

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHLAND PINES EDUCATION ASSOCIATION, Complainant,

vs.

NORTHLAND PINES SCHOOL DISTRICT, Respondent.

Case 54
No. 62113
MP-3899

Decision No. 30602-D

Appearances:

Teresa M. Elguezabal, Attorney, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003 Madison, Wisconsin 53708, succeeded by **Steven M. Lucareli**, Attorney, Lucareli Law Office, P.O. Box 1357, Eagle River, Wisconsin 54521, appearing on behalf of the Complainant.

Joel S. Aziere, Attorney, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northland Pines Education Association filed a complaint with the Wisconsin Employment Relations Commission on February 13, 2003, alleging that Northland Pines School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 5, Stats., of the Municipal Employment Relations Act (MERA) by failing to reinstate Complainant to his teaching position on January 20, 2003, and continuing Complainant's suspension without pay. The Commission issued an order on April 17, 2003, authorizing Examiner Lauri A. Millot to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.70(4)(a) and 111.07, Stats.

Hearing on the Complaint was held on May 27 and May 28, 2003. At hearing on May 28, 2003, prior to Complainant taking the subpoenaed testimony of Board of Education Members Amy Decker and Charles Gilman, Respondent's counsel informed Decker and

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Gilman that they may be subject to criminal prosecution for their testimony. The May 28, 2003, hearing was continued to August 7, 2003, and Respondent was afforded until July 1, 2003, to file any formal motions on the matter. No motions were received by July 1, 2003. On July 31, 2003, Complainant filed a Motion for Telephonic Testimony to allow for Board of Education member Amy Decker's telephonic testimony. On August 6, 2003 Respondent filed an Objection to Telephonic Testimony and Motion for Protective Order to Quash the Subpoenas Issued to Members of the Northland Pines School District Board of Education and Motion to Suppress Testimony. The hearing scheduled for August 7, 2003, was continued to September 12, 2003. Respondent's Motion to Quash and to Suppress Testimony was denied on September 10, 2003. Respondent filed an Interlocutory Appeal with the Wisconsin Employment Relations Commission on September 29, 2003, which was denied on November 4, 2003. Hearing was resumed and completed on January 30, 2004, at Eagle River, Wisconsin. A stenographic transcript of the proceedings was made and received.

The Complainant and Respondent filed post-hearing briefs and reply briefs, the last of which was received by April 23, 2004, whereupon the record was closed.

Respondent filed a Motion for Protective Order on March 19, 2004, to forbid the Complainant from releasing a copy of its post-hearing brief to the media. Complainant informed the Examiner and Respondent on March 19, 2004, that it would not furnish a copy of its brief to the media. On that basis, an Order Dismissing Respondent's Motion for Protective Order was issued on June 18, 2004.

The Examiner, having considered the evidence and arguments of the Complainant's Counsel and Respondent's Counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, Northland Pines Education Association (Complainant or Association) is a labor organization with its mailing address at 1901 West River Street, P.O. Box 1400, Rhinelander, Wisconsin 54501. The Association serves as the exclusive collective bargaining representative for a bargaining unit of all classroom teachers, librarians, psychologists and guidance counselors employed by the Northland Pines School District.

2. The Respondent, Northland Pines School District (Respondent or District) is a municipal employer, with offices located at 1780 Pleasure Road, Eagle River, Wisconsin, 54521. At all times material herein, Linda Kunelius was the School District Administrator, Duane Frey was the Elementary School Principal and Tom Christensen was the School Board President.

3. The Complainant and Respondent were parties to a collective bargaining agreement for the time period July 1, 2001, to June 30, 2003. The Agreement contained no grievance procedure and no final and binding method for resolving disputes concerning its meaning and application. The agreement contained the following language addressing Discipline, Discharge and Suspension:

Section A: When, in the judgment of the District Administrator a condition or situation warrants, the District Administrator may suspend an staff member pending action by the Board. The final step in any review of such suspension shall decide the status of the teacher's compensation during that suspension.

Section B: No teacher shall be required to appear before the Board or its agents concerning any matter which could adversely affect the continuation of that teacher in his/her office, position, employment or the salary or increments pertaining thereto, unless he/she has been given prior written or verbal notice (at least 24 hours) of the reason for such meeting or interview and shall be entitled to have a representative of the Association present to advise him/her and represent him/her during such interview.

Section C: In the event that the discipline of a teacher shall have an adverse effect on continuation of employment, the teacher and Association shall receive written notice of the reasons and the disciplinary action being taken.

Section D: No teacher shall be dismissed, suspended, reduced in rank or compensation or otherwise disciplined without cause.

Section E: All rules and regulations governing employee activities and conduct shall be interpreted and applied uniformly throughout the District.

4. Peter Bugni is a 28-year teacher of the Northland Pines School District assigned to teach mathematics to fifth grade students. Bugni's immediate supervisor is Duane Frey, Eagle River Elementary School Principal. Bugni is currently suspended without pay.

The District was involved in an investigation and subsequent disciplinary hearing regarding an incident that occurred between Bugni and a student on May 14, 2002. Following multiple hearings and deliberation by the District Board of Education concluding on September 25, 2002, the Board issued the following:

DECISION OF THE BOARD

The Board has carefully considered all of the evidence presented in this hearing, including the sworn testimony of students, adults, and administration, the written documents provided, and has heard the oral arguments of counsel for the administration and for Mr. Bugni. After due deliberation, the Board has concluded whereas Mr. Bugni's conduct does not meet the level expected of Northland Pines School District teachers, it does not rise to the level of breach of contract so as to constitute just cause for dismissal as required by the Collective Bargaining Agreement. It is sufficiently serious, however, as to warrant discipline of Mr. Bugni and guidance. It is the decision of the Board, therefore, that Mr. Bugni is suspended from his teaching duties, without pay, until the end of the first semester of this school year. Before returning to the classroom Mr. Bugni shall undergo a psychological evaluation by a psychologist selected by the Board and receive training in conflict management, anger control, and perceptive communications as well as other such training as recommended by the evaluation of the psychologist. A written reprimand shall be placed in his file concerning the incident of May 14, 2002. Upon returning to his teaching duties, he shall be considered on probation for a period of three (3) years with regular evaluations by the principal, no less than semi-annually.

Bugni was represented at the Board hearings by Gene Degner, Director, Northern Tier UniServ, and Teresa Elguezabal, Attorney, Wisconsin Education Association Council.

The District was represented at the Board hearings by John O'Brien, Attorney, O'Brien, Anderson, Burgy, Garbowicz & Brown, LLP, and the District administration was represented by Robert Simandl, Attorney, Davis & Kuelthau, S.C. O'Brien was present during deliberations, offered legal advice, and assisted the Board in drafting the September 25 Decision.

Following a verbal reading of the decision by O'Brien, Degner asked for clarification on three issues; 1) who was financially responsible for the training and related costs; 2) what the psychological evaluation entailed; and 3) was the three year probationary period the same as a new teacher or a different kind of probation. O'Brien responded to Degner's questions and confirmed that the District would pay for the training costs associated with perceptive communications, anger management and conflict training. O'Brien informed Degner that the psychological evaluation was limited to just seeing the psychologist and that the three year probation was not the same type as a new teacher and thus just cause applied.

5. Tom Christensen, President, Northland Pines Board of Education issued the following Written Reprimand to Bugni on September 25, 2002:

Dear Mr. Bugni:

Pursuant to the decision of the Board of Education rendered by it on September 25, 2002, this letter is to serve as a written reprimand to you and is being placed in your personnel file. This letter of reprimand relates to your conduct on May 14, 2002, with regard to a student at the District.

Be advised that based upon the professional standards required of teachers in this District, your conduct in the handling of the student constitutes a breach of the code of conduct of the District, its corporal punishment policy and Wisconsin Statutes. Your response was highly unprofessional, was an over reaction and was contrary to the positive educational environment and experience we want our students to have. Henceforth, you need to verify facts before taking action.

The board has established training that you must undergo before you will be permitted to return to your position at the District. Such training is to occur before the beginning of the second semester of the 2002-2003 school year.

Any further violations of District policy may result in additional discipline to you, up to and including termination from employment. If you do have any further questions, please contact the District Administrator directly.

. . .

6. Following the September 25 hearing and imposition of discipline, Elguezabal, Bugni's WEAC attorney, and O'Brien communicated by telephone and exchanged letters on September 27, October 1, and October 15 to clarify the decision of the Board.

On October 29, 2002, Simandl sent the following letter to Elguezabal that showed no copy to anyone else:

Re: Northland Pines School District v. Peter Bugni - Clarification of Operation of Decision of the Board

Dear Teresa:

As a follow-up to our discussions on the Board decision in the Peter Bugni matter, Mr. O'Brien has provided the following guidance relative to the decision. I understand that Mr. Bugni and Ms. Kunelius are currently coordinating these efforts:

1. The effective date of unpaid suspension: The effective date of unpaid suspension shall be September 26, 2002. The retroactive provisions of Article VI of Section A, will not be applied to disqualify Mr. Bugni from compensation to May 23, 2002. During the period of unpaid suspension, he may continue his group health plan coverage by electing COBRA, and paying the cost of COBRA coverage, beginning in October, 2002. The District has forwarded to him the appropriate COBRA notice for continuation coverage. As to other benefits he receives as a result of his employment with the District, these ceased as of October 1, 2002 unless paid for by Mr. Bugni, with an after tax check to the District.
2. The written reprimand to be placed in the file relative to the May 14, 2002 incident will be in the form developed by the Board of Education. It is my understanding that the Board will issue the formal written reprimand to Mr. Bugni, to be included in his personnel file.
3. As to the psychiatric evaluation, the District Administrator has identified the psychologist to perform such evaluation. There is no written certification of the evaluation, or fitness for duty, to be provided to the District relative to the evaluation. All that is required is that Mr. Bugni obtain a psychiatric evaluation. As to the training in conflict management, anger control and perceptive communication, and such other recommendations for training as may result from the psychiatric evaluation, the District shall coordinate with Mr. Bugni's said training. Such training must occur and be completed prior to his return to employment with the District. While there is no certification requirement for the training, the successful completion of the identified training through the psychiatric evaluation is a condition of his return to employment.
4. The three-year probationary requirement is reflected in the decision of the Board and is to be reflected in his individual contract beginning in the 2003-2004 school year. Three years of probation will begin on his return to employment in the second semester of the 2002-2003 school year.
5. Under the decision of the Board, the three year probationary period does not constitute a "last chance agreement." Therefore, for the District to take any further disciplinary action against Mr. Bugni, the just cause standard will need to be applied relative to such conduct.

Teresa, I hope this helps clarify the administrative issues associated with the discipline leveled against Mr. Bugni by the Board. If you do have any further questions, please call me directly at (414) 225-1418.

. . .

7. On October 22, 2002, Bugni executed an Authorization for Release of Medical Information which was prepared by O'Brien with modifications from Elguezabal that read as follows:

TO: Dr. Michael L. Galli
1908 Edgewood Drive
Schofield, WI 54476

1. Name of Patient:

Peter Bugni

2. Agency to whom disclosure is to be made:

Northland Pines School District
1780 Treasure Island Drive
Eagle River, WI 54521

Including any authorized representative of said District.

3. Type of information to be disclosed:

Written findings, opinion and recommendations resulting from your evaluation of Mr. Bugni, copies of all of which shall be provided to Mr. Bugni.

4. Purpose of disclosure:

Employment/XXXX (word following hash mark blocked out and handwritten initials of "JOB" inserted)

5. I understand that this consent will remain in force for a period of one year.

6. I hereby consent that any photocopy of the original of this written Authorization be fully valid and effective.

Dated this 22 day of October, 2002.

. . .

8. The District selected Michael Galli, Ph.D. to conduct the psychological evaluation. Galli conducted a clinical interview with Bugni on October 22, 2002, and administered a Millon Clinical Multiaxial Inventory, 3rd revision objective test which was scored and interpreted by National Computer Systems, Inc. Galli also verbally interviewed two individuals recommended by Bugni and obtained their comments regarding Bugni's abilities and talents as a teacher. Subsequent to Bungi's appointment, Galli reviewed 20 documents submitted by O'Brien which were copies of some of the reports and materials utilized by the Board in reaching its decision. Galli was aware of and based his evaluation on the District's desire to "assure that the students are in no danger from physical mishandling by Mr. Bugni and that his teaching methods will not pose any threat of harm to students, whether physical or psychological," as explained in a letter from O'Brien to Galli dated October 14, 2002. Bugni's appointment with Galli lasted two hours.

Galli prepared a report dated November 27, 2002 wherein he indicated that he believed Bugni would continue to act and react as he had in the past. Galli stated he was unable to find a basis to respond affirmatively to the Board's request for assurance that Bugni does not pose a threat to students.

Galli did not inform Bugni that he was recommending any additional training and did not provide Bugni with a copy of his evaluation. Galli indicated that over a period of years he believed therapy would succeed in altering Bugni's patterns of perception and reaction.

9. O'Brien forwarded a copy of Galli's report on or about December 5, 2002, to Degner, Elguezabal and Steven M. Lucareli, Attorney, as an enclosure to the following letter:

Dear Folks:

Since you are all representing Mr. Bugni, I am enclosing to each of you a copy of the report which I just received from Dr. Galli. No one else has received this report from me except Linda Kunelius, the District Administrator.

I understand Mr. Bugni is continuing with his training with Dr. Chuck Michels in Minocqua. I have asked Dr. Michels for a report no later than January 13, 2003, as the second semester starts January 20, 2003.

If any of you have any questions, please do not hesitate to contact me.

. . .

10. On December 12, 2002, Lucareli forwarded the following response to O'Brien's letter of December 5, 2002:

Dear Mr. O'Brien:

My client, Peter Bugni, has received some requests for releases of information regarding the recent psychological evaluations that he has undergone. I am writing to advise you that Mr. Bugni will authorize release of this information to you, and you alone, as the attorney for the Northland Pines School Board. I want to advise you at this time that under no circumstances is anything in any of these evaluations to be disclosed to Linda Kunelius, or any other outside party without first obtaining Mr. Bugni's express written permission.

As I'm sure you can appreciate, Peter Bugni has a significant privacy interest in the contents of these psychological evaluations. It is his desire to maintain the confidential nature of these records, and all protections afforded by the law to their content in the greatest possible manner. Mr. Bugni will authorize the release of this information to you in your capacity as the School board's attorney. I believe that review of the records by you will allow you to offer appropriate counsel to the Northland Pines School Board. I also believe that the School Board is capable of acting on your advice and counsel without a need to know the specific contents of Mr. Bugni's counseling records.

Should some member of the School Board offer some compelling reason to support a specific need to review the actual psychological evaluations, we would certainly be open minded to consider such a request. However, until such a request is made, and valid reasons are offered to support it which we deem acceptable, it is Mr. Bugni's request that the contents of his psychological records be disclosed to nobody else beyond yourself. Thank you.

Bugni attended and completed the conflict management and anger control training with Charles R. Michaels, MSW, BCD of the Marshfield Clinic Lakeland Center. Dr. Michaels confirmed Bugni's attendance at 12 sessions which began November 19, 2002 with a letter dated January 14, 2003. Bugni attended and completed the perceptive communication training in Madison on either December 3 and 4 or December 4 and 5, 2002.

11. O'Brien responded to Lucareli on December 13, 2002, as follows:

. . .

In reference to your correspondence of December 12, 2002, Mr. Bugni executed a release before seeing Dr. Galli. The signed Release is in Dr. Galli's possession. That Release authorized him to make disclosures to: Northland Pines School District, 1780 Treasure Island Drive, Eagle River, WI 54521,

including any authorized representative of said District. Pursuant to that Release, I sent a copy of Dr. Galli's report to Ms. Kunelius. Presumably the Board will review that report before making a final determination as to Mr. Bugni's employment.

. . .

12. At some point after December 5, 2002 and before January 16, 2003, the Board of Education met and received from either Kunelius or Simandl a copy of Galli's evaluation of Bugni. Board members Tom Christensen, Carolyn Ritter, Jerry Sparks, Michael Sealander, Amy Decker and Charles Gilman all viewed and read all or a portion of the evaluation. Board members had the evaluation in their possession for a time period estimated at between five minutes and 20 minutes and then the document was collected from the Board by either Kunelius or Christensen. Board members were advised during the meeting that since no longer had access to the evaluation, they were unable to base any decision or action on the content of the evaluation.

13. O'Brien sent the following letter to Lucareli on or about January 16, 2003:

. . .

The District Board has reviewed the various correspondence you sent to me, including your last letter of January 9, 2003. They have instructed me to advise you that, contrary to your understanding, the intent of the Board when it issued its disciplinary decision to Mr. Bugni was that it receive a written report from the psychologist following the psychological evaluation satisfying the Board that Mr. Bugni's return to the classroom would not pose any safety hazards to the students. Further, the Board received written verification, from the provider, that Mr. Bugni has successfully completed training in conflict management, anger control, and perceptive communications. Mr. Bugni will not be permitted to return to the classroom until the Board receives the above documentation. Further, the Board emphasizes that this was the clear intent of the decision.

In further reply to your correspondence of January 9, 2003, enclosed please find the copy of Dr. Galli's evaluation which had been furnished to Ms. Kunelius. I point out again that the written authorization signed by Mr. Bugni authorized Dr. Galli to provide a written report to the School District and its representatives. This clearly includes myself, the Administrator, and the School Board.

Your letter also points out that you read and observed comments attributable to Ms. Kunelius that Mr. Bugni had undergone a psychological evaluation. I would point out the decision of the Board was given to Mr. Bugni on the night it

was rendered and was read to the assembled persons including media representatives, by one of Mr. Bugni's representatives, who I believe was Mr. Degner.

I hope Mr. Bugni will see fit to comply with the Board's directives so this matter can proceed to a resolution.

. . .

On the same date, Lucareli forwarded to O'Brien the following:

. . .

This letter is sent to confirm that on today's date I have faxed to you a copy of a letter dated January 14, 2003 from Charles R. Michaels, MSW, BCD, of the Marshfield Clinic Lakeland Center, wherein Mr. Michaels confirms that Peter Bugni has successfully completed training in Conflict Management and Anger Control per the decision of the Northland Pines School District. At this point in time, I believe that this completes the documentation necessary to establish that Peter Bugni has successfully complied with all conditions set by the Board as a necessary predicate to his return to teaching on January 21, 2003.

In the event that you disagree with my conclusion that Mr. Bugni is in compliance with the Board's decision, please advise immediately. Thank you.

. . .

14. On January 10, 2003, Duane Frey, Elementary Principal sent the following to the elementary school staff:

To all Staff:

I have attached a copy of the 5th grade letter that will be mailed to all ERES grade 5 families today. It is a simple explanation concerning Mr. Bugni's anticipated return to ERES. I wanted to keep Mr. Bugni's return as low-keyed as possible, so I kept the family letter low-keyed and simple.

I feel it is far better for all concerned (students, parents, staff) if the transition is quiet and we go about business as usual, without an fanfare (banners, balloons, whatever). I do not expect the transition to be difficult. I will be meeting with 5th grade students next week to simply explain Mr. Bugni's return and field any reasonable questions they may have.

I also would like to thank Mrs. Mlaker for her outstanding job as a substitute for Mr. Bugni, and would like to thank Mrs. Weber and Mrs. Pokrandt for their assistance in helping the first semester go so smoothly.

If you have any questions please feel free to ask me. Your assistance is appreciated.

. . .

Following is the letter that Frey provided to the staff and sent home to the fifth grade parents:

Dear Grade 5 Parents/Guardians:

I would like to take this opportunity to thank Mrs. Mlaker for her outstanding work as a substitute teacher in grade 5 this first semester. Her efforts are greatly appreciated.

We anticipate Mr. Bugni will be returning to the classroom starting January 21, 2003, and fully expect the transition from Mrs. Mlaker to Mr. Bugni to go very smoothly.

If you have any questions, I invite you to give a call at school.

. . .

Frey was informed by Kunelius on January 15, 2003, that Bugni was non-compliant with the Board Decision.

Frey telephoned Bugni on January 17, 2003, and scheduled an appointment to meet. Bugni and Frey met at the school at eight o'clock in the morning on January 20, 2003, the first day of the second semester, to discuss a remediation plan drafted by Frey in anticipation of Bugni's return to the classroom on January 21, 2003. Bugni asserted to Frey that he had complied with all requirements of the Board's Decision. Frey understood Bugni to still be under suspension and at the conclusion of the meeting, directed Bugni to leave the school grounds as a result of his continued suspension.

15. On January 24, 2003, Peter Bugni and Northland Pines Education Association filed a grievance stating as follows:

STATEMENT OF GRIEVANCE

The District is violating the rights afforded Peter Bugni under the collective bargaining agreement. In particular, the District violated ARTICLE VII –

DISCIPLINE, DISCHARGE, AND SUSPENSION, by not allowing Peter Bugni to return to work on Monday, January 20, 2003, as provided for in the September 25, 2002, decision of the Board. The District's promise of return to work following completion of their disciplinary action is now being arbitrarily and capriciously violated.

AREAS OF CONTRACT VIOLATED:
(Articles/Sections)

ARTICLE VII – DISCIPLINE, DISCHARGE, AND SUSPENSION

REMEDY REQUESTED:

That Peter Bugni be returned to work, immediately, and made whole, with interest, for all wages lost as a result of the Board refusing to return him to work on January 20, 2003.

16. Northland Pines Board of Education President, Tom Christensen responded to the grievance in a letter dated February 12, 2003, as follows:

Dear Mr. Degner:

This Decision is in response to the grievance you filed on behalf of Peter Bugni and NPEA dated January 24, 2003. The grievance is denied.

You have grieved the fact that the Board has not allowed Peter Bugni to return to work on Monday, January 20, 2003, as provided for in the September 25, 2002, Decision of the Board. The Board has told you, and again affirms, that Mr. Bugni will be returned to paid status upon receipt by the Board of the evaluation prepared by Dr. Michael Galli, which was part of the Decision.

The Decision of the Board which you quoted required Mr. Bugni to undergo a psychological evaluation by a psychologist selected by the Board and to receive training in conflict management, anger control and perceptive communications as well as such other training as recommended by the evaluation of the psychologist.

Prior to his meeting with Dr. Galli, Mr. Bugni executed an authorization permitting Dr. Galli to release the evaluation results to the District and its representatives. A copy of Dr. Galli's report was sent to you after it was received by counsel for the Board. The authorization was immediately revoked

by Mr. Bugni and you have refused to permit the Board to see a copy of the Galli report since that time. This is despite the fact the release executed by him was done under guidance of counsel. The Board feels it was implicit in its Decision that it would receive the evaluation before permitting Mr. Bugni to return to work, and expected that would happen. Your refusal to release the evaluation to the Board, while still demanding that Mr. Bugni return to work, places the Board in an untenable position. Without seeing the evaluation the Board has no way of knowing if it would be appropriate for Mr. Bugni to return to the classroom.

You obviously recognize the Board is entitled to receive documentation as to the activities required in its Decision by the fact that the Decision also ordered him to receive training in conflict management, anger control and perceptive communications. Although written results were not specifically stated in the Decision, you acknowledged that was expected when you furnished both letters and certifications of successful completion of this training.

. . .

17. The express language of the September 25, 2002 Decision does not require Bugni to furnish a copy of the psychologist's evaluation to the Board. Six Board of Education members received and reviewed a copy of Dr. Galli's evaluative report of Bugni. The Board's decision to continue Bugni's suspension without pay effective January 20, 2003 because Bugni had failed to provide them a copy of Galli's evaluation was arbitrary, capricious and discriminatory in violation of the cause provision of the collective bargaining agreement.

18. Christensen issued a "Final Written Warning - Insubordination and Job Abandonment" to Bugni on May 12, 2003. The content of that letter, in its entirety, is as follows:

I find it necessary to again write you concerning your continued absence from employment. While I understand that you assert that you have taken steps necessary to return to employment (and that you are fully able to return), what has been required of you all along here has been your providing the District with a fitness for duty certification. As is clear from the information we received from Dr. Galli on December 2, 2002, questions as to your fitness for return to duty have resulted in for foreclosure from employment at this point in time. We are requesting that you contact the District Administrator immediately so that a fitness for duty examination may be had to determine the appropriateness of your return. Your continued failure to satisfy this obligation for return to work will subject you to additional discipline, up to and including discharge.

I request that you contact Ms. Kunelius concerning this matter. If you have any further questions, please contact me.

. . .

cc: Ms. Linda Kunelius
Personnel File
bc: Robert J. Simandl, Esq.

Christensen's letter of May 12, 2003, was the first notification to the Complainant that he was expected to obtain a fitness for duty certification prior to his return to work. Bugni has not complied with the District's request of May 12, 2003.

19. Bugni was the subject of a criminal prosecution arising out of the May 12, 2002 incident. Attorney Lucareli represented Bugni in the criminal matter. Lucareli rescinded school board and administration access to Galli's report based on concerns that the document was a medical report containing information that could potentially jeopardize negotiations between Lucareli and the District Attorney's office. The criminal matter was resolved in either January or February 2003.

CONCLUSIONS OF LAW

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

2. Respondent Northland Pines School District is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. The District's action in continuing Peter Bugni's suspension without pay on and after January 20, 2003, has not been shown to be a direct violation of Sec. 111.70(3)(a)1, Stats.; therefore, said claim is dismissed.

4. Respondent arbitrarily and capriciously exercised its management rights and violated the cause provision of the collective bargaining agreement by continuing the suspension of Peter Bugni after January 20, 2003, thereby violating Sec. 111.70(3)(a)5, Stats., and derivatively, Sec. 111.70(3)(a)1, Stats.

5. Respondent reasonably exercised management rights on May 12, 2004 when it requested a fitness for duty certification from Peter Bugni.

ORDER

1. To remedy the violation of Sec. 111.70(3)(a)5, and derivatively Sec. 111.70(3)(a) 1, Stats., noted in Conclusion of Law 4 above, IT IS ORDERED that the Respondent, its officers and agents shall immediately take the following affirmative action which the Examiner finds will effectuate the purposes of the Wisconsin Employment Peace Act:

a. Expunge all references in personnel files to the continued suspension of Peter Bugni between the dates of January 20, 2003 and May 12, 2003, and make him whole by paying him a sum of money for wages and benefits that he otherwise would have earned during that time period plus interest at the rate of 12 percent per annum, 1/ less any amount of money that he earned elsewhere.

1/ The interest rate noted is that set forth in Sec. 814.04(4), Stats., in effect at the time the complaint is initially filed with the agency, see WILMOT UNION HIGH SCHOOL, 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. IV, 1983).

b. Notify all teachers represented by the Northland Pines Education Association, by posting in conspicuous places in Respondent's offices and buildings where such teachers are employed, copies of the Notice attached hereto and marked "Appendix A." This notice shall be signed by an authorized representative of the Respondent 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.

2. Complainant's request for relief in addition to that set forth in 1 above is denied.

3. Except as noted in 1 above, the Complaint is dismissed.

Dated at Rhinelander, Wisconsin this 30th day of August, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/

Lauri A. Millot, Examiner

APPENDIX "A"

**NOTICE TO ALL TEACHERS REPRESENTED BY THE NORTHLAN PINES
EDUCATION 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 Northland Pines School District will not violate its collective bargaining agreement with the Association by arbitrarily and capriciously exercising its management rights when disciplining an employee.

Northland Pines School District

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO TEACHERS REPRESENTED BY NPEA 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.

NORTHLAND PINES SCHOOL DISTRICT

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

BACKGROUND

This dispute arises out of the disciplinary determination of the Northland Pines Board of Education issued on September 25, 2002. The parties' collective bargaining agreement requires that discipline, suspension, and discharge must be for just cause. Under Sec. 111.70(3)(a)(5) of MERA, it is an unfair labor practice for an employer to violate the terms of a collective bargaining agreement. Because the parties' collective bargaining agreement contains no provision for final and binding arbitration of grievances, the Union brought the instant complaint for a determination of whether the Company violated the bargaining agreement and, therefore, Sec. 111.70.(3)(a) 1 and 5, Stats., of MERA by its continued suspension of Bugni. The parties agree that the issue is limited to whether Bugni has complied with the District's disciplinary determination of September 25, 2002, and if so, what is the appropriate remedy?

POSITIONS OF THE PARTIES

Complainant Initial Brief

The plain, black letter language of the Board Decision is unambiguous and Bugni has fulfilled every requirement set forth in the Decision, and thus, he should be allowed to return to work. The Board of Education, in closed session and with the assistance of its legal counsel issued a four paragraph written decision. The first paragraph summarized the evidence that the Board considered to make its decision and the second paragraph acknowledged that termination was not justified under the circumstances. The third paragraph is the one most relevant to this case and is limited to two sentences. Sentence one clearly states that Bugni's suspension would end following the completion of the first semester. Sentence two states Bugni would need to undergo a psychological evaluation by a psychologist selected by the Board and received training in certain areas. This language is clear and unambiguous; Bugni is not obligated to furnish the Board with a copy of the psychological evaluation. Relying on contract law, intent is derived from the language of the contract citing *ROSS & STEVENS V. GALAXY GAMING*, 2003 WI APP 190, 02-0359, 670 N.W.2D 74 (CT. APP. 2000). If the Board intended for Bugni to furnish them with a copy of the psychologist's report, it would have stated so in its decision. Similarly, if the Board intended for Bugni to complete psychiatric prescribed therapy, it would have stated so rather than utilize the term "training."

The District's intent is further supported by letters sent by attorneys John O'Brien dated October 14, 2002, and Robert Simandl dated September 25, 2002. O'Brien's letter to Dr. Michael Galli fails to make any reference to a requirement that Bugni provide the Board of Education a copy of the Galli's evaluation. Simandl, after consulting with O'Brien, specifically stated in an October 29, 2002 letter that "[t]here is no written certification of evaluation or fitness for duty to be provided to the District relative to the evaluation. All that is required is that Mr. Bugni obtain a psychiatric evaluation."

The Examiner should not consider the testimony of the Board members explaining their intent of the language of the September 25, 2002. First, the directive is unambiguous. Second, Simandl's letter confirms the unambiguous language of the directive. Given the clarity of the directive and the letter, it is unnecessary to resort to extrinsic evidence. Finally, it is impossible to discern the intent of the Board through the testimony of Board members since each Board member testified differently regarding the Board's intent.

Even assuming that the Board intended for Bugni to furnish it a copy of Dr. Galli's evaluation, the evidence irrefutably establishes that the District Administrator, the attorney for the Administration, the attorney for the Board and the Board members all received a copy of the evaluation. Six Board members testified that they had received a copy of the evaluation. O'Brien's December and January letters confirm that he and the District Administrator were provided copies of the evaluation. The evidence establishes that it was the District that distributed and subsequently retrieved the evaluations. The Respondent's argument that it had not been furnished with a copy of Dr. Galli's evaluation is frivolous since it did not produce one witness that testified they did not receive a copy of the report.

Mr. Bugni has completed all of the requirements of the September 25, 2002, directive. He has completed the psychological evaluation and has attended all training sessions specifically enumerated. Although Galli recommended therapy, it was extensive and would have been impossible to complete before January 21, 2003, which is when Bugni was expected to return to the classroom.

Given that Bugni is in full compliance with the Board's directive of September 25, 2002, his continued suspension from the classroom without pay is a violation of the parties' collective bargaining agreement and is a prohibited practice.

Respondent Initial Brief

The Complainant, on behalf of Mr. Bugni will argue two conflicting defenses. First, that he was under no obligation to provide a copy of Galli's report and second, that if he was obligated, he has complied. The Complainant is in error. Bugni knew that compliance with the Board's order required disclosure of the psychological evaluation and his failure to do so has resulted in his continuing suspension.

Implicit in any order to undergo a test or evaluation is the obligation of the employee to provide the results of the evaluation to the employer. Lacking the results, the evaluation is worthless. The Board of Education had concerns and therefore ordered Bugni to undergo a psychological evaluation with the purpose to assess the risk of returning Bugni to the classroom and to determine whether Bugni required additional therapy or training prior to his return.

The intent of the Board was to receive a copy of Dr. Galli's report and be able to act upon it. This was clearly communicated to Bugni in multiple correspondence sent by the Board's attorney, O'Brien, to Bugni and his legal counsel. Bugni was repeatedly advised of the Board's requirement that he submit a copy of the evaluation before his return to the classroom. Bugni signed a medical release that specifically stated Galli's written findings would be released to the Northland Pines School District. If he wasn't obligated to submit the evaluation to the Board, why would a release be necessary? The release was reviewed by the UniServ Director and WEAC legal counsel, who deemed it acceptable and directed him to sign. Bugni's signature on the release is definitive proof that he acquiesced to the release of the psychological evaluation.

All of the Board members testified that it would have made no sense for the Board to require Bugni to undergo an evaluation if it did not have access to the results. The amount of time that the Board of Education had to review Galli's evaluation before it was permanently withdrawn from their consideration was insufficient. Board members testified that they had questions and serious concerns regarding Galli's report. As a result of Bugni's demand for the return of all copies of the report, the Board was unable to clarify the extensive therapy recommendation and take action. It is disingenuous for Bugni to claim that he provided Dr. Galli's report to the Board.

Bugni has not complied with the Board's order and is not entitled to return to his former teaching position. As such, the Board has not committed a prohibited practice and the Complaint must be dismissed in its entirety.

Complainant's Reply Brief

Complainant first takes issue with the Respondent's statement of the facts. Bugni has neither refused to obey a clear directive of the Board of Education nor was he required to complete any additional therapy as recommended by the evaluating physician. Bugni did not collect the evaluations from the Board of Education following their very limited viewing of the report nor did Attorney Lucareli demand withdrawal of the evaluation from Board members. Respondent's inaccurate portrayal of the record is required to achieve the end result that they seek.

In response to the Respondent's argument that Bugni's signature on the medical release constituted acquiescence to its release to the Board, at the time Bugni signed the release he was unaware of O'Brien's letter to Galli dated October 14, 2002, seeking Galli's prediction of the

future. O'Brien "poisoned the well" when he sought Galli's assurance that the students "are in no danger from physical mishandling by Mr. Bugni, and that his teaching methods will not pose any threat of harm to students, whether physical or psychological." Galli was put in an untenable position and could not offer a guarantee with respect to future behavior. O'Brien's letter was designed to seize upon Galli's inability to provide this guarantee and thus, was an end-run to an indefinite suspension equating with termination that would never expire before Bugni reached retirement age or grew tired of pursuing reinstatement. At the time Bugni signed the release, he relied upon the Board's directive of September 25, 2002, and believed an objective evaluation was contemplated and it was only when Bugni and his representatives received a copy of Galli's evaluation that they learned they had been deceived.

Bugni did not have anything to do with the presentation and withdrawal of Galli's evaluation from the Board. Bugni did not know the date of nor was he present at the meeting when the report was received and retrieved from the Board and therefore the Board's assertion that it could no longer look at the evaluation is the Board's own doing and should not be blamed on Bugni.

The Respondent's argument that it was free to "clarify an ambiguity in its written decision, if deemed necessary" ignores the doctrine of promissory estoppel as defined by *TEFF V. UNITY HEALTH PLANS INS.*, 2003 WI APP 115, 666 N.W.2D 38, 02-1319 (Ct. APP. 2003) (CITING *HOFFMAN V RED OWL STORES INC.*, 26 WIS.2D 683, 698, 133 N.W.2D 267 (1964)) The Board's decision of September 25, 2002, constituted a promise to Bugni that if he complied with the requirements contained in the decision, he would be returned to the classroom. There is no question that the Board expected Bugni's compliance with its September 25 decision and the Board's unilaterally change to a significant term of the decision created an injustice and thus the initial order must be enforced.

Bugni has complied with every requirement of the Board's September 25, 2002 Decision and his continued suspension is a violation of the collective bargaining agreement and a prohibited practice. The Complainant respectfully requests that the District be ordered to reinstate Bugni and for such other relief as the Examiner deems just.

Respondent's Reply Brief

Respondent challenges the statement of the facts by the Complainant.

The Simandl letter of October 29, 2002, did not establish "what the board's intent was in their decision" because Simandl represented the Administration and not the School Board. Christensen testified that Simandl was not speaking on behalf of the Board and did not have the authority to do so. The letter never stated the intent of the Board nor purported to convey the Board's intent. Rather, it was Simandl's interpretation of the Board's decision.

Complainant's assertion that the medical release signed by Bugni only afforded Galli the authority to release copies of the Bugni evaluation is erroneous. The release authorized access of the evaluation to the "Northland Pines School District" and "any authorized representative of said District." Attorney O'Brien, members of the Board of Education, District Administrator Kunelius and Elementary Principal Duane Frey all qualified as representatives of the District and thus were entitled to access to the report. As to Complainant's challenge that Dr. Galli was the only individual that could physically release the report, there is no legal authority to support this proposition.

As the Hearing Examiner correctly ruled during the hearing, the validity of Galli's report and/or its contents are not before the Commission in this case, thus Complainant's challenge must be disregarded. If the Examiner delves into this issue, Galli's report specifically contemplated additional treatment for Bugni and Complainant's assertion that nothing further was recommended for Bugni is false.

Complainant has mischaracterized the testimony of witnesses Chuck Gilman and Amy Decker. Neither witness testified that the Board did not intend to receive a copy of Galli's evaluation.

The Board's Decision of September 25 is not a contract and therefore the Complainant's application of contract interpretation principles is inappropriate.

There is no legal authority to support Complainant's argument that the Board is bound by the four corners of the written decision Section 118.22(2) Wis. Stats., provides a school board the authority to discipline or discharge a teacher in its employ. *GORTNEY V. SCHOOL DISTRICT OF WEST SALEM*, 108 WIS.2D 167, 174 (1982). This statute neither requires that the discipline be issued in writing nor does it prohibit the school board from subsequently modifying or clarifying its initially issued discipline. Even assuming that the Board Decision was not clear, the Board is not obliged by its September 25 Decision and is free to clarify or modify its expectations for Bugni. No provision of the collective bargaining agreement supports the Complainant's position that the Board is bound by its September 25 Decision.

The Board's intent when it issued the September 25 Decision was to "ensure that Bugni engaged in all recommended treatment, was fit for duty, and no longer posed a threat to his students." This intent was testified to by Board President Christensen and members Carolyn Ritter, Jerry Sparks and Mike Sealander and was communicated to the Complainant in numerous correspondences. Implicit in the Decision was the expectation that Board members would be provided a copy of the psychological evaluation. Complainant's WEAC attorney and his UniServ Director understood the requirements of the medical release and fully understood that the release authorized the District to have access to Galli's report. The evidence supports that conclusion that the Board intended to receive and review Galli's evaluation and Complainant cannot credibly argue that furnishing Galli's report was not a requirement of the Board Decision.

Finally, the record does not support Complainant's assertion that he complied with the Board directive to submit a copy of Galli's report. Bugni testified that Lucareli's December 12 letter withdrew his consent for the Board to look at, consider, or use Galli's report. Bugni admitted that his rescission contravened the September 25 Decision and he cannot now claim he was in compliance. Because Bugni has not complied with the Board's September 25, 2002 Decision, he is not entitled to return to his former teaching position.

For all of the above reasons, Respondent respectfully requests the Wisconsin Employment Relations Commission dismiss the prohibited practice complaint in its entirety.

DISCUSSION

The Complainant alleges that the District violated Sec. 111.70(3)(a)1 and 5, Stats., when it continued Peter Bugni's suspension without pay on January 20, 2003. The Association has not alleged and the evidence is insufficient to establish an independent violation of Sec. 111.70(3)(a)1 and thus, that allegation is wholly derivative.

Sec. 111.70(3)(a)5, Stats., provides that it is a prohibited practice for a municipal employer:

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement . . .

If the District's conduct was contrary to the Agreement, then the Association has established a violation of Sec. 111.70(3)(a)5 and Sec. 111.70(3)(a)1, derivatively.

This is an alleged breach of a collective bargaining agreement case. The issue is whether the District violated the cause provision of the collective bargaining agreement when it concluded that Peter Bugni had failed to comply with the terms of the September 25 Decision of the Board of Education and therefore was not returned to the classroom on January 20, 2003.

Peter Bugni was disciplined on September 25, 2002. The attorney for the Board of Education, John O'Brien, memorialized the Board's disciplinary decision which was read verbally to the individuals present at the meeting and provided in written form to Bugni and his representatives. The Decision placed Bugni on suspension through the end of the first semester of the 2002-2003 school year provided he fulfilled the conditions enumerated in the Decision. These included: 1) training in perceptive communication, anger control and conflict management and conflict; 2) undergoing a psychological evaluation by a psychologist of the

Board's choosing; and 3) completion of any training recommended by the evaluation of the psychologist. Respondent did not allow Bugni to return to the classroom at the conclusion of the first semester because it concluded that he had not fulfilled the terms of the Board Decision. The Board's position in that regard is not supported by the evidence.

Respondent asserts that inherent in the September 25 was the obligation for Bugni to provide the Board a copy of the evaluation and he failed to do so. The Respondent is in error. The disciplinary Decision of the Board issued on September 25 was a final determination and does not specifically state that the Board of Education would receive a copy of the psychological evaluation. The Decision was a significant document, in term and content, to the Board and to Bugni. The Board, faced with a recommendation for termination from the Administration, met on multiple occasions, deliberated and ultimately over-ruled the recommendation of the Administration. It is reasonable to conclude that the Respondent, in drafting the decision, exercised due diligence and included all items to which it intended. Regardless of whether the Board members believed that the release of Bugni's evaluation from the psychologist was inherent in the Board's decision, it failed to specify that obligation. Employees are entitled to know, especially when their continued employment is at stake, what is expected of them.

Moreover, the record reflects that the Board's intent as communicated to Bugni and the Complainant did not include the expectation that Bugni supply a copy of the psychological evaluation. The Board's expectations of Bugni on September 25 were not only spelled out in the Decision, but also explained by O'Brien. Degner testified, without challenge, that he was told by O'Brien that Bugni need only see the psychologist and that a report or fitness for duty certification was not expected by the Board. This conclusion is supported by Simandl's letter of October 29, 2002. Respondent asserts that since it is O'Brien and not Simandl that has the authority to speak for the Board of Education the Examiner is required to dismiss Simandl's letter. The Respondent argues that the District Administrator and Board of Education are separate and distinct and that, in this instance, it is the Board that speaks on behalf of the District thus rendering Simandl's letter meaningless. Simandl's letter states that he consulted with O'Brien and that the content of the letter is intended to clarify all issues outstanding; including the very issues that Elguezabal and O'Brien had been working on. Under these circumstances, it was reasonable for the Complainant to conclude that Simandl was responding on behalf of Respondent and that the letter accurately represented its position. Given that the language of the Board Decision did not include the expectation that Bugni supply the Board with a copy of the psychological evaluation, the fact that O'Brien failed to communicate such an expectation during his conversation with Degner and the important letter from Simandl which specifically stated a report from the psychologist was not an expectation of the Board, I conclude that Bugni was not expected to submit a copy of the psychological evaluation to the Board of Education.

The Respondent next asserts that Bugni failed to submit a copy of Galli's evaluation to the Board and further, that submission was a prerequisite to his return to the classroom. As previously addressed, submission of the evaluation was not a prerequisite to Bugni's return to

the classroom, but assuming *arguendo* that it was, Bugni provided Respondent with a copy of the evaluation. Six Board of Education members, Christensen, Sealander, Sparks, Ritter, Decker and Gilman testified that they had seen and had the opportunity to review the psychological evaluation. Kunelius received a copy of the document on or about December 5, 2002, and was in possession of the document until approximately January 16, 2003. O'Brien, the Board's attorney, was in possession of the document and was explicitly granted permission by the Complainant on December 12, 2002 to review the document and provide the Board "appropriate counsel" regarding its content. There is no question that Board members, administration and legal counsel received and reviewed Galli's evaluation.

Finally, Respondent asserts that it was the intent of the Board to receive, review and be able to act on the psychologist's report to ensure that it was appropriate for Bugni to return to the classroom. Respondent is arguing that it expected Bugni to demonstrate that he was fit for duty. The September 25 Decision did not contain a fitness for duty component and Simandl's October 29 letter specifically stated that fitness for duty was not a component of the Board decision. The Board's failure to include the requirement that it receive a copy of the evaluation is persuasive evidence that such a requirement was not intended by the Board when it issued the September 25 Decision. In that context, the Examiner finds unpersuasive O'Brien's assertion to Lucareli on January 16, 2003, that the Board's September 25 Decision had all along required Bugni to provide evidence of his fitness to return to work. The Board's refusal to return Bugni to work on January 20, 2003, was arbitrary and capricious and violative of the labor agreement's cause standard and Secs. 111.70(3)(a)(5) and (1), Stats.

However, the Board on May 12, 2003, directed Bugni to provide evidence that he was fit to return to the classroom. This request was independent of the September 25 Decision. It is well within an employer's management authority, unless restricted by the labor agreement, to require an employee to complete an physical examination so long as that right is "reasonably exercised under the proper circumstances." Elkouri and Elkouri, How Arbitration Works, 6th Edition, p. 825 (2003). Because the parties' agreement does not specifically provide otherwise and given the content of Galli's evaluation and the District's legitimate and specific interests at stake in this case, it was reasonable for the District to condition its reinstatement of Bungi, on and after May 12, 2003, on Bugni providing evidence of his fitness to return to the classroom. Bugni has not submitted any such evidence to the District to date.

Remedy

In the foregoing circumstances, the Examiner finds it appropriate, in addition to a conventional cease and desist order, to order the Respondent to pay Bugni back pay with interest for the period January 20, 2003, through May 12, 2003. However, Bugni's failure to comply with the District's reasonable May 12, 2003 request for evidence of fitness tolls his right to relief in the forms of immediate reinstatement and/or backpay and interest for the time

period after May 12, 2003. Attorney fees and costs are remedies limited to extraordinary situations and this case does not rise to such a level and Complainant's request is therefore denied.

This decision solely addresses the Respondent's failure to allow Bugni to return to the classroom on January 20, 2003. It does not address the legitimacy of the Board's decision to discipline Bugni on September 25 nor the validity of Galli's report. Consistent with this limited authority, I specifically do not address Bugni's rights subsequent to his non-compliance with the District's May 12, 2003 fitness for duty request including, but not limited to, his employment status and his rights should disputes arise if and when he submits the requested fitness for duty certification.

In conclusion, the Association has proven by a clear and satisfactory preponderance of the evidence that the District has violated Sec. 111.70(3)(a)5 and Sec. 111.70(3)(a)1, Stats., derivatively, by continuing the suspension without pay for of Peter Bugni for the time period of January 20, 2003, through May 12, 2003. Subsequent to May 13, 2003, Mr. Bugni failed to provide fitness for duty certification as requested by the District thereby limiting his remedy.

Dated at Rhinelander, Wisconsin this 30th day of August, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/

Lauri A. Millot, Examiner