary to meet unanticipated expenses.

The evidence demonstrates that the Board was not motivated in any manner by anti-union animus. The Board eliminated Girtz' study hall position for legitimate business reasons. Since no violation of Sec. 111.70(3)(a)1 or 3, Stats., has occurred, the complaint should be dismissed in its entirety. Moreover, the School District should be awarded costs and attorneys' fees.

DISCUSSION

Sec. 111.70(3)(a)3, Stats.

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. In order to establish a violation of this section, a complainant must demonstrate, by a clear and satisfactory preponderance of the evidence, all of the following elements:

1. The employee was engaged in protected activities; and
2. The employer was aware of those activities; and
3. The employer was hostile to those activities; and
4. The employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. 2/

As the Respondent recognizes, Patricia Girtz was engaged in protected activities when she became active in the organization of the support staff union. However, assuming arguendo, that the Respondent was aware of this activity at the time that it decided to terminate the employment of Girtz, the Examiner is not persuaded that Respondent's decision to terminate Girtz' employment was motivated, in any part, by hostility toward the protected

2/ Milwaukee Board of School Directors, Dec. No. 23232-A (McLaughlin, 4/87), aff'd by operation of law, Dec. No. 23232-B (WERC, 4/87); Kewaunee County, Dec. No. 21624-B (WERC, 5/85).

activities.

In arguing that Respondent was hostile toward Girtz for engaging in protected activity, Respondent relies upon the following testimony of Principal Kellstrom:

Q. Do you recall when you became aware of the support staffs organization effort?

A. There were two things that lead me -- that helped me with this, okay. Number one Mr. Whitcomb was informed, and he shared that information with me. And then at the School Board meeting the School Board president at that time was informed that they had had an election, and he had, he had a reaction to that.

Q. Who was the School Board president?

A. Mr. Burby.

Q. And what was his reaction?

A. His reaction was basically a hostile reaction. It was they're not going to do it, we're not going to certify their election, we're going to have -- we're going to force them to have a regular election.

Q. When you refer to election previously then, you weren't referring to the election conducted by the WERC then?

A. Apparently, according to Mr. Whitcomb's testimony, there had been a meeting off grounds of the support people, and they had had an election of their own, okay. And I think it's discretionary as to whether or not the District would accept that. That's the best of my knowledge at this point.

Q. And the remarks that Mr. Burby made, that would have been at the March 22 --

A. I believe it, yes. 3/

A review of the above testimony does not establish that Burby was hostile toward the union organizing effort. At best, it establishes that Burby was hostile to the idea of voluntarily recognizing the support staff union. Such a conclusion is supported by the following testimony of the District Administrator:

Q. Do you have any indication or recollection if the support staff asked to be recognized as a

labor organization?

A. They had, because they had held an election in the town hall and I do not remember the date, but it was prior to this date. I do remember that.

Q. Okay. And so does that refresh your recollection in that they asked the Board to voluntarily recognize the association?

A. Yes.

Q. Okay. And Mr. Burby stated the response that it would have to be pursuant to an election?

A. Yes.

Mr. Dietrich: Well, I'm going to object to his characterization of what Mr. Burby said, simply that the document speaks for itself.

Mr. Pieroni: Right. I'm just stating what the document is. I didn't mean to add anything to it.

Examiner Burns: All right.

Mr. Pieroni:

Q. Okay. And so was that a major issue at that time, if you recall, at that time, a minor issue, was there much discussion on it, if you have a recollection?

A. I don't recall it as a major issue. Just the fact that they wanted a, a sanctioned election, which was then held.

Q. Okay. All right. Do you recall if any of the Board members at the meeting, whenever that was that you gave them your advice, subsequently asked you any questions about the Board's conduct toward the support staff forming a union?

A. Not to the best of my recollection. 4/

At the time that Burby made these remarks, he was President of the Elcho School District Board of Education. The Board, as a whole, and Burby, as the President of the Board, were legally entitled to refuse to voluntarily recognize the support staff union and to insist upon a representation election conducted by the WERC. The Examiner does not consider the exercise of this legal right to support the inference that Burby, as an individual, or the Board, as a whole, was hostile to any union organizing activity.

In asking the Examiner to find a hostile motive, the Complainant relies upon a sequence of Board conduct. In reviewing the pattern of the District's conduct, it must be recognized that there were two different Boards during the period in question. Board #1, of which Burby was President, was in control of District affairs prior to April of 1993. Board #2, of which Elsie Foreman was President, gained control of Board affairs in April of 1993. Of the five member Board #2, only two members were also on Board #1, i.e., Richard Burby and Cindy Raith.

Given this change in Board membership, the fact that the actions of Board #2 may not be consistent with the actions of Board #1 does not provide a reasonable basis to "suspect" the actions of Board #2. For example, Board #1's hiring of Jennifer Eckardt for a fifteen hour school office aide position on January 25, 1993 does not, per se, cause the Examiner to "suspect" Board #2's decision that it was necessary to reduce the number of aide positions.

Moreover, as set forth in the minutes of the January 25, 1993 Board meeting, Eckardt was hired through May 28, 1993. As Burby testified at hearing, Board #2 did not rehire Eckardt for the 1993-94 school year. 5/ Since the financial concerns which motivated Board #2's decision to terminate Girtz' study hall position involved the 1993-94 budget, Board #2's handling of Eckardt and Girtz are not inconsistent.

At the March 8, 1993 Board meeting, Board #1 did direct the District Administrator to construct a staffing pattern which removed the equivalence of

4/ TR. 28-9.

5/ TR. 229.

three full-time aide positions. As the Complainant argues, this action of the Board did occur at a time period in which the support staff was meeting to discuss union organization. There is, however, no evidence that this union organization was a subject of discussion at the March 8, 1993 meeting. Indeed, when questioned as to why the Board took this action, the District Administrator stated that the removal was due to school finance and not to dissatisfaction with the aides. 6/ The testimony of the District Administrator is consistent with that of then Board President Richard Burby, who indicated that the Board's motivation in reducing staff was concern about DPI projections which indicated that the District's 1993-94 budget would be subject to a 3.2% cap. 7/

As the Respondent argues, the Board's action on March 8, 1993 was not confined to aides, but rather, the Board also directed the District Administrator to give consideration to not filling vacant teacher positions. The evidence of the Personnel/Negotiation Committee's conduct at the March 8, 1993 meeting does not support the inference that the decision to eliminate aide positions, including Girtz', was motivated, in any part, by hostility toward protected concerted activities.

Item IX(B) of the minutes of the March 22, 1993 Board meeting demonstrate that the Board had a continuing concern that proposed state mandates would require staff realignment and budget savings. To be sure, at this meeting, the Board was notified that the support staff would like to form a union. It is not evident, however, that any Board member made any statement which linked the consideration of the "staff realignment and budget savings" to the union activity of the support staff. As discussed above, the only Board response to the notification of the support staff union activity was to require the Union to have a representation election. The evidence of the Board's conduct at the March 22, 1993 meeting does not support the inference that the decision to eliminate Girtz' aide position was motivated, in any part, by hostility toward protected concerted activities.

On April 26, 1993, Board #2 did approve the hiring of Patti Hickey. As with Eckardt, Hickey was expressly hired for the 1992-93 school year. Since Girtz' position was eliminated due to concerns over the 1993-94 budget, the Board's April 26, 1993 decision to hire Hickey does not support the inference that the Board did not have a legitimate financial reason to eliminate Girtz' position.

The support staff representation election was conducted by mail ballot. The ballots were mailed on or about May 19, 1993, and the ballots were counted on June 3, 1993. In the intervening time period, Board #2 met at a regular board meeting on May 24, 1993. At that meeting, the District Administrator reported on the status of the support staff elections and the Board gave reasonable assurance of continued employment to three aides: Patti Hickey, Vicki Pelzer, and Connie Ernst. 8/

As the Complainant argues, it is not evident that either the District Administrator or the Principal recommended that the Board give reasonable assurance to only these three aides. Rather, Kellstrom's testimony demonstrates that the administration had advised the Board that they would have

6/ TR. 35.

7/ TR. 211-12.

8/ Historically, aides have been hired for one year at a time without any guarantee of continued employment.

to pay unemployment compensation to employees in aide positions if the Board did not provide the employees with reasonable assurance of employment for the 1993-94 school year. 9/ This testimony suggests that the Board's discussion of reasonable assurance was prompted by administration warnings about the ramifications of not providing reasonable assurance to the aides, rather than the timing of the representation election.

Kellstrom's testimony suggests that the Board did consider giving reasonable assurance to the other aides, but acted upon only three. 10/ To be sure, neither administrator understood why the Board decided to offer reasonable assurance to only three of the aides. However, the Board's discussion on the motion occurred in closed session. Since the administrators were often excluded from these closed sessions, it is not surprising that Kellstrom and Whitcomb were not privy to the Board's rationale. The administrator's lack of understanding of the Board's rationale does not, per se, support the inference that the Board's motives were unlawful.

While the Complainant argues that Burby's explanation for this action of the Board is not supported by the evidence, the undersigned disagrees. Upon review of Burby's testimony, it is apparent: (1) that he recognized that Hickey was a new employee and that his explanation that the aides were long-term employees was a reference to Pelzer and Ernst; (2) that he understood that Hickey was involved in the hot lunch program and his explanation that the Board had EEN needs was a reference to Ernst and Pelzer; and (3) that a consideration in the retention of all three aides was that they were in positions which were subject to reimbursement monies. 11/

Burby did not claim that Ernst and Pelzer were the only EEN aides and, in fact, they were not. Nor was Hickey the only non-EEN aide to occupy a position for which the District received reimbursement monies. Thus, much of the rationale used by Burby would apply to other aides, although it would not apply to Girtz. This fact does support the inference that the Board's decision to offer reasonable assurance to only three of the aides was intended to create fear and dissension among the aides during a time period in which the aides were voting for representation. However, the greater weight of the evidence indicates that the Board was acting in a "piecemeal" fashion because it had not yet decided on the aide staffing pattern for the 1993-94 school year.

The aide staffing pattern requested at the March 8, 1993 meeting was not prepared by the administrators until the latter part of May and was not presented to the Board until June, 1993. Thus, it is neither surprising, nor suspicious, that the Board did not provide reasonable assurance to all of the aides on May 24, 1993.

During the executive session of the June 21, 1993 school board meeting, the Board continued to discuss the possibility of reducing the number of aides within the District. By this time, the Board had received the "School District of Elcho: A Comprehensive Analysis of School Aides for 1993-94 School Year" in which the administrators offered the Board three different aide staffing plans.

One plan maintained the status quo; one plan involved the use of both EEN and non-EEN aides; and the third plan involved the use of only the non-EEN aides. As the Complainant argues, the two administrators recommended the maintenance

9/ TR. 138.

10/ TR. 139.

11/ TR. 218-19.

of the status quo. Not surprisingly, the plan recommended by the administrators was not adopted by the Board because it did not result in any savings. Rather, the Board instructed the administration to prepare a comprehensive plan for the District aide positions without using the present full-time study hall aide.

Following this directive, the administrators did prepare such a plan, i.e., the "needs survey." Given the evidence that the "needs survey", which provided plans for staffing the study hall without the use of the full-time study hall aide, was provided to the Board by June 24, 1993, 12/ it is neither suspicious, nor surprising, that the Board waited until June 29, 1993 to give reasonable assurance to the remaining aides, but did not give such assurance to Girtz.

Foreman's testimony demonstrates that, at the time that Board #2 came into control of District affairs, it was too late to lay off teachers and, thus, if the Board determined that it was necessary to lay off staff for the 1993-94 school year, then the layoff had to be among the support staff. Foreman denies that the decision to eliminate Girtz' study hall position was influenced, in any part, by Girtz' participation in union organizing activities. 13/ According to Foreman, the decision to eliminate the study hall position was primarily motivated by budgetary concerns. 14/ Specifically, that the state imposed caps required the District to reduce budget expenditures. 15/ Foreman testified that a secondary reason for eliminating Girtz' position was that Girtz had less contact with students than many of the other aides and, thirdly, that Foreman believed that the student activity account should be handled by the Bookkeeper. 16/

Burby recalls that the Board did consider eliminating aides other than Girtz, i.e., Reynolds, Artymiuk, and Hickey, but decided that the elimination of Girtz' position was least detrimental to the District because Girtz did not work directly with children and the District did not receive reimbursement monies for Girtz' position. 17/ Burby denies that Girtz' involvement in union activities was a motivating factor in the decision to eliminate her study hall position. 18/

At a Board meeting in August of 1992, Burby had made the motion which resulted in the transfer of the student activity account from the Bookkeeper to Girtz. Thus, the return of the student activity account duties to the Bookkeeper is a reversal of Burby's prior position. However, it is Foreman, and not Burby, who stated that the transfer of the student activity account duties to the Bookkeeper was a reason for eliminating Girtz' position. 19/

12/ TR. 135.

13/ TR. 269.

14/ TR. 268.

15/ TR. 266.

16/ TR. 268.

17/ TR. 220-21.

18/ TR. 221.

19/ Burby merely acknowledged that he was confident that the Bookkeeper could handle the student activity account. TR. 260.

Foreman's testimony on this point demonstrates that this factor was important to Foreman, but does not demonstrate that it was of equal concern to the other Board members.

More importantly, however, three out of the five members of Board #2, including Foreman, were not members of the Board in August of 1992 and, thus, it is not reasonable to assume that the majority of Board #2 was aware of the fact that the student activity account had been assigned to Girtz because of dissatisfaction with the Bookkeeper. Nor is it otherwise evident that they had such knowledge. Despite Complainant's arguments to the contrary, the record does not provide a reasonable basis to conclude that the Board intentionally jeopardized a well-managed program by assigning the student activity account to the Bookkeeper.

It is true that both administrators were well satisfied with Girtz' study hall performance and considered her to have contact with students by virtue of her tutoring of study hall students. However, as the District Administrator stated at hearing, the tutoring performed by Girtz was not a duty which was expected of the study hall aide. 20/ Thus, neither Burby, nor Foreman, are inaccurate when they state that the study hall position does not have the student contact of other aide positions, such as the EEN aide positions. Moreover, while Kellstrom and the District Administrator both believe that they had advised the Board of Girtz' tutoring activities, it is not evident that these comments had been directed to Board #2. 21/

As the administrators stated at hearing, Girtz performed her duties exceptionally well. It is not evident, however, that either of the two administrator's discussed Girtz' work performance, or any other aide's work performance, at the time that the Board was considering reducing aide positions. According to Foreman, she assumed that all of the other aides were doing a good job in their respective positions. 22/ The record does not demonstrate otherwise.

According to the District Administrator, Girtz could perform any of the duties of the other non-EEN aides. It is not evident, however, that the District Administrator advised the Board of this fact. Nor is it evident that either administrator suggested to the Board that Girtz be reassigned to one of the other non-EEN aide positions.

Girtz was a new employee, the position that she occupied was unique, and it is not evident that the Board had any reason to be dissatisfied with the performance of any of the other aides. The Examiner does not consider it surprising, nor unreasonable, that the Board did not consider laying-off another aide and reassigning Girtz to that position.

It is true that the administration feared that the loss of continuity in the study hall would have an adverse impact upon student discipline. 23/ It is

20/ TR. 17.

21/ Kellstrom's testimony indicates that his comments concerning Girtz' study hall performance were made in the Fall of 1992, but that he did not make a point of blowing someone's horn every month. TR. 126.

22/ TR. 273.

23/ The Examiner notes that Girtz' predecessor provided continuity of study hall supervision but had problems maintaining student discipline.

also true that time has demonstrated that the administrator's fears were valid, i.e., the aides have had difficulty in maintaining discipline in the study halls during the 1993-94 school year. The Examiner, however, is not persuaded that, at the time that the Board made the decision to reassign Girtz' study hall duties to the other aides, the Board had a reasonable basis to believe that the other aides were not capable of monitoring the study hall.

Contrary to the argument of Complainant, Burby did not create reasons for the elimination of Girtz' position during cross examination. To be sure, on direct examination, Burby did not discuss his complaint that he had observed Girtz's study hall on one occasion and noted that there were students who were not studying. However, when Burby did discuss this complaint, he did not indicate that it had been the subject of discussion at the time that the Board decided to eliminate Girtz' study hall position. Rather, he indicated that the discussion had occurred earlier in the year, at a time when the Board was considering the possibility of reducing the number of study halls available to students. 24/ While Complainant argues that the fact that Girtz never saw Burby looking into her study hall establishes that Burby could not have done so, the Examiner does not find this argument to be persuasive.

As Complainant argues, at one point in Burby's testimony, he did indicate that the Board was comfortable with retaining Hickey in the hot lunch position because Hickey had turned the hot lunch program around 25/. As Complainant further argues, at another point in his testimony he indicated that he did not have any information as to whether Hickey's work performance was good, bad or indifferent, because the Board had never received any formal or informal evaluation. 26/ While the Examiner does consider this testimony to be inconsistent, the inconsistency does not persuade the undersigned that Burby is not a credible witness. Nor is the Examiner otherwise persuaded that Burby is not a credible witness.

As the Complainant argues, at the time that Board #2 made the decision to eliminate Girtz' study hall position, the Board had sufficient monies in the Fund 10 equity account to pay for Girtz' position. This fact, however, does not persuade the undersigned that the Board was not legitimately concerned about the ramifications of the proposed state revenue caps.

As Complainant argues, the fact that the District increased the two non-union support staff employe wages by 12% and 14% does support Complainant's claim that the Board's alleged financial concerns are pretextual. On balance, however, the record supports the conclusion that Respondent's decision to eliminate one aide position was motivated by legitimate business reasons, i.e., the desire to reduce 1993-94 budget expenditures in the face of state imposed budget limitations. The record also supports the conclusion that Girtz' position, rather than another aide position, was eliminated because it was not subject to reimbursement monies and was not considered to involve direct contact with students.

Conclusion

The clear and satisfactory preponderance of the evidence does not

24/ TR. 251.

25/ TR. 232.

26/ TR. 250.

demonstrate that Respondent's decision to eliminate the study hall aide position and terminate the employment of Patricia Girtz for the 1993-94 school year was motivated, in any part, by hostility toward Girtz for engaging in protected

concerted activity, or by any other anti-union animus. Accordingly, the Examiner has not found a violation of Sec. 111.70(3)(a)3, Stats., and has dismissed the complaint in its entirety.

The District has requested that it be awarded costs and attorney fees. In Wisconsin Dells School District, Dec. No. 25997-C (WERC, 1990) the Commission stated as follows:

As the Examiner correctly held, where a party's position is found to demonstrate "extraordinary bad faith", attorney fees and costs are available from the Commission. Hayward Schools, supra. In his concurring opinion in Madison School District, Dec. No. 16471-D (WERC, 5/81), Commissioner Torosian more fully stated our present view on the general availability of attorney fees and on how the "extraordinary bad faith" test can be met. He held:

While I concur with the majority that attorney fees are not justified in the instant case, I disagree with the iron-clad policy enunciated by the majority of denying attorney fees in all future cases. I agree that, for some of the policy reasons stated in the United Contractors case, the Commission should be reluctant to grant attorney fees. However, I feel the Commission should retain the flexibility, and therefore adopt a policy, which would enable it to grant attorney fees in exceptional cases where an extraordinary remedy is justified. In this regard I would adopt the reasoning of the National Labor Relations Board stated in Heck's Inc., 88 LRRM 1049, wherein the National Labor Relations Board stated its intention ". . . to refrain from assessing litigation expenses against a respondent, notwithstanding that the respondent may be found to have engaged in 'clearly aggravated and pervasive misconduct' or in the 'flagrant repetition of conduct previously found unlawful' where the defenses raised by that respondent are 'debatable' rather than 'frivolous'."

In my opinion limiting the granting of attorney fees to such cases would best balance some of the policy considerations cited in United Contractors and the interest of the Commission in discouraging

frivolous litigation and to protect the
integrity of our process. (Emphasis
added.)

The Examiner does not deem the instant complaint to be so frivolous, in bad faith or devoid of merit as to warrant the imposition of costs and attorneys' fees. As a result, the District's request for the same is hereby denied.

Dated at Madison, Wisconsin, this 13th day of August, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns /s/
Coleen A. Burns, Examiner