

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**RACINE EDUCATION ASSOCIATION**, Complainant,

vs.

**RACINE UNIFIED SCHOOL DISTRICT  
AND THE BOARD OF EDUCATION OF THE  
RACINE UNIFIED SCHOOL DISTRICT**, Respondent.

Case 212  
No. 62190  
MP-3912

**Decision No. 30613-A**

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Appearances:

**Robert K. Weber**, Weber & Cafferty, S.C., Attorneys at Law, 704 Park Avenue, Racine, Wisconsin 53403, appearing on behalf of the Racine Education Association, which is referred to below as the Association.

**Jack D. Walker**, Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, Ten East Doty Street, Suite 900, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of the Racine Unified School District and the Board of Education of the Racine Unified School District, which is referred to below as the District.

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

On March 7, 2003, the Association filed a complaint of prohibited practices alleging that the District had violated Secs. 111.70(3)(a)1 and 3, Stats., by acts based on its hostility toward Peter Knotek's exercise of lawful, concerted activity protected by Sec. 111.70(2), Stats. After informal attempts to resolve the matter proved unsuccessful, the Commission, on May 12, 2003, appointed Richard B. McLaughlin, a member of its staff, to act as Examiner. Hearing was set for July 22, then postponed to August 5, 2003. The District filed its answer to the complaint on June 23, and the hearing was conducted in Racine, Wisconsin on August 5,

No. 30613-A

2003. Lynn M. Bayer filed a transcript of the hearing with the Commission on August 18, 2003. The Association filed a brief and a reply brief by October 7, 2003. The District filed a brief on September 22, 2003. In a letter to the parties dated January 26, 2004, after noting the untimeliness of my review of the record, I asked the parties to formally note if the record should contain a reply brief from the District. In a letter filed with the Commission on January 28, 2004, the District confirmed its waiver of a reply brief.

### **FINDINGS OF FACT**

1. The Association is a labor organization, which maintains its principal offices at 1201 West Boulevard, Racine, Wisconsin 53405. The Association serves as the exclusive collective bargaining representative for a bargaining unit of certain certified teaching personnel employed by the District.

2. The District is a municipal employer, which maintains its principal offices at 2220 Northwestern Avenue, Racine, Wisconsin, 53404. Special education services to students with learning disabilities, including speech and language impairments, are among the educational services provided by the District. Since August of 2001, Rene Pfaller has served as the District's Director of Special Education. As of the date of hearing, the District had 3,582 special education students and roughly 400 special education staff. Among that staff are roughly 62 Speech Pathologists, who provide therapy and diagnostic services for students with speech and language impairments.

3. The District maintains policies governing certain employment matters, including a policy numbered 4133.1a, and one numbered 4154.4. 4133.1a states, "An employee desiring to attend conferences/conventions/meetings/seminars must receive prior approval from his/her immediate supervisor." 4151.4a states:

Absence to attend school conventions and other educational meetings may be permitted without salary deductions, provided they are approved prior to the meeting by the Superintendent.

Reimbursement of expenses incurred in attending conventions or educational meetings can only be made when the person is officially representing the District and the expense has previously been budgeted in accordance with procedures approved by the Board.

The District and the Association are parties to a labor agreement covering the bargaining unit noted in Finding of Fact 1. The agreement states its effective term as "July 1, 2001 through June 30, 2003." Section 22.1.6 of the agreement, entitled "Educational Conferences", states:

Absence to attend educational conferences and/or meetings will be permitted, pursuant to existing Board policy.

Peter Knotek is a Speech Pathologist, and a member of the bargaining unit covered by the labor agreement.

4. In the 2001-02 and 2002-2003 school years, Knotek worked out of the District's Wind Point Elementary School. Irene Nahabedian was Wind Point's Principal. In an e-mail to Nahabedian dated January 24, 2003, Knotek stated:

I hope to attend the Preconvention Workshop of the Wisconsin Speech-Language Pathology and Audiology Association 2003 Convention to be held in Madison on March 13, 2003. The workshop is entitled "Communication Curriculum Collaboration: A Framework for School-Based Services." Please consider giving your approval of my attendance at this workshop.

Also, I would appreciate it if you would forward the attached form to Renee Pfaller . . . so that she may consider approving education release time for Thursday, March 13, 2003 and my funding request. . . .

The Wisconsin Speech-Language Pathology and Audiology Association Annual Convention, referred to below as the Convention, took place, in 2003, from March 13 through March 15. The workshop Knotek sought approval for took place on March 13. Nahabedian signed the "Principal's Approval" portion of the form on January 24, 2003. Pfaller denied the request, advising Nahabedian of the denial in an e-mail dated February 7, 2003. Pfaller mailed a copy of the form noting the denial to Nahabedian and to Knotek. In an e-mail to Pfaller dated February 11, Knotek asked that Pfaller "provide for me the reason you have denied this request." Pfaller responded in an e-mail to Knotek dated February 14, 2003, which states:

In response to your question, I noticed that you have been absent often for non-district related things and I am concerned that you may not have the time to do all of your work in a timely fashion. In weighing the value of the conference as compared to the value of being able to handle your cases, I decided the latter was more valuable to the district.

Thank you for your patience and commitment to the students you serve.

There is a market shortage of Speech Pathologists. The District has difficulty recruiting them, and has difficulty providing substitute Speech Pathologists for absences other than those which prompt long-term leaves of absence such as maternity. The District typically cannot provide a substitute Speech Pathologist for absences of a few days or less.

5. At least twelve District-employed instructors (Peter Knotek; Laura Lock; Becky DeRosia; Sarai Wood; Aimee Jadrnicek; Jill Fetzer; Kelli Viertel; Katherine Nelson; Sarah Myers; Judy McCarthy; Mari Seefeldt; Pamela Danby; Kathy Hesse) applied for permission to attend part or all of the 2003 Convention. In each of the cases in which the District approved Convention attendance, the building principal initially approved the request. With regard to Hesse's request, the Building Principal was the sole supervisory approval. With regard to the rest, Pfaller reviewed each to assess the amount requested and then contacted the District's Payroll Department to check on the absence record of the requesting instructor. She immediately approved all but three of the requests to attend the 2003 conference. Eight of the requests she approved were for more than one day of the conference. Pfaller returned Seefeldt's and Danby's requests so the reimbursement request could be trimmed. Seefeldt amended her request from \$831 to \$515, and Danby amended hers from \$654 to \$560. Pfaller approved the amended requests. Each of the forms for the remaining requests that Pfaller approved includes an entry for an estimation of costs to be reimbursed. Some of the requests listed only registration costs and some added lodging costs. The amounts actually reimbursed typically exceeded the estimates, which did not typically attempt to estimate costs other than registration or lodging. Knotek's request was for "\$310 (Approximately)." The other requests range from "\$140 plus mileage" to "285." Knotek has attended the annual Convention in 1999, 2000, 2001 and 2002. In each case, the Wind Point Elementary Principal and the Director of Special Education approved his attendance. Knotek's requested reimbursement for these Conventions ranges from \$130 to \$200. The approved amounts range from \$100 to \$180. Pfaller attended the 2002, but not the 2003 Convention. To her experience, the Convention afforded good training value.

6. The District has employed Knotek as a Speech Pathologist for fifteen years. Knotek has served on the Association's Executive Committee as a representative for the elementary level special education instructors and has served as a member of the Association's negotiating team. He has been an Executive Committee member since 1994 and a member of the negotiating team since 1999. Dennis Wiser is the Association's Executive Director. He has asked Knotek to assist and to advise him regarding special education issues, including District compliance with State and Federal law governing special education students and teachers.

7. An Individual Education Plans (IEP) plays a legally significant role in the provision of special education services under State and Federal Law. At the elementary education level, an IEP Team includes a special education student's parents, their special education teacher, their general education teacher, and an administrator of a local educational agency (LEA), typically a building principal. The special education teacher acts as an expert in their field to identify the needs of a student and to recommend appropriate services for the IEP. The LEA representative must sign an IEP before it can be implemented.

8. In April of 2000, Knotek assisted the then incumbent Executive Director of the Association in filing a complaint with the Department of Public Instruction for the State of Wisconsin (DPI). The complaint asserts the District committed violations of state and federal special education law. Knotek inventoried special education instructor concerns, and assisted the Association in voicing those concerns to the District. He assisted in drafting and documenting the complaint to DPI. Association concerns underlying this complaint also prompted, in October of 2001, its filing of a class action grievance. The complaint, captioned by DPI as Case No. 00-017, produced a decision, dated November 15, 2000. The DPI decision treated the complaint to raise the following five issues:

1. Did IEP teams determine the special education services to include in four children's 1999-2000 . . . (IEPs) based upon the resources available at the applicable school building, rather than upon each child's needs?
2. During the 1999-2000 school year, did the district improperly subject IEP teams' placement determinations for ten children to administrative approval?
3. Did special education supervisors direct staff to alter the content of the same ten students IEPs, including IEP cover sheets and IEP meeting invitations after IEP team meetings were completed?
4. With regard to those same ten children, did the district fail to provide the parents of each child with notice of placement and a copy of the child's IEP prior to implementation of the IEP and placement?
5. During the 1999-2000 school year, did the district fail to provide 21 children with disabilities with the amount and frequency of special education services specified in each child's IEP?

The decision concluded that the complaint had been substantiated, in varying degrees, regarding each of the five issues. Regarding Issue 5, the decision states:

The district acknowledged that it failed to provide the amount and frequency of S/L services to four children at Wind Point Elementary, as required by their 1999-2000 IEPs. Based upon the evidence, the department concludes that four other Wind Point students and three children at Olympia Brown Elementary also did not receive the amount and frequency of S/L services required by their 1999-2000 IEPs. . . .

The decision required the District to submit a Corrective Action Plan (CAP) to ensure compliance with DPI directives. In a letter dated May 11, 2001, Wisner stated concern that the District was not complying with its CAP regarding compensatory services to seven special education students at Wind Point Elementary School. In a letter dated July 13, 2001, to the District's then incumbent District Administrator and the Association's then incumbent

Executive Director, the DPI sought documentation concerning these compensatory services. District compliance with the CAP remained a point of contention between the Association and the District, and was an ongoing source of discussion involving Wisner, Knotek, Pfaller, Nahabedian, as well as other District special education instructors and administrators.

9. In February of 2002, the Association filed a complaint that the DPI ultimately captioned as Case 02-024. Knotek assisted the Association with this complaint as he did regarding the complaint noted in Finding of Fact 8. Throughout the Spring of 2002, the Association compiled documentation and supplied it to DPI, urging in a letter, dated March 28, 2002 from Wisner to DPI, that the complaint rested on “systemic violations of law that have adversely affected students across the school district during the 2000-01 and 2001-02 school years.” In April of 2002, DPI sought certain documentation from the District regarding the complaint. Pfaller responded in a cover letter dated July 2, 2002, which was supplemented with documentation authored by Kathleen Herbst, a Special Education Supervisor. The cover letter states:

...

Let me begin by saying that the enclosed documents demonstrate that these issues and cases outlined in this complaint are emphatically frivolous, false and unfounded! Because of this I am surprised at the amount of energy, time and dollars spent by our team having to clarify to the DPI what the facts are. The magnitude of work that this complaint has generated has impacted our department’s ability to respond in a timely manner. I would like to make it very clear that this complaint has proven to be a waste of our time and is impacting our ability to service children.

...

The documentation provided by Herbst regarding students at Wind Point Elementary includes the following statements:

The speech pathologist (PK), the originator of this entire complaint, is using the IEP process and the DPI complaint process in an attempt to add additional speech therapy staff at his school. He develops IEPs that call for significant amounts of one-on-one therapy time for students and then argues that he cannot provide the service needed.

...

We suspect that PK has been deliberately manipulating caseload delivery service delivery. By doing so, PK has created a situation in which he is unable to successfully fulfill the service time indicated on the IEP, thus causing it to appear that an additional speech pathologist is necessary at Wind Point School. Requirements for services are continuously reviewed by the Special Education Department, and it has/had been determined that it is/was not necessary for there to be more than one therapist at the Wind Point site. Others handle similar scheduling problems by considering additional creative grouping or meeting the students' needs in a more inclusive classroom setting.

PK denotes Knotek. Carolyn Stanford Taylor, an Assistant State Superintendent, authored the DPI decision in Case 02-024, which is dated January 22, 2003. Prior to a statement of the issues, the decision states:

The department rarely receives complaints from teacher unions. However, this is the third complaint filed by the REA since 1999. The issues in this complaint have been addressed in the previous complaints. In the previous investigations, the department found that the district did not follow procedural requirements in all instances reviewed. While the issues in this complaint clearly relate to procedural requirements in state and federal special education law, they also reflect ongoing communication and policy issues between school administration and staff.

During much of the time period covered by the three complaints filed by the union, the department has been engaged in onsite compliance review activities in the district. The district was directed to take corrective measures as a consequence of these review activities. The issues in this complaint have close parallels to some of the review findings and corrective actions. Further, the department consolidated its oversight of corrective measures required through the previous complaint investigation with the ongoing compliance review activities in the district. The department's review of follow-up activities, including as recently as early December 2002, have satisfied department staff that the district has made progress in addressing the compliance concerns identified during compliance review. The district has a number of new administrators, all of whom started their employment with the district at the beginning of the time period covered by this complaint. The department has seen considerable progress under the new administration. Much of the action being reviewed in this complaint took place prior to completion of the compliance review corrective actions, and the department expects that the corrective action already has resolved, or at least improved, areas of concern related to this complaint.

The decision interpreted the complaint to raise the following issues:

- Did the district, during the 2001-2002 school year, provide specific students with the amount and frequency of special education services specified in each child's . . . (IEP)?
- Did IEP teams, during the 2001-2002 school year, determine the special education services to be included in specified students' IEPs based upon the resources available at the applicable school building rather than upon each child's needs?
- Did central office administrators make unilateral placement determinations for specified students and/or improperly subject IEP teams' placement determinations for administrative approval during the 2001-2002 school year?

The decision concluded that the District had to initiate certain corrective measures.

10. Knotek viewed the complaint in Case 02-024, as it concerned Wind Point Elementary School, to reflect that the District assigned two speech pathologists to the school for the 2000-01 school year, but assigned one for the 2001-02 school year. He believed that the school's caseload was too great to permit the appropriate implementation of IEPs with one speech pathologist. The District added a Speech Pathologist to the Wind Point Elementary School in September of the 2002-03 school year. Knotek played a role in the planning process that preceded this assignment.

11. In September of 2002, Knotek became an elected member of the Board of Directors of the Special Education Council for the Racine Unified School District, referred to below as the Council. A group that included District administrators, instructors and parents of special education students formed the Council roughly five years ago. The District does not directly fund the Council. The Council does receive federal funds under a flow-through grant to the District under the Individuals With Disabilities Education Act (IDEA). The Council and two other groups serve as parent input groups under IDEA. The Council treats the District's Special Education Director as an advisory member of its Board. Council members include parents of special education students, teachers and administrators of the District's special education programs and representatives of community organizations with an interest in children with disabilities. Council by-laws state that its purposes include the promotion of parental involvement in the education of students with disabilities; the facilitation of communication between the District, including administrators and instructors, and parents of students with disabilities; and the obtaining of materials and resources for parents and teachers to promote the education of students with disabilities. The Council has offered conferences for parents, teachers and others interested in special education, and has advised or advocated positions



before the District Board concerning special education policy. Knotek, as an Association representative, made a presentation to the Council. Pfaller attended the meeting at which the presentation took place.

12. In an e-mail directed to Pfaller dated December 2, 2002, Knotek stated his belief that information presented by Pfaller at a Special Education Council meeting and by another administrator at a Wind Point staff meeting presented a description of “Least Restrictive Environment” (LRE) that was inconsistent with federal law. Knotek directed the e-mail to Pfaller, and included as a “cc” , a number of recipients including Nahabedian and Association represented instructors. The e-mail states:

It appears to me that information regarding LRE presented at the aforementioned meetings has not been properly grounded in special education law and as such will likely yield faulty IEP team decisions. The notion that every child’s LRE is the general education classroom is a “one size fits all” approach.

Please inform me as to whether you believe the LRE definition included in the 11-18 and 11-10 presentations should be refined so as to be consistent with applicable law. If my recollection of your presentation and/or my understanding of LRE is incorrect, I’d appreciate your thoughts on the subject. Thanks in advance for your timely response.

Pfaller did not respond, and Knotek reissued the e-mail on December 9, adding Ann Laing, as a “cc”. Laing was then the District’s Assistant Superintendent For Student Services. Pfaller did not respond, and Knotek reissued it on December 16, adding Thomas Hicks, the District Administrator of the District, and Jetha Lawson, the District’s Assistant Superintendent, to the “cc” list. Pfaller responded in an e-mail dated December 18, which states:

I have done some investigation on your question. I now feel that we need to meet to review what you heard at the November 19<sup>th</sup> . . . presentation, as I was not present to hear what you heard. I am encouraging you to set up a meeting with my secretary . . . between 8:00 to 8:45 a.m. or any time after 4:15. During holiday break, I will be available any day, all day.

Thanks for your patience.

Pfaller included Laing, but not Hicks or Lawson, in her “cc” list. Knotek responded in an e-mail dated December 19, which states, “I am most interested in your written response” and that should Pfaller “believe it is necessary to meet” he and other Association represented instructors would be “happy to do so.” His response included Laing, Lawson and Hicks on the

“cc” list. In a response e-mail dated December 20, Pfaller continued to offer to meet with Knotek at her office. The e-mail includes the same “cc” list as her e-mail of December 18. Knotek responded with an e-mail, dated January 7, 2003. That e-mail, which he directed to Ann Laing, and which includes Pfaller, Hicks and Lawson in the “cc” list, states:

Recently I have been in contact with Renee Pfaller regarding a concern about definitions given LRE in the school district. Joan Brown, Craig Matheus, and I share this concern and wish to communicate with an appropriate district administrator who can address the relevant issues. On December 20, 2002 Ms. Pfaller indicated to me that she was offering to meet only with me and discuss what I heard at a meeting with Sandy Riekoff.

Joan, Craig and I believe that LRE issues are of importance to both regular education and special education teachers at Wind Point and across the school district. Therefore, if a meeting is necessary to address the serious concern I have raised regarding LRE definitions, the meeting should include all of us at a mutually agreed upon time and place. I share with you an interest in supporting partnership between special and regular education professionals. Please assist us in determining whether the LRE definition included in Ms. Pfaller’s 11-18-02 presentation and Ms. Riekoff’s 11-19-02 presentation should be refined so as to be consistent with applicable law. We look forward to your response.

Laing responded in an e-mail to Knotek dated January 7, 2003, which states:

Renee Pfaller is the appropriate district administrator with whom you should speak. I know that she has agreed to meet with you; therefore, you need to talk to her.

Laing’s e-mail did not include any entries as a “cc”. Knotek responded in an e-mail to Laing dated January 8, 2003, which states:

Thanks for your response. Joan Brown and Craig Matheus, regular education teachers at Wind Point, share my concern. We wish to meet as a group because this is a matter that affects both special educators and regular educators. Ms. Pfaller has indicated she will meet only with me.

- 1) With whom can Craig, Joan and I meet as a group to discuss the need for a lawful district wide definition of LRE?
- 2) Do you concur with the DPI perspective on the definition of LRE as specified in my December 9, 2002 email?

Laing did not respond, and the meeting sought by Knotek did not take place.

13. Knotek used 1.5 days of sick leave in the 2000-01 school year; 2.5 days of sick leave in the 2001-02 school year and 2.5 days of sick leave in the 2002-03 school year. As of February of 2003 he had not used any sick leave. For the 2000-01 school year, Knotek used 21 Association Business leave days. He used 10.5 days for the 2001-02 school year and 13.5 for the 2002-03 school year. Such leave includes negotiations sessions, study of special education instructor concerns and professional conferences related to special education issues. Knotek or the Association sought and received the approval of district administrators prior to Knotek's use of Association Business Leave. At the time of reviewing Knotek's request to attend the 2003 Convention, Pfaller did not determine whether or not other administrators had excused Knotek's absences. She did not consider absences for Association Business leave district related unless it involved attendance at a professional conference. At the time of reviewing his request to attend the 2003 Convention, Pfaller was not aware of any work on which Knotek was behind. Pfaller believes Knotek's work for the Association is a conflict of interest with his service as a Council Board member. She viewed his presentation to the Council on behalf of the Association as an example of that conflict of interest. As a result of this view, she has limited her own contact with the Council. During the processing of the DPI complaints noted in Findings of Fact 8 and 9, Pfaller and other special education supervisors compared the student contact time of District Speech Pathologists. They determined Knotek averaged perhaps thirty to sixty minutes more per student than other pathologists. Nahabedian's formal evaluation, in June of 2002, of Knotek's teaching performance rated him at the highest performance level for each of the eleven criteria listed on the evaluation form. Sometime in the fall of 2001, Nahabedian discussed with Frank Johnson, the District's Executive Director of Employee Relations Council, the propriety of disciplining Knotek for what she viewed as insubordinate acts. After a grievance arbitration hearing on November 12, 2001, Johnson alerted Wisner to the discipline then under discussion among administrators regarding Knotek. Pfaller did not review his evaluations at the time she reviewed his request to attend the 2003 Convention. Pfaller did not participate in discussions concerning possible discipline of Knotek, but has conferred with other administrators concerning the possibility of bringing in outside experts to evaluate Knotek's IEP recommendations.

14. Knotek's work on behalf of the Association regarding the processing of the DPI complaints noted in Findings of Fact 8 and 9 and the related grievance is lawful, concerted activity. Pfaller's denial of Knotek's request to attend the 2003 Convention was based, at least in part, on hostility toward this lawful, concerted activity.

**CONCLUSIONS OF LAW**

1. The Association is a “Labor organization” within the meaning of Sec. 111.70(1)(h), Stats.
2. Knotek is a “Municipal employee” within the meaning of Sec. 111.70(1)(i), Stats.
3. The District is a “Municipal employer” within the meaning of Sec. 111.70(1)(j), Stats.
4. Pfaller’s denial of Knotek’s request to attend the 2003 Convention was based, at least in part, on Knotek’s exercise of lawful, concerted activity within the meaning of Sec. 111.70(2), Stats. This constitutes a District violation of Secs. 111.70(3)(a)1 and 3, Stats.

**ORDER**

The District, its officers and agents, shall immediately:

- (a) Cease and desist from administering terms or conditions of employment, including the administration of policies governing attendance of special education teachers at educational conventions, based even in part on hostility toward the exercise of employee rights established in Sec. 111.70(2), Stats.
- (b) Take the following affirmative action, which the Examiner finds will effect the purposes of the Municipal Employment Relations Act:
  - (1) Pay Knotek \$310.00, plus interest at the rate of twelve percent (12%) *per annum* on this amount from March 13, 2003, the date of the workshop Knotek sought approval to attend, until the date the District makes payment.
  - (2) Notify instructors at Wind Point Elementary School in the bargaining unit represented by the Association by posting in conspicuous places where these employees work, copies of the Notice attached to this Order as Appendix A. The Notice shall be signed by an official of the District and shall remain posted for 30 days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

- (3) Notify the Wisconsin Employment Relations Commission in writing within 20 days of the date of this Order as to what steps have been taken to comply with it.

Dated at Madison, Wisconsin this 9th day of February, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Examiner

**APPENDIX A**

**NOTICE TO EMPLOYEES**

In response to an Order of the Wisconsin Employment Relations Commission and in order to remedy District violation of Sections 111.70(3)(a)1 and 3 of the Wisconsin Statutes, the Racine Unified School District and the Board of Education of the Racine Unified School District hereby notify our employees that:

1. The District will cease and desist from administering terms or conditions of employment, including the administration of policies governing attendance of special education teachers at educational conventions, based even in part on hostility toward the exercise of employee rights established in Section 111.70(2) of the Wisconsin Statutes.

2. The District will make Peter Knotek whole for the opportunity denied him to attend a workshop of the 2003 Annual Convention of the Wisconsin Speech-Language Pathology and Audiology Association.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2004

On Behalf Of The Racine Unified School District and the Board of Education of the Racine  
Unified School District

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

**RACINE UNIFIED SCHOOL DISTRICT**

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

**THE PARTIES' POSITIONS**

**The Association's Brief**

After a review of the record, the Association contends that the legal standards concerning the application of Sec. 111.70(3)(a)3, Stats., are "well-established" and consist of four elements. A review of the record establishes that Knotek's "activities on behalf of the REA are many and varied" and that they constitute "what is considered to be 'protected' activities – representing and advocating the interests . . . of the Association's special education teachers in a variety of forums."

The record also establishes that the District "was well aware of Mr. Knotek's protected activities." Pfaller's concern with "what she perceives as Knotek's unspecified conflict of interest" in serving on the Council's Board reflects this. Similarly revealing is the District's avowed interest in considering Knotek's dismissal in November of 2001. The District knew of Knotek's involvement in DPI complaint cases 00-017 and 02-024.

The District's hostility to Knotek's exercise of concerted activities is evident. Pfaller's testimony establishes the point. Contrary to her and Johnson's avowed testimony, there is no evidence that any of Knotek's supervisors viewed him as anything but an excellent employee. His evaluation confirms the point, and the absence of testimony from his direct supervisor is significant. A review of the DPI complaints establishes "per se evidence of Respondent's hostility toward Mr. Knotek's union activities." Pfaller's hostility is evident, as is the fact that the complaints advanced the collective interests of Association represented employees.

Against this background, the District's refusal to permit Knotek to attend the March 13 Workshop was motivated, at least in part, by the District's hostility toward Knotek's exercise of protected activities. That this conclusion must be based on inferences resting on circumstantial evidence is necessary, and flows directly from Commission case law. Pfaller's assertion that Knotek was absent too often for "non-District related things" has no evidentiary support. Knotek had an excellent attendance record at the time of his request. His record was superior to that of instructors who were permitted to attend the conference. Undisputed evidence establishes that Knotek processed student cases in numbers consistent with prior years. The most damning piece of evidence is, however, Pfaller's approval of every other speech therapist's request to attend the workshop. Significantly, "none of the other therapists held elective position within" the Association. The denial "was a clear deviation from well-established practice" and from Pfaller's personally stated support for professional conferences.

None of the District's asserted justifications for the refusal have evidentiary support. Knotek's past attendance had no bearing on the March Workshop. That Board policy grants Pfaller the authority to deny a request falls short of establishing authority to discriminate.

The Association concludes that the evidence establishes a violation of Secs. 111.70(3)(a)1 and 3, Stats.

### **The District's Brief**

After a review of the record and an overview of the factual bases for the Association's assertions, the District contends that the "Union's evidence did not prove the claim." The claim is that "the Pfaller decision was a pretext, and that the real reason" to deny approval to attend the March Workshop "was to retaliate for his protected activity."

Under Commission case law, the existence of grievances, prohibited practices or DPI complaints "does not establish that a District has anti-Union animus." Just as the existence of "numerous and nearly continuous" complaints by the Association in the past could not establish District animus, a line of complaints cannot "bootstrap Knotek into a showing that either the District or Renee Pfaller have anti-Union animus." Significantly, the Association's establishment of a "litany of complaints and other collective activity . . . cannot establish even an intemperate response by a supervisor." That the District responded affirmatively to a number of Knotek's complaints, including a reimbursement request and increased staffing of specialists at the school to which he was assigned, undercuts any conclusion that the District acted toward him in hostility to his exercise of concerted activity.

Even if Pfaller's decision was subjected to "special scrutiny, it passes muster." Knotek, on average, takes more time per student than other pathologists, and has complained about his workload. He attended the WSHA convention in the past. There is a known and persistent shortage of speech specialists compounded by the "complete inability to use substitutes." IEP's "must be performed . . . they have the force of law." Against this background "there is no pretext", since the decision was made on its merits.

In the alternative, the District urges, "the WSHA convention was not a benefit or working condition." Thus, the District's assignment of his regular workload produced "no loss of benefit or change in working conditions." Beyond this, the Association's attempt to characterize all of Knotek's activities as protected activity is unpersuasive, and constitutes bad policy. The attempt to attend the convention was "to improve his work in the District – not to help himself, or other employees." Beyond this, to conclude "an employee can convert any professional convention into protected activity" would do no more than create an improper incentive for employees to create a record of Union activity.



The District concludes that the “complaint should be dismissed.”

### **The Association’s Reply Brief**

The Association contends that the District’s arguments are “long on unsubstantiated invective and short on substance.” More specifically, the Association contends that the evidence will not support a conclusion that Knotek was “frequently” absent for non-District purposes. The proven absences were District approved, and Pfaller “never attempted to find out if those absences were for district or non-district related reasons.” The record fails to establish that Knotek complained during the 2002-2003 school year “that he could not get his work done.” Pfaller was, in any event, unaware of any work Knotek was behind on “at the time she rejected his application.”

The WSHA convention is, in any event, “an annual professional convention, not a one-time workshop.” Knotek’s past attendance has no bearing on the request at issue here. The record fails to establish “one legitimate reason” for the denial. The inference of pretext is appropriate under the precedent cited by the District.

The District’s characterization of the factual bases for the Association’s complaint itself lacks factual support. Knotek’s involvement on the Council poses no evident conflict of interest. Assertion that Knotek is a malcontent ignores the quality of his evaluations. Nor is it evident that Pfaller responds courteously to Knotek. Assertions that he manipulates his caseload ignore that his “directing principal has to sign off on it.” Nor can Pfaller’s response to the DPI complaints be viewed as anything but intemperate.

## **DISCUSSION**

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

Sec. 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to “encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment.” To prove a violation of this section the Association must, by a clear and satisfactory preponderance of the evidence [see Sec. 111.07(3), Stats., made applicable by Sec. 111.70(4)(a), Stats.], establish that: (1) Knotek was engaged in activity protected by Sec. 111.70(2), Stats.; (2) the District was aware of this activity; (3) the District was hostile to the activity; and (4) the District acted toward Complainant, at least in part, based upon hostility to Knotek’s exercise of protected activity. *MUSKEGO-NORWAY C.S.J.S.D. NO. 9 v. WERB*, 35 WIS.2D 540 (1967), as discussed in *EMPLOYMENT RELATIONS DEPT. v. WERC*, 122 WIS.2D 132 (1985).

The first element demands a determination whether Knotek engaged in protected activity. The Association points to a series of actions that culminate in Pfaller's denial of permission for Knotek to attend the 2003 Convention. The Conclusions of Law stated above focus on the preparation and processing of DPI complaint 00-017 and 02-024. As the Commission stated in CITY OF LACROSSE, DEC. NO. 17084-D (WERC, 10/83) AT 4-5, AFF'D, CIR. CT. CASE NO.-83-CV 821 (1985):

The MERA does not refer to "protected" activities. Sec. 111.70(2) of the MERA identifies certain rights of municipal employees . . . "to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." The rights thus identified are enforced by Secs. 111.70(3) and 111.70(4) of MERA. Protected activity is, then, a shorthand reference to those lawful and concerted acts identified and enforced by the MERA.

The Commission in LACROSSE, as cited more recently in VILLAGE OF STURTEVANT ET. AL., DEC. NO. 30378-B (WERC, 11/03) AT 24, stated the determination of concerted activity thus:

Analysis of what a concerted act is demands an examination of the facts of each case to determine whether employee behavior involved should be afforded the protection of Sec. 111.70(2) of MERA. At root, this determination demands an evaluation of whether the behavior involved manifests and furthers purely individual or collective concern.

The processing of a complaint of a violation of federal or state law has been found to constitute lawful, concerted activity, see MANITOWOC PUBLIC SCHOOL DISTRICT, DEC. NO. 30276-A, (NIELSEN, 2/02), *aff'd. by operation of law*, DEC. NO. 30276-B (WERC, 3/02); and CITY OF MADISON ET. AL., DEC. NO. 30028-A (BURNS, 3/02), *aff'd by operation of law*, DEC. NO. 30028-B (WERC, 3/02). Knotek assisted the Association's Executive Director in preparing each DPI complaint, including inventorying special education instructors' concerns and communicating them to the DPI, the Association and the District. Thus, the processing of the matters is concerted activity. That the dispute underlying the complaints became the subject of a class action grievance underscores this conclusion, since the Commission has found the processing of a grievance to be lawful, concerted activity, see VILLAGE OF WEST MILWAUKEE ET. AL, DEC. NO. 9845-B (WERC, 10/71). In MONONA GROVE SCHOOL DISTRICT ET. AL, DEC. NO. 20700-G (WERC, 10/86) AT 24, the Commission referred to "filing and processing of a grievance" as presumptively concerted activity. Here, the DPI complaints were found in part to be meritorious, and rested on concerns shared among a number of instructors and Association representatives. Thus, even though the contractual merit of the grievance is not at issue, it reflects lawful, concerted activity under any view of MERA and the Commission's case law. In sum, the presence of lawful, concerted activity surrounding the DPI complaints has been established.

There is little dispute regarding the second element. Pfaller's and Knotek's testimony establishes District awareness of his role in the processing of the DPI complaints. Whatever doubt could be said to exist on this point is obviated by the District's July 2, 2002 correspondence with DPI. The District took strong exception to Knotek's role in the complaints, taking the position that he was manipulating his caseload to strengthen the case for an additional Speech Pathologist at Wind Point Elementary. This position presumes awareness of the activity and thus poses the third element.

The evidence establishes hostility on the District's part toward Knotek's role in processing the DPI complaints. Pfaller's letter of July 2, 2002 establishes this point, as does Herbst's documentation of the letter. These concerns were sufficiently strong that Pfaller advocated for the use of an outside expert to evaluate Knotek's use of therapy time. Pfaller testified that Knotek's position within the Association posed a conflict of interest with his work as a Council Board member. Her perception of the conflict led her to distance herself from the Council, though it exists as one of three bodies providing parental input called for under federal legislation concerning special education. Presumably, the conflict involves Knotek's use of the Council and his role in the IEP process to advocate for increased staffing of Speech Pathologists. Whatever merit Pfaller's view may have in the abstract, it is not a proven conflict of interest. The District added a Speech Pathologist to Wind Point Elementary for the 2002-03 school year. Presumably, this addition reflected the District's analysis of appropriate special education policy. It demonstrates the weakness of the broad assumption that Knotek's advocacy for increased staffing is inherently a conflict of interest. More to the point here, Pfaller's hostility to Knotek's advocacy effort is evident, and broadly based. There is no persuasive evidence that Pfaller determined specific behavior on Knotek's part posed a conflict of interest. Rather, her view appears to be that his Association ties were an inherent conflict of interest with service on the Council Board. This is the type of hostility proscribed by Sec. 111.70(3)(a)3, Stats.

The fourth element demands proof that the hostility provoked District action against Knotek. The Association points to a number of potential adverse actions, but the Findings of Fact and Conclusions of Law and Order focus on the denial of permission to attend the 2003 Convention. The evidence supports the Association's view that hostility motivated the denial.

The evidence affords little basis for Pfaller's avowed reason to deny the request, and considerable basis to question it. This evidence is sufficiently strong to warrant an inference of pretext. Her February 14, 2003 e-mail supplying reasons for the denial establish that the processing of the DPI complaints played a significant, if not causal, role in the denial. The reference to potential problems in getting work done is a specific reference to the allegations made through the DPI complaints. There is no persuasive evidence, including Pfaller's testimony, to warrant a conclusion that Knotek was behind, or likely to become behind, on any work at the time of his request to attend the 2003 Convention or at the time of the single session he hoped to attend. Rather, the reference in the e-mail is to the workload dispute that simmered throughout the ongoing processing of the DPI complaints.

Nor does the evidence provide a basis for Pfaller's avowed concern for Knotek's attendance "at non-district related things." There is no assertion that his use of sick leave during the 2002-03 school year was remarkable. He had not used any sick leave in the 2002-03 school year at the time of his request, and used the same amount of sick leave for that school year as he had in the previous school year. He used Association Business leave in the 2002-03 school year, but the evidence indicates that administrators approved it. Pfaller's statement that she viewed the leave as non-District related business except for the attendance of seminars has no support. That the leave was approved, was used for collective bargaining purposes, and was not remarkable in light of past usage, puts Pfaller's view on a tenuous base. Significantly, Pfaller did little, if anything, to check on the basis for the absences. This indicates she was more concerned with rationalizing the denial than with investigating the basis for an approval.

There is no dispute that the 2003 Convention was pedagogically sound. That Pfaller approved each request other than Knotek's establishes the point. Pfaller acknowledged that she had found past Conventions to be useful. That she approved the balance of the requests indicates there was value to the Convention. This puts the balance of her rationale for the denial in a questionable light. Knotek's past attendance at the Convention has no evident bearing on the workshop he asked to attend in 2003. Pfaller offered no insight into what, if any, subject matter of the workshop Knotek sought to attend may have been covered in the past. There is no evidence that Pfaller considered the point beyond the fact that Knotek had attended in the past. There is no evidence she considered the past attendance of any other applicant. Those requests she questioned were questioned on the amount of funds requested, not their educational value. Knotek's request was toward the high end of the requested amounts, provided only requests for single day attendance are considered. The request is not on the high end of any of the requests if it is compared to the amounts actually reimbursed. More significantly, unlike any other request questioned as to the amount sought, Pfaller afforded Knotek no chance to modify it.

There is no evident support for the assertion that some educational need outweighed the value of the conference for Knotek. It is established that it is difficult, if not impossible, for the District to find substitute Speech Pathologists for short-term absences. Granting this general point sheds no light on why Knotek's single day request was the sole request to provoke a denial. Nor does it highlight why Knotek's request was subjected to a cost/benefit analysis not generally applied. In sum, the lack of substantiated rationale for the denial, viewed against the presence of hostility toward Knotek's role in the advocacy of the DPI complaints, warrants the inference that Pfaller denied the request based on her hostility toward Knotek's exercise of lawful, concerted activity.

This conclusion thus establishes a District violation of Sec. 111.70(3)(a)3, and derivatively, of Sec. 111.70(3)(a)1, Stats. Before addressing the issue of remedy, it is necessary to touch on certain arguments posed by the parties. The District asserts that the Convention is not a benefit or working condition and that Knotek suffered no loss by being

asked to assume his normal caseload. The Commission has recently noted its inclination “to interpret (the scope of Sec. 111.70(2), Stats., broadly”, CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) AT 13. More to the point here, Pfaller’s testimony specifically undercuts the assertion. She noted that the District uses convention-attendance to recruit special education specialists and that she specifically considered this in approving requests to attend the 2003 Convention made by more recently hired instructors. This testimony establishes a benefit. Whether or not a benefit, it is not evident how attendance at a professional development workshop could be considered anything other than a “term or condition of employment” under Sec. 111.70(3)(a)3, Stats.

The Association has pointed to a series of activities on Knotek’s part that may indicate proscribed hostility. The Association contends that Knotek’s reimbursement for expenses in attending the 2002 Convention came slower than in prior years. The connection between this and the processing of the DPI complaints is speculative at best. How, if at all, this is linked to either DPI complaint is not apparent. Those complaints span a considerable period of time, and there is no demonstrated linkage between the complaints and the reimbursement request other than Knotek’s perception. In any event, a conclusion that the delay in reimbursement indicates discrimination makes it less than clear what the initial approval would indicate.

There is some evidence concerning potential discipline regarding Knotek. Wisner recalled a conversation with Johnson to be that the discipline was a non-renewal, while Johnson recalled the discussion to involve a lesser level of discipline, concerning insubordinate behavior. The conversation affords no assistance to resolve the issues posed here. There is no evidence Pfaller was involved in these discussions. Significantly, the source of the potential disciplinary issue was Nahabedian, who authored the laudatory evaluation the Association cites as evidence that Pfaller acted with proscribed hostility regarding Knotek’s request to attend the 2003 Convention. It is, in any event, less than apparent why Johnson would approach Wisner to advise him of the matter if the District sought to retaliate against Knotek for his role as Association advocate. The record does not establish what, if any, discipline occurred.

More troublesome is the Association’s citation of the e-mail exchange summarized in Finding of Fact 12. The exchange plays no role in the Conclusions of Law and Order because the discrimination found there rests on the processing of the DPI complaints and its linkage to Pfaller’s denial of Knotek’s 2003 Convention request. The e-mail exchange involves a dispute between Knotek and other Wind Point Elementary teachers and administrators, including Pfaller, regarding a matter of federal regulation. In my view, the exchange is part of a pattern of conduct that kept Knotek’s advocacy ever-present to Pfaller. As such, it may have played some role in her denial of his request, but affords no independent basis for the application of Sec. 111.70(3)(a)3, Stats. As noted in MILWAUKEE COUNTY, DEC. NO. 28951-B (NIELSEN, 7/98) AT 12, *aff’d by operation of law* DEC. NO. 28951-C (WERC, 9/98): “Distaste for . . . personal manner is not the same as hostility to the activity.” Pfaller’s responses to Knotek

were, if not timely to his view, measured and to the point. She did not react to his end-run to other administrators, but did not afford him the meeting he sought in the manner he requested. Apart from the denial of Knotek's request to attend the 2003 Convention, the exchange is unremarkable as a statutory matter.

The complaint seeks a cease and desist Order; an Order that the District permit Knotek to attend the 2003 Convention or "(i)mmediately make mutually satisfactory provisions for . . . Knotek to attend . . . an equivalent conference"; and an Order that the District post a notice that it "will not discriminate or retaliate against "Peter Knotek or other members of the Complainant."

The Order entered above includes a cease and desist Order. Attendance at the 2003 Convention is impossible. Provision to attend another conference under "mutually satisfactory provisions" demands continued involvement of the parties and potentially continued Commission oversight of the complaint. The added time and expense, in my view, would not be worthwhile to anyone. This dispute involves a single act of excess, and it is preferable to remedy that act and "move on." Beyond this, compliance with the cease and desist order will mean that future conference attendance requests are treated on their merit, without need of an ongoing question of what a "mutually satisfactory" conference might be. More significantly, the attempt to remedy the discriminatory act in the future permits the District "a free shot" since the 2003 Convention is history. Thus, the Order includes a make whole element of paying Knotek the amount he initially requested. In a sense, this is a windfall, since the payment does not require Convention attendance and the resulting expenses. This is, however, the inevitable flipside to the "free shot" Pfaller's denial of the request creates, since attendance at the 2003 conference is impossible. The make whole component serves as an objective measure of the lost opportunity value of the conference, and serves to assure that the statutory violation has a cost associated with it. The amount pales against the litigation costs, but does serve as an incentive to treat future requests without the animus proven in this case. The interest noted in the Order is required under Sec. 804.04(4), Stats., as noted in 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).

The Order includes the posting of a notice at Wind Point Elementary. The cease and desist portion of the Order is stated broadly, to highlight the type of conduct at issue, while the make-whole component of the Order reflects that Knotek is the sole employee directly affected. The Association seeks an Order from the District renouncing discrimination against "Knotek or other members of the Complainant." This request overstates the proof. No "other member of the Complainant" was affected by Pfaller's denial of Knotek's request. The inference of a chilling effect would, in any event, extend to unit employees generally. More significantly, such an inference is not rooted in the evidence. Pfaller candidly and openly stated her concerns with Knotek's advocacy in her response to DPI. Her candid response to the DPI that

the complaints unnecessarily drew needed resources from special education programs may not constitute a defense to the violation of Sec. 111.70(3)(a)3, Stats., but does highlight that the proven hostility does not implicate the Association as institution. In significant part, the dispute reflects Pfaller's personal resistance to Knotek's and the Association's tactics. As exemplified in the e-mail exchange summarized in Finding of Fact 12, this reflects a conflict generated by two professionals who take their work seriously enough to differ fundamentally. Pfaller's response to the e-mail exchange was measured and appropriate. Her response to Knotek's request to attend the 2003 Convention was punitive. The Order seeks to regulate that excess, without unduly broadening the scope of the dispute, or drawing the Commission further than necessary into a professional dispute concerning the efficiency or propriety of District special education services.

Dated at Madison, Wisconsin this 9th day of February, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Examiner

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