

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREEN BAY EDUCATION ASSOCIATION, and its  
bargaining unit member, CONNIE PESERIK,

Complainants,

vs.

GREEN BAY AREA PUBLIC SCHOOL DISTRICT  
AND THE BOARD OF EDUCATION OF THE  
GREEN BAY AREA PUBLIC SCHOOL DISTRICT,  
and PRINCIPAL NANCY CROY,

Respondents.

Case 191

No. 54373 MP-3206

Decision No. 28871-A

Appearances:

Mr. Robert C. Kelly, Kelly & Kobelt, Attorneys at Law, 122 East Olin Avenue, Suite 195, Madison, Wisconsin 53713, appearing on behalf of the Green Bay Education Association and its bargaining unit member, Connie Peserik.

Mr. Jack D. Walker, 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 Green Bay Area Public School District and the Board of Education of the Green Bay Area School District and Principal Nancy Croy.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 22, 1996, Green Bay Education Association and its bargaining unit member, Connie Peserik, filed a complaint of prohibited practices alleging that Green Bay Area Public School District and the Board of Education of the Green Bay Area Public School District and Principal Nancy Croy had violated Secs. 111.70(3)(a)1 and 3, Stats., by terminating her assignment as House Leader at Lombardi Middle School. On October 15, 1996, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Secs. 111.70(4)(a) and 111.07, Stats. Hearing on the matter was conducted in Green Bay, Wisconsin, on November 19, 1996. A transcript of that hearing was provided to the Commission on December 2, 1996. The parties filed briefs and reply briefs, the last of which was received by the Commission on February 10, 1997.

## FINDINGS OF FACT

1. Green Bay Education Association, referred to below as the Association, is a labor organization having its principal office located at 1960 August Street, Green Bay, Wisconsin 54302. The Association serves as the exclusive collective bargaining representative for a bargaining unit of employes which includes certain "regular full-time . . . certificated teaching personnel employed by the Board." Connie Peserik is a municipal employe who resides at 2950 Mayflower Road, Green Bay, Wisconsin 54311, and who serves as a Mathematics instructor at the Grade Six level at the Lombardi Middle School. Until the end of the 1995-96 school year, she also served as the House Leader of House 6-2. She is a member of the bargaining unit represented by the Association. Lombardi Middle School is one of the educational facilities within the Green Bay Area Public School District.

2. Green Bay Area Public School District, referred to below as the District, is organized under the Wisconsin Statutes to provide educational services to its residents. The Board of Education of the District is a District agent charged with the control and management of the District's property and affairs. The District is a municipal employer, and maintains its principal office at 200 South Broadway, Green Bay, Wisconsin 54303. The Board and the District are collectively referred to below as the Employer. Nancy Croy is a District employe who serves as Principal of the Lombardi Middle School.

3. The Association and the Employer have been parties to a series of collective bargaining agreements. One of those agreements was in effect, by its terms, from July 1, 1991 through June 30, 1994. The successor to that agreement was in effect, by its terms, from July 1, 1994 through June 30, 1995. The successor to that agreement was in effect, by its terms, from June 30, 1995 through July 1, 1997. The 1995-97 agreement includes, among its provisions, the following:

### ARTICLE XII NONTEACHING DUTIES

A. Teachers shall not be required to perform nonteaching duties at extra-curricular and co-curricular activities . . . supervise groups, and participate in other school activities outside of the teacher workday.

. . .

1. Teachers performing such nonteaching duties, authorized by an appropriate administrator in writing

or verbally, either directly or through a designee, shall be granted compensatory time on an equal time basis.

2. . . . Compensatory time may be accumulated; however, such time is expected to Be used as soon after it is earned as is practicable. Unused compensatory time will be carried over to the following year . . .

ARTICLE XIII  
TEACHING HOURS

- A. . . . The normal workday for all teachers shall be seven and one-half (7 1/2) hours exclusive of a thirty (30) minute duty-free lunch period. However, the teacher's day shall end at the close of the student school day on the last workday preceding holidays or recesses . . .

ARTICLE XXII  
DEPARTMENT CHAIRPERSONS/MIDDLE SCHOOL HOUSE LEADERS

- A. Department chairpersons may be appointed to provide subject area curriculum improvement and leadership for the department. Middle school house leaders may be appointed to provide instructional leadership for the academic block team.
- B. The duties of the department chairperson and the middle school house leaders shall not be such as to require the performance of any supervisory duties that would jeopardize their bargaining unit membership.
- C. A department chairperson and middle school house leader shall be compensated on a full-time teacher equivalency basis on the following schedule:

DEPARTMENT CHAIRPERSON

|                                       |   |
|---------------------------------------|---|
| .1-1.9 teachers in a department       | 2.2% of BA Base Salary;                                       |
| 2.0 and over teachers in a department | 0.09% of the BA Base salary<br>for each additional 0.1 F.T.E. |

MIDDLE SCHOOL HOUSE LEADER

1. The house leader for one (1) teacher team shall be

compensated at two (2) percent of the BA base salary;

2. The house leader for a two (2) teacher team shall be compensated at four (4) percent of the BA base salary;

3. The house leader for a three (3) teacher team shall be compensated at five (5) percent of the BA base salary; and
  4. The house leader for a four (4) teacher team shall be compensated at six (6) percent of the BA base salary.
- D. Department chairpersons in laboratory subjects shall receive one-half (1/2) of one (1) percent per teacher in addition to the schedule in Section C of this Article. Grades 6-12 laboratory subjects shall be agribusiness, art, business education, home economics, technology education, music and science . . .

The Association and the Employer, sometime in 1993, agreed to handle teacher participation at scheduled open houses in a manner not covered by Article XII. Under the agreement, a teacher who participated in an open house would not receive compensable comp time. Rather, the teacher would receive a type of noncompensable comp time, sometimes referred to as "washout" comp time. As applied to an open house, washout comp time meant a teacher would accrue comp time for time spent at the open house. The comp time could be used during the school year in which it had been earned. It could not, however, be carried into another school year, and, if unused, was not eligible for monetary reimbursement.

3. The sixth grade of Lombardi Middle School is structured as discrete Houses. A House consists of three to four teachers from varying disciplines who share instructional duties over a discrete group of students. Each House is headed by a House Leader. For the 1994-95 school year, the sixth grade had four Houses identified as 6-1, 6-2, 6-3 and 6-4. Peserik was the House Leader for House 6-2. The members of House 6-2 were Peserik, Lynn Allen, Lynn Zibell and Kim McCarthy.

4. Prior to the expiration of the 1991-94 labor agreement, The Association advised the Employer that it wished to negotiate a successor agreement. The parties exchanged their initial proposals on May 17, 1994. The Employer's proposals included a challenge to a number of provisions of the 1991-94 labor agreement which the Employer deemed permissive. The Association's bargaining representatives were displeased with these proposals. During the bargaining for a successor to the 1991-94 agreement, the Employer also filed a unit clarification petition with the Commission. The petition sought to exclude certain employees from the unit represented by the Association. By the end of 1994, both the unit clarification petition and a petition for declaratory ruling (DR) had been placed before the Commission. The DR proceeding covered roughly thirty-two provisions of the 1991-94 labor agreement. The Commission's General Counsel, Peter Davis, ultimately became involved as a mediator in the parties' negotiations.

5. Bargaining continued without resolution. As a result, the Association called

meetings of its general membership to address how the negotiating team should proceed. The first membership meeting took place on January 16, 1995. At that meeting, roughly 1,000 unit members assembled and considered the following agenda items:

III. **Action Items** - The following items require a majority vote from the General Membership. Each item will be voted on separately, either up or down. If passed, they will become the Association's policy should they need to be implemented.

A. Authorization for Action -

**Motion:** *The President of the GBEA is authorized to call an emergency meeting of the Representative Assembly to set a date to commence the recommended job actions should there be no progress in negotiating a 1994-95 contract.*

B. Recommended Actions:

1. **Motion #1:** *Take no job action at this time and trust the School Board's good intentions. Until a tentative agreement is reached, members:*
2. **Motion #2:** *Will only work to the language of the 1991-94 contract.*
3. **Motion #3:** *Will no longer volunteer for any compensatory time duties, including washout comp time.*
4. **Motion #4:** *Will resign from any current voluntary District-wide or school committees and/or refuse to actively participate if asked, except for the Faculty Committee, which is in the contract.*
5. **Motion #5:** *Will participate in informational picketing before and/or after the school day.*
6. **Motion #6:** *Members will commit to supporting the actions approved by the GBEA, by completing and signing a Commitment Card.*

The membership voted to defeat Motion #1 and to adopt the remaining motions. This was communicated to Association members through a membership newsletter. Association representatives from each District facility at which Association represented employees work meet, typically, on a monthly basis. This group is known as the Representative Assembly (RA). The RA is the policy making body for the Association. The Association, in addition to its newsletter, periodically published negotiations updates to its membership. For example, the Association published a "negotiations crisis update #8," dated April 7, 1995. This was marked for distribution through the District's internal mail system to Association members and to Building Administrators. The update noted, among other things, that the RA would consider the implementation of "Phase 1 of job actions." The RA ultimately approved the implementation of Phase 1 of job actions, thus calling on its membership to, among other things, report to and leave school as a group until a tentative agreement on a new labor agreement had been reached. In a publication dated May 5, 1995, the Association advised its members that the mediation effort had broken off, and that the members should undertake, as of May 9, 1995, Phase 2 job actions. The Association published the following "Guidelines for Phase II, Beginning Tuesday, May 9, 1995":

#### PHASE II WORKING TO THE CONTRACT

1. Continue Phase 1--leave and arrive at school exactly at contract time.
2. Work to the language of the 1991-94 contract.
3. Stop **volunteering** for any compensatory time duties, especially "wash out" comp time.
4. Resign from any current **voluntary** District wide or school Committees and refuse to actively participate if asked.

#### RECOMMENDED GUIDELINES

1. Do not participate in after school activities or classes unless for pay or to fulfill EDIMPRO requirements.
2. Do all school work during the normal work day.
3. Reduce planning outside of school.
4. Discontinue/resign from **voluntary** duties within the school day and after school.
5. Participate in M-Teams after school hours **only for pay**.
6. Attempt to hold all M-Team meetings during school hours.
7. Resign from committees for which you **volunteered**; submit form to principal.
8. Do not attend meetings after the contract day, except for the one faculty meeting per month which may be extended.
9. Hold parent conferences only during the normal work day.

10. Do not plan field trips or over nights outside of the school day.
11. Do not monitor detention.
12. Do not open the library before and after the work day.
13. Stop putting up displays and art shows.
14. Do not supervise graduation or other activities except if paid.
15. Use time before and after the student day for preparing and grading student work.
16. Do not open labs before and after the work day and during lunch hours, such as computer lab, writing lab, English lab, unless it is your professional duty assignment.
17. Do not supervise hallways except as part of teaching or administrative time (passing time is teaching time).

...

A number of teachers acted to implement the Association's recommendations, including Lombardi teachers. For example, Lynn Zibell, who served as a Building Representative, submitted a form, dated May 8, 1995, which noted her resignation for a committee she had previously volunteered to work on. The form was addressed to "Building Principal/Supervisor" and includes the following prefatory paragraph:

With regret, I hereby submit my resignation from the following committee(s) and/or activities for which I had previously **volunteered**. Once a contract is settled, I will indicate to you whether I will again volunteer for these activities.

Five similar forms were submitted to Lombardi administration on May 9, 1995. One of those forms was submitted by Jim Brittelli, who served as a House Leader in the 1994-95 and 1995-96 school years. One more of these forms was submitted to Lombardi administration on May 18, 1995. The Employer and the Association did not formally meet during the summer of 1995. In mid-August of 1995, the executive committee of the Association met and discussed whether a temporary Moratorium on job actions might assist the parties in resolving their differences. The Executive Committee decided to recommend this action to its membership at a meeting set for the Tuesday preceding the first day of the 1995-96 school year. The Executive Committee announced its action in press releases distributed to two Green Bay and one Milwaukee newspapers. The general membership meeting took place, as scheduled, at the Riverside Ball Room in Green Bay and was attended by roughly 1,000 unit members. On a split vote, the general membership approved the Moratorium, which was to last until September 15. The general membership meeting



took place immediately before a bargaining session. The vote to approve the Moratorium was taken, in part, to foster movement at the bargaining session. The bargaining session proved to be brief and produced no major initiatives. This result was communicated to the general membership. Some Association members believed that the Moratorium should be lifted or that individual members should continue job actions. The Association left the Moratorium in effect, but did not disapprove of individual members working to contract during its term.

6. Peserik reviewed the Association's publications and kept informed on the progress of negotiations during the 1994-95 school year. She and Allen attended the meeting at the Riverside, and discussed whether a work to contract response was appropriate if the bargaining session proved ineffective. Each concluded this would be appropriate.

7. Prior to the start of the 1995-96 school year, Croy had scheduled an open house for a date beyond September 15. She later rescheduled it to September 14. This event is referred to below as the Open House. In a memo dated August 28, Croy sought from each Lombardi teacher a statement of intent regarding Open House attendance. The memo set the hours of the Open House as "5:00-7:00 pm on Thursday, September 14, 1995" and noted that open house "has been well attended in past years." The memo included separate boxes for a teacher to check to confirm their intention to attend or not to attend the Open House. The memo stated that "Non-paid compensatory time will be earned by those in attendance." Peserik, Allen and Zibell all returned forms indicating they did not plan to attend. Sometime after Croy issued the August 28 memo, a meeting of Association members at Lombardi was conducted in which the choice to attend or not to attend the Open House was discussed. The meeting produced no consensus view among the attendees. Peserik, Allen and Zibell did not confer regarding their individual response to Croy's August 28 memo.

8. In a memo to Peserik dated September 1, 1995, Croy stated:

So far 3 of 4 teachers in your house have let me know that they will be unable to attend Open House. Let's meet on Tuesday during team plan to discuss what alternative activities we could do for parents - ie: expanded parent visitation day. Also, how to communicate this to parents.

Croy appeared, as announced by her memo, during the planning period of House 6-2. Croy and all of House 6-2 participated in this meeting. Croy voiced her concern to the team that the only non-attending sixth grade teachers were House 6-2 members, and that this could lead to an adverse parental reaction toward House 6-2. She suggested that the House should expand a scheduled parent visitation. She stated that this would give her something to say to parents at the Open House to smooth over any bad feelings. At some point during the meeting, McCarthy made a suggestion

concerning parent visitation. That suggestion reflected an idea voiced by Peserik to other teachers over the summer. McCarthy also questioned why, if Open House was a voluntary activity, teachers would have to substitute some other activity for it. This reflected a concern of other House members. Croy, at some point in the meeting, confirmed that teachers who participated in an expanded parent visitation would receive comp time. After this meeting, the members of House 6-2 met to "compare notes," literally and figuratively, concerning the meeting. After this discussion, Peserik prepared the following memo from "House 6-2 teachers" to Croy:

Nancy Croy met with House 6-2 teachers on Sept. 5, 1995 to discuss Open House attendance. Because 3 of the 4 teachers are not attending the Sept. 14th Open House, we have been directed to expand Parent Visitation Day later in the year.

We understand that Parent Visitation will now consist of one hour of visitation with an extension of 15 minutes into the planning time for parent-teacher contact. Following this presentation, parents will be directed to their children's related arts classes. During the meeting with Mrs. Croy, it was agreed that compensatory time would be granted for this additional time in House 6-2.

This is the plan discussed during the Sept. 5th meeting. Please sign below to verify the accuracy and return a copy to each teacher.

At the authors' signature, the memo states: "House 6-2." At the bottom of the memo appears a blank line with the following reference immediately below it: "(Verification signature)." Peserik drafted this memo, with the input of each House member. She placed it in Croy's mailbox on September 6.

9. At the close of the school day on September 6, 1995, Croy summoned Peserik to her office. During the meeting which followed, Croy voiced her chagrin at Peserik's response to the September 5 meeting. She advised Peserik that she thought House members had been quite negative. Allen, Croy noted, had shown "strong body language" indicating her displeasure. Croy noted she believed Allen may have voiced a number of complaints in the faculty lounge. Croy stated that if Allen was concerned about the issue, Allen should speak to her directly. Croy voiced her concern regarding negative parent reactions to the poor attendance of House 6-2 members at the Open House, and stated that Peserik had been chosen as House Leader to be the pulse of the House, thus assuring that the concerns of House members would be communicated to Lombardi administration. Croy did not agree that she had issued the House members a directive. Rather, she thought she had opened a dialogue which could have produced other options rooted in recommendations from the House 6-2 members, and had voiced, at most, a strong recommendation. Croy did not direct Peserik to expand the parent visitation day, and sometime after this meeting

Peserik informed House 6-2 members they were under no directive concerning parent visitation.

10. McCarthy was the only House 6-2 member who attended the Open House. Sometime after the Open House, the members of House 6-2 conducted a parent visitation day in a revised format. Under the old format, parents would spend the entire visitation in a single House 6-2 classroom. Under the new format, the parents spent ten minutes in each House 6-2 classroom, thus getting a more realistic simulation of the student contact day. Croy was pleased with this revision, and so informed the members of House 6-2. She did so by appearing at the teachers' lounge during lunch period, then informing the members that a particularly hard to please parent had complimented Croy on the presentation. Croy informed the members of House 6-2 that they all deserved a "warm fuzzy."

11. Croy and Peserik did not discuss her performance as House Leader between the informal discussion noted in Finding of Fact 10 and April 15, 1996. At no point during this period of time did Croy advise Peserik of any flaws in her performance as House Leader.

12. In the Spring of each school year, Croy distributes a "Confidential Staffing Interest Survey" form. The form for the 1995-96 school year is dated March 11. Peserik indicated, on her survey, that she wished to continue as House Leader of House 6-2. In a memo addressed to Peserik and Mike Palluconi, and dated April 15, Croy stated:

I have switched your house assignment for the 1996-97 school year as follows:

Mike - House 6-2 (Team Leader to be determined)  
Connie - House 6-4 (with Brittelli as team leader)

Palluconi and Peserik together sought a meeting with Croy on April 17. Croy was unavailable, and Palluconi informed her on April 18 that he and Peserik wished a meeting with her. She advised Palluconi that she would not meet with them together, but would meet with them individually. On April 18 Croy met with Palluconi, then with Peserik.

13. Peserik went into the April 18, 1996 meeting with lined note paper. On the first full line, she had written "reason for switch?" On the eighth full line, she had written "-reason for removal from team leader position." The balance of the sheet was blank so that she could take notes. Her line by line notes of that meeting read thus:

reason for switch?  
parent involvement - resisted attempts

lot of resistance in house  
no one would attend spelling conference  
leadership not working with me  
stipend very little expected 1/  
open house  
-reason for removal from team leader position  
handled in negative way - response to her suggestion  
tried to get to do something else - resisted  
so much resistance - on that issue  
nobody would attend spelling conference  
need team leaders who are working with me  
summarize reasons in writing - for my records  
asked for it in writing  
"I don't know"  
advice from personnel  
told Mike - wants to make Kim team leader

The final line reflects what she understood Palluconi to have told her as he left Croy's office. Throughout the April 18 conversation, Peserik perceived Croy's concern with her performance as House Leader to be linked to her refusal to attend the Open House. She also understood Croy to have been upset by her failure to attend, or to arrange to have another House 6-2 member attend, a spelling conference conducted in Madison in the Fall of 1995. During the conversation, Peserik attempted to defend her efforts to increase parent involvement, but she did not perceive Croy to be interested in them.

14. Croy did not take notes during the April 18, 1996 conversation. She did not want to retain Peserik as a House leader because she viewed Peserik to be too rigid with students and parents, and she did not perceive Peserik to be helpful in implementing building initiatives. Croy attempted, during the April 18 meeting, to explain this to Peserik. She attempted to communicate to Peserik that the teacher she would name as House Leader would assist her more effectively than Peserik. To exemplify these points, Croy pointed to Peserik's conduct concerning the spelling conference. Croy attempted to inform Peserik that if no other teacher would attend, Peserik, who received the Leader stipend, should have. When Peserik questioned Croy regarding parent involvement, Croy attempted to tell Peserik that her resistance to Croy's suggestion on expanding parent visitation manifested an unwillingness to become involved in enhancing parent involvement with the school. Peserik attempted to link her loss of House Leader status to her refusal to attend

---

1/ At the end of this line appears the following reference which spans two lines: "open house volunt why I should have attend." Parts of two words of this reference are not discernible from the exhibit.

the Open House. Croy felt Peserik was attempting to put words in her mouth, and repeated her position. Croy did not perceive Peserik to be interested in her views, and did not attempt to elaborate on them any further than required to complete the conversation.

15. James Meyers is an Associate Principal at Lombardi. He approached Croy in mid January of 1996, and suggested the possibility of altering the leadership and composition of the Houses. Meyers and Croy prepared separate wish lists of House membership and leadership, then compared the lists. His list included McCarthy, but not Peserik, as a House Leader. Meyers did not feel Peserik was open with him regarding the concerns of House 6-2. No member of House 6-2 complained to Meyers or to Croy regarding Peserik's performance as Leader. McCarthy had once served as a House Leader, but had voluntarily relinquished that status when he had been moved from House 6-4 to House 6-2. McCarthy did not, in his 1996 Spring survey, state his desire to become a House Leader in writing. He did, however, verbally inform Croy he would be interested in a House Leader position if one was available. Croy did not mention this to Peserik in their April 18, 1996 conversation because she did not want Peserik to conclude McCarthy had engineered Peserik's removal as House Leader.

15. Croy has seven years of experience as an administrator at Lombardi. Prior to her employment with the Employer, she had roughly three years of experience as an administrator and eleven as a teacher. While a teacher in Perry, Iowa, she served for two years as the President of the Perry Education Association. She also served as a member of the Perry Education Association's bargaining team for roughly nine years.

16. Peserik's refusal to attend the Open House is lawful, concerted activity. Croy was aware of concerted activities by teachers at Lombardi during the 1994-95 and the 1995-96 school years. Croy has been aware of and has not been hostile to the past exercise of concerted activity by House Leaders and Department Chairs. Croy was not hostile to the exercise of concerted activities by Lombardi teachers in the 1994-95 or the 1995-96 school years. Peserik's loss of House Leader status is not traceable to hostility on the part of Croy, the District or the Board for Peserik's exercise of lawful, concerted activity.

#### CONCLUSIONS OF LAW

1. Peserik 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. Neither Croy nor any other agent of the District committed a violation of

Sec. 111.70(3)(a)1 or Sec. 111.70(3)(a)3, Stats., by changing the composition of the sixth grade Houses at Lombardi School or by denying Peserik the assignment of House Leader for the 1995-96 school year.

ORDER 2/

The complaint is dismissed.

Dated at Madison, Wisconsin, this 26th day of March, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

2/ 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 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).**

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

GREEN BAY SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

This is a well-argued case, and the parties' positions are set forth in some detail below. The complaint alleges violations of Secs. 111.70(3)(a)1 and 3, Stats. Although the complaint names Croy, the District and the Board separately as Respondents, the evidence and argument turn on Croy's conduct. If her conduct cannot be considered proscribed by the sections noted above, no prohibited practice can be found against the Respondents.

THE POSITIONS OF THE PARTIES

The Complainant's Initial Brief

After an extensive review of the evidence, the Association argues that the District's conduct violated Sec. 111.70(3)(a)3, Stats. A review of the evidence in light of the well established standards governing this section support this argument. Peserik "in refusing to attend the September 14 . . . open house" was, the Association argues, "asserting a contract right and engaging in concerted activity for the purposes of collective bargaining." Sections XII A and XIII A of the labor agreement establish that the Open House was voluntary. Peserik's refusal to attend the Open House fit within a range of work to contract options the Association had considered during general membership meetings. The breakdown in negotiations on August 29, 1995, prompted Peserik and other teachers to consider this type of gesture to reflect their disappointment. The gesture was "lawful concerted activity for the purpose of collective bargaining." A review of the evidence also establishes Croy was aware that certain teachers would refuse to participate in the District Open House. Beyond this, the Association contends that the evidence establishes that the District and Croy were hostile to Peserik's refusal to participate in the Open House.

A review of Croy's and Peserik's testimony concerning Peserik's loss of Team Leader status establishes, according to the Association, that Croy retaliated against Peserik motivated, at least in part, by hostility to her exercise of concerted activity. Peserik's testimony, unlike Croy's, is consistent with contemporaneously taken notes. Beyond this, the Association urges that the absence of specific reasons for the demotion coupled with the absence of negative comments in Peserik's evaluations undercut the credibility of Croy's testimony.

The Association's next major line of argument is that the District's conduct violated Sec. 111.70(3)(a)1, Stats. The presence of concerted activity is acknowledged and the presence of



interference is unavoidable. The Association argues that Peserik's replacement by the only teacher who attended the Open House establishes an element of favoritism "not lost on the teaching staff." The general perception that Peserik's choice hurt her "had the tendency to make employees less supportive of the Association." Even though governing Commission authority will look past this tendency if "the employer has a valid reason for its actions," the Association argues that since "the Employer here had no valid reason for its action," a violation of Sec. 111.70(3)(a)1, Stats., must be found.

The Association concludes that the District should be ordered to reinstate Peserik to her position of Team Leader, with a "make-whole remedy," and retain her in that position "until such time as there is a legally permissible reason to discontinue that employment."

### The District's Initial Brief

After a detailed evaluation of the evidence, the District notes that the elements necessary to a violation of Sec. 111.70(3)(a)3, Stats., are well established and that the application of those elements to "a quasi supervisory position" is no less well established. In such cases "subjectivity and conclusory reasons are to be expected, not suspected." Beyond this, the District argues that there is no "evidence of hostility toward (the Association) by the District or any of its agents, including Principal Croy." Concerted activity was common in Lombardi throughout the Spring of 1995, yet there is no indication Croy bore any hostility toward this activity. That Croy had, prior to her assumption of the duties of a Principal, strong union affiliation and that Croy retained a Building Representative as Reading Chair rebuts, the District asserts, any possibility of proscribed hostility on her part.

Nor can the Association's contention that Croy made an "admission" that "the reason for nonretention was nonattendance at Open House" be credited. Testimony on the alleged "admission" shows no more than Croy's statement that "she was displeased with Peserik's handling of Croy's effort to help the House deal with misconception by parents." Beyond this, if a credibility determination needs to be made on this point, "Croy is the more credible witness." Croy, unlike Peserik, has no incentive to lie, according to the District. Even if it is plausible to credit Peserik's view that Croy acknowledged the demotion was retaliation for failing to attend the Open House, "it is entirely implausible that Croy would have said she did just that."

A review of the evidence, according to the District, establishes that Croy "chose McCarthy first, she did not reject Peserik first." The position McCarthy was given requires a satisfactory relationship with supervision in implementing District policy. The reasons given by Croy for favoring McCarthy over Peserik reflect no more than that, and are, in any event, not subject to a due process analysis.

An examination of the evidence shows that Peserik's decision not to attend the Open House

was motivated by "individual, not collective" concerns. Even if it could be considered a collective concern, there is no reliable evidence Croy was aware that the non-attendance reflected a group concern. The Association did not recommend the non-attendance and Peserik did not communicate the basis for her non-attendance to Croy. Association arguments to the contrary try "to substitute inference for evidence." If Peserik's non-attendance reflects concerted activity, the District views that activity as an "unlawful . . . strike."

Beyond this, the District challenges the contention that the Open House can only be seen as a voluntary activity:

Open Houses are . . . not purely voluntary, gratuitous things but are integral to the teaching profession, and are in fact compensated -- by "non-compensable compensatory time."

Commission precedent underscores this conclusion. 3/ Even if the Open House could be considered voluntary under the contract or Commission precedent, the District asserts that considering the non-attendance anything other than a strike "is bad policy." To conclude otherwise puts an employe in the position of refusing, without any adverse consequence, to perform an assigned duty. Focusing on this case, the District argues that the House Leader position requires "close and honest cooperation with the principal, in pursuit of building goals." Peserik cannot, the District urges, be considered qualified for the position under this standard.

The District concludes that the complaint must be dismissed.

#### The Association's Reply Brief

The District "errs, and seriously so" by contending the record shows no protected activity. A review of the record shows, the Association urges, a long list of concerted activity spanning the collective bargaining process from May of 1994 through the 1995-96 school year. The breakdown in negotiations brought this long-simmering controversy to a head, and led to a number of teachers "reinstating job actions, including refusing to volunteer for any compensatory duties" such as the Open House. The Association evaluates this conduct thus:

Whether their actions in this regard were themselves concerted

---

3/ Citing Kenosha Unified School District No. 1, et. al., Dec. No. 10752-A (Bellman, 7/72) aff'd Dec. No. 10752-B (WERC, 10/72).

activities, or merely individual extensions of prior concerted efforts, their conduct was concerted activity for the purposes of MERA.

That Peserik, Allen and Zibell "did not discuss a common plan of action among themselves" has no bearing on this conclusion. Their mutual, if not shared, decision to protest the lack of progress in bargaining must, the Association asserts, be considered concerted activity.

Beyond this, the Association argues that this concerted activity must be protected under the MERA. Because the activities "can reasonably be seen as affecting the terms or conditions of employment," those activities must be considered protected.

The Association then contends that Croy "had full, complete and detailed knowledge of the Association's so-called job actions and their implementation." Croy had received copies of Association publications reporting contemplated and implemented job actions. Croy acknowledged, in her testimony, that she was aware of a broad range of teacher conduct protesting the negotiations. Those negotiations were covered in depth in local newspapers. That she altered the date of the Open House reflects her knowledge of the concerted activity.

The collective bargaining process underlying the complaint was tortured and caused hard feelings on both sides of the table. The Association's organized protest of the District's bargaining stance could not, according to the Association, have been viewed "with favor" by the District. That Croy was upset with Peserik for not attending the Open House was, the Association asserts, complicated by the fact that two other House members similarly refused to attend. Croy, the Association argues, "laid the whole matter at Peserik's door."

District attempts to assert Peserik's demotion can be traced to her job performance must be ignored. Such concerns were neither documented nor shared with Peserik. No reason, other than Croy's desire to punish Peserik for her non-attendance, can withstand scrutiny.

An examination of the labor agreement and relevant testimony establishes, according to the Association, that the Open House was a voluntary activity. This distinguishes this case from Kenosha. The more appropriate authority for this case is State of Wisconsin et. al., Dec. No. 8892 (WERC, 3/69), which establishes that non-attendance at voluntary activities cannot be considered an unlawful strike. Nor can finding her conduct to be protected activity be considered "bad policy," since "Connie Peserik should not be penalized because she declined to do something she need never have done anyway."

### The District's Reply Brief

After a detailed evaluation of the Association's statements of fact, the District argues that on

any view of the facts, "nonattendance at Open House is not the sort of event that would raise eyebrows in Green Bay, as being some sort of palace revolution or partial strike." This undercuts the Association's contention that Peserik's absence, like many other teachers', angered Croy sufficiently to provoke a demotion. Association attempts to tie its protests to the bargaining process to explain the retaliation fail to explain how Croy personally came to know

or to care why Peserik failed to attend the Open House. Whatever upset Croy concerning Peserik's non-attendance is traceable not to her refusal to attend, but to her refusal to assist Croy in assuaging parental concern for the absence of House 6-2 teachers at the Open House.

The Association's attempt to portray Peserik as a more credible witness than Croy is, the District asserts, unpersuasive. That Croy's testimony was not "precise" or "consistent with her notes" has no bearing on credibility unless it shows that Croy should be credited for testifying from her honest recall, unencumbered by a desire to make a formal record. If Croy's attempt to fix the problem with poor parental reaction to a sparsely attended Open House is made a retaliation for the non-attendance, the District contends the "credibility" of Peserik's account has effectively become a license to refuse to undertake any activity seeking to promote parental involvement.

Association attempts to undercut the reasons given Peserik for her loss of Team Leader status improperly, according to the District, seek to impose due process requirements on a quasi-supervisory position. Beyond this, the District argues that the absence of reasons pointed to by the Association reflects not an absence of reasons, but Peserik's refusal to hear any other than the one she sought.

The District contends that the existence of protected activity is unproven, and cannot be considered proven by material contained in its answer to the complaint. Beyond this, the District contends that finding interference on this record, in the absence of proscribed District animus to protected activity, would insulate any union activist from any adverse employment action, no matter how egregious the underlying conduct.

## DISCUSSION

### The Alleged Violation of Sec. 111.70(3)(a)1, Stats.

Sec. 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer to "interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed" by Sec. 111.70(2), Stats. Those rights are "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

An independent violation of Sec. 111.70(3)(a)1, Stats., requires that the Complainants meet, by a clear and satisfactory preponderance of the evidence, 4/ the following standard which, as the Union notes, was stated in Cedar Grove-Belgium Area School District:

---

4/ Sec. 111.07(3), Stats., made applicable by Sec. 111.70(4)(a), Stats.

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)mloyer 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. 5/

The parties' arguments highlight a tension within this standard. The final sentence of the standard creates a "valid reasons" exception to the "reasonable tendency to interfere" rule stated in the second sentence. The "reasonable tendency to interfere" rule addresses the chilling effect on the exercise of employe rights which employer actions can have even if that effect is unintended. 6/ The Commission presumably intended that the exception not swallow the rule, and that each sentence of the standard be given effect. Doing so in this case poses problems.

In Milwaukee Board of School Directors, I addressed the difficulty of reconciling the second and third sentences of the Cedar Grove standard. In Milwaukee, I resolved the dilemma by considering the issue of intent. 7/ The difficulty in Milwaukee regarding the application of Cedar Grove turned on the fact that a Principal's reassignment of an individual teacher could reasonably be perceived by teachers within the building as a retaliation for the exercise of concerted activity or as a valid exercise of the Principal's right to assign. This conclusion reflected that differing inferences could reasonably be drawn by teachers based on the facts available to them.

The Association's forceful arguments on the application of the Cedar Grove standard pose a similar difficulty in this case. My review of the Cedar Grove standard convinces me that the standard need not pose the irreconcilable differences between the second and third sentences of the standard which I discussed in Milwaukee.

The problem pointed to in Milwaukee flows from focusing on the perceptions of affected employes. Under Cedar Grove, those perceptions should not have been considered determinative.

---

5/ Dec. 25849-B (WERC, 5/91) at 11-12.

6/ See, Ibid.

7/ Dec. No. 27685-A (McLaughlin, 8/94), aff'd by operation of law, Dec. No. 27685-B (WERC, 9/94).

Rather, those perceptions should have been, and should be, considered part of the evaluation of "all the circumstances." The Commission reserved, under Cedar Grove, the decision on what constitutes a "reasonable tendency" to interfere with protected rights to itself based on the record placed before it. Thus, where conflicting "reasonable" perceptions of the impact of alleged interference exist, the Commission will determine the "most reasonable" of those perceptions. Thus, in Cedar Grove, the Commission assessed the remarks of a District Administrator to two bargaining unit employees and determined those remarks "could most reasonably (emphasis added) be understood . . . as expressing an interest in explaining the employer's position . . . as opposed to expressing an implicit threat of adverse action if either employee exercised their . . . right to file a grievance." 8/

The conflict between the second and third sentences of Cedar Grove is reconcilable on a case by case basis if they are viewed to create a weighing standard. To give meaning to each sentence, the interests of the employee and those of the employer must be isolated and weighed in light of "all the circumstances." For example, in Cedar Grove, the Commission noted that to evaluate allegedly coercive "employer remarks which inaccurately or critically portray the employee's labor organization," it is necessary to weigh an employee's "right of supporting their labor organization" against the employer's "free speech rights." 9/

Whether or not this clarifies the application of the Cedar Grove standard, it must be applied to the facts. Threshold to any application of the standard is a determination whether an employee has engaged in protected activity. "Protected activity" is a shorthand reference to those "lawful, concerted activities" identified by Sec. 111.70(2), Stats., and enforced by Secs. 111.70(3)(a), (b) and (c), Stats. The Employer argues that Peserik's refusal to attend the Open House cannot be considered protected because it was not lawful and not concerted.

As the parties note, Peserik's refusal to attend the Open House may not be lawful if the Open House is a required activity. The evidence establishes, however, that her attendance at the Open House was voluntary. Each testifying teacher noted that attendance at open houses is voluntary. The form distributed by Croy to determine teacher "intentions" concerning the Open House confirms this. The form notes that a teacher could elect either to "plan to attend" or to "not plan to attend" the Open House. The form offers "Non-paid compensatory time" to "those in attendance." This inducement presumably sought to enhance participation. The Lombardi Open House is thus unlike the open house discussed in Kenosha, in which employees had, for some time, been required to obtain an excuse to justify non-attendance. Croy's testimony underscores this, for she affirmed that Department Chairs and House Leaders had, in years past, refused to attend open house without any adverse consequence. Thus, the Open House is voluntary, and Peserik's refusal to attend it was lawful.

---

8/ Dec. No. 25849-B at 15.

9/ Ibid. at 11.

Peserik's conduct was also concerted. The Commission has detailed what constitutes "concerted" activity thus:

It is impossible to define "concerted" acts in the abstract. Analysis of what a concerted act is demands an examination of the facts of each case to determine whether employe behavior involved should be afforded the protection of Sec. 111.70(2) of MERA. At root, this determination demands an evaluation of whether the behavior involved manifests and furthers purely individual or collective concerns. 10/

Peserik's refusal to attend the Open House both manifested and furthered collective concerns. The Employer accurately points out that Peserik did not coordinate her refusal to attend with the other House members or with other employes. She did, however, discuss Open House attendance with Allen at a general membership meeting at which the Moratorium was discussed and adopted on a split vote. She and Allen concluded a refusal to attend would be appropriate if the bargaining session set for that evening broke down, as it did. The choice of individual teachers to continue job actions was collectively discussed at a meeting of Lombardi teachers early in the school year, and the refusal was a type of the Phase 2 actions implemented by the Association the prior school year. Her avowed support for the continuation of job actions must be considered to manifest more than her own individual concerns. Her refusal to attend was a concerted activity.

It is now necessary to isolate Peserik's and the Employer's interest in her refusal to attend the Open House and her loss of House Leader status. Peserik's interest lies in the assertion of an individual, arguably contractual, right to decline to attend an event outside of the normal school day against the Employer's institutional, arguably contractual right to assign a House Leader. 11/ The term "arguably" reflects that the complaint poses no issue of contract interpretation. Whether the voluntary nature of the Open House reflects an established contractual right, past practice, or simply the Employer's decision not to compel attendance is irrelevant here. Similarly, whether the contract specifically authorizes the Employer to refuse to continue House Leader status for any reason or no reason at all is not posed here. The complaint poses competing assertions of arguably equivalent

---

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

11/ It can be argued Peserik had a broader interest in helping the Association pressure the District in bargaining. The assertion of such an interest poses troublesome issues concerning the extent to which Sec. 111.70(3)(a)1, Stats., can serve as a shield for self help tactics. For reasons discussed below, these broader issues are not posed on the facts of this complaint.



rights of a contractual nature.

While the force of the Association's arguments must be acknowledged, the evidence will not support a conclusion that Croy's refusal to select Peserik as House Leader has a reasonable tendency to interfere with protected activity. The arguable equivalence of the general interests sketched above breaks down when those interests are evaluated against the evidence.

The interference allegation seeks to link Peserik's loss of House Leader status to her refusal to attend the Open House. The allegation focuses on employe perception of the effect of Croy's actions rather than her intent, and requires concluding that the replacement of a House Leader who did not attend the Open House with a House member who did has sufficiently coercive overtones to trigger Sec. 111.70(3)(a)1, Stats.

While the coercive appearance of Croy's actions regarding Peserik cannot be ignored, it is insufficient to establish an independent violation of Sec. 111.70(3)(a)1, Stats. As preface, it should be noted that the appearance of Croy's actions support more than the inference of coercion. A Principal's preference of a teacher who undertakes a non-required activity over a teacher who does not can reasonably be viewed as a routine exercise of administrative discretion. An evaluation of the evidence supports the latter inference over the former.

The House Leader position is a quasi-supervisory position, linked to the implementation of building policy. That Principals have broad discretion over the selection of a House Leader is mutually recognized by the Employer and the Association and a known feature of the work place. Against this background, the loss of House Leader status based on a refusal to attend a voluntary event is, standing alone, unremarkable.

Peserik's loss of House Leader status is coercive to the extent it can be viewed as retaliation for her non-attendance at the Open House. On the current facts, this begs the issue of intent, which is not relevant to this allegation. Even ignoring potential difficulties in linking her loss of House Leader status to the Open House, the appearance of coercion is more easily understated than overstated on this record. A considerable period of time passed between the non-attendance and the asserted retribution for it. This is not insignificant. The purported retribution has no immediately apparent purpose. It did not serve to secure attendance at the Open House. If the attendance sought to be secured concerned future open houses, it is not apparent why Zibell and Allen suffered no adverse consequences. Nor can it be assumed that the retaliation was restricted to Peserik as House Leader. Brittelli openly engaged in Phase 2 job actions, yet remained a House Leader. The evidence affords no persuasive basis to discern why Croy would seek to punish Peserik's individual non-attendance at the Open House rather than Association supported Phase 2 actions. The coercive overtones are, then, attenuated.

The evidence also establishes the Employer's institutional interest in Croy's right to assign outweighs Peserik's individual interest in the assignment. The Association's assertion of coercion is

magnified to the degree Peserik's non-attendance can be viewed as a generally recognized stand of conscience. The asserted coercion is undercut to the degree her non-attendance can be viewed as an individual expression of convenience. The evidence establishes that Peserik discussed the non-attendance with Allen, but did not coordinate her refusal to attend with any other teacher. Although her refusal to attend the Open House manifests concerted activity, she acted as an individual. Beyond this, Peserik was not playing a high-profile role in the then ongoing negotiations. In marked contrast to this, Zibell, who served as Building Representative and as a Reading Chair, suffered no adverse consequence for her refusal to attend the Open House or for her earlier support of Phase 2 job actions. This should not be read to imply the law must be enforced to afford greater protection to high-profile Association members than to a rank and file member. It underscores, however, that any chilling effect flowing from Croy's action toward Peserik is limited.

The Employer's interest in exercising discretion in the assignment of positions closely linked to the implementation of building policy is apparent. But for the then-ongoing negotiations, Peserik's loss of House Leader status would not have been challenged. The parties' mutual recognition of the Employer's discretion over this type of assignment underscores the depth of the Employer's institutional interest in it.

In sum, the Union's statement of the coercive appearance of Croy's conduct is forceful, but the evidence will not support a conclusion that those overtones establish interference with employee exercise of protected rights. The evidence fails to establish that employees at Lombardi could reasonably be expected to see Croy's action as more than the exercise of managerial discretion.

The Association also contends that Croy lacked a "valid business reason" under Cedar Grove for its conduct. The conclusion reached above moots this argument, but it is appropriate to touch on it to complete the record for review. The Association accurately notes that Meyers' and Croy's reasons for preferring McCarthy over Peserik are general and subjective. This is not, however, determinative given the nature of the House Leader assignment. That general or subjective thinking may influence a supervisor in selecting a lead worker is, for better or worse, not unusual. Beyond this, the subjectivity cannot obscure that Peserik refused to attend the Open House, reluctantly participated in Croy's attempt to smooth over parental concern over the Open House and failed to provide meaningful assistance for the spelling conference. A House Leader must function in a quasi-supervisory role in cooperation with building administration. Croy's citation of this conduct to ground her preference of McCarthy over Peserik cannot be considered less than a "valid business reason" under Cedar Grove given the nature of the House Leader position.

The record fails to establish an independent violation of Sec. 111.70(3)(a)1, Stats.

The Alleged Violation of 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 Association must, by a clear and satisfactory preponderance of the evidence, establish that: (1) Peserik was engaged in activity protected by Sec. 111.70(2), Stats.; (2) Croy was aware of this activity; (3) Croy was hostile to the activity; and (4) Croy acted, at least in part, based upon her hostility to Peserik's exercise of protected activity. 12/

The first two elements of this standard have been met. The first element has been discussed above. The second element is more troublesome. Peserik did not communicate to Croy the basis for her refusal to attend the Open House. However, it is apparent that Croy was generally aware of Phase 2 actions at Lombardi during the close of the 1994-95 school year and at the start of the 1995-96 school year. This awareness led her to move the 1995 Open House to fall within the Moratorium. Beyond this, Peserik was quick to communicate to Croy that House 6-2 perceived her suggestion to expand parent visitation as a directive. Croy was no less prompt in denying this. Communication between Croy and Peserik concerning the Open House was strained and circumspect. These facts are sufficient to support the inference she was aware that Peserik's refusal to attend the Open House was traceable to concerted activity.

The final two elements turn on "hostility," and the evidence will not support a conclusion that Croy bore such hostility toward Peserik or the Association. This determination does not turn on witness credibility. There is no reason to doubt the sincerity or truthfulness of Peserik or Croy. Rather, the evidence indicates Peserik sincerely believed the changes Croy made could not be rooted in her conduct as a teacher or as a House Leader. From this she concluded the changes were traceable to Croy's hostility toward her refusal to attend the Open House. That she would reach this conclusion is neither unjustifiable nor surprising. However, even though the evidence affords no persuasive basis to impugn the sincerity her belief, it will not support the validity of her conclusion.

The inference of hostility cannot satisfactorily account for the events following Peserik's submission of the Open House RSVP. Croy's account of those events can. Under the Association's view, Peserik's refusal to attend the Open House was sufficiently egregious to warrant retribution the following April. The record would not indicate open houses carry this level of significance. Past non-attendance by Department Chairs or House Leaders has not been punished. The most telling evidence of the significance of the Open House is that Croy rescheduled it to fall within the Moratorium. This change cannot, however, be accounted for by anti-Association hostility. The change had no established impact on the Association's bargaining position. At most, the change may have secured the attendance of more teachers and may have made the parent-teacher

---

12/ 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).

interaction more likely to revolve on educational rather than labor-relations issues. Croy's desire to facilitate meaningful parent-teacher involvement can account for this change. The inference of hostility cannot.

Nor does the inference of proscribed hostility persuasively account for Croy's conduct after her receipt of Peserik's RSVP. If Croy was angered by Peserik's stated refusal to attend the Open House, it is inexplicable why she took no meaningful action to secure the attendance of Peserik or any other House 6-2 member between her receipt of the RSVP and the date of the Open House. Rather, she called a meeting to attempt to address what she anticipated would be adverse parental reaction to the non-attendance of three of four House 6-2 members. This reaction presumes the non-attendance the Association argues caused Croy's anger. Croy avowedly called the meeting to address adverse parental reaction to finding three darkened classrooms in a four classroom House. That she could accept non-attendance at the Open House, but would attempt to address adverse parental response to it can be accounted for by her avowed interest in enhancing parent-teacher contact. It cannot be accounted for by inferring proscribed hostility.

Nor can the inference of proscribed hostility persuasively account for the September 5, 1995 meeting and its aftermath. The Association urges that Croy issued a directive, which reflected her anger at the non-attendance. That anger, sown in September, presumably flowered the following April, when Croy rewarded McCarthy for his attendance at the Open House. By Peserik's account, however, McCarthy questioned Croy, during the September 5 meeting, on why teachers would have to "make up" a voluntary event. How this squares with the inference that Peserik was punished as a dissenter while McCarthy was rewarded as a "yes man" is not apparent.

More significantly, the first substantial indication of hostility from the meeting is rooted not in Croy's conduct, but in Peserik's September 6, 1995 memo. That memo refers to Croy as "Nancy Croy" and "Mrs. Croy," and contains a blank line for a "Verification signature." None of these references are inaccurate, but each compose a strikingly formal response to be communicated from a lead worker to a supervisor. There is no apparent provocation for this. Croy acknowledged the memo angered her. Her anger should have been expected. Her behavior toward Peserik is, however, the most notable fact here. In the September 6 meeting, she expressed her personal frustration, but would not accede to Peserik's characterization of the suggestion as a "directive." Nor did she attempt to make her "strong suggestion" stick in the face of House 6-2 reluctance. It is difficult to account for Croy's willingness to abandon her "directive" or "strong suggestion" to her lead worker if it is presumed she bore significant anger for the then prospective non-attendance at the Open House. No such difficulty exists if it is inferred that Croy hoped to smooth over adverse parental reaction and knew she could not do so without the cooperation of her teachers.

Croy's subsequent conduct further undercuts the persuasive force of the assertion of proscribed hostility. When the House 6-2 members, on their own, modified the parent visitation format and the modification yielded favorable parental response, Croy openly communicated her pleasure with them. Why she would do so if she continued to bear hostility toward the non-attendance at Open House is not apparent.

In sum, the inference of hostility rests on a weak factual basis concerning the events of September of 1995.

Nor will a broader view of the evidence lend greater support for the inference. On the most general level, the inference of hostility does not clarify what Croy or the Employer gained, in a labor relations sense, by denying Peserik House Leader status. As noted above, the alleged retaliation could not secure the attendance of the teachers at the Open House and sent, if anything, a weak coercive message concerning attendance at future open houses. Why Croy would overlook Phase 2 actions in the 1994-95 school year, then be angered by the same type of actions during the Moratorium is not apparent. Neither Zibell nor Allen suffered any adverse consequence for their non-attendance. Zibell, unlike Peserik, was known to Croy and Lombardi teachers as an Association activist. Brittelli continued as a House Leader, in spite of undertaking Phase 2 actions. Croy's actions had, then, no clear impact on stifling Association-based dissent within Lombardi. Nor do her actions have any apparent impact on the broader Association/Employer conflict. Roughly one thousand teachers met to approve and suspend job actions. How Croy's actions could be perceived to address dissent outside of Lombardi is not apparent.

The Association argues that the reasons given for not continuing Peserik as House Leader are vague and thus unreliable. The force of this assertion must be acknowledged. Meyers' testimony concerning his own reasons for wishing to replace Peserik as House Leader is unspecific. Croy's testimony is general, but not unspecific. The generality of her testimony is not solely traceable to her. The April 18, 1996 meeting was unpleasant for both participants, and affords little insight beyond their conflicting and deeply held views. More to the point here, it is apparent Croy saw no purpose in an extended dialogue with Peserik at that meeting and did not elaborate her position. This makes the generality of her testimony less than determinative.

More significantly, her reasons for replacing Peserik stand, in effect, unrebutted. It is undisputed that Peserik was less than forthcoming in helping Croy redress the potential difficulties regarding the Open House and the spelling conference. As noted above, House Leader is a quasi-supervisory assignment and the significance of Croy's relationship to Peserik is, for better or worse, a significant feature of the assignment. That Croy and Peserik communicated with some difficulty is apparent. The tone the September 6, 1995 memo drafted by Peserik speaks for itself concerning the quality of their communication. There was no demonstrated provocation for the tone of that memo. The assertion of pretext presumes Croy gained something, in a labor relations sense, for preferring McCarthy. The evidence would indicate she gained no more than a House Leader with whom she could comfortably communicate.

It is worthy of some note that Meyers initiated the dialogue which led to Peserik's loss of House Leader status, and that Croy has prior union ties. The significance of neither fact should be overemphasized. As noted above, Meyers' testimony is unspecific. Croy's past association ties establish no more than that she has no history of anti-union animosity. The facts do, however, underscore that the inference of hostility lacks persuasive support in the evidence.

In sum, the record will not support the assertion that Croy bore hostility for Peserik's exercise of concerted activity. In the absence of that hostility, there can be no violation of Sec. 111.70(3)(a)3, Stats., against any of the Respondents.

Dated at Madison, Wisconsin, this 26th day of March, 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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