

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

**GEORGE MUDROVICH**, Complainant,

vs.

**D.C. EVEREST AREA SCHOOL DISTRICT**, Respondent.

Case 53  
No. 57582  
MP-3522

**Decision No. 29946-M**

---

**Appearances:**

**George A. Mudrovich**, 826½ Steuben Street, Wausau, Wisconsin, 54403, appearing on his own behalf.

**Ronald L. Rutlin**, Ruder Ware & Michler, LLSC., Attorney at Law, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of the Respondent D.C. Everest Area School District.

**Bruce Meredith**, General Counsel, and **Chris Galinat**, Legal Counsel, WEAC, 33 Nob Hill Drive, Madison, WI 53708, filed a brief amicus curiae.

**ORDER ON REVIEW OF EXAMINER'S DECISION**

On August 15, 2003, Examiner Coleen A. Burns issued Findings of Fact, Conclusions of Law and Order in this matter, holding that the Respondent D. C. Everest Area School District (School District or District) had violated Secs. 111.70(3)(a)1 and 3 when Junior High School Principal Robert Knaack (Mr. Knaack or Knaack) recommended to District Administrator Roger Dodd (Dr. Dodd or Dodd) that Complainant George A. Mudrovich (Mr. Mudrovich or Mudrovich) be laid off at the conclusion of the 1997-98 school year, in part because of Mudrovich's lawful concerted activity. For this violation, the Examiner issued a cease and desist order and ordered that a notice be posted.

Dec. No. 29946-M

The Examiner also concluded that the School District had not violated Secs. 111.70(3)(a)1 or 3, Stats., when it laid off the Complainant George Mudrovich at the conclusion of the 1997-98 school year and thereafter failed to rehire him, inasmuch as the decisions of the District Administrator and the School Board were not unlawfully motivated nor were they tainted by Principal Knaack's unlawful hostility. Accordingly, the Examiner dismissed Mr. Mudrovich's complaint in those respects.

On September 3, 2003, Mr. Mudrovich filed a petition for review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. Both parties filed briefs and reply briefs on or before February 12, 2004, WEAC submitted an amicus brief on February 13, 2004 supporting Mr. Mudrovich's petition for review, and the Respondent filed a reply brief on February 24, 2004.

For the reasons explained in the Memorandum accompanying this decision, we set aside the Examiner's Findings of Fact and substitute the Findings set forth in our Order, below. We affirm her conclusion that the Principal was unlawfully motivated in recommending Mr. Mudrovich's layoff, but we reverse her conclusion that the School District's action in laying off Mr. Mudrovich was lawful, as we instead conclude that the School District's decision was tainted by the animus attributable to the Principal and thus violated Secs. 111.70(3)(a)1 and 3, Stats. We affirm the Examiner's conclusion that the District did not violate the law in failing to hire Mr. Mudrovich for the full time position that was posted after his layoff. Lastly, under the very unusual circumstances of this case, we decline to order reinstatement as a remedy for the District's unlawful layoff and instead order back pay terminating on the date of the instant decision.

---

*1/ While the Examiner's factual findings are largely accurate, and we commend her assiduous management of this compendious record, we believe that her findings are unnecessarily extensive and we have restated them more narrowly. A few of our findings are contrary to or in addition to those found by the Examiner, and accordingly, on May 20, 2004 we heard Examiner Burns' impressions of the demeanor of witnesses during hearing. We address the significant discrepancies between our findings and those of the Examiner either in footnotes or in the Memorandum that follows our Order.*

---

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following:

### **ORDER**

- A. The Examiner's Findings of Fact 1 – 33 are set aside and the following Findings of Fact are made:

1. Mr. Mudrovich was employed by the D.C. Everest Area School District as a part-time French teacher in the Junior High School from the 1995-96 school year until he was laid off at the conclusion of the 1997-98 school year. In his first year (1995-96), he taught three periods of French and held a 50% contract. In his second year (1996-97) he held a 65% contract and taught four periods of French. In his third and last year (1997-98), he held an 80% contract, teaching four periods of French and in addition supervising study halls.

2. The School District is a municipal employer with a principal address at 6300 Alderson, Schofield, Wisconsin, 54476. At all relevant times, Roger Dodd, Robert Knaack, and Michael Sheehan have been employed by the District and have acted on behalf of the District as District Administrator, Junior High School Principal, and Junior High School Vice-Principal, respectively.

3. While employed as a teacher with the District, Mr. Mudrovich was a member of the collective bargaining unit represented by the D.C. Everest Teachers' Association (the Association) and was subject to a collective bargaining agreement that was negotiated between the Association and the District.

4. Mr. Mudrovich's classroom performance was satisfactory throughout his employment in the School District and District officials have not cited classroom performance as a basis for any action taken against Mudrovich.

5. Mr. Mudrovich experienced interpersonal conflicts with certain members of the School District's staff from time to time throughout his employment. During his first year, he and Ann Berns, a French teacher who taught mostly at the High School but also taught one class at the Junior High, developed an antagonism because each resented what they perceived as the other's interference in their teaching and the other's uncooperative attitude. For example, at one point early in his employment, Mudrovich corrected Berns' French pronunciation. During Mudrovich's first two years in the District, Ms. Berns complained about him on several occasions to both Principal Knaack and Curriculum Coordinator Corinne Solsrud. Mudrovich also complained to Solsrud about Berns from time to time. Principal Knaack encouraged Solsrud to handle the problems internally within the Foreign Language department.

6. During Mr. Mudrovich's first two years in the District, he and Ms. Berns "floated," i.e., moved from classroom to classroom to teach their French classes at the Junior High. Seniority has traditionally been a major factor in teachers acquiring the benefit of being assigned to a single classroom. The Spanish teachers, who had considerably more seniority than Mudrovich, each taught primarily in one classroom, which they decorated to reflect Spanish or Hispanic culture. During his first year, Mudrovich from time to time broached in departmental meetings the notion that the school ought to designate one of the foreign language classrooms primarily for French, so it could be decorated to reflect French culture. At the end of that first year (1995-96), there was some concern among the Spanish teachers that the transition to a team teaching concept in the Middle School might jeopardize their ability to retain their classrooms, and Mudrovich supported their successful campaign to keep their "little pieces of Spain" in the form of dedicated classrooms.

7. During the 1996-97 school year, Mr. Mudrovich's second year, he made a determined effort to persuade District officials to set aside one of the foreign language classrooms as a primarily French classroom. His effort, while ultimately successful, engendered significant conflict towards the end of the school year, both within the Foreign Language department and between Mudrovich and his superiors. In the fall of 1996, Mudrovich broached the issue with Vice-Principal Sheehan, who was responsible for room assignments, with Coordinator Solsrud, and with his colleagues in the Foreign Language department via a memorandum. Having received little response, Mudrovich approached Mr. Sheehan again in the spring, around the time that Sheehan was preparing the master schedule and room assignments for the upcoming (1997-98) school year. Although Sheehan had expressed support for the idea earlier in the school year, he was noncommittal on the occasions Mudrovich approached him in the spring. When the master schedule was posted in May 1997, it did not include a dedicated French classroom and appeared to require even more "floating" among the French teachers than had previously been true. Each of the five Spanish teachers was scheduled to teach all his/her classes in the same room. Mudrovich protested this room assignment to the school administrators, who asked Coordinator Solsrud to resolve the problem within the department. To that end, Solsrud convened a departmental meeting on May 28, 1997. By all accounts, this meeting became contentious and acrimonious, with the Spanish teachers insisting that their seniority entitled them to retain their own classrooms and Mudrovich insisting that any solution had to include

a classroom dedicated to French. The meeting concluded with no agreement to change the assigned classrooms. The next day, May 29, 1997, Mudrovich distributed to Solsrud and other department members a memorandum setting forth a proposal that would allow for three classrooms primarily dedicated to Spanish and one classroom dedicated to French, but would require the Spanish teachers to do some traveling between classrooms, asking them to, "Please consider this."

8. The following day, May 30, 1997, four teachers, including Spanish teachers Shar Soto and Holly Martin, met with Principal Knaack to complain about a note that Mr. Mudrovich had sent to teacher aide Carol Maki some two weeks earlier. In the note, Mudrovich had written, "Oh cram it," in response to a note Ms. Maki had sent to him, requesting that he send students to study hall with a "study buddy." Mudrovich considered Maki a friend and intended his response to be taken as a joke. Knaack met with Mudrovich on May 30 to tell him about the complaint. Although Knaack would not disclose the identities of the complaining teachers, he informed Mudrovich that Maki did not want to pursue the matter and that Knaack would be taking no disciplinary action regarding the incident.

9. Shortly after meeting with Mr. Knaack about the Maki note on May 30, 1997, Mr. Mudrovich learned that Spanish teachers Soto and Martin were among those who had complained to Knaack about the Maki note. Based upon the timing of the complaint, Mudrovich concluded that Soto and Martin had complained to Knaack in retaliation for Mudrovich's insistence upon a dedicated French room. He advanced this claim to Knaack and asked him to arrange a meeting among the relevant parties to address the matter. Knaack denied seeing any connection between the two events and refused to convene such a meeting, noting that nothing disciplinary or negative had been put in Mudrovich's file as a result of the complaint. Mudrovich also asked Association officials to intercede in the situation, and they also declined.

10. As the 1996-97 school year drew to a close, Mr. Mudrovich continued to pursue the issue of a dedicated French room. On May 30, Mudrovich provided Mr. Sheehan with a copy of Mudrovich's May 29 room allocation proposal and urged Sheehan not to reward the Spanish teachers' retaliatory conduct by permitting the assignments to remain unchanged. Sheehan was unwilling at that time to change the room assignments, mentioning the Spanish teachers' seniority, but he

suggested that Mudrovich return later in June when the assignments were being finalized. Mudrovich also continued to press Coordinator Solsrud on the matter. She in turn discussed it with Principal Knaack, giving him her view that Mudrovich had been very argumentative during the departmental meeting. On or about June 6, 1997, Mudrovich provided Solsrud with a lengthy letter recounting his efforts to obtain a dedicated French room, defending the reasonableness of his actions and conduct, and urging her to defend her authority by not rewarding Ms. Soto's and Ms. Martin's "malicious" conduct.

11. On June 18, 1997, Mr. Mudrovich again approached Mr. Sheehan about room assignments and Sheehan told him that they would remain unchanged. Mudrovich then asked Principal Knaack to overturn Sheehan's decision, but Knaack would not do so. Mudrovich then made an appointment to discuss the issue with District Administrator Dodd. During the meeting with Dodd, Mudrovich was polite and respectful and in Dodd's opinion presented reasonable arguments that the French program was not being treated in the same way as Spanish or German. After this meeting, Dodd directed that Knaack find a way to arrange for a dedicated French room.

12. On July 17, 1997, Mr. Mudrovich met with Principal Knaack to discuss the French room issue. At this meeting, Knaack initially resisted dedicating a French room during the upcoming school year, offering certain compromises and citing the Spanish teachers' seniority. Mudrovich remained very insistent upon a dedicated room. Eventually Knaack offered Room 11, the smallest of the Foreign Language classrooms. Mudrovich was not satisfied with this offer and demanded that Knaack find and review the master schedule to compare class sizes for the upcoming year. Upon review of class sizes and student distributions, Mudrovich argued that the French program should have Room 7, the largest Foreign Language classroom, because French had the largest section of students. Eventually Knaack became quite angry and stated in a raised voice that he would not "stick it to" Jean Haverly, who had a great deal of seniority and presently was assigned that room. Mudrovich became loud and argumentative. When Knaack then offered Room 10 and asserted it was the same size as Room 7, Mudrovich further exasperated Knaack by insisting on physically pacing off the two rooms. The argument continued for some time, with both Knaack and Mudrovich trading angry remarks. By the end of the meeting, they had agreed upon a tentative modification in the room

assignments, assigning Room 10 to French. Mudrovich apologized for “yelling.” The modified schedule would require Spanish teachers to travel somewhat during the school day.

13. On or about July 17, 1997, Mr. Mudrovich delivered a 33-page hand-written letter to District Administrator Dodd detailing the meeting that morning with Mr. Knaack. This letter expressed satisfaction with the ultimate result (Room 10) but conveyed Mudrovich’s concern that Knaack had developed hostility to Mudrovich that could adversely affect his career in the District. Most of the letter comprised Mudrovich’s near-verbatim account of the meeting with Knaack. Near the end of the letter, after restating his fear that Knaack would retaliate, Mudrovich wrote:

Finally, I’d like to request that neither Bob Knaack nor Mike Sheehan be my direct supervisor this coming year, or in any future years. They have both treated me most unfairly, and I doubt that either of them will ever really get over the fact that I went over their heads to get that unfairness reversed.

14. On July 25, 1997, Mr. Knaack telephoned Mr. Mudrovich and informed him that he had changed his mind and the French classroom would be Room 11. Although at the time Knaack attributed this change to complaints from the Spanish teachers, in fact it had been fellow French teacher Ms. Berns who had objected, because she felt that the Room 10 arrangement would put Mudrovich in a position to observe her teaching her class. At first, Mudrovich acquiesced in the change; later, however, he informed Knaack that he did not agree and would pursue the matter with Dr. Dodd.

15. On or about July 25, 1997, Mr. Mudrovich delivered a letter to Dr. Dodd, complaining about Mr. Knaack’s decision to revert to Room 11 as the dedicated French room and attaching a hand-drawn schedule showing how the classes would have been apportioned under the schedule established at the July 17 meeting, along with a diagram of the paced-off measurements of the various rooms and a list of their actual measurements. After receiving this letter, Dodd telephoned Knaack who stated his belief that Mudrovich’s issue regarding the French room had been resolved; Knaack also denied harboring animosity. The two administrators also discussed Mudrovich’s relationship with other staff

members, in particular Ms. Berns, and Knaack informed Dodd that Berns had objected to Room 10 as the French room in order to avoid being in close proximity to Mudrovich. Thereafter Dodd decided not to respond to Mudrovich's letters of July 17 and July 25.

16. On or about July 25, 1997, at Mr. Mudrovich's direction, his attorney sent a letter to Ms. Soto and Ms. Martin claiming that their actions regarding the Maki note had harmed Mudrovich and requesting a retraction and an apology.

17. On July 29, 1997, Mr. Mudrovich telephoned Dr. Dodd to follow up on his earlier letters. Among other things, Mudrovich complained about having the smallest room assigned to French and requested Dodd to convene a meeting among Mudrovich, Dodd, and Knaack, to discuss the room assignment issue and Knaack's treatment of Mudrovich. Mudrovich also discussed the conflict that had arisen with Ms. Soto and Ms. Martin, expressing his view that the conflict originated with Soto and Martin rather than with him. Dodd expressed disagreement with Mudrovich's point of view regarding these issues and Mudrovich concluded that Dodd had sided with Knaack regarding the room dispute and Mudrovich's responsibility for his interpersonal conflicts with other staff members.

18. On July 29, 1997, after his conversation with Dr. Dodd, Mr. Mudrovich telephoned School Board President Susan Leonard, with whom Mudrovich felt he had developed a friendly relationship while her two sons were students in his French classes. Mudrovich reviewed with Ms. Leonard the events regarding the French room issue, the conflict with Ms. Soto and Ms. Martin, the recent meeting with Mr. Knaack and conversation with Dodd, and Mudrovich's concerns about these issues and his future employment security. On August 4, 1997, Leonard and her husband met with Dodd to discuss these issues. On August 6, 1997, Leonard informed Mudrovich by telephone that Dodd had agreed to have another conversation with Knaack. On August 7, 1997, Mudrovich telephoned Dodd to follow up on the matter. Dodd confirmed that he had met again with Knaack and discussed Mudrovich's concerns, but that the assignment to Room 11 would not be changed. In this conversation, Mudrovich reiterated his previous statements regarding the unfairness of the room assignment and the concern about his future relationship with the Junior High School administration. Dodd expressed reassurances that Mudrovich would be treated fairly.



19. On August 5, 1997, having received no retraction or apology from Ms. Martin or Ms. Soto in response to his attorney's letter of July 25, Mr. Mudrovich initiated a civil lawsuit against them alleging, inter alia, injury to reputation and defamation. Soto and Martin immediately requested that the District undertake their representation. Mudrovich's lawsuit against Soto and Martin was pending throughout the ensuing 1997-98 school year.

20. On August 8, 1997, Mr. Mudrovich went to the Junior High office and encountered Vice-Principal Sheehan. Mudrovich told Sheehan that he was going to ask the School Board to invoke a disciplinary hearing against both Sheehan and Knaack because of the way they had handled the room assignment issue. Sheehan responded "Oh." Mudrovich asked Sheehan to inform Knaack of this, since Knaack was not in school on that day, and Sheehan agreed to do so.

21. On August 26, 1997, Mr. Mudrovich learned that his supervisor for the upcoming (1997-98) school year would be Vice Principal Sheehan. Mudrovich approached Mr. Sheehan and asked him to withdraw as supervisor, explaining that he did not feel comfortable with Sheehan because of the turmoil over the French room from the previous school year. Sheehan declined to withdraw as supervisor. Mudrovich then sent a letter on that same day to Principal Knaack protesting Sheehan's assignment as his supervisor and asking that either Kristine Gilmore (another Junior High administrator) or Coordinator Solsrud be assigned as his supervisor instead.

22. By letter dated August 27, 1997, Mr. Knaack denied Mr. Mudrovich's request for a change of supervisors, stating, inter alia, "I see no relationship between the supervision process and, as you stated in your letter, the turmoil that occurred over a French room." Also by letter dated August 27, 1997, Vice-Principal Sheehan wrote to Mr. Mudrovich, stating in part as follows:

At this time there is no relationship between this opportunity for professional growth and "...the turmoil I had to go through in the process of getting a room dedicated to French. . . ." It is my hope that you are able to see the purpose for which our supervision process operates and are able to enter into the process with a positive spirit. It may be necessary for you to look past any perceived problems of the past summer in order for you to take advantage of this opportunity for professional growth.

23. In a letter dated August 28, 1997, Mr. Mudrovich appealed to District Administrator Dodd to change his primary supervisor, advising Dodd that both Sheehan and Knaack had turned down his request. Mudrovich's letter stated in part:

Their [Knaack's and Sheehan's] contention that Mike is better suited to helping me grow professionally than are Kris Gilmore or Corinne Solsrud – both of whom are primary supervisors to a number of other teachers, including members of the Foreign Languages Department – doesn't hold water. If the goal is truly "to help [me] grow into the most effective teacher [I] can be", that goal would be much more likely to be achieved if I were to work with a primary supervisor whose objectivity is not in doubt. This does not include Bob Knaack or Mike Sheehan.

24. Upon receiving the foregoing letter, Dr. Dodd discussed the supervisory issue with Mr. Knaack and concluded that he would support Knaack's decision. By letter dated September 2, 1997, Dodd denied Mr. Mudrovich's request, on the ground that "assignment of teachers to supervisors has always been delegated to the principal of each building," and that it would undermine the process and be inequitable to some teachers if he were to allow teachers to request a particular supervisor. He also stated, "I have all the confidence in the world that you will have a productive experience as a classroom teacher during the 1997-98 school year."

25. In a five-page letter dated September 9, 1997, addressed to School Board President Leonard, Mr. Mudrovich asked that the School Board "invoke a disciplinary hearing" against Dr. Dodd, Mr. Knaack, and Mr. Sheehan, based on their handling of the supervisory assignment issue, their allegedly poor attitude towards the French program, their handling of the issue regarding the dedicated French classroom, and their refusal to assist him in responding to Ms. Soto's and Ms. Martin's accusations regarding the Maki note. Board President Leonard discussed the letter with Dodd, who recommended that she bring it to the full School Board for response. Leonard did not contact Mudrovich regarding this letter.

26. The School Board, in a September 23, 1997 executive session, reviewed Mr. Mudrovich's letter of September 9, 1997. Dr. Dodd conveyed to the School Board the advice of the School District's attorney that the contractual grievance procedure should be used for such complaints. The School Board members read parts of Mudrovich's letter, engaged in very little discussion of its contents, and

directed Dodd to advise Mudrovich that there was a grievance procedure in place to address such issues. Dodd so informed Mudrovich in a letter dated September 25, 1997.

27. On or about October 29, 1997, Mr. Mudrovich initiated a grievance pursuant to the collective bargaining agreement incorporating the concerns that he had raised in his September 9, 1997 letter to the School Board. In preparing this grievance, he was assisted by representatives of the Association. The subject matter of the grievance was identified as "Creation of a Hostile Work Environment." Mudrovich himself drafted the "Corrective action desired" portion of the grievance document, in which Mudrovich sought, *inter alia*, compensation for mental anguish, a guarantee of a 100% contract for the duration of his employment in the District, and "a formal hearing to determine whether the actions of Dr. Dodd and Mr. Knaack, during conversations between Dodd and Knaack concerning Mudrovich, were in violation of Wisconsin Statute 134.01." While the Association endorsed the validity of the grievance, it did not sign the grievance, partly because the Association believed that the corrective action request was inappropriate.

28. On October 29, 1997, Dr. Dodd engaged in a telephone conference with School District counsel Ronald Rutlin regarding "issues related to pending lawsuits against teachers in district and discussion of issues related to possible discipline of teacher." The reference to "teacher" referred to Mudrovich. 2/ In this conversation, Dodd also discussed the fact that the District's insurance carrier had refused to undertake the defense or indemnification of Ms. Soto and Ms. Martin in Mudrovich's civil lawsuit and whether the District had a statutory obligation to provide representation to the teachers. Shortly thereafter, the District decided that it was obliged to provide representation to the teachers because the alleged conduct had occurred in the course of their duties and thereafter provided representation to the teachers through the District's law firm, Ruder Ware.

---

*2/ In making this finding, we depart from the Examiner's findings for the following reason. The billing records maintained by District legal counsel state that a conversation occurred on that date about disciplining a "teacher." Further, an affidavit from District legal counsel states that references to "teacher" in those billing records referred to Mudrovich. The District did not introduce any evidence – which would have been within its possession – to counter the inference from these documents that Dodd discussed with his attorney on that date the possibility of disciplining Mudrovich.*

---

29. After receiving the grievance Mr. Knaack informed Dr. Dodd about it. Knaack, who was taken aback by the personal nature of the grievance, denied the grievance at the first step of the grievance procedure, by letter dated November 4, 1997. On November 5, 1997, the Association and Mr. Mudrovich filed the grievance at the next contractual level, i.e., with Dodd. On November 18, 1997, Dodd convened a meeting regarding the grievance. Present were Mudrovich and two Association representatives, as well as Dodd and two of his assistant administrators. At some point, when the discussion focused upon Mudrovich's allegations that Dodd and Knaack had violated Sec. 134.01, Stats., Dodd demonstrated anger and annoyance. During this meeting, Mudrovich requested copies of the notes that were being taken by one of the administrators. After consulting with counsel, Dodd refused Mudrovich's request. On November 24, 1997, Dodd submitted a written answer to the October 29 grievance denying that the contract had been violated.

30. The Association and Mr. Mudrovich forwarded the October 29 grievance to Step Three in the contractual grievance procedure, i.e., the School Board level. The Step Three hearing was scheduled for January 19, 1998. In January, 1998, prior to the Step Three hearing, at the suggestion of the Association, School District officials and Mudrovich met in a mediation session conducted by a WEAC staff attorney in an attempt to settle the civil lawsuit as well as the grievance. The mediation was unsuccessful. At the January 19, 1998 Step Three School Board hearing on the grievance, Mudrovich's private attorney spoke on his behalf after which Mudrovich himself requested five minutes to address the Board. Mudrovich read for approximately 12 minutes from an 18-page prepared statement before the Board terminated his presentation and allowed him to submit it in writing instead. Mudrovich's statement reviewed in great detail the events giving rise to the conflict with other Foreign Language teachers and District administrators and expressed his view that these conflicts had been handled unfairly. By its attorney's letter dated January 20, 1998, the School Board informed Mudrovich and the Association that it had voted to deny the grievance. The Association did not forward the grievance to arbitration.

31. On January 20, 1998, the day after the School Board hearing on the grievance, Mr. Knaack assigned Mr. Mudrovich to additional study hall supervision periods, resulting in his being the only

teacher assigned to a study hall (“IMC”) every day. Knaack made this

assignment because the employee assigned to the study hall was having difficulty managing the group alone and Knaack believed that Mudrovich had a relatively small supervision assignment. There were other study halls to which two staff members were assigned. On January 22, 1998, Knaack issued a memorandum to all study hall supervisors reminding them that, if they were assigned to a dual-supervision study hall, both supervisors were expected to remain in the study hall throughout the entire period.

32. In March, 1998, the School District renewed Mr. Mudrovich's individual teaching contract for the upcoming (1998-99) school year. Pursuant to the collective bargaining agreement, the School District would have been required to establish "just cause" in order to non-renew Mudrovich's contract. On or about March 11, 1998, Mudrovich returned his signed contract to the Junior High office and asked the secretary to give him a receipt. Mr. Knaack and Mr. Sheehan overheard this request and instructed Mudrovich that it was not the secretary's job to sign such a receipt. Mudrovich then asked the administrators to sign a receipt, but they refused and suggested Mudrovich take the contract to the central office himself if he wanted assurances that it would be safely delivered.

33. On or about April 18, 1998, in connection with the civil lawsuit against Ms. Soto and Ms. Martin, Mr. Mudrovich's attorney conducted depositions of various administrators and staff members of the School District, including Mr. Knaack and Mr. Sheehan.

34. Sometime in early to mid-May 1998, District administrators met regarding staffing needs and assignments for the upcoming (1998-99) school year. At this meeting, Mr. Knaack mentioned that he might need an additional section of French at the Junior High and the participants discussed whether this section would be added to Mr. Mudrovich's work load, thereby increasing him to full time status. Dr. Dodd left the decision up to Knaack, as such decisions are customarily within the principal's purview, but Dodd noted at the meeting that the District could expect legal consequences from Mudrovich if he was not assigned the additional section

35. On or about May 14, 1998, Mr. Sheehan posted the tentative "Master Class List" for the 1998-99 school year. The list included six sections of French, five of them assigned to Mr. Mudrovich and one assigned to Ms. Berns. When Mudrovich reviewed this posting on Friday, May 15, 1998, he approached Sheehan, who confirmed that

the schedule did list Mudrovich for five sections; Mudrovich stated that he appreciated the additional section but pointed out that his (Mudrovich's) contract was only for an 80% position, which covered only a four section assignment. Sheehan indicated he would look into the matter. The following Monday, May 18, 1998, Knaack asked Mudrovich if he was interested in teaching full time and Mudrovich responded that he definitely was interested. Knaack asked Mudrovich to put his interest in writing, which Mudrovich did later that day. At the time, Knaack was unsure whether to assign the additional section to Mudrovich, because of Mudrovich's conflicts with other staff members regarding the room assignment issue, the civil lawsuit he had brought against coworkers, and what Knaack viewed as Mudrovich's stubbornness about getting his own way.

36. Prior to the circumstances that gave rise to the instant case, the District customarily offered available additional sections to currently employed and qualified part-time teachers, before seeking outside applicants.

37. On or about May 22, 1998, Mudrovich asked Knaack about the additional section and Knaack indicated that he was still looking into the matter.

38. On May 27, 1998, Mr. Mudrovich ran an errand during a period when he was assigned to be supervising a dual-supervision study hall. Mr. Sheehan saw Mudrovich in the hallway and told him to return to the study hall, noting that there was a substitute that day for the other staff member. Mudrovich responded "OK" and complied. Since Mudrovich believed that it was commonplace for one or the other staff member assigned to a dual-supervision study hall to leave for short periods to run errands, and since he himself had done so on several previous occasions without repercussions, he interpreted Sheehan's directive on this date to have stemmed from the fact that a substitute was present.

39. At the beginning of the first instructional period of the day on May 28, 1998, Mudrovich went to the office and asked Mr. Knaack about the status of the additional section of French. Knaack responded that he would like to meet with Mudrovich, who in turn responded, "What about now?" in a manner that Knaack viewed as inappropriate. Knaack stated that Mudrovich was supposed to supervising a study hall at that time and to see him later. Shortly after noon on that date, when Mudrovich was again scheduled to co-supervise a study hall, he went to

the office to deposit a substantial sum of money he had collected for a French Club trip. Sheehan observed Mudrovich and directed him to return to the study hall. Mudrovich responded that it was all right because the other supervisor was present that day, rather than a substitute. Sheehan reiterated the instruction in a firm voice, stating that both staff members were needed. Mudrovich responded that he only needed a few minutes to make the deposit and that it was not uncommon for co-supervisors to leave the study hall for short periods of time when the other supervisor was present. Sheehan believed that Mudrovich was arguing inappropriately and again told him firmly, "You need to go back to your study hall now, I don't have time to discuss this." Mudrovich demanded to know whether Sheehan enforced the rule so closely with the other study hall supervisors. Sheehan responded even more sternly, "I'm not going to discuss this with you. Go back to the study hall now." Mudrovich again protested about differential treatment and Sheehan again ordered him to return to his assignment, which Mudrovich did. This incident occurred in the presence of a school secretary, who documented the encounter because in her view it was very unusual for a teacher to argue in that manner with a supervisor. Sheehan informed Knaack contemporaneously about the incident.

40. At the end of the school day on May 28, 1998, Mr. Mudrovich approached Knaack again about the extra French section. Knaack responded that he was not sure that Mudrovich was professional enough to deserve an increase in his contract and that he may have to post a 20% position instead. Mudrovich also complained to Knaack about the way Sheehan had treated him earlier in the day and asked Knaack to direct Sheehan to apologize to him (Mudrovich). Mudrovich voiced his belief that he was being treated differently regarding study hall attendance than other staff members co-supervising study halls, which Knaack vehemently denied. Knaack criticized Mudrovich for taking things personally and always wanting to sue people, and Mudrovich in turn criticized Knaack for mismanaging the conflicts that had arisen between Mudrovich and other staff. The conversation continued in this confrontational vein for some time. According to Knaack's brief contemporaneous notes of this lengthy conversation, "Mr. Mudrovich said that if he does not get the full time job that I could expect a grievance." Knaack further noted that Mudrovich stated an intention to file a grievance if Sheehan did not apologize, and that after the conversation Mudrovich "asked Mrs. Boon for six grievance forms."



41. The next morning, May 29, 1998, Mr. Mudrovich entered the school office in an aggressive manner and, in the presence of students and staff, loudly demanded to know whether Mr. Sheehan, who was with a student at the time, had checked the study hall to make sure the two assigned co-supervisors were both present. Sheehan responded, “no,” and Mudrovich loudly asked, “Why not?” Sheehan stated that he had not had the time, and Mudrovich questioned whether it was just him that Sheehan routinely checked up on. When Sheehan did not respond, Mudrovich said to the effect, “I see. It’s just me. Some rules.” Sheehan reported this conversation in writing to Knaack, stating, inter alia, that it “could be considered insubordinate.”

42. Some time in the latter part of May 1998, concerns began to surface among other staff members about Mudrovich’s behavior. Several staff members discussed the situation among themselves and agreed to express their concerns on “FYI” forms that staff used at the Junior High School to give feedback to Principal Knaack and/or call his attention to problems. At about this time, Kathleen Heller, a fellow Junior High School teacher and member of the Association’s Executive Committee, decided to stand outside the door of a room where the Association was celebrating a colleague’s retirement to observe whether Mudrovich would attempt to enter the room and to handle any issues that might then arise. Junior High School Assistant Principal Kris Gilmore told Heller that she (Gilmore) considered Heller’s guarding the door as somewhat foolish but also said that, if Heller was genuinely concerned, she should inform Knaack. On or about May 27, 1998, Ms. Heller submitted an “FYI” to Knaack commenting on several issues unrelated to Mudrovich, but also stating, “It is my perception and the perception of many others that the situation with George has become very uncomfortable. He makes me and many others uneasy. I do feel somewhat fearful of him at the Jr. High.” On May 29, 1998, another teacher complained to Gilmore that Mudrovich had been using offensive language in speaking about Knaack and Sheehan to other faculty in the teachers’ lounge. Gilmore directed the teacher to submit something in writing, if she wished, which the teacher did on or about May 29. In late May or early June, three other staff members submitted FYI’s commenting on several issues unrelated to Mudrovich, but also stating, “We feel threatened by the unstable environment George Mudrovicz [sic] has created in this building. We feel the issue of security and safety in our school needs to be addressed.”

43. After school on May 29, 1998, at Mr. Mudrovich's request, he and an Association representative met with Mr. Knaack and Mr. Sheehan. Mudrovich brought with him a lengthy list of written questions, and during the meeting he recorded the administrators' answers. The conversation largely centered upon the study hall issue, the status of the additional French section, and the surrounding events and conversations. Knaack's contemporaneous notes state in full as follows:

George Mudrovich and Carol Tuska [sic] met with Mr. Knaack and Mr. Sheehan on May 29, 1998 at approximately 3:00 p.m. Mr. Mudrovich asked numerous questions which Mr. Knaack answered. Mr. Knaack asked him exactly what he wanted, he said 'You'll find out next week,' referring possibly to a grievance.

At the outset of this meeting, Knaack had expressed uncertainty about how he intended to handle the extra French section. At the end of the session, Knaack indicated that he would be posting a 20% position on or about June 2.

44. On May 29, 1998, at Mudrovich's direction, his attorney telephoned the School District's attorney to inform the District that Mudrovich would file a grievance if he was not assigned the additional section of French.

45. On June 1, 1998, at Mr. Knaack's direction, the District posted a 30% position, comprising one section of French and two sections of study hall supervision. While Knaack had some interest in obtaining additional supervision, as the school continued to implement team teaching which limited staff availability for supervision, his primary motive in increasing the posting from 20% to 30% was to preclude Mr. Mudrovich from obtaining the position by making it a larger assignment than Mudrovich could accept. The posting indicated that it would be open until June 19, 1998. Prior to having the position posted, Knaack discussed the issue with District Administrator Dodd, who, until that date, had assumed that Mudrovich would be assigned the additional French section. Dr. Dodd believed that the decision to post instead of assign an additional section to Mudrovich was within Knaack's scope of authority and did not disagree with Knaack's decision.

46. Mr. Knaack's reasons for posting the 30% position and thereby making Mr. Mudrovich ineligible for an increase to full time included Knaack's negative view of Mudrovich's interpersonal relationships at school and the effects of Mudrovich's civil lawsuit against other faculty, Knaack's view that Mudrovich had behaved inappropriately and unprofessionally in his dispute with Mr. Sheehan over the study hall issue, and Mudrovich's having filed and threatened to file grievances in response to disagreements with administrators.

47. At the beginning of the school day on Monday, June 1, 1998, Mr. Mudrovich entered the school office and approached Sheehan to ask if he had checked to see whether certain teachers were both in the study hall as assigned. Sheehan said, "no," Mudrovich asked, "why not," and Sheehan said, "You know the answer to that question." Mudrovich again protested that he was being treated unfairly before departing the office.

48. By letter dated June 1, 1998, Mr. Mudrovich applied for the 30% position by hand delivering a hand written letter to the District's personnel director, Mr. Jaworski. At that time, Mudrovich asked Jaworski to confirm that the District's normal practice was to offer additional sections to part-time teachers, but Jaworski denied that this was the case. Mudrovich then asked Jaworski to sign a statement to the effect that it was not the District's normal practice to assign additional available sections to part-time teachers, but Jaworski refused to do so.

49. During first period on Tuesday, June 2, 1998, Mr. Mudrovich again engaged in a confrontation with Mr. Sheehan over the study hall issue. As Sheehan entered the office, engaging in a conversation with a student, Mudrovich approached while clapping his hands and loudly demanded to know whether Sheehan had checked the study hall supervisors. Sheehan answered, "no," and thereafter ignored Mudrovich's loud questions about "why not," and whether he was being discriminated against. Eventually, Sheehan took the student into his office.

50. During the second period on June 2, 1998, Mr. Mudrovich returned to the office and loudly asked Mr. Knaack and Mr. Sheehan, who were together in Sheehan's office, whether they had been to the study hall to check up on the supervisors. Knaack told Mudrovich to come into the office and shut the office door. During the ensuing

mutually hostile conversation, Mudrovich and the administrators spoke in loud tones from time to time, causing other staff members to clear the outer office of students. Among other things, Knaack accused Mudrovich of getting the whole school in an uproar and Mudrovich accused Knaack and Sheehan of failing to do their jobs, mismanaging the inter-staff conflicts, and singling him out for unfair treatment. Mudrovich expressed anger over the 30% posting, stating his view that it departed from longstanding practice of assigning additional sections to part-time teachers. Mudrovich also stated words to the effect, “You have made your bed, now lie in it.” 3/ Sheehan asked what Mudrovich meant by that and Mudrovich responded to the effect, “These things will come back to you in the course of time, just think about that.” Sheehan again asked what Mudrovich meant, and Mudrovich said Sheehan could figure it out for himself. Eventually Mudrovich ended the conversation by asking Knaack to step aside from the door so that Mudrovich could leave the office.

---

*3/ Mr. Mudrovich challenges the finding that he made the statement “You have made your bed, now lie in it,” during the course of the June 2, 1998 meeting. We conclude that Mudrovich did make that statement, largely because Assistant Principal Kristine Gilmore’s contemporaneous notes state, “Mudrovich was yelling, ‘You have made your bed, now your [sic] going to lie in it, you’ll see’ over and over.” Contrary to Mudrovich’s contention in his petition for review, we find Ms. Gilmore’s testimony at the hearing to have been consistent with what she stated in her contemporaneous notes. This phrase also appeared in the letter of reprimand issued the next day – also a contemporaneous event. More importantly, we see little difference in substance or effect between this phrase (you made your bed) and the phrase Mr. Sheehan’s contemporaneous notes memorialized, i.e., “These things will come back to you in the course of time, just think about that,” or for that matter Mudrovich’s phraseology in his own notes of the June 2 conversation: “In the course of time you’re going to see that that’s going to come back on you, not me.”*

---

51. On June 2, 1998, Mr. Mudrovich also distributed a hand-written note to several colleagues via the intra-school mail system, in which he attempted to explain his attorney having raised a particular issue during the April 1998 deposition of Carol Maki in connection with Mudrovich’s civil lawsuit. In that deposition, Mudrovich’s lawyer

sought to undermine Soto's and Martin's claim that Maki was offended by Mudrovich's note by pointing out that Maki herself had sent another teacher, Sally Holzem, an "off color" birthday card. From this deposition questioning, Mudrovich worried that Maki's friends might think that Holzem had "tattled" on Maki by telling Mudrovich about the birthday card and his note was his attempt to set the record straight. Elements of the note were negative about Maki as well as Soto and Martin. Ms. Holzem gave Mr. Knaack a copy of the note. Later on June 2, Maki gave a note to Knaack stating, "I am becoming very concerned about the escalating 'feud' between Mr. Mudrovich and several staff members and myself. His recent note and irrational words and actions make me very uncomfortable." (Emphasis in original).

52. On June 3, 1998, after first reviewing the matter with Dr. Dodd, Mr. Knaack issued the following letter of reprimand to Mr. Mudrovich:

It has been brought to my attention that you have, on more than one occasion, called Mr. Sheehan's attention to the fact that your fellow teachers may or may not be carrying out their professional responsibilities. Furthermore, I have been told that you have done so in an unprofessional manner while in front of junior high students and office staff. Please be advised that we do not see this as appropriate behavior for a member of our teaching staff.

I tried to make this perfectly clear when you walked into Mr. Sheehan's office at approximately 8:45 a.m. on June 2, 1998. Quite frankly, however, we are concerned that you may have missed the message since you exhibited behavior that could be described as out-of-control. Yelling loud enough so people in outer offices could understand you and so that students had to be moved to the guidance office is, again, not appropriate behavior for a member of our teaching staff.

Mr. Sheehan and I are very concerned about one of your final statements. You threatened us that we "made our bed and now we'd have to lie in it." When you were asked by Mr. Sheehan for clarification on your intended

meaning you commented “These things will come back to you in the course of time, just think about that!” We find this statement that you made, more than once, to be a very threatening statement and remain concerned about your actual intent.

So there can be no misunderstanding, always be prompt to your teaching and supervising duties. Remain on duty for the entire time assigned.

Please be advised that any further actions of this nature may lead to further disciplinary actions including termination.

53. On or about June 4, 1998, staff member Lois Klein provided Mr. Knaack an “FYI” that addressed some issues unrelated to Mr. Mudrovich but also stated, “As a side comment, I am concerned about the feelings/tension this building is suffering due to one person’s ‘thinking errors’ and irrational behavior. It is so unfortunate that our lives are manipulated by one person’s misuse of laws designed to protect true victims. In this case I think we are the victims.” (Emphasis in original). Klein’s comments in this respect referred to Mudrovich.

54. On June 5, 1998, Mr. Mudrovich and his Association representative met with Principal Knaack at the first step of the grievance procedure to present a grievance claiming, in substance, that Knaack’s decision to post the 30% position violated the collective bargaining agreement and the past practice of awarding additional available sections to currently-employed and qualified part time teachers. The requested corrective action was that the District increase Mudrovich’s 1998-99 contract to 100% and assign him the extra section of French. Knaack denied the grievance. Shortly after Knaack received this grievance, he discussed it with Dodd.

55. June 5, 1998 was the last day of the school year.

56. On June 9, 1998, Mr. Mudrovich’s attorney hand-delivered a public records request to the School District’s central office, where an individual by the name of LaVonne Kirschner signed for its receipt at 3:25 p.m. The request sought copies of “all postings for

teaching positions where said teachers were adjusted upward; Minutes approving all teacher contracts that were adjusted upward.” The request was for the purpose of obtaining information to support Mudrovich’s grievance regarding the 30% posting.

57. Article 32(I) of the collective bargaining agreement provides as follows:

I. Part-Time to Full-Time Assignment: In the event that a regular part-time position covered by this contract becomes a regular full-time position at any time during the year, it is understood that the employee occupying the regular part-time position may be laid off immediately and that he/she may apply for the regular full-time position and will be considered together with other applicants for the position. Full-time teachers reduced to regular part-time shall not be subject to this provision.

Although this language had been in the contract for many years, it had never been utilized to lay off a part-time teacher prior to Mr. Mudrovich’s layoff.

58. On June 10, 1998, Mr. Knaack initiated a meeting with Dr. Dodd in Dodd’s office. In that meeting, Knaack advised Dodd that the District had not yet received any applications for the 30% position. Although there were still nine days left in the posting period, Knaack recommended that the District withdraw the 30% posting, lay off Mudrovich pursuant to Article 32(I), and post a new full time French position in order to see whether the District could find better candidates than Mudrovich. Knaack provided Dodd with a copy of Mudrovich’s June 2 note to colleagues regarding the Holzem birthday card and also informed Dodd of the FYI’s expressing concerns by other staff regarding Mudrovich. During this meeting, Dodd telephoned the District’s legal counsel to discuss the matter.

59. Prior to withdrawing the 30% posting on June 10, 1998, the District had never foreshortened the posting period stated in a job posting. The District has had some success in the past in obtaining good candidates for teaching positions from postings during the summer months.

60. Mr. Knaack's reasons for recommending that Mudrovich be laid off included Knaack's opinion that Mudrovich was largely responsible for interpersonal conflicts with other staff members, Knaack's view that the civil lawsuit was an inappropriate and irrational way to respond to the Soto-Martin incident, concerns that had been expressed about Mudrovich by staff members, Knaack's negative view of Mudrovich's behavior surrounding the designation of the French classroom, and Knaack's opinion that Mudrovich had acted inappropriately in his confrontations with Mr. Sheehan over the study hall issue. Knaack was also motivated in part by hostility to Mudrovich's filing and threatening to file grievances in response to disagreements between himself and administrators, including Mudrovich's June 5 grievance.

61. The District Administrator, but not a principal, may recommend a layoff to the School Board; the School Board makes the ultimate decision whether to accept or reject that recommendation. In this case, Dr. Dodd would not have initiated or recommended that Mudrovich be laid off if Mr. Knaack had not brought that recommendation to Dodd. Dodd acquiesced in Knaack's recommendation to lay off Mudrovich, and Dodd in turn recommended Mudrovich's layoff to the School Board.

62. Dr. Dodd's reasons for acquiescing in Mr. Knaack's recommendation that Mudrovich be laid off included Dodd's belief that the District might be able to find a better candidate than Mudrovich if the position were full-time, his view that Mudrovich was largely responsible for interpersonal conflicts with other staff and administrators, Dodd's view that Mudrovich had been inappropriate in his confrontations with Mr. Sheehan, Dodd's view that Mudrovich was not a team player and always insisted upon getting his own way as exemplified in Dodd's mind by the French room conflict, and his view that Mudrovich had behaved irrationally in some situations. Dodd considered the fact that teachers had been willing to sign their names to FYI's complaining about Mudrovich and decided that the District should be willing to incur the legal costs likely to ensue from laying off Mudrovich. In making this decision, Dodd was not himself motivated by hostility to Mudrovich's grievances nor was Dodd aware that Knaack had been influenced in part by those grievances.

63. Later on June 10, 1998, Dr. Dodd summoned Mr. Mudrovich to meet with him and Mr. Knaack in Knaack's office. There Dodd informed Mudrovich that he had decided to recommend



Mudrovich's layoff pursuant to Article 32(I) and supplied him with a copy of that provision. Dodd informed Mudrovich that the District would be posting a full-time French position and that he had a right to apply and be considered for the position. Dodd stated erroneously that Article 32(I) had been utilized in the past for similar purposes. At the conclusion of the meeting, Dodd directed that Mudrovich turn in his keys. Mudrovich then gathered his belongings and left the building. Thereafter, the District did not permit Mudrovich access to the building or its equipment without Dodd's prior permission.

64. On June 11, 1998, the District withdrew the 30% posting and instead posted a vacancy for a full-time French teacher.

65. On June 15, 1998, Mudrovich and Association representatives met with Dr. Dodd, Mr. Knaack and another administrator, Tom Owens, regarding Mudrovich's pending layoff. The Association argued in substance that the District's action was not a good faith layoff but more in the nature of a discharge for which the District lacked just cause, and that Mudrovich was entitled to the additional French section based on fairness and past practice. Dodd responded that Article 32(I) was appropriate in this situation because Mudrovich had been hired into a part-time job from a small pool of applicants and the District was entitled to gather the best candidates from a larger pool. After a while, Mudrovich attempted to read parts of the contract, Dodd cut him off, and an exchange occurred more or less as follows:

M: "Dr. Dodd, if you expect to have your job in a week or two you had better listen."

D: "Are you threatening me?"

M: "You serve at the pleasure of the Board and you better consider how they look at this contract."

D: "Are you threatening me? It sure sounds like it."

M: "All I'm saying is that if you, Mr. Knaack, and Mr. Sheehan expect to have your jobs in a week or two you had better think about how a jury views the contract as well."

D: "Now you are threatening all of us."

Page 25  
Dec. No. 29946-M

M: "I'm not threatening you, just saying what could happen. I can't take your job away, only the Board can do that."

D: "I know. So the only reason I won't be here is if you do me physical harm."

Mudrovich's voice rose during this exchange. Dodd stood up when he asked if he was being physically threatened and pointed his finger at Mudrovich. The meeting ended with no resolution of the layoff issue.

66. On June 23, 1998, the School Board, in open session and without discussion, voted to approve a number of personnel actions, including that Mudrovich be reduced from an 80% contract to a 0% contract, thereby effectuating his layoff. A number of citizens attended the meeting and spoke in favor of retaining Mudrovich; none spoke against. Prior to the Board meeting, Dr. Dodd had informed Board President Leonard that the purpose of the layoff was to allow the District to seek a wider applicant pool for the French position and that Article 32(I) of the contract permitted this action.

67. On June 30, 1998, Mr. Mudrovich applied for the posted full-time French position and, pursuant to Article 32(I), was automatically placed into the group of applicants who would be interviewed. In a departure from normal practices, Dr. Dodd took steps to appoint a selection team that would avoid the appearance of bias against Mudrovich. Mr. Knaack, who would normally be involved in interviewing candidates for a position at the Junior High, was not placed on the interview team, nor was Mr. Sheehan. The team was headed by Assistant District Administrator Hazaert, who would not normally be involved in teacher interviews, and also included Coordinator Solsrud and High School Principal Johansen. All team members had some knowledge of Mudrovich's problems at the Junior High, Hazaert was at least generally aware of Mudrovich's conflicts with Knaack, and all were generally aware of Mudrovich's civil lawsuit. Johansen and Hazaert were specifically aware that Mudrovich had been involved in a grievance. Neither Knaack nor Dodd had directed any team member to avoid selecting Mudrovich and, while team members likely harbored some notion that Knaack and/or Dodd were opposed to Mudrovich, simply from the fact that he had been laid off rather than automatically

given the additional section, they were not aware that any of Knaack's hostility related to Mudrovich's grievances. Neither Knaack nor Dodd had any involvement in the selection process itself. 4/

---

*4/ Mudrovich argues that Dr. Dodd did influence the selection process by encouraging Beth Bouffleur to submit an application even though the deadline for applications had (very recently) passed. It is not clear that it was Dodd whom Ms. Bouffleur contacted, but assuming it was, Ms. Bouffleur initiated the contact, rather than the other way around, and there is no other evidence suggesting nefarious motives regarding this particular action. We find it sufficiently unremarkable that Dodd would encourage Bouffleur to apply (indeed it is what a superintendent would be expected to do) as to negate any inference that by doing so Dodd was interfering in the selection process to the detriment of Mudrovich.*

---

68. The District interviewed five candidates, including Mr. Mudrovich, Beth Bouffleur and Betty Delsarte, utilizing normal District selection procedures, including an extensive interview in which all candidates were asked the same questions and portions of the interview were recorded. All candidates were also subjected to the Teacher Perceiver, a selection device intended to identify candidates' strengths on various criteria related to successful teaching. Mudrovich, Bouffleur, and Delsarte were each "predicts" on the Teacher Perceiver, meaning that they satisfied at least the minimal criteria. Mudrovich's and Ms. Bouffleur's scores were not significantly different. Consistent with District practice, the interview team met after conducting the interviews and each identified his or her first and second choices. Of the five candidates, Mudrovich was not selected by any team member as a first or second choice; Bouffleur and Delsarte were the top two choices of all team members. Johansen's and Hazaert's lower ranking of Mudrovich largely stemmed from their negative views of his responses to questions regarding certain District-approved teaching techniques and to questions regarding getting along with colleagues. Both administrators interpreted Mudrovich's responses to indicate that he took little personal responsibility for the interpersonal conflicts in which he had been involved. All three were negatively influenced by the fact that Mudrovich appeared to have accompanied his application with a handwritten letter stating that he "resented" having to apply for the position. That letter, however, unbeknownst to the interviewers, had actually been

submitted as an application for the 30% position, not the full-time position, and someone (whose identity is not disclosed in this record) in the central office had attached it to Mudrovich's application for the full-time position. None of the team members reviewed Mudrovich's observation reports, because those reports, although on file in the District, were not included in the interview materials. All three interviewers were highly impressed with Bouffleur's "positive" interview, her enthusiasm, her answers to questions regarding teaching techniques, her portfolio, and the fact that she had a Master's Degree in French. The interview team ultimately reached a consensus in favor of Bouffleur and recommended to Dr. Dodd that she be hired, a recommendation that he and the School Board accepted.

69. The selection team's recommendation was not motivated in any part by hostility toward Mr. Mudrovich's grievance activity, nor was the team's recommendation influenced by Mr. Knaack's hostility toward such grievance activity. In accepting the selection team's recommendation to hire Ms. Bouffleur and not Mudrovich, the School Board was not motivated in any part by hostility to Mudrovich's grievance or other protected activity.

70. On July 7, 1998, Mr. Mudrovich and the Association submitted a grievance alleging that the District violated the collective bargaining agreement by laying off Mudrovich. The Association submitted this grievance to arbitration and, on January 18, 2000, an arbitrator issued an award denying the grievance.

71. By letter dated July 15, 1998, the District notified Mr. Mudrovich that he had not been selected for the full-time French position.

72. On or about July 22, 1999, during the arbitration hearing regarding Mr. Mudrovich's layoff and failure to rehire grievances, Mr. Knaack testified as follows:

**Q. [By School District's attorney]:** In terms of your thought processes just having George increase from 80 to a hundred percent, as opposed to issuing the layoff notice and then having him apply with other outside applicants, kind of go through your thought process on that decision.

- A. **[By Mr. Knaack]:** Well, like I said, George had sued colleagues, that was on my mind. George had a confrontation with Mr. Sheehan. He had threatened Mr. Sheehan and myself. He had a number of grievances, you know that were being filed for different situations. All those things, I, you know, I thought, well, maybe there's someone out there that we should look at that maybe is as good or better than Mr. Mudrovich. ...
- B. The Examiner's Conclusions of Law 1 - 2 are affirmed.
- C. The Examiner's Conclusions of Law 3 - 15 are set aside and the following Conclusions of Law are made:

3. Complainant Mudrovich was engaged in lawful, concerted activity for the purpose of collective bargaining or other mutual aid or protection when: (a) he filed and processed his grievance of October 29, 1997; (b) on May 28, 1998, he announced an intent to file grievances if Vice Principal Michael Sheehan did not apologize to Complainant and if the District denied Complainant an available full time French position; (c) on May 29, 1998, accompanied by his Association representative, he met with Principal Robert Knaack and Vice Principal Michael Sheehan to discuss whether the additional French section should be added to Complainant's contract, as well as his dispute with Sheehan over study hall supervision, and other issues concerning his employment; (d) on May 29, 1998, his attorney telephoned the School District's attorney to state that Complainant would be filing a grievance if he was not assigned the additional section of French; (e) on June 5, 1998, he filed and processed a grievance pursuant to the collective bargaining agreement regarding Principal Knaack's decision to post a 30% position instead of assigning an extra section of French to Complainant; and (f) on June 9, 1998, when he submitted a public records request, through his attorney, in furtherance of his June 5 grievance.

4. But for Principal Knaack's recommendation, which was motivated in part by hostility to Complainant Mudrovich's lawful, concerted activity as set forth in Conclusion of Law 3 (a) through (e), above, District Administrator Dodd would not have recommended to the School Board that Complainant be laid off nor would the School Board have laid off the Complainant. Thus by laying off the Complainant in June 1998 the Respondent District violated Sec. 111.70(3)(a)3, Stats., and derivatively violated Sec. 111.70(3)(a)1, Stats.

5. The Respondent District's decision not to hire Complainant Mudrovich for the full time French position in June 1998 was not motivated in any part by hostility toward Complainant's lawful, concerted activity. Thus, Respondent District did not thereby violate Secs. 111.70(3)(a)3 or 1, Stats.

D. The Examiner's Order is set aside and the following Order is made:

1. The Respondent District, its officers and agents, shall immediately:

- a. Cease and desist from considering an employee's lawful, concerted activity when deciding whether to lay off an employee.
- b. Take the following affirmative action, which will effectuate the purposes and policies of the Municipal Employment Relations Act:
  - (1) Make the Complainant whole by paying him all wages and benefits he would have earned, less any amount he earned or received that he would not otherwise have earned or received but for his layoff, plus interest at the rate of twelve percent (12%) per annum 5/ on said amount from the effective date of his layoff to the date of issuance of this decision.

---

*5/ The applicable interest rate is that set forth in Sec. 814.04(4), Stats., in effect at the time the complaint is initially filed with the agency. WILMOT UHS, DEC. NO. 18820-B (WERC, 12/83), CITING ANDERSON V. LIRC, 111 Wis. 2d 245 (1983), and MADISON TEACHERS, INC. V. WERC, 115 Wis. 2d 623 (Ct. App. 1983).*

---

- (2) Notify all employees represented by the D.C. Everest Teachers' Association, by posting in conspicuous places in

Respondent's offices and buildings where such employees are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be signed by the District Administrator and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of sixty days (60) thereafter. Reasonable steps shall be taken by the Respondent to insure that this Notice is not altered, defaced or covered by other material.

- (3) Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

2. Complainant Mudrovich's allegations that Respondent District violated Secs. 111.70(3)(a)1 and 3, Stats., when it did not hire him for the full-time French position, are dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of June, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

Commissioner Paul Gordon did not participate.

**APPENDIX "A"**

**NOTICE TO ALL EMPLOYEES REPRESENTED BY THE D.C. EVEREST  
TEACHERS' ASSOCIATION**

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

The D. C. Everest School District will not consider an employee's grievances or other lawful, concerted activity when making a decision to recommend that the employee be laid off.

The D. C. Everest School District will make George A. Mudrovich whole by paying him all wages and benefits he would have earned, less any amount he earned or received that he would not otherwise have earned or received but for his layoff, plus interest at the rate of twelve percent (12%) *per annum* on said amount from the date of his layoff to the date of issuance of the Commission's decision.

D. C. Everest School District

\_\_\_\_\_  
District Administrator

\_\_\_\_\_  
Date

**THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES REPRESENTED BY DCETA FOR A PERIOD OF SIXTY (60) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.**



**D.C. Everest Area School District**

**MEMORANDUM ACCOMPANYING DECISION**

Mr. Mudrovich's complaint in this case challenges two actions the District took in June 1998 as violations of Secs. 111.70(3)(a) 3: first, the District's decision to lay him off from his 80% position in order to post and seek applicants for a full-time position; second, the District's decision not to hire him for that full-time position. To establish these violations, the Wisconsin Supreme Court has set forth a four-pronged test: (1) that an employee has engaged in lawful concerted activity; (2) that the employer, by its officers or agents, was aware of said activity; (3) that the employer was hostile to the lawful concerted activity; and (4) that the employer took action against the employee based at least in part upon such hostility. *MUSKEGO-NORWAY C.S.J.S.D. No. 9 v. WERB*, 35 Wis.2d 540 (1967); *EMPLOYMENT RELATIONS DEPT. v. WERC*, 122 Wis.2d 132 (1985).

We will apply the foregoing paradigm first to the District's layoff decision and then to the District's failure to select Mudrovich for the full-time position.

**The Layoff Decision**

Regarding the Mudrovich's layoff, the first two elements of the paradigm are relatively undisputed. The District expressly acknowledges that Mudrovich's October 1997 grievance, his statements of intent to file grievances on May 28, 1998, and his June 5, 1998 grievance comprised lawful concerted activity. (Resp. Brief at 10 n.4). It is also clear that Mudrovich engaged in concerted activity on May 29, 1998, when he was accompanied by Association representatives at a meeting with Knaack and Sheehan to discuss his employment situation. The District does not dispute that it was aware of Mudrovich's protected activity in these respects.

As urged in Mudrovich's petition for review, we have found two additional incidents of protected activity beyond those found by the Examiner: (1) Mudrovich's attorney's telephone conversation of May 29 in which he informed the District's attorney that Mudrovich would file a grievance if he was denied the additional French section; and (2) Mudrovich's public records request submitted on June 9, 1998, in which he requested District records regarding situations in which teachers' contracts "were adjusted upward." We have little trouble concluding that both instances implicate lawful concerted activity. The May 29 statement of intent to file a grievance obviously embraces protected activity, whether it was conveyed by Mudrovich personally or through his attorney. We also conclude that the June 9 public records request is protected, given the relationship between the substance of the request and the substance of his June 5 grievance (challenging the District's failure to adjust his contract upward), as it was designed to support the contractual grievance and as such is a form of "mutual aid and protection."

The second element, employer knowledge, is more difficult regarding both of these additional instances of protected activity. Regarding the May 29 message, the record does not specifically reflect that the District's attorney conveyed to District administrators the content of the May 29 message from Mudrovich's attorney; nonetheless, absent an express denial, we make the reasonable inference that the message was duly conveyed and therefore was known to Knaack and Dodd. We also infer that Dodd was aware of Mudrovich's June 9 request for public records prior to the time he met with Knaack on June 10 to discuss laying Mudrovich off, as the request was hand-delivered to the District's central office on June 9 and Dodd did not deny such knowledge. However, as discussed later in this memorandum, it was not Dodd but Knaack who acted upon unlawful animus. Hence, the question is whether Knaack had knowledge of the June 9 records request prior to recommending Mudrovich's layoff on June 10. Knaack directly denied such knowledge (TR. at 1178), and, regardless of Knaack's credibility on other matters, the record provides no reason to doubt his credibility on this specific issue. As Principal of the Junior High School, he worked in a different building than Dodd, to whose office the request was delivered towards the end of the day on June 9. While it is plausible that the two administrators discussed the public records request on June 9 or 10, such a finding would be purely speculative on this record. Accordingly, we find the record insufficient to conclude that the June 9 public records request played a role in the District's decision to lay off Mudrovich.

The outcome of this dispute, as is often the case, centers on the last two elements of the paradigm. Did Mudrovich establish that District officials bore animus towards his October 1997 grievance, his May 28 and May 29 threats to file grievances, and/or his June 5, 1998 grievance, and that such hostility played some role in his layoff on June 10, 1998? Mudrovich devotes considerable energy to demonstrating that the District's contemporaneously asserted reasons for laying him off were pretextual and indeed on this point we have little doubt. The application of Article 32(I) of the collective bargaining agreement (though contractually permitted) was indeed unprecedented in a situation similar to Mudrovich's. The District's general practice had been to offer additional sections to qualified part-timers currently on staff; clearly Mudrovich had performed well as a French teacher and, apart from administrator antipathy, could have expected to be offered the additional French section as a matter of course. Therefore 32(I) and its subsidiary rationale about Mudrovich having been hired from a "small pool" does not ring true. Both Knaack and Dodd admitted in testimony that Knaack's initial gambit of posting a 30% position rather than 20% was purposely designed to disqualify Mudrovich. Thus, the rationale Knaack advanced for the 30% posting (i.e., the need for extra supervision and wanting to make the position more attractive) was also largely pretextual. We agree with Mudrovich that administrators were disingenuous about their motives, offering inconsistent explanations and failing to articulate some of their reasons (e.g., the FYI notes) until well after the events in question. All in all, Mudrovich seems abundantly accurate in asserting that the layoff was a sham intended to cover up a hostile intent.

However, as the Examiner noted in her decision, if an employer has acted on pretext the question becomes, a pretext for what? Put another way, are the hostility and pretext related to statutorily-protected activity or to conduct outside the purview of Section 111.70, or to a

mixture of both? In this case, Mudrovich gave administrators ample grounds for animosity apart from his protected concerted activity and we conclude that administrators advanced the pretext of a layoff under Article 32(I) largely (but not entirely) in order to evade the “just cause” provisions of the collective bargaining agreement that would have applied to a straightforward discharge. 6/

---

*6/ In so stating, we make no decision whether administrators were objectively justified in laying off Mudrovich, but merely that the District had lawful grounds. This point is worth emphasizing, as Mudrovich has misdirected much of his evidence and argument (including many of his attacks on the Examiner’s procedural rulings) toward either justifying his own behavior or demonstrating that administrators were objectively wrong in their view of events. A discrimination case under Section (3)(a)3 requires us to determine the employer’s actual motives, not necessarily the wisdom, accuracy, or fairness of those motives. In this case, we agree with Mudrovich that some of the District’s explanations were pretextual – but pretextual for lawful antipathy toward Mudrovich. We conclude that, justly or unjustly, the various instances of unprotected conduct discussed in the text, above, actually did significantly motivate administrators to terminate Mudrovich’s employment.*

---

The seeds of animosity between Mudrovich and District administrators were sown towards the end of the 1996-97 school year during the dispute over the designated French room. Although Mudrovich’s goal may have been legitimate or even laudatory, both Sheehan and Knaack were annoyed by what they saw as his “uncompromising” persistence. Sheehan admitted being irritated that Mudrovich had “gone over his [Sheehan’s] head” by complaining to Knaack and Dodd. Knaack’s meeting with Mudrovich in July 1997 to work out the room assignment degenerated into a shouting match. Dodd also began to adopt a negative view when, after Mudrovich persuaded Board President Leonard to prevail upon Dodd to overrule Knaack and have a room assigned to French, Mudrovich continued to voice unhappiness.

Similarly, whether Mudrovich was right or wrong on the merits of his various interpersonal disputes with other staff members, there is little question that administrators viewed him as responsible for the discord. These difficulties began nearly as soon as Mudrovich entered the District, as he did not get along with the other French teacher at the Junior High, Ann Berns. Curriculum Coordinator Solsrud worked with the two teachers and with Knaack during that first year but by and large this early conflict was not a major administrative concern during Mudrovich’s first two years. However, it assumed greater significance when the French room issue exploded at the conclusion of the 1996-97 school year and Mudrovich brought a civil lawsuit against two other teachers at the school. Administrators likely saw a pattern of interpersonal conflict in which Mudrovich was the common denominator. It is also reasonable to infer that administrators did not react positively

to Mudrovich's suing fellow teachers, especially after the District determined it was statutorily obligated to assume the costs of the defense. None of this was protected activity, as Mudrovich was not acting pursuant to the collective bargaining agreement, with the assistance of the union, or directly or indirectly on behalf of other teachers. Nor does Mudrovich claim otherwise.

During the 1997-98 school year, Mudrovich continued to provoke administrators largely through unprotected conduct. It is reasonable to infer that Mudrovich engendered negative feelings in the administration early in that year, not only by initiating the lawsuit, but by insisting that Sheehan be replaced as his supervisor and, when unsuccessful, demanding in his September 9, 1997 letter that the School Board conduct a disciplinary hearing about Sheehan's, Knaack's, and Dodd's alleged mismanagement and harassment. It is also reasonable to infer that administrators were uncomfortable about being deposed, along with other staff members, in April 1998 in connection with Mudrovich's civil lawsuit.

It seems clear that Knaack already harbored some misgivings about Mudrovich by mid-May 1998, because he did not follow the District's customary practice of automatically offering Mudrovich the additional French section that had become available; indeed, administrators discussed how to handle the additional section during their mid-May staffing meeting. Towards the end of the school year, Mudrovich's contentious relationship with administrators accelerated markedly. His repeated confrontations with Sheehan over the study hall supervision issue, sometimes in the presence of students and other staff, were clearly viewed as disruptive and insubordinate by Knaack and Sheehan and added to their animosity. Significantly, Knaack did not mention the possibility of posting for a part time French teacher, either 20% or 30%, until after school on May 28, 1998, the same day that Mudrovich had earlier had his first major confrontation with Sheehan regarding study hall supervision. In this context, Knaack's comment on May 28 that Mudrovich may not be "professional enough" to be given a full time position is more reasonably attributed to Mudrovich's public argument with Sheehan earlier that day than to Mudrovich's protected activity of several months before. 7/ Over the next few days, Mudrovich engaged in further encounters with Sheehan that administrators viewed as unprofessional and disruptive, culminating in an impromptu meeting on June 2 among Mudrovich, Knaack, and Sheehan, in which voices were raised and accusations traded regarding misconduct and mismanagement. While Mudrovich perhaps felt goaded into such confrontations by the way Sheehan spoke to him and by Knaack's decision on June 1 to post for a 30% French teacher rather than increase Mudrovich's contract, the salient fact is that his unprotected behavior did induce lawful hostility in the administrators.

---

7/ *Mudrovich also threatened to file grievances during this May 28 conversation with Knaack, but not until after Knaack had already made the "not professional enough" comment.*

---

On June 3, 1998, Knaack issued Mudrovich a written reprimand for his conduct in confronting Sheehan regarding the study hall issue and his putatively “threatening” statements at the June 2 meeting. Contrary to what Mudrovich argues, Knaack’s decision to impose the relatively mild discipline of a written reprimand does not necessarily mean that the reprimand discharged all of Knaack’s aggravation, thus cleansing the palate for purposes of determining Knaack’s motivation for taking subsequent adverse action. More likely it means that Knaack felt constrained to follow progressive discipline standards. 8/ Moreover, Knaack experienced fresh confirmation as late as June 4 in the form of FYI notes and other messages from staff of his view that Mudrovich was having a negative effect on staff morale.

---

*8/ Mudrovich notes in his petition for review that administrators testified at various times that they viewed the reprimand as sufficient punishment for the misconduct and that, even after June 3, they still would have preferred to keep Mudrovich as an 80% teacher rather than have to post for a full-time teacher. Mudrovich also notes that nearly all of the District’s asserted legitimate justifications for laying him off (e.g., his disputes with other teachers and not being a “team player,” the civil lawsuit and its effect on the atmosphere in the building, the confrontations with Sheehan, his allegedly uncompromising, irrational or threatening conduct) had occurred prior to June 1, when the 30% position was posted, and/or June 3, when he was reprimanded for some of this conduct. From these points he argues that the layoff cannot reasonably be viewed as motivated by any of the unprotected conduct that predated these adverse actions. We think Mudrovich underestimates the level of lingering animosity he had engendered by his unprotected conduct (partly because administrators themselves understated that animosity in their testimony) and also misapprehends the manner in which hostile motivation operates. Despite any statements they may have made to the contrary, we conclude that, on or shortly before June 10, administrators realized the possibilities Article 32 (I) offered for replacing Mudrovich, and this realization, coupled with the lack of applicants for the 30% position, presented administrators with the opportunity to act on the hostility that had built up over time, much of which was attributable to Mudrovich’s unprotected activity. We also note that some of Mudrovich’s protected activity also occurred prior to June 1, and, as we discuss in the text that follows, the animus engendered by this activity also continued to fester and affect the ultimate layoff decision.*

---

Thus the evidence is plentiful that administrators had developed hostility toward Mudrovich from his unprotected activity and that this hostility contributed to the decision to lay him off on June 10, 1998. We also conclude, however, contrary to the Examiner, that Mudrovich’s protected activity – in particular his resort (and threats to resort) to the contractual grievance procedure – played a legally significant part in the layoff decision.

The Examiner concluded that Knaack harbored unlawful animus that played a role in his “thought process” in recommending the layoff. She also concluded, as we do, that but for Knaack’s recommendation to Dodd, Dodd would not have in turn recommended the layoff to the Board or the Board voted to lay off Mudrovich. However, the Examiner reasoned that “Knaack’s layoff recommendation was *triggered* by the significant, legitimate reasons and not

by Knaack's unlawful hostility," and therefore did not "taint" Dodd's layoff recommendation. Examiner's Decision at 182. (Emphasis added). Hence, according to the Examiner, the layoff was not unlawful. We are constrained to disavow the Examiner's analysis, as it cannot be squared with the Commission's longstanding, court-approved "in part" test in discrimination cases under Section (3)(a)3. In approving that test, the Supreme Court understood that the test could invalidate employment decisions that were otherwise well-justified by an employee's misconduct. The Court sanctioned such results as necessary to effectuate the purposes of the law, pointing out that it is far easier for an employer to document alleged employee misconduct than for the employee to monitor or have access to the employer's intra-management discussions about its motives. *ERD v. WERC*, 122 Wis.2d 132, 142 (1985). The Court also noted that, "When anti-union hostility enters into the [employer's] decision to terminate an employee, not only are the rights of that individual employee violated, but also, in effect, the rights of co-employees are violated, because union participation is stifled in the work place. This result is deemed undesirable by this court." *Id.* at 144. We agree with Mudrovich that there is no meaningful distinction under the "in part" test between animus that enters an employer's "thought process" in making a decision and animus that "triggers" that decision. Nor can we accept the Examiner's premise that an adverse action can be lawful where higher level officials, who themselves lacked improper motives, did not initiate the action and would not have taken the action but for the unlawfully motivated recommendation of a subordinate agent. As discussed more fully below, this "but for" nexus is what it means to say that an ultimate decision has been "tainted" by its unlawful origin.

Accordingly, we will apply the Commission's traditional "in part" test to determine whether the District laid off Mudrovich unlawfully. We begin by observing that this case contains highly unusual direct evidence of unlawful animus in the form of Knaack's testimony at the arbitration proceeding, set forth in pertinent part in Finding of Fact 72, above. Knaack later in his arbitration testimony sought to diminish the significance of this admission, asserting that the grievances were not a "major factor" in his thinking. However, at no time during either the arbitration hearing or the hearing in the instant case did Knaack disclaim the essence of his statement, i.e., that he considered Mudrovich's grievances when making the layoff recommendation. 9/

---

9/ *Asked at the instant hearing about his testimony at the arbitration hearing, Knaack testified that Mudrovich's grievances were in his (Knaack's) "thought process" concerning the layoff recommendation but "not in my decision making." (TR at 1223). We agree with Mudrovich that, at least on this record, Knaack's explanation offers a distinction without a difference. Knaack's initial admission that Mudrovich's grievances played a role was in response to a question that clearly used the term "thought process" interchangeably with "decision-making process," i.e., Knaack was asked about his "thought process on that [layoff] decision." The list of factors Knaack cited in response to that question included Mudrovich's grievances. We see no reason not to take this testimony at face value. Hence we do not credit Knaack's attempt at the instant hearing to distance himself from the implications of his forthright testimony at the arbitration hearing.*

---

Even so, given the substantial lawful hostility Knaack had developed against Mudrovich, we might have been able to construe his reference to “grievances” as merely a layman’s verbiage for Mudrovich’s litigiousness, except that the record contains circumstantial corroboration that Knaack did have Mudrovich’s grievance activity on his mind. We are struck in particular by the fact that Knaack’s relatively brief contemporaneous notes of lengthy conversations with Mudrovich on both May 28 and May 29 refer disproportionately to Mudrovich’s grievance threats, thus emphasizing, in our view, that he indeed was thinking about them in the relevant time frame. In Knaack’s notes of May 28, he refers to Mudrovich’s grievance threats in three of a total of seven sentences. In a very brief three-sentence memorandum regarding the prolonged conversation on May 29 among Knaack, Mudrovich, and an Association representative, Knaack deemed it significant to note that: “Mr. Knaack asked him [Mudrovich] exactly what he wanted, he said, ‘You’ll find out next week,’ *referring possibly to a grievance.*” (Emphasis added). This disproportionate focus on Mudrovich’s grievance threats in Knaack’s notes suggests that Mudrovich’s propensity for filing/threatening grievances when he was unhappy with administrator decisions played some role in Knaack’s decision just a couple days later (June 1) not only to post the additional French section, but to ensure that Mudrovich would be disqualified by posting it as a 30% position. Adding to Knaack’s perception of Mudrovich’s grievance propensity was the May 29 message from Mudrovich’s attorney reinforcing Mudrovich’s intent to grieve any decision not to award him the additional French section.

Although the record provides no direct evidence that Knaack was specifically influenced by Mudrovich’s October 1997 grievance, we infer from the circumstances that the October grievance also formed part of Knaack’s “thought process.” The October grievance had included inflammatory accusations of criminal behavior against Knaack and Dodd, had resulted in a prolonged and unsuccessful mediation attempt by a WEAC attorney, and had concluded only a few months before Knaack’s decision not to increase Mudrovich’s contract. Moreover, Knaack testified at the instant hearing that he believed Mudrovich had filed more grievances than any one else – a belief that is likely to be inaccurate, since Mudrovich had actually filed only two grievances, one on October 1997 and one in June 1998.

In addition, the timing of the June 10 decision suggests it was at least partially related to Mudrovich’s June 5 grievance meeting with Knaack and the written grievance that followed. As Mudrovich notes, the 30% posting was not set to expire until June 19, and School District officials acknowledged that it was unprecedented to withdraw a posting prior to its expiration. The vast record in this case contains surprisingly little explanation for Knaack’s unusual request to withdraw that posting on June 10 and replace it with a full time posting, except brief reference to the fact that the District had not as of June 10 received any applications for the 30% position. This conclusory assertion is insufficient to persuade us that a lack of applications alone would have caused such an aberration from customary practice. The question then becomes, what else motivated Knaack to cut short the posting period? Between June 1, when he posted the 30% position, and June 10, when he withdrew it, Knaack had received a few additional written notes from staff members complaining about Mudrovich.

However, he had received similar notes prior to the June 1 posting. We conclude from the evidence as a whole that Knaack's decision on June 10 to cut short the posting period and recommend Mudrovich's layoff was motivated by an amalgam of factors, including Knaack's general pent-up aggravation with Mudrovich, an accumulating sense of urgency precipitated by the staff complaints, and Mudrovich's continued propensity for engaging in grievance activity, most recently the June 5 grievance.

Thus Knaack's express acknowledgment of being influenced by Mudrovich's grievance activity is corroborated by the surrounding circumstances, and we conclude that his recommendation was indeed unlawfully motivated in part.

Like the Examiner, we do not find that Dodd was motivated in any part by animus towards Mudrovich's protected activity in accepting and forwarding Knaack's recommendation to lay off Mudrovich. In arguing to the contrary, Mudrovich focuses primarily upon Dodd's anger surrounding Mudrovich's October 1997 grievance. Mudrovich points to two events: Dodd's conversation with the District's attorney on October 29 – the date Mudrovich filed his grievance – in which Dodd discussed the possibility of disciplining Mudrovich; and Dodd's angry reaction during the superintendent-level meeting on November 18, 1997 regarding the October 29 grievance.

We do not agree that these events demonstrate unlawful animus. Regarding Dodd's October 29 conversation with the attorney, we note that the conversation centered upon the District's obligation to undertake the defense of the Soto-Martin lawsuit; therefore the discussion of disciplining Mudrovich could have related to his having brought the lawsuit, rather than to his having filed a grievance. More importantly, the record contains no evidence from which we can infer that Dodd was aware of the grievance on October 29, the date of the telephone conversation. While October 29 was the date Mudrovich initiated the grievance, presumably at Step One (the building principal), both Dodd's testimony and the dates on the relevant documents indicate that Dodd received the grievance no earlier than November 5. The record reflects that Knaack informed Dodd about the grievance but does not specify when that conversation occurred. It is possible that Dodd had heard about the grievance at the time it was filed on October 29, but on this record that would be a speculative conclusion. As to Dodd's angry reaction during the grievance discussion on November 18, 1997, his anger clearly was directed at Mudrovich's allegations that Dodd and Knaack had conspired to injure Mudrovich's reputation and hence were guilty of criminal conduct pursuant to Sec. 134.01, Stats. As the Examiner noted, an employer's anger at the content of a grievance is not necessarily tantamount to unlawful animus toward the filing of the grievance. *CF. VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) AT 18* ("an employer is entitled to offer a frank and even negative assessment when confronted with a grievance"). Even if Dodd's reaction to this portion of Mudrovich's grievance were evidence of unlawful animus, however, we would not conclude that it was instrumental in any way in Dodd's decision to accept Knaack's recommendation, primarily because the record is devoid of any evidence that Dodd



continued to harbor any antipathy to Mudrovich's grievance activity in June 1998 or that Dodd acted on the basis of any lingering animus from Mudrovich's October grievance. 10/

---

*10/ Mr. Mudrovich points out that, during the mid-May staffing meeting, administrators discussed whether or not to assign the extra section of French to Mudrovich and Dodd noted during that discussion that there would be repercussions if Mudrovich were not assigned the section, expressly referring to Mudrovich's October 1997 grievance. The fact that Dodd was aware that Mudrovich would likely respond to negative treatment by filing a grievance does not in itself display hostility toward Mudrovich or his grievance activity.*

---

However, though Dodd himself did not act out of animus, it is undisputed that, but for Knaack's partially unlawful recommendation, Dodd would not have considered or initiated Mudrovich's layoff. This was not a situation where District officials were considering layoff for reasons independent of Knaack's feelings about Mudrovich, such that Dodd might have had an overarching role in initiating the process; rather, it was a situation in which layoff was the mechanism Knaack seized upon and recommended to handle Mudrovich. The Examiner concluded that Dodd did not "defer to" Knaack but rather exercised independent judgment in accepting Knaack's recommendation and forwarding it to the Board. The Examiner distinguished earlier Commission decisions holding employers responsible for the unlawfully motivated actions of their agents on the ground that those cases involved citizen boards approving the recommendations of top managers and were premised upon the customary deference such boards accord managerial recommendations. SEE, E.G., NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NO. 28954-B (NIELSEN, 8/98), AFF'D DEC. NO. 18954-C, D (WERC, 3/99). We agree that Dodd had developed his own concerns about Mudrovich's interpersonal relationships and unprofessional or insubordinate behaviors and did not simply "rubber stamp" Knaack's decision. For example, we credit Dodd's testimony that he was moved by the courage of some teachers to put their complaints about Mudrovich in writing. It is also true that the examiner decisions in NORTHEAST WISCONSIN TECHNICAL COLLEGE, SUPRA, and GREEN LAKE COUNTY, DEC. NO. 28792-A (NIELSEN, 4/97) relied upon the deference that citizen boards as a practical matter generally give to recommendations from subordinate managers. However, neither of those decisions required the examiner to confront the problem we face here, of one manager acquiescing in the recommendation of a subordinate manager, where both managers exercised some independent discretion. We also note that the Commission's decision affirming the Examiner in NORTHEAST WISCONSIN TECHNICAL COLLEGE did not rely upon the customary deference of a citizen board, but rather articulated a more traditional "but for" connection:

“We also reject the College’s view that it is insulated from liability for the acts of its agents because the ultimate decision-makers were Board members. The Board’s agents set the layoff in motion. Without their layoff recommendation, the record gives us no substantial basis for concluding the layoff would still have occurred. Under such circumstances, the College is culpable as a municipal employer based on the acts of its agents.”

NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NO. 28954-C (WERC, 3/99) AT 10.

Here, we find a meaningful nexus between Knaack’s unlawful animus and Dodd’s otherwise lawfully motivated recommendation to the Board, because Knaack in a very real sense instigated and “set in motion” the process culminating in Mudrovich’s layoff. But for Knaack’s having taken that initiative, Dodd admittedly would not have laid off Mudrovich. Knaack’s role was not merely pro forma, a condition precedent, a necessary preliminary step, or otherwise mechanistically related to the layoff decision. Hence, Dodd’s independent judgment that it was appropriate to lay off Mudrovich because of his other unprotected conduct does not insulate the District’s decision from having been motivated “in part” by Knaack’s unlawful animus.

Contrary to the District’s argument, this conclusion is not inconsistent with Commission precedent. None of the decisions cited by the District involved a situation similar to the instant case, where an adverse action was initiated by an agent and where the agent’s precipitating action was determined to have been motivated in part by animus. Thus in BARRON COUNTY, DEC. NO. 26065-A (BURNS, 1/90), the layoff situation existed independently of any animus towards the complainant, the layoff decision was initiated by a supervisor without animus and, while the selection may have been discussed with another supervisor who harbored animus, the examiner expressly found that the non-initiating supervisor’s animus played no role even in that supervisor’s participation in the layoff decision. Similarly, in CITY OF MILWAUKEE, DEC. NO. 26728-A (LEVITAN, 11/91), AFF’D, DEC. NO. 26728-B (WERC, 9/92), the examiner found that the supervisor who harbored the animus neither initiated the adverse action (denial of a promotion) nor played a role in that decision. In MILWAUKEE COUNTY, DEC. NO. 28951-B (NIELSEN, 7/98), the agent who harbored some animus initiated the discharge process by advising a superior of the complainant’s lack of a driver’s license, but the examiner expressly found that the lower level supervisor’s animus played no role in that process; moreover, the higher level supervisor made all of the decisions about how to handle the complainant’s lack of a driver’s license, including several attempts to ameliorate the situation before deciding upon discharge. 11/

---

*11/ We also note that the BARRON COUNTY and MILWAUKEE COUNTY decisions were examiner decisions that were affirmed by operation of law and hence are of limited precedential value. CITY OF BROOKFIELD, DEC. NO. 19822-C (WERC, 11/84).*

---

Therefore, we reverse the Examiner and conclude that the District did violate Secs. (3)(a)3 and 1, Stats., in laying off Mr. Mudrovich in part out of hostility to his lawful concerted activities.

### **The Failure To Hire Mudrovich for the Full-Time French Position**

Mudrovich also alleges that the District's failure to hire him for the full time French position was unlawfully motivated, inasmuch as he had worked successfully for three years as a French teacher in the District, including the most recent year in a nearly full time capacity. As set forth in detail in our Findings of Fact, the hiring decision was effectively made by a selection team comprising three administrators who neither harbored their own unlawful animus nor were aware of Knaack's unlawful animus. The team's decision on its face, as detailed in our facts, was largely based upon impressions conveyed during the interview process – both the especially positive impression left by Bouffleur and the somewhat negative impression left by Mudrovich.

Nonetheless, despite their claims to the contrary, we are not sanguine about the likelihood that the selection team members were influenced by Knaack's and Dodd's negative feelings towards Mudrovich. Realistically, the simple fact that Mudrovich had been laid off and required to undergo an interview to keep the job he already had (albeit full-time rather than 80%) sent a message to the selection team about Mudrovich's popularity with Knaack and Dodd. As Mudrovich argues, the practical likelihood is that fellow administrators on a selection team would not be enthusiastic about selecting a candidate known to be viewed negatively by the building principal and the District Administrator. The difficult question is whether a selection team's awareness of negativity is a sufficient basis upon which to invalidate the team's selection under the "in part" test, where, unbeknownst to the selection team, the negativity is partially due to unlawful animus.

Under the circumstances present here, we conclude that the nexus between Knaack's animus and the District's hiring decision is too attenuated to invalidate that decision. It is singularly difficult to penetrate the motivations underlying a group recommendation, particularly where the recommendation is based upon subjective judgments about how candidates answer interview questions. Certainly the mere fact that a decision has been made by an ostensibly neutral selection team is insufficient to insulate the decision from claims of unlawful motivation. That would simply create a roadmap for any employer interested in concealing unlawful motives – in Examiner Nielsen's colorful phrase, "would render all but the clumsiest acts of discrimination immune from review." NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NO. 28954-B (NIELSEN, 8/98) AT 38. In this case, however, the team itself was not only devoid of animus but unaware of Knaack's illegal animus. Moreover, the team was organized by individuals (Dodd and Hazaert) who did not themselves harbor unlawful

animus. While it is true that Dodd would not have created a selection team in the first place if he had not accepted Knaack's partially unlawful recommendation, this seems to us an overly mechanistic application of the "but for" test. Accordingly, we reject Mudrovich's claim that the District's failure to select him for the full time position was unlawful discrimination within the purview of Sec. 111.70(3)(a)3, Stats., and we dismiss that charge.

### **Remedy**

Section 111.07(4), Stats. (which is applicable to this proceeding by virtue of Sec. 111.70(4)(a), Stats.) gives us substantial discretion when determining what remedy best meets the purposes of the statute-in this instance the Municipal Employment Relations Act. *WERC V. CITY OF EVANSVILLE*, 69 WIS 2D 140 (1975). In *EMPLOYMENT RELATIONS DEPT. V. WERC*, 122 WIS.2D 132, 143 (1985), the Court specifically noted the Commission's remedial discretion in mixed motive cases, such as this one: ". . . [E]vidence that legitimate reasons contributed to the employer's decision to discharge the employee can be considered by the WERC in fashioning an appropriate remedy." ID. AT 143.

The District in this cases urges us to adopt the remedial approach taken in cases decided under the Wisconsin Fair Employment Act, i.e., to decide whether Mudrovich would have been laid off based solely upon lawful considerations, even apart from the unlawful animus, and, if so, to limit the remedy to a cease and desist order and attorney's fees, if any. SEE *HOELL V. LIRC*, 186 WIS.2D 603, 615 (CT. APP. 1994). We decline to adopt that approach. As we stated in *CLARK COUNTY*, DEC. NO. 30361-B (WERC, 11/03) AT 18, ". . . [I]t bears consideration that our traditional monetary remedy of back pay alone is relatively modest in comparison with what is available to victims of other forms of employment discrimination, which encompasses compensatory damages, attorneys (sic) fees, and sometimes punitive damages." It would be particularly harsh in this case to adopt a remedial approach that would provide no monetary remedy but attorney's fees, as Mudrovich may have proceeded without an attorney precisely because our traditional remedies provided him little expectation of garnering attorney's fees even if he prevailed on his claims.

On the other hand, while we do not specifically hold that the District would have laid off Mudrovich in June 1998 regardless of his protected activity, it is clear from the foregoing discussion that Mudrovich engaged in substantial unprotected conduct, particularly near the end of the 1997-98 school year, that reasonably disturbed not only administrators but several of Mudrovich's fellow staff members and reasonably led them to view him as a disruptive element in his school environment. We base this conclusion largely upon the extreme animosity – unrelated to any protected activity – that Mudrovich exhibited toward Knaack, Dodd, and Sheehan towards the close of the 1997-98 school year and Mudrovich's loud and argumentative behavior toward administrators in the presence of staff and students. We have recently reaffirmed the primacy of reinstatement as a remedy for unlawful retaliatory terminations from employment. *CLARK COUNTY*, DECISION NO. 30361-B (WERC, 11/03) AT 19. Nonetheless,

mindful of our statutory mission to foster harmonious employment relationships, we think it highly unlikely that Mudrovich could be reabsorbed into the District's work force at this point without undue acrimony and negative effects on productivity. In these unique circumstances, where the animus played a relatively minor role and a complainant's unprotected activity has severely undermined the work climate into which he would be returned, we conclude that reinstatement is inappropriate as a remedy. 12/

---

*12/ In this connection, we note that Mudrovich has challenged several procedural rulings by the Examiner on the ground that these rulings prevented him from fully exploring the administrators' motives and/or from fully defending the reasonableness of his own conduct. We have considered Mudrovich's procedural challenges and determined that the excluded evidence would have made no material difference in the outcome of this case. On the one hand, it is clear that we have found the existing record sufficient to demonstrate unlawful motive. On the other hand, none of the excluded evidence would have altered our conclusions that the unlawful motive played a relatively minor role, that administrators had developed substantial lawful (besides unlawful) antipathy toward Mudrovich, and that Mudrovich engaged in ostentatiously hostile behavior toward administrators in May and June of 1998 – the factors that we believe make reinstatement inappropriate in this unusual case.*

---

Where reinstatement is withheld, it has become common in some forums to determine a period of constructive future employment ("front pay") to compensate the victim for "the post-judgment effects of past discrimination." *USEEOC v. CENTURY BROADCASTING CORP.*, 957 F.2d 1446 (7<sup>TH</sup> CIR. 1992). We decline to do so in this case. Front pay is a substitute for reinstatement where reinstatement has been rendered infeasible for reasons not attributable to the complainant. In *CLARK COUNTY*, we cited with approval the criteria the National Labor Relations Board has stated it would consider when deciding whether or not to order front pay, i.e., where the employer has impaired the complainant's ability to work, where the employer remains hostile to the employee and the employees at large are also hostile, where the complainant is close to retirement, or as a substitute for a preferential hiring list. *Id.* AT 19. In contrast, we have withheld reinstatement here because the antipathy generated by Mudrovich's own unprotected conduct has poisoned the employment relationship. Just as the Commission, with the Court's approval, has occasionally adjusted its remedies to account for the complainant's own contributory misconduct, 13/ we believe Mudrovich's unprotected conduct warrants adjusting the monetary relief to which he is entitled. We also note that the accumulated back pay plus 12% interest is likely to be considerable in this case, as nearly six years have elapsed since Mudrovich's layoff. Balancing these considerations, we think an

award of back pay in this case, terminating on the date this decision is issued, will suffice to effectuate the purposes of the law, by deterring unlawful discrimination and providing substantial make whole relief to the Complainant.

---

*13/ SEE, E.G., EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132, 143 (1985), where the Court approved the Examiner's decision to reinstate the complainant to probationary status, based upon the employer's legitimate job performance concerns, a remedy that left the complainant vulnerable to discharge without proof of "just cause," even though the standard remedy in that case would have credited the complainant with sufficient service to have achieved permanent status.*

---

Accordingly, we remedy the District's violations of the law through a cease and desist order, the posting of a notice and an award of back pay, subject to the usual offsets, terminating on the date this decision is issued.

Dated at Madison, Wisconsin, this 2nd day of June, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

---

Judith Neumann, Chair

Susan J. M. Bauman /s/

---

Susan J. M. Bauman, Commissioner

Commissioner Paul Gordon did not participate.