

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS INCORPORATED
with and on behalf of its bargaining unit member,
KATHLEEN O'BRIEN KIM, Complainants,

vs.

MADISON METROPOLITAN SCHOOL DISTRICT,
the **BOARD OF EDUCATION** of the
MADISON METROPOLITAN SCHOOL DISTRICT
and **PRINCIPAL MICHAEL MEISSEN, Respondents.**

Case 283
No. 56634
MP-3438

Decision No. 29418-A

Appearances

Kelly & Kobelt, by **Attorney Robert C. Kelly**, 122 East Olin Avenue, Suite 195, Madison, Wisconsin 53713, appearing on behalf of the Complainants.

Lathrop & Clark, by **Attorney Kirk D. Strang**, 740 Regent Street, Suite 400, Madison, Wisconsin 53701-1507, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On July 2, 1998, Madison Teachers Incorporated and its bargaining unit member Kathleen O'Brien Kim filed a complaint of prohibited practices alleging that the Madison Metropolitan School District and the Board of Education of the Madison Metropolitan School District and Principal Michael Meissen had violated Secs. 111.70(2) and (3)(a)1, Stats., by refusing to appoint O'Brien Kim as coach of the La Follette High School Girls' Junior Varsity Soccer team. On July 31, 1998, the Commission appointed Karen J. Mawhinney, 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. A hearing on the matter was held on August 17, 1998, in Madison, Wisconsin. The parties completed filing briefs by January 11, 1999.

FINDINGS OF FACT

1. Madison Teachers Incorporated, herein called the Union, is a labor organization with its principal office at 821 Williamson Street, Madison, Wisconsin 53703.

2. Madison Metropolitan School District, herein called the District, is a municipal employer with its offices located at 545 West Dayton Street, Madison, Wisconsin 53703.

3. The Union represents all regular full-time and regular part-time certificated teaching and other related professional personnel pursuant to the collective bargaining agreement in Section I-B-1. Further, the Union represents all non-faculty personnel in the capacity of athletic directors and athletic coaches, pursuant to Section I-B-1-d. In Section III-L (Extra Duty Compensation Schedule), the bargaining agreement provides the following under 4-c:

1) No later than May 10 of the current school year teachers employed in an extra duty position, under Section III-L, shall be notified by their principal if the teacher will not be reappointed to the position for the ensuing school year. In conjunction with any non-reappointment, the principal shall notify the teacher of the reasons therefore. However, any teacher who holds an extra-duty position in which the season/activity extends beyond May 10 such notice shall be made by their principal no later than 15 days beyond the conclusion of such extra duty activity season. Any teacher willing to be relieved of such extra duty positions shall notify the principal in writing by May 1.

2) Qualified faculty members who apply for positions covered in Article III-L-13, will be given preference for such positions over other individuals who apply. When a vacancy occurs, the principal will send notice of the vacancy to each school. Said notice when sent will be posted for five (5) days prior to the date requests for application for said position are due. Such notice shall be posted in a conspicuous place.

The 1995-97 labor agreement was the first contract that included language in the first paragraph above regarding the principal's duty to notify a teacher of the reasons for a non-reappointment. The language was not changed in the successor agreement.

4. Kathleen O'Brien Kim is a teacher in the District and a bargaining unit member. O'Brien Kim teaches Spanish at Sherman Middle School and Shabazz High School. From August of 1996 through October of 1996, she coached freshman boys' soccer at La Follette High School. From March 1997 to May 1997, she coached girls' junior varsity soccer at La Follette. She continued to coach those two teams during the 1997-98 school year, with the boys' season running in August 1997 to October 1997 and the girls' season from March of 1998 through May of 1998. In the summer of 1997, O'Brien Kim applied to be head coach of the boys' varsity soccer team at La Follette High School and was denied that position. O'Brien Kim filed a grievance over the denial on August 18, 1997. An arbitration hearing was held on

June 12 and 23, 1998, before Arbitrator Herman Torosian. On June 26, 1998, the La Follette High School Principal notified O'Brien Kim that he was not reappointing her as the girls' junior varsity soccer coach at La Follette for the 1998-99 school year. That action is the basis of this complaint, with the Complainants alleging that the failure to reappoint O'Brien Kim as girls' junior varsity coach was retaliatory for her engaging in a protected and concerted activity by pursuing her grievance to arbitration.

5. Michael Meissen is the Principal at La Follette High School. Meissen is responsible for the athletic program and sees that it is in compliance with the Wisconsin Interscholastic Athletic Association's rules and the Board of Education's policies and expectations. Meissen makes the decision to hire or terminate coaches, with recommendations from the Athletic Director. Kenneth Roberts was the Athletic Director during the relevant times in this proceeding.

6. The Union's Executive Assistant for Labor Relations is Edward Sadlowski. He sent Meissen a letter on July 11, 1997, stating the following:

Re: Kathleen O'Brien-Kim/Head Coach Boys' Varsity Soccer

Dear Mike:

We write on behalf of the above-referenced individual who has been employed by the District as a faculty member since August 22, 1995.

It has been brought to our attention that Ms. O'Brien-Kim submitted an application for the position of Head Coach Boys' Varsity Soccer. It is also our understanding that you selected Jorge Arenas to fill said Position. Mr. Arenas is not a faculty member employed by the District.

Such action is a violation of section III-L-4-2 of MTI's Collective Bargaining Agreement inasmuch as Ms. O'Brien-Kim is a qualified faculty member who has applied for a position covered in Article III-L-13 of the Collective Bargaining Agreement and as such Ms. O'Brien-Kim has preference for said position over other individuals who apply.

Furthermore, we have reason to believe that La Follette High School decision to hire Mr. Arenas, as Head Coach Boys' Varsity Soccer, thus denying Ms. O'Brien-Kim with the opportunity to be employed by the District in said capacity is violative of Madison's Equal Opportunities Ordinance, inasmuch as the fact that students expressed that they would not participate if a woman was employed as coach and those statements impacted the decision to employ Mr. Arenas.

Kathleen O'Brien-Kim desires to be employed by La Follette High School in the capacity as Head Coach Boys' Varsity Soccer for the 1997-98 school year. The season starts August 18, 1997. We would appreciate your prompt response to the above so that any damages can be mitigated.

Meissen responded to Sadlowski's letter on July 16, 1997, with the following:

Dear Ed:

This letter is in response to your letter regarding Kathleen O'Brien-Kim.

It is always my intent to employ teachers as coaches at our school and to work within the framework of the teachers negotiated contract. Ms. O'Brien-Kim was the only teacher applicant for the Head Boys Soccer position. As stated in the contract, if she is qualified, she would receive the position over a non teacher.

However, based on her performance as Freshmen boys soccer coach (Fall, 1996) and the JV girls' soccer coach this past Spring, along with input from the La Follette athletic director, parents of athletes she has coached, and student athletes she has coached, it is my judgment that she is not qualified to be the head soccer coach at La Follette. Specifically, we are looking for a Head coach with the attributes of excellent communication skills with players and parents. Ms. O'Brien-Kim does not have the requisite strengths in this area to meet the needs of the head coaching vacancy. Therefore, with no other qualified candidates available who are teachers, I hired Mr. Jorge Arenas.

Roberts told O'Brien Kim that if she were unhappy about the decision to not appoint her as the boys' varsity coach, she should grieve it. She did just that, on August 18, 1997. She continued to coach freshman boys' soccer in the fall of 1997 and girls' junior varsity soccer in spring of 1998.

7. Roberts is a teacher in the District and was no longer the Athletic Director at La Follette during the hearing in the instant case but had been during the relevant times in this proceeding. Roberts talked with three girls at the end of the spring semester in 1997, asking them how their soccer season had gone, and one of them said it was the worst athletic experience they ever had. Between the 1997 and 1998 seasons, the girls' soccer program had a level of attrition that caused a problem. In the spring of 1997, the girls' junior varsity started with about 30 students and finished with 26, according to Roberts. There were about 16 on the freshman team, and some of the freshmen go to junior varsity and some go to the varsity program. In the spring of 1998, there were not enough junior varsity players – perhaps

only eight -- to field a team. A typical lineup consists of 11 players, and Roberts elevated the freshmen to the junior varsity team in order to play a schedule. Roberts contacted seven former players and asked them why they were no longer out for soccer, and they told him that did not want to play for O'Brien Kim.

8. After the 1998 spring sports season ended, Roberts and Meissen discussed the position of the girls' junior varsity coach. Roberts assumed that he and Meissen discussed O'Brien Kim's coaching status after the last day of the arbitration hearing, on June 23, 1998, three days before she was notified that she would not be reappointed as girls' junior varsity coach. Roberts and Meissen had decided to not re-appoint her to the girls' junior varsity coaching position before June 23, 1998.

9. Meissen found that O'Brien Kim was not qualified for the boys' varsity position based on her performance as the freshman boys' coach in the fall of 1996 and her performance as the girls' junior varsity coach in the spring of 1997. While Meissen did not personally receive any complaints about O'Brien Kim's performance as a coach during the 1996-97 school year, he was told by Roberts that there were some concerns about her performance. Meissen found more problems with the girls' season than the boys' season, due to the attrition rate in the girls' program. Meissen stated that there was a concern about safety, particularly that the goals were not fastened and could fall over. Meissen was aware of those problems by June 23, 1998, when he testified at the arbitration hearing before Arbitrator Torosian. At the arbitration hearing, Meissen testified that O'Brien Kim was not qualified to coach the boys' varsity soccer team. He stated that qualifications included were being a licensed teacher, having coaching and playing experience, and other qualifications included past performance, relationship to parents, and the number of students continuing to participate under a coach. He was concerned about O'Brien Kim's lack of administrative or organization detail because of a problem at East High School. The other main concern was that Meissen thought O'Brien Kim had skill working with talented, top-flight players but did not with other less talented players.

10. In accordance with the contractual requirement to give notice of the reasons for a non-reappointment to a position, Meissen sent the following letter to O'Brien Kim on June 26, 1998:

As Principal of La Follette High School, I am responsible for the administration of both the curricular and the co-curricular programs. Such responsibility brings with it the need to hire and also dismiss coaches at La Follette. At this time, I am officially notifying you that I am not reappointing you as JV Girls' Soccer coach at La Follette High School for the 1998-99 school year.

Furthermore, it is my responsibility to inform you of the reasons for this non-reappointment. They include the following:

1. Failure to generate the appropriate coach/player relationship necessary to make a positive experience for our student-athletes.

2. An attrition rate from the previous year that didn't allow La Follette to have both a JV and a ninth grade team. Interviewing many of these athletes that didn't return to the soccer program made it apparent that it was because of the coach.

3. We are beginning to receive calls from parents and/or students regarding your calls to them related to their signing a petition. Although this may not turn out to be a matter of concern, we are unprepared to reassign you without investigating the nature and appropriateness of those contacts.

I wish to thank you for your efforts on behalf of La Follette athletes and good luck to you.

The first and second reasons in Meissen's letter were discussed at the arbitration hearing. The first reason – the appropriate coach/player relationship – was in reference to three students that told Roberts that they had the worst athletic experience ever in the 1997 season. The second reason – the attrition rate – was in reference to the girls' junior varsity participation, not the freshman boys' participation. During the spring of 1998, Meissen learned from Roberts that there were student athletes who did not go out for soccer because of the prior year's experience with O'Brien Kim. There were at least 16 fewer students in 1998 than in 1997. Nine of them may not have returned for various reasons, such as they were seniors, or they moved up to the varsity team or they were foreign exchange students no longer there, or they moved out of the District.

11. The petition that Meissen referred to in the letter noted above was a petition signed by 116 people recommending that O'Brien Kim be relieved of all duties in the La Follette soccer program. The petition was introduced at the arbitration hearing in June of 1998. No one from the Union had seen the petition before that time. O'Brien Kim was not aware of the petition before the arbitration hearing. Meissen had not seen it either until the arbitration hearing. After the arbitration hearing, Sadlowski started to contact some of those who signed the petition. He talked with three people and left messages for several others. O'Brien Kim contacted two people who signed the petition. The Union decided to have everyone on the petition contacted by a law firm that was handling O'Brien Kim's sex discrimination complaint before the Madison Equal Opportunities Commission. Meissen's concern about the petition was whether people who were being contacted were being harassed or intimidated. Three parents called Roberts and told him that they were getting phone calls from the Union, legal counsel, and O'Brien Kim, and that they were concerned about calls to younger kids. Meissen testified that now that time has passed and the District investigated the phone calls or contacts of the petitions' signers, he would not use the petition as the basis of his decision regarding O'Brien Kim's coaching. At the time he wrote the June 26, 1998, letter, he was trying to figure out what was going on. His decision to not reappoint her as a coach is based primarily on the first two reasons he gave in his letter.

12. Meissen testified that the timing of the June 26, 1998, letter was due to the 15-day period outlined in the labor contract in Section III-L-4-c for the time to notify someone of a non-reappointment. The close of the season is the close of the state tournament, with the calendar established by the Wisconsin Interscholastic Athletic Association or the WIAA. The close of the season was the tournament played on June 11, 12 and 13, 1998, and Meissen had 15 days after that to notify O'Brien Kim if he was not going to reappoint her to a coaching position. The record is unclear as to the time of La Follette's last girls' match. It may have been played on May 21 or June 5 or 6, 1998. Meissen reviewed all of the reappointments for the spring sports around the same time. Meissen believed the contract would have allowed him to give O'Brien Kim notice earlier than the 15 days at the end of the season. Meissen reviewed the information given him about her performance that would determine whether she continued in the coaching position. Meissen did not have any new information about O'Brien Kim's qualifications or performance between the end of the arbitration hearing on June 23, 1998 and the June 26, 1998, letter non-renewing her to the girls' junior varsity soccer position.

13. O'Brien Kim has no knowledge that Meissen or Roberts were hostile to her filing a grievance. O'Brien Kim testified that she did not believe that Roberts' testimony at the arbitration hearing was truthful. She did not know whether Roberts or Meissen did anything during the 1997-98 school year to evaluate her coaching abilities.

14. Meissen considered O'Brien Kim to be qualified for freshman boys' soccer coaching and girls' junior varsity soccer coaching positions for initial employment, but her performance would determine whether or not she would be reappointed.

15. O'Brien Kim retained her position to coach freshman boys' soccer for 1998-99. The District would have had to notify her by May 1, 1998, if she were not going to be reappointed to that position.

16. The record does not establish by a clear and satisfactory preponderance of the evidence that the District was hostile to O'Brien Kim's grievance when it determined to not reappoint her to the girls' junior varsity soccer coaching position in June of 1998 for the 1999 season or that its decision was motivated in any part by anti-union considerations.

Based on the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

The Respondents' decision to not reappoint Complainant Kathleen O'Brien Kim to the girls' junior varsity soccer coaching position for 1998-99 was not due to animus toward her union activities and did not discriminate against her. Consequently, the Respondents did not violate Sec. 111.70(3)(a)3, Stats., or derivatively Sec. 111.70(3)(a)1, Stats.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

The Complaint is hereby dismissed in its entirety.

Dated at Elkhorn, Wisconsin this 3rd day of February, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/

Karen J. Mawhinney, Examiner

**MEMORANDUM ACCOMPANYING FINDINGS
OF FACT, CONCLUSION OF LAW AND ORDER**

The dispute in this case arose when the District notified Kathleen O'Brien Kim that it would not reappoint her as the coach of the girls' junior varsity soccer team, and this notice came three days after the conclusion of an arbitration hearing in which O'Brien Kim grieved the District's denial to her of a varsity coaching position. The essence of the Union's complaint is that the District has retaliated against O'Brien Kim for her pursuit of her grievance through arbitration.

THE PARTIES' POSITIONS

The Union

The Union asserts that the reasons given by Principal Meissen for non-renewing O'Brien Kim to her junior varsity coaching position are pretextual. The fact of the pretext together with the sequence of events immediately preceding the non-renewal indicate a retaliatory motive, at least in part, for O'Brien Kim's engaging in lawful, protected activity under MERA. The Union asserts that the Respondents subverted O'Brien Kim's ability to grieve a superior's decision without fear of reprisal, and thereby also interfered with, restrained or coerced her in the exercise of her legal rights. The Complainants asked that she be restored to the position she would have enjoyed but for the District's prohibited practices.

The Union argues that the District has taken contradictory positions in the instant complaint and the arbitration case. In this complaint, Meissen has claimed that O'Brien Kim's qualifications for the girls' junior varsity position were unrelated to her performance in that position. In the arbitration proceedings, both he and Roberts claimed she was unqualified to coach varsity primarily because of her performance in the position. The District cannot have it both ways.

When Meissen testified that O'Brien Kim was qualified to be junior varsity coach, he understood "qualified" to encompass her performance as a coach, her ability to relate to parents, and the number of players that continued on her team from one year to the next.

Nothing changed between June 23 and 26, 1998, with respect to O'Brien Kim's qualifications for the junior varsity position. Meissen testified that he was aware of all the problems in both the 1997 and 1998 seasons. Nonetheless, he non-renewed her as girls' varsity coach and cited performance deficiencies in the very areas he looked to when finding her qualified for the position three days earlier.

The Union states that the reasons given by Meissen in his June 26, 1998, letter were a sham. The petition was the only new event, and Meissen admitted that it cannot serve as a

basis for his decision. There was one new element between June 23 and June 26 – Meissen’s testimony at the arbitration hearing, where he was subpoenaed to explain under oath his reasons for denying a 20-year coach a varsity position on the grounds that she was not qualified for the position.

The Union submits that the District discriminated against O’Brien Kim in part because of her participation in lawful, protected activities under MERA. The issues before the Examiner are relatively narrow. Was Meissen hostile to O’Brien Kim’s use of the grievance procedure to contest his appointment of a non-faculty applicant to the boys’ varsity position, and was his subsequent decision to non-renew her based, even in part, on such hostility? The Union asserts that the answer to each question was illustrated at hearing to have been “yes.”

The Commission has recognized the direct evidence of hostility toward protected activity is difficult to obtain, and it allows illegal motive to be inferred from the circumstances of a given case. An inference of hostility toward protected activity exists where an employer’s stated reasons for an adverse employment decision are shown to be pretextual. Meissen’s hostility toward O’Brien Kim’s protected activity was not overt and must be inferred from his actions and inactions from the time the grievance was filed to the time he non-renewed her for the position.

The first reason given by Meissen – her inability to develop appropriate player/coach relationships – was too remote in time to serve as a valid basis for the non-renewal. There is no indication as to when she failed to generate those relationships, and the only evidence is that she failed to provide a positive experience for her junior varsity players in the 1997 spring season, not her 1998 spring season. Meissen testified that there were only two difficulties he perceived with the 1998 season – the high attrition rate and the dispute over who was responsible for staking down goal posts. Therefore, the first reason was no longer viable at the time it was given, since it referred to her performance in a season one year earlier. If Meissen considered the matter significant enough to warrant non-renewal, he could have not renewed O’Brien Kim for the 1998 girls’ junior varsity season. Also, he could have raised the issue in the context of O’Brien Kim’s qualifications for the position when questioned on the point on June 23, 1998, but he did not. With knowledge of her performance during both seasons, he pronounced her qualified for the position as of that date.

Except for the arbitration hearing, nothing changed between June 23 and 26, 1998. No new information was received indicating that O’Brien Kim also suffered from poor player relationships during the 1998 season. Meissen had no reason to believe that the problem continued in 1998. It is logical to believe that Meissen’s first reason for non-renewing her was merely a pretext, and the inference of his hostility is established.

Furthermore, the Union states that Meissen was aware of the attrition rate when he said that O’Brien Kim was qualified for the position on June 23, 1998. While 16 players did not return from the 1997 season in 1998, Meissen admitted he could not blame O’Brien Kim for

four that were foreign exchange students, three that graduated, two that moved out of the District, and girls who left junior varsity for the varsity team. To the extent that attrition could be attributed to O'Brien Kim, it was a byproduct of her admittedly poor 1997 season. There was no way of knowing the attrition rate until the 1998 season started. When two-thirds of the players returned, Roberts looked into the reason and was told that it was because of the less than ideal experience the prior year.

The Union argues that just as the first reason for non-renewing O'Brien Kim was stale, so was this second reason. By looking at the number of players not returning, Meissen is actually reasserting that O'Brien Kim failed to develop appropriate player relationships during the prior season. The two reasons are merely flip sides of the same coin, one of which could only manifest itself during the 1998 season. The fact remains that Meissen was aware of the attrition rate on June 23 when he pronounced O'Brien Kim qualified for the position. However, after twice testifying that he considered her qualifications to include all aspects of her performance in junior varsity, he tried to backpedal, claiming that he believed she had been qualified at the time she was hired for the junior varsity position, but that her non-renewal was based on her subsequent performance which had nothing to do with her qualifications. When he testified on June 23, he included in his assessment of qualifications such things as her performance as a coach, her relationship with parents, and how many students continued in the program. He then attempted to distinguish between her qualifications and her performance by claiming that he meant she was qualified because she already held the position, but that her continuation in that position relied on her performance, not her qualifications. Yet in the arbitration case, Meissen and Roberts took exactly the opposite position and testified that her qualifications for the varsity position were determined solely by her performance in prior coaching positions.

The District has said in the arbitration case that O'Brien Kim was not qualified for the boys' varsity job because of her prior coaching performance in girls' junior varsity. Now it said she was qualified to coach girls' junior varsity without regard to her performance. The District cannot have it both ways.

The Union asserts that the second reason offered for the non-renewal is pretextual. Most of the players did not return for reasons other than the coach, and Meissen was aware of that when he found her qualified on June 23. The inference of hostility is established.

Finally, the Union points out that Meissen admitted the third reason for non-renewing O'Brien Kim was not a basis for his action. The decision was based on the first and second reasons in his letter. Those reasons were known long before the arbitration hearing. As such, they were pretextual and provide a strong inference of hostility on his part.

The Union contends that the connection between Meissen's hostility and his non-renewal of O'Brien Kim is quite clear. The hearing on her grievance was only three days before the non-renewal notice was sent. His claim that he had decided by the arbitration hearing not to reappoint her is precisely the type of self-serving testimony warned against in SHATTUCK DENN

MINING CORP. V. NLRB, 362 F.2D 466, 470 (9TH CIR. 1966). Neither Meissen nor Roberts gave anyone an indication that they had decided to non-renew her prior to the arbitration hearing. While Meissen claims that he notified other coaches of their non-renewal about the same time, that claim sought to blur the focus on O'Brien Kim. There was no evidence of which other coaches were non-renewed, why they were non-renewed, or exactly when they were non-renewed. There is only one conclusion regarding O'Brien Kim's non-renewal as girls' junior varsity coach three days after a hearing was completed on her grievance – that it was motivated, at least in part, because of hostility toward that protected activity.

When an employer commits prohibited practices under MERA, it also interferes with, restrains, and coerces employees in the exercise of rights guaranteed them by Sec. 111.70(2), Stats. The Union states that because the Respondents were shown to have violated Sec. 111.70(3)(a)3, Stats., so too has a derivative violation of Sec. 111.70(3)(a)1 been established. The Complainants asked for a cease and desist order and the immediate reappointment of O'Brien Kim as girls' junior varsity soccer coach at La Follette and a make whole remedy for any lost wages, with interest and that all references to her non-renewal be removed from her personnel file.

The District

The District states that the Complainants bear the burden of proving a violation by a clear and satisfactory preponderance of the evidence. The District agrees that O'Brien Kim engaged in protected activity and that the employer knew of this activity. However, it submits that the complaint should be dismissed because the Union cannot meet its burden of proving that the District was hostile toward that activity or that hostility toward that activity motivated its decision to non-renew O'Brien Kim to the girls' junior varsity coaching position.

The District asserts that it has legitimate reason for not re-appointing O'Brien Kim to the coaching position in question. At the end of the 1996-97 school year, three junior varsity girls told Robert that their experience on O'Brien Kim's team was the worst athletic experience they ever had. In the 1997-98 year, there was so much attrition in the girls' junior varsity soccer program that the junior varsity and ninth grade team had to be merged in order to have enough players to field a team. Roberts's inquiry into the reasons for the attrition found a number of girls who did not want to participate if O'Brien Kim was the coach.

The Union has not rebutted the District's business reasons for refusing to re-appoint the Complainant. While the Union has alleged that the reasons offered by the District are pretextual, there was no attempt to make out a pretext case through competent evidence. The District calls the Union's case deficient in two areas. First, there is no real attempt to deny the

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legitimate reasons not to re-appoint O'Brien Kim, and the bargaining agreement only requires that notice of the reasons for the decision be given. At least three girls told Roberts that soccer was a terrible experience for them. Roberts also commented at the arbitration hearing that pupil and parental feedback were not positive. While O'Brien Kim does not believe Roberts, she cannot really dispute that he got negative feedback about her coaching from pupils and players. Also, the unusual attrition rate in the girls' participation in 1998 gave enormous weight in the

District's decision, and there is no claim that O'Brien Kim was not identified by students as the reason for that attrition.

The District presumes that at this point, the Union's argument must be that despite player relation problems and attrition, the District was still partially motivated by hostility toward O'Brien Kim's protected activities, but there is no evidence of anti-union animus on the part of the District. The Union did not offer any witness to show that Meissen harbors anti-union hostility or make a claim that Meissen has displayed animus in any other case. Meissen routinely handles grievances as part of his job. There is no claim of a pattern of prohibited practices or retaliation claims against the District. Roberts handles the major decisions in the Athletic Department and he is in the bargaining unit.

The District says that the centerpiece of the Union's case – the “qualification” issue – is a red herring. The argument is that Meissen testified that O'Brien Kim was qualified to be the girls' junior varsity coach, but he notified her that she would not be re-appointed to that position soon after giving such testimony. The Union is arguing that but for hostility toward her for pursuing her grievance, she would not have been non-renewed. The answer is that a teacher being “qualified” under the contract has nothing to do with whether there is a valid reason to refuse to re-appoint him or her.

The District submits that throughout the arbitration hearings, the Union implied that a coach can be non-renewed so long as he or she is given a reason, but an internal applicant must be given preference for coaching positions if they are minimally qualified. Thus, there is an about-face in the Union's position. At the arbitration hearing, the Union introduced an opinion letter from its own legal counsel (Employer Exhibit #6 in this case) which states that qualified faculty members get preference over other individuals but also notes that once appointed, coaches serve at the discretion of the District. The Union tried to get a just cause protection for coaches before they can be removed but was unsuccessful. It obtained language that states that coaches must be provided with reasons for their non-reappointment. An individual can be qualified for a job, and thereby entitled to be appointed to that job, but the appointment creates no entitlement to keep that job from year to year.

There were three components that Meissen considered in assessing qualifications in a hiring decision. However, the Union then built a case on a presumption that is false – that people who are qualified for jobs never experience performance problems thereafter and are never removed on that basis.

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The District asserts that Meissen has been completely consistent in both proceedings. He testified before Arbitrator Torosian that O'Brien Kim is qualified to be both the freshmen boys' and girls' junior varsity coach, but that she had performance problems as the girls' coach. He testified to the same thing in the instant proceeding. Meissen reiterated concerns over O'Brien Kim's performance in the 1997 girls' season, but in 1998, he became aware of the attrition in the girls' program.

The District asks – if Meissen were truly out to retaliate against O'Brien Kim for her Union activities, why re-assign her to coach the freshmen boys' soccer? Meissen was aware of the grievance back in August of 1997 and had ample time to contrive a reason to refuse to re-appoint her to the boys' position in the fall of 1998. The logical answer is that he is telling the truth, and he is not aware of any problems that would warrant removing her from the boys' coaching position while he is aware of problems with the girls' program.

While there was an effort to sully the District with the petition at hearing, it had nothing to do with the issue of whether animus motivated the District's decision not to re-appoint O'Brien Kim. The District also notes that the Union suggested that witnesses had already offered every fact concerning O'Brien Kim's performance deficiencies in the arbitration hearing. The decision to not re-appoint her to the girls' junior varsity coaching position was made almost a year after the decision not to appoint her to the varsity position, which is the subject of the grievance. But at the arbitration hearing, Meissen was not being asked about performance in 1998 but in 1997.

The District submits that the decision to not re-appoint O'Brien Kim was a collaborative one, with Roberts, who is in the bargaining unit, being the primary decision maker, subject to approval by Meissen. There is no claim that Roberts harbored anti-union animus. He even told O'Brien Kim to grieve the decision about the varsity position if she didn't like it. Meissen has never been accused of anti-union animus until now. He handled the four-block grievance, which got far more publicity than this case and involved disagreements among the La Follette faculty. He never retaliated against the opponents of the four-block program. He also decided not to re-appoint a spring sports coach and mailed notice of that decision at the same time he notified O'Brien Kim. He testified that he sends out such notices at about the same time each year.

The District also points out that the sports season ended June 13, 1998. The arbitration hearings were June 12 and 23, 1998. The fact that notice was sent to O'Brien Kim on June 26, 1998 had nothing to do with animus. The notice was sent at the same time as other notices. By operation of the bargaining agreement, notice would have to be given within a 15-day period that necessarily arose during the pendency of the grievance arbitration proceedings. Complying with the bargaining agreement's time lines is not animus.

In Reply

The Union

The Union replies by stating first that the mere fact that the District has discretion to non-renew a qualified coach does not give it the right to break the law. The District can – and did here – exercise both a contractual prerogative and break the law, because of the retaliatory motive underlying its contractual right.

The District claimed that its reasons for non-renewing O'Brien Kim were legitimate and therefore not pretextual, and that the reasons had a factual basis not rebutted at hearing. The Union asserts that the District's argument is fundamentally flawed. Few employers will undertake a retaliatory action without having some other basis to support that action, as the likelihood of getting caught would be too great. Thus, most cases of illegal retaliation are motivated by both legitimate and illegitimate reasons. It is not the Complainants' burden to prove that the reasons given by the District had no basis in fact. The Complainants need only show that the District's reasons were not the real reasons or the only reasons for its adverse employment action. One must look at all the circumstances surrounding the action.

The Union summarizes the facts of the case at this point, and notes that at the arbitration hearing, Roberts stated that O'Brien Kim was not qualified to hold her girls' varsity position while Meissen stated she was qualified. When asked whether Meissen was continuing O'Brien Kim for the upcoming year in her junior varsity position, Roberts answered "yes." Three days later, Meissen non-renewed her as the junior varsity coach.

The Union asks – if "qualified" is a term Meissen believed to have significance only at the hiring stage, then why would factors such as attrition play any role in his determination that O'Brien Kim was qualified for the junior varsity position on June 23rd? Meissen twice confirmed that performance-related concerns were encompassed in his assessment of O'Brien Kim as qualified. The Union contends that the District presented two different stories – one day O'Brien Kim was qualified based on her performance, and three days later she was removed because of her performance.

The Union asserts that it is unreasonable to expect that Meissen would have overtly exhibited animus toward O'Brien Kim's protected activity. Direct evidence of illegal acts only rarely exists. Improper motive is a state of mind, which can only be ascertained by examining one's actions in the context of the real world and human nature. The lack of demonstrable retaliation in response to other grievances means little unless it can be shown that the facts of those grievances were reflective of the facts found here. Meissen need not have retaliated in response to every grievance in order to justify a finding that he illegally retaliated in response

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to O'Brien Kim's grievance. The record lacks sufficient evidence to compare the other non-reappointment of an unidentified coach at La Follette. O'Brien Kim's season ended long before she received notice of her non-reappointment. Her season ended for all practical purposes on May 21, 1998. The WIAA season ended on June 13, 1998, when the contractual 15-day notice period begins to run.

The Union states that Roberts was under the impression on the second day of the arbitration hearing that O'Brien Kim was going to continue her coaching position, and that no decision had been made between Roberts and Meissen. But at the instant hearing, Meissen

testified that he had informed Roberts before the arbitration hearing that he had agreed with Roberts' recommendation to non-renew her. The disparity between the testimony cannot be reconciled. Like all retaliatory motive cases, it boils down to credibility, and the Union believes that Meissen has not presented himself well in this vital area.

The District

The District replies to the Union by first stating that Meissen has never stated in any case that O'Brien Kim was not re-appointed because she was not qualified. The reasons for not re-appointing her were that she failed to generate a positive coach-player relationship and that athletes reported that they did not wish to play for her. The Union's brief focussed on O'Brien Kim's qualifications and never once seriously disputed the District's legitimate reasons for not re-appointing her, even though it is that issue that the Union must address as a matter of law to meet its burden. The Union does not dispute that there was a serious attrition rate in 1997-98, although it contends that O'Brien Kim should not be held responsible for that attrition. The Union does not dispute the fact that Roberts was told by athletes that the reason they did not return was that they did not want to play for O'Brien Kim. The Union acknowledged that O'Brien Kim had a bad year, that player relations were bad, but concludes that in order to avoid a finding of animus, the District should have fired her immediately rather than see if the situation would turn around in the next year.

Meissen's stated that O'Brien Kim is qualified to be a junior varsity coach is true in itself, but is irrelevant to the legal issue present, namely, whether the District's reasons for its decision are pretextual. The District points out that an individual can be qualified for a coaching position, but there may also be a reason to remove him or her from the job. An individual's performance may be considered to determine whether he or she is qualified for another position, such as a higher position. The Union's premise that the District must use the term "qualified" as always incorporating performance considerations, or never incorporating performance considerations, in order to be consistent, is untrue under the collective bargaining agreement and as a practical matter.

The Union's second argument is that the District knew of the problems of player relations and could have terminated O'Brien Kim as a coach before the 1997-98 season. The Union's burden is to establish that the District's reasons for its decision are pretextual, and accordingly, one might expect the Union to dispute the truth of those reasons. However, the

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Union does not dispute that 1996-97 was a bad year and player relations were a problem in both years. The Union does not claim that the problems the District identified do not really exist. The District also asserts that a coach's problems at the junior varsity level means that he or she is not yet ready for a promotion to run the entire varsity program, and yet it might still be premature to terminate that coach from the junior varsity position based on one year's experience. The District does not fire an employe at the first sign of trouble. The inference that the Union seeks to have drawn – that the District should fire an employe at the first opportunity to do so or else animus must later be present – is not a valid inference and not a necessary one.

The District disputes the Union's claim that Meissen admitted he could not hold O'Brien Kim responsible for the level of attrition and states that this claim is not based on the record. No affirmative evidence was offered by the Union that the reasons for attrition built into the Union's cross-examination actually explain the attrition in the program. Meissen was asked if he would blame O'Brien Kim if players did not return to the program because they were foreign exchange students who left La Follette. Sec. 111.70(3)(a)3, Stats. prohibits decision motivated in part out of hostility toward union activity, not decisions based on non-discriminatory but incorrect bases. The sincerity of Meissen's determination, regardless of its correctness, is beyond question.

The District submits that the Union's case is flawed based in part on the reasons set forth in Section I of its brief, and adds that an even more critical deficiency in its case lies not in the argument but in what the Union fails to argue. The Union does not seriously dispute the legitimate reasons offered by the District in support of its decision not to re-appoint O'Brien Kim as the junior varsity girls' coach. The Union does not dispute the attrition and the fact that the drop in pupil participation could not have been known during the previous summer when Meissen and Roberts concluded that O'Brien Kim should not be promoted to varsity coach but left her in the junior varsity program. The Union does not dispute the fact that Roberts interviewed athletes who told him they did not want to play for O'Brien Kim. The Union does not dispute the fact that O'Brien Kim failed to generate a coach/player relationship that produced a positive experience for students.

The Union has failed to produce any evidence regarding renewal or non-renewal of other coaches that might suggest animus in this case. The burden of proving disparate treatment to show discrimination lies with the Complainant. The Union has not alleged any violation of the collective bargaining agreement. The only indirect evidence of animus cited by the Union is not credible. The Union alleges that the timing of the District's decision is sufficiently close to the grievance arbitration hearing as to warrant an inference of animus. However, the time of the decision is dictated by the collective bargaining agreement. The Complainant would have to be notified of the District's decision right before, during, or after the arbitration hearing. She was notified at the same time as other employees participating in spring sports and at the same time as in previous years.

The District states that the Complainant's protected activity did not begin at the arbitration hearing – it began when she filed the grievance, roughly nine months before the hearing. Nevertheless, she was re-appointed to the freshmen boys' position for the 1998-99 year thereafter. She was told by Roberts to file a grievance if she wished to contest the District's decision not to promote her to the varsity head coach. It is not credible to maintain that the District is not hostile to protected activity in the form of grievances but is hostile to protected activity in the form of their logical outcome, grievance hearings.

DISCUSSION

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 show all of the following elements:

1. The employe was engaged in lawful and concerted activities protected by MERA; 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. See 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).

Evidence of hostility and illegal motive (factors three and four above) may be direct, such as with overt statements of hostility, or as is usually the case, inferred from the circumstances. See TOWN OF MERCER, DEC. NO. 14783-A (GRECO, 3/77). If direct evidence of hostility or illegal motive is found lacking, then one must look at the total circumstances surrounding the case. In order to uphold an allegation of a violation, these circumstances must be such as to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. See COOPERATIVE EDUCATION SERVICE AGENCY #4, ET AL., DEC. NO. 13100-E (YAFFE, 12/77), AFF'D, DEC. NO. 13100-G (WERC, 5/79).

Regarding the fourth element, it is irrelevant that an employer has legitimate grounds for its action if one of the motivating factors was hostility toward the employe's protected concerted activity. See LACROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-B (WERC, 7/78). In setting forth the "in-part" test, the Wisconsin Supreme Court noted that an employer may not subject an employe to adverse consequences when one of the motivating factors is his or her union activities, no matter how many other valid reasons exist for the employer's actions. See MUSKEGO-NORWAY C.S.J.S.D. NO. 9 v. W.E.R.B., 35 WIS.2D 540, 562 (1967). Although the legitimate bases for an employer's actions may properly be

considered in fashioning an appropriate remedy, discrimination against an employee due to concerted activity will not be encouraged or tolerated. See *EMPLOYMENT RELATIONS DEPT. v. WERC*, 122 WIS. 2D 132, 141 (1985).

There is no dispute that the Complainants have satisfied the first two elements. Clearly, O'Brien Kim was engaged in lawful and concerted activities protected by MERA when she filed a grievance over being denied the head coaching position for the varsity soccer team. And obviously, the District knew of the grievance and her pursuit of it. The Examiner agrees with the Union that the issues are relatively narrow – was Meissen hostile to O'Brien Kim's use of the grievance procedure to contest his decision about the varsity position, and was his subsequent decision to non-renew her for the girls' junior varsity position based even in part on such hostility?

There is no evidence that Meissen was hostile to O'Brien Kim for filing a grievance over the varsity coaching position. Roberts had in fact told her to file a grievance if she did not like the decision. The record does not show whether Roberts' comment was said in a friendly or challenging manner. The grievance was filed in August of 1997 and was pending for the whole year up to the hearing in this proceeding. The District is correct that if Meissen wanted to retaliate against O'Brien Kim, it could have also removed her from coaching freshmen boys' soccer. However, the District left her in that position, as it had no major concerns over the freshman boys' soccer program.

The record has nothing at all to show that Meissen or the District was hostile to the protected activity in this case. The total circumstances of the case will not support an inference of hostility. The only inference is the timing of the District's notice, coming only three days after the last day of the arbitration hearing. However, the timing alone is not enough to persuade the Examiner that the reasons given were a pretext. The Union attacks the reasons given as a pretext. The reasons are based on facts in the record – mainly, an attrition rate that caused Roberts to combine the freshman and girls' junior varsity programs into one team in order to get enough players to play a schedule. The attrition rate was an effect of O'Brien Kim's performance in the 1997 season.

The Union has argued that the first reason given by the District is a pretext and that it is too remote in time to be a factor in her non-renewal. While the reason – her inability to develop appropriate coach/player relationships – related to her 1997 season, it carried over into her 1998 season and became a greater problem due to the attrition rate. Therefore, it is not necessarily too remote in time, because the effects of the lack of good coach/player relationships were to become evident only in the 1998 season. There is no inference of hostility established by Meissen's first reason in his non-reappointment letter.

The Union has also argued that the District argued in the arbitration case that O'Brien Kim was not qualified for the varsity job because of her prior coaching performance in the girls' junior varsity, but it now says she was qualified to coach girls' junior varsity without regard to her performance. The Union believes that the District is trying to have it both ways.

I disagree. The District has maintained that O'Brien Kim was qualified to coach girls' junior varsity. However, her qualifications have nothing to do with her performance in the job. A qualified coach can be non-reappointed. It was her performance that led to her non-reappointment as girls' junior varsity coach, not her qualifications. The fact that the District looked at her performance as part of judging qualifications for the boys' varsity position does not lead to any inconsistency.

While the Union asserts that the attrition rate is a pretextual reason for the non-reappointment, it failed to prove this in a clear and convincing manner. The Union states that most of the players did not return for reasons other than the coach. However, Roberts found seven players who told him that they were no longer going out for soccer because they did not want to play for O'Brien Kim. The turnover of students graduating or leaving the District would be natural, but there would always be students leaving. If one considered that the coach could not be held accountable for the students who left, the program would eventually be down to nothing because all students eventually leave the school system. However, the program lost 18 students, and some of that was clearly attributed to the coach. The District merged two teams to find enough players to field one team. The District presented a legitimate reason that had nothing to do with the pending grievance

The strongest inference of hostility relates to the timing of the notice of the non-reappointment. The fact that the notice came three days after the last date of the arbitration hearing would certainly raise a red flag. However, the grievance was pending since August of 1997, and any time the notice was given during the pendency of this grievance could raise a suspicion of a retaliatory motive.

In *EMPLOYMENT RELATIONS DEPT. v. WERC*, 122 Wis.2d 132, 361 N.W. 2d 660 (1985), the Wisconsin Supreme Court stated:

As the key element of proof involves the motivation of the employer and as, absent an admission, motive cannot be definitively demonstrated given the impossibility of placing oneself inside the mind of the decision maker, the employe must of necessity rely in part upon the inferences which can reasonably be drawn from facts or testimony. On the other hand, it is worth noting that the employer need not demonstrate just cause for its action. However, to the extent that the employer can establish reasons for its actions which do not relate to hostility toward an employe's protected concerted activity, it weakens the strength of the inferences which the employe asks the WERC to draw.

While the timing of the employer's action here raises some inference of hostility toward O'Brien Kim's protected activity, the employer also has established a reason not related to hostility toward her grievance activity. The timing of the notice of non-renewal to the coaching position was done in the ordinary course of business, in accordance with the time lines the parties have agreed upon, and without regard to the arbitration hearing that had just concluded. The Union does not dispute that by contract, the District has 15 days to give

notice of a non-reappointment, and that the 15 days runs from the end of the state tournament. While the notice could have been given earlier, it would still have been during the time that the arbitration hearing was going forward.

Based on the record and the facts presented, the timing of the non-reappointment notice does not rise to the level of proof needed to show that the District was hostile to O'Brien Kim's protected activity. The complaint has been dismissed.

Dated at Elkhorn, Wisconsin this 3rd day of February, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/

Karen J. Mawhinney, Examiner