

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**LOCAL 95, OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, AFL-CIO, Complainant,**

vs.

**WISCONSIN RAPIDS SCHOOL DISTRICT
and SCOTT KELLOGG, Respondents.**

Case 61
No. 63683
MP-4062

Decision No. 30965-A

Appearances:

Bruce F. Ehlke and **Kathleen Lounsbury**, Hawks, Quindel, Ehlke & Perry, S.C.,¹ Attorneys at Law, 222 West Washington Avenue, Suite 705, Madison, Wisconsin 53701-2155, appearing on behalf of Complainant.

Jeffrey T. Jones (with **Christopher M. Toner** on the brief), Ruder Ware, Attorneys at Law, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of the Respondents.

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

On May 20, 2004, Local 95, Office and Professional Employees International Union, AFL-CIO (Union), filed a complaint with the Wisconsin Employment Relations alleging that the Wisconsin Rapids School District (District) and Scott Kellogg (Kellogg) had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 111.70(3)(a)3 and 111.70(3)(c), Stats., as regards their treatment of a member of the Union's bargaining unit, Beth Thomas (Thomas).

¹ During the course of the proceedings, Attorney Ehlke's firm consolidated with another law firm. The new name is shown.

On July 8, 2004, the Commission appointed Marshall L. Gratz, a member of its staff, to act as Examiner in the matter. On July 21, 2004, Respondents filed an answer and on July 22, 2004, an amended answer, to the complaint. On July 29, 2004, Respondents filed a motion to dismiss the allegations of the complaint which related to facts occurring prior to one year before the filing of the complaint.

Pursuant to notice, the Examiner conducted a hearing in the matter on August 10, September 29, and November 4, 2004, at the District's offices in Wisconsin Rapids. At the outset of the hearing the Examiner granted the District's and Kellogg's motion to dismiss the allegations of the complaint relating to incidents occurring prior to May 20, 2003, but permitted the Union to produce evidence with respect to such incidents in support of the Union's claims regarding the lawfulness of the incidents that occurred on or after May 20, 2003. Also at the outset of the hearing, the Examiner granted the Union's motion to amend the complaint to allege that the District and Kellogg reduced Thomas' hours for the 2004-05 school year, in violation of Secs. 111.70(3)(a)1, 3 and 111.70(3)(c), Stats., and allowed the District and Kellogg to amend their answer to deny said allegation.

Following distribution of the hearing transcript, the parties filed briefs and reply briefs. The District and Kellogg objected to the scope of the Union's reply brief, which ultimately led to the parties agreeing to supplemental briefing. The supplemental briefing was completed on April 13, 2005, marking the close of the record.

FINDINGS OF FACT

1. The Complainant Union is a labor organization with an office at 1551 West Grand Avenue, Wisconsin Rapids, Wisconsin. At all material times, Wayne Pankratz (Pankratz) was the Union's Business Representative.

2. The Respondent District is a public school district and a municipal employer with main offices at 510 Peach Street, Wisconsin Rapids, Wisconsin. The District is governed by an elected school board. At all material times, Dean Ryerson (Ryerson) has been the District's Superintendent.

3. Among the 10 elementary schools operated by the District are three relatively large schools, specifically, Howe, Mead, and Woodside.

4. Respondent Kellogg is an individual who, at all material times, has been employed by the District as the principal of Howe and responsible for supervising, among others, the clerical and educational assistant personnel employed at that school. Kellogg reported directly to Ryerson.

5. At all material times, the Union has been the certified representative of a collective bargaining unit including certain office, clerical and educational assistant employees of the District, including employees in the classifications of Office Aide I, Office Aide/Health

Aide, Office Aide II, Noon Duty Aide (K-12), Secretary/Elementary Principal and Instructional Aide. The District and Union have been parties to a series of collective bargaining agreements, including one with a nominal term of July 1, 2001 through June 30, 2004. At all material times, said agreements provided for reduced or eliminated health and dental insurance benefits for employees who work less than 28 hours per week.

6. At all material times, Howe, Mead, and Woodside schools each had one Office Aide II assigned to them. Office Aides at the smaller elementary schools were designated Office Aide I and generally worked fewer hours per week than the Office Aide IIs at the three large schools.

7. At all material times since December 2000, Beth Thomas (Thomas) held the Office Aide II position at Howe.

8. At all material times, the Union's bargaining unit has included two positions in the office at Howe, in addition to that of Thomas: those of Elaine Fisa (Fisa), Secretary to the principal, and Sara Matthews (Matthews), Health Aide/Instructional Aide. Thomas, Fisa, and Matthews worked in close proximity to Kellogg, as did Howe Guidance Counselor Luceanna Eisberner (Eisberner) and Howe Social Worker Barb Bondioli.

9. At all material times, Thomas performed a range of duties under Fisa's direction, including handling, recording, depositing, and accounting for student lunch money, dealing with substitute teacher issues, handling/forwarding staff time cards, leave requests, and attendance records, processing external and intra-office mail and deliveries, tracking and sometimes storing supplies, answering the telephone, responding to visitors, assisting with the care of sick or injured students, photocopying materials, and other general office tasks. In performing these tasks, Thomas from time to time was required to handle confidential student records and/or confidential legal documents. Office Aide IIs at Mead and Woodside performed similar but not identical duties to those Thomas performed at Howe.

10. At all material times, Matthews was employed at Howe on a part-time basis. She performed Instructional Aide duties for a classroom teacher for part of her work day and Health Aide duties for the remainder. Matthews was not employed to perform the duties of Office Aide. However, from time to time, Matthews was called upon to assist Fisa and/or Thomas in performing their duties, especially during their absences. Matthews also worked as a parent volunteer at the Howe School during some daytime hours when she was not on the payroll. As a volunteer, Matthews regularly spent from a few to several hours per week on laminating projects for teachers and/or assisting Eisberner in preparing student "prizes" related to various counseling-related activities.

11. In January 2001, Thomas joined the Union's bargaining team and participated in negotiations for the 2001-04 collective bargaining agreement that began in late winter or early spring 2001 and ended in May 2002, when the 2001-04 agreement was ratified.

12. In or about February 2001, Union business agent Pankratz received a telephone call from a Noon Duty Aide at Howe, who complained that some Aides had been required to supervise students outdoors for recess and/or lunch during severely cold weather. At some point thereafter, Pankratz passed this information along to Ryerson. During a break in a negotiation session in the same time frame, at or around 10 p.m., Ryerson telephoned Kellogg at home and asked him whether students at Howe were sent outside in sub-zero weather. Kellogg was upset by the telephone call and the next day called a meeting with Fisa and Thomas, at which he mentioned the Superintendent's telephone call, questioned Thomas about the basis for the complaint, asked Thomas whether she had made the complaint, and, when Thomas denied doing so, asked whether she knew who had. At the time of this meeting, Kellogg was aware that Thomas was the only Howe employee who was a member of the Union's bargaining team. Although Kellogg accepted Thomas' assertion that she was not the complaining party, he continued to believe that she had played a role in bringing the issue to Ryerson's attention, given her membership on the bargaining team and Ryerson's reference to the negotiations in his telephone call to Kellogg. Kellogg believed it was "irresponsible" for the issue to have been raised in negotiations without it first having been raised with him. The District's cold weather policy remained a topic of administrative discussion and directive thereafter.

13. On April 1, 2001, after Thomas had been working at Howe for about four months, she received her first annual written performance evaluation from Kellogg. She was rated "Exceeds Expectations" on two of the 22 applicable criteria ("interacts well with students" and "telephone techniques") and on the remaining criteria was rated "Satisfactory." Her overall performance was rated "Satisfactory." The evaluation contained no additional commentary.

14. At some point in the middle of the following (2001-2002) school year, the Union brought an issue to the bargaining table about increasing the pay grade of the Office Aide II positions and in support of that proposal conducted an investigation about the duties Office Aide IIs were performing. Pankratz asked Thomas to assist in the investigation. Thomas informed the Union that, among other things, she had from time to time been asked to perform the duty of checking students for head lice. The Union mentioned this to Ryerson during negotiations, and Ryerson in turn had a follow-up conversation with Kellogg. Shortly after that discussion, Kellogg directed Thomas not to perform the duty of checking for head lice. Kellogg was not otherwise involved in the issue or in deliberations about whether the Office Aide II position should be reallocated. Ultimately, the Union and the District agreed to reallocate the position to a higher pay grade as part of the resolution of the 2001-04 collective bargaining agreement.

15. Prior to approximately January 2002, the District had maintained a student lunch system that required students to purchase lunch tickets at the office with cash for the days they wished to buy lunch. Fisa and Thomas shared the task of selling lunch tickets at Howe, and the system often resulted in numerous students standing in line at the office and interacting individually with office staff, especially on Mondays. Thomas was also responsible

for the recordkeeping regarding the free-and-reduced lunch program for students who could not afford to purchase lunch. In connection with the lunch ticket system, Thomas also worked in the lunch room later in the day, punching and/or collecting the tickets, and later balancing the cash receipts with the recorded financial records.

16. In or about January 2002, the District implemented an automated lunch system. At this point, Thomas assumed primary responsibility for managing the financial aspects of the lunch program at Howe. The automated system permitted students to deposit cash intermittently into a receptacle at the office, which Thomas would regularly collect, tabulate, and record by computer into the students' individual "accounts." The students had a digital code which they entered into the computer as they passed through the lunch line. The new system eliminated the need for students to wait in line and for Thomas to interact with them on a daily basis. Thomas notified students (through their classroom teachers) when their balances needed replenishing. After automation, Thomas continued to operate the computer in the lunchroom itself, as part of the automated system, until some point early in the 2003-04 school year, when the District hired an additional (fifth) Noon Duty Aide and Thomas' hours were reduced from 30 to 28. Thereafter two Noon Duty Aides generally shared the task of operating the computer in the lunch room, although Thomas and Fisa would occasionally do so in order to maintain familiarity with its operation.

17. The automated lunch system saved the office personnel at Howe (primarily Thomas) some time by eliminating the need to sell lunch tickets to students every day and simplified recordkeeping. However, the automated system added time for handling and accounting for money and for keeping students notified of their balances. While Kellogg asserted that the automated lunch system "drastically reduced" the amount of time spent on lunch-related office duties, Fisa and Thomas testified that, on balance, the system did not reduce the amount of work or "headaches" for the office staff.

18. On or about February 21, 2002, Kellogg provided Thomas with her second annual written performance evaluation. She was rated "Exceeds Expectations" on five of the 22 applicable criteria: "Take interest in job," "Strives to perform beyond minimum requirements," "Adjusts to new or different assignments," "Willingness to adjust in a cooperative manner," and "Maintains a positive attitude at work." She was rated "Satisfactory" on the remaining 15 criteria and received an overall "Satisfactory" rating. The evaluation included the comment, "Beth has always shown willingness to learn and expand her skills," "Seems to adjust very well on 'those' hectic days," and "Beth has adjusted very well to Howe School. She is self motivated. She relates very well with everyone." Next to the "exceeds expectation" marks regarding her ability to adjust, Kellogg inserted the notation, "Automated Lunch Program."

19. At material times, Ryerson and other District administrators have maintained an ongoing concern about hourly employees adhering to their schedules and not incurring potential overtime liability for the District. At some point in the spring of 2002, Pankratz encountered some present and former Howe school employees, including some teachers, who

mentioned to him that Fisa had been observed on several occasions working outside normal business hours. Pankratz, in turn, mentioned those reports to Ryerson during negotiations. Shortly thereafter, Ryerson telephoned Kellogg about the issue of Fisa's hours. A day or so after this conversation with Ryerson, Kellogg met with Fisa and Thomas, directed them not to work any hours beyond their normal work day, asked them to sign a statement confirming that they understood this policy, and directed them to surrender their building keys. Within a month or two, Kellogg returned a master building key to Fisa, based upon his stated belief that, besides the head custodian, another employee should have a master key for emergency and security purposes. He did not return a key to Thomas, although she requested him to do so. Thomas rarely if ever worked beyond normal business hours, and none of the reports or the discussion among Pankratz, Ryerson, and/or Kellogg mentioned Thomas as having worked excess hours.

20. Prior to the start of school for the 2002-03 school year, the office furniture at Howe had to be moved in order for new carpeting to be installed. After the carpet was installed and as the furniture was being moved back, Kellogg decided to reorient Thomas' computer such that her back would be to the counter when she was working at the computer. Kellogg testified that his intention was to allow Thomas to have fewer distractions while making financial entries and performing other work on the computer. Kellogg had not discussed this decision with Thomas prior to implementing it. When Thomas returned to work at the outset of the school year, she was upset about how her computer and desk had been reoriented. She asked Kellogg on two occasions during the first several weeks of the school year to permit her to return her computer to its previous orientation. Kellogg refused, stating, without further explanation, that the computer was placed the way he wanted it.

21. Also at the outset of the 2002-03 school year, at Kellogg's direction, Fisa prepared a weekly work schedule for herself and for Thomas, which was designed to insure office coverage during rest and lunch breaks. Matthews as well as the school custodian also had daily work schedules, though the custodian's may have been in existence at a much earlier date.

22. Also at the outset of the 2002-03 school year, consistent with a suggestion from Ryerson, Kellogg initiated a series of regular office staff meetings with Fisa and Thomas, later including Matthews. The first meeting was held on September 11, 2002. The agenda and subsequent written "Weekly Office Update" followed a four-part format originated by Kellogg: (1) "Any problems?" (2) "Anticipate any problems?" (3) "Does the work meet the job description?" and (4), "Looking ahead." Kellogg presented Thomas' schedule to her at the first office staff meeting that year.

23. Some time shortly before September 30, 2002, Thomas mentioned her concern about the reorientation of her desk to Pankratz, who, in turn, mentioned it to Ryerson. Ryerson telephoned Kellogg to discuss the issue. In that conversation, Ryerson did not direct Kellogg to reorient the desk, but rather indicated that Kellogg was free to use his judgment as to how to promote office efficiency.

24. On September 30, 2002, Kellogg held a meeting with Fisa and Thomas, at which he mentioned Ryerson's telephone call about the orientation of Thomas' computer and questioned Thomas about why she had approached the Union rather than him about the issue. Kellogg stated his view that, while Thomas was entitled to contact the Union, he thought that school-based problems could be solved through better direct communication. In response to Thomas' concern about the computer placement, Kellogg stated that he had moved Thomas' computer so that she could concentrate better on counting the lunch money and entering data. The group also discussed Thomas' concern about having been given a weekly schedule. Kellogg agreed to return Thomas' computer and desk arrangement to its previous configuration. The "Weekly Office Update" for that meeting states, "Starting fresh as these issues will be buried. We all need to talk to each other about how we feel. If Elaine bites Beth's head off she needs to tell her. Weekly meetings."

25. Kellogg approved the agenda format for the office meetings of October 11, 2002, and November 4, 2002, and he added to the second formatted agenda item the following phrase: "Anticipate any problems? Anything Wayne needs to know." "Wayne" referred to Pankratz. As indicated on the agenda, Kellogg asked Thomas during those meetings whether there was anything "Wayne" needed to know. This question caused Thomas discomfort and she complained about it to Pankratz, who was also upset by it and asked Ryerson to intervene. Ryerson then telephoned Kellogg, after which Kellogg no longer asked during these meetings whether there was "anything Wayne needs to know" and no longer included the notation in the Weekly Office Updates.

26. On or about March 7, 2003, Kellogg provided Thomas with her annual written performance evaluation. Thomas was rated as "Exceeds Expectations" on seven of the 22 applicable criteria, including four of the six criteria relating to "Interpersonal Communications." She was rated "Satisfactory" on the remaining criteria and her overall rating was in the lower range of "Exceeds Expectations." The written commentary included, under "Dependability," the comment, "good example - award pins." Under the general rubric "Interpersonal Communications" and the sub-rubric "Maintains confidentiality," Thomas was marked "Satisfactory," with the following additional written comment: "Reminder: confidentiality is extremely important while working in the office and being accessible to information about students, staff and issues. Basically what is heard in the office stays in the office." In his testimony, Kellogg could not recall specifically what had prompted him to make that comment. At the time Thomas received this evaluation, she asked Kellogg whether something specific had occasioned a confidentiality concern on his part, and Kellogg replied that his comment was just a general reminder to everyone about the importance of confidentiality.

27. On one occasion in the spring of 2003, Kellogg observed Thomas looking at a document in a manner that Kellogg interpreted as "reading" it. The document contained confidential student information. Thomas had been requested by Eisberner to photocopy only certain pages of the document and was looking through the document for the correct pages. Without investigating whether his perceptions of Thomas' behavior were accurate, Kellogg verbally reprimanded Thomas for reading confidential student information.

28. On May 15, 2003, Kellogg issued a written reprimand to Thomas for having assisted Eisberner, without her objection, in trying to physically control an emotionally disturbed student. In the document, in addition to comments about the specific incident, Kellogg also stated, "Only staff members (teachers, aides, counselor, social worker, principal, secretary) should discuss or handle confidential information. At no time should there be sharing of confidential information outside of school." The record does not contain information about Kellogg's reason for inserting this comment.

29. The District has experienced budgetary problems in recent years. In early 2003, Ryerson notified the principals of the District's schools that the District needed to reduce expenditures and sought recommendations for reductions in the upcoming (2003-04) school year that would not affect instructional programs. The District asked the elementary principals to brainstorm as a group for resource savings recommendations. Individual schools or principals were not required to meet any established targets. Kellogg decided that the office at Howe could function with fewer hours from Thomas, assertedly because of the efficiencies that flowed from the automated lunch program. He initially recommended to Ryerson that Thomas' hours be reduced from 30 to 25 per week. After discussing the matter with Kellogg, Ryerson decided to recommend reducing Thomas' hours from 30 to 27.5 per week. Although the Union had been told by District officials that school principals would be speaking with those bargaining unit members who would lose hours and/or benefits, Kellogg did not at any time inform Thomas that she could or would be experiencing a reduction in her hours for 2003-04.

30. A reduction of hours below 28 resulted in a loss of contractual benefits and permitted the affected bargaining unit member to exercise seniority rights to bump into another position in order to retain benefits. At the time Kellogg initially recommended reducing Thomas' hours for the 2003-04 school year, he may not have been aware of the effect the reduction would have on Thomas' benefits.

31. By letter dated June 12, 2003, the District notified Thomas that her hours were reduced for the 2003-04 school year from 30 to 27.5. Pankratz immediately protested to Ryerson that this reduction would be viewed by the Union as unlawful retaliation for Thomas' protected activity. Ryerson thereafter successfully recommended to the District's School Board that one half hour per week be restored to Thomas' schedule for 2003-04, which brought her hours to 28 per week and thereby avoided any loss of insurance benefits.

32. The District reduced the hours of several other members of the Union's bargaining unit for 2003-04, but did not reduce the hours of either of the other two Office Aide IIs (at Meade and Woodside). The automated lunch system had been implemented at Meade and Woodside as well as Howe. At Meade, the Office Aide II continued to operate the computer in the lunchroom as part of the automated system. The record does not indicate whether or not the Office Aide II continued to operate the lunchroom computer at Woodside.

33. Prior to the 2003-04 school year, the District employed four Noon Duty Aides at Howe, each of whom worked 7.5 hours per week. For some years prior to that, Kellogg had been requesting that the District employ a fifth Noon Duty Aide at Howe, for safety and security reasons. He continued to advance this request for the 2003-04 school year and was successful. After the fifth Noon Duty Aide was hired, Thomas no longer operated the computer in the lunchroom on a regular basis. Thomas testified that she did not ask to be assigned the additional hours in the lunchroom for 2003-04, because her hours already had been restored to 28 per week, thus restoring her benefits.

34. At the outset of the 2003-04 school year, on August 27, 2003, Kellogg held a meeting with the Thomas and Fisa. During that meeting he told Thomas that he had heard that Thomas had told another individual that Thomas believed her hours had been reduced in retaliation for the Union complaining to Ryerson about the cold recess or other issues. Kellogg asked Thomas whether she had made that statement, which she denied. Kellogg then stated that he had recommended the hours reduction for budgetary reasons and because he believed the automated lunch system required fewer hours from Thomas. He also stated that he would check with the individual who had reported Thomas' alleged statements.

35. As a result of the reduction of two hours per week in Thomas' schedule in 2003-04, there were occasions when the mail did not get finished and/or supplies did not get inventoried/stored promptly, but the reduction did not cause major productivity problems.

36. On or about September 2, 2003, Kellogg met with Fisa, Thomas, and Matthews about distribution of office tasks and what role Matthews could appropriately play that would not intrude into Office Aide duties. Kellogg also emphasized that all staff would need to "streamline" their work and minimize distractions and that care should be taken to make sure that the office was covered during staff lunch and breaks.

37. In or about early December 2003, a student's grandmother delivered a custody order to the school office and asked that a copy be made for the District and the original returned to her. Thomas photocopied the document and returned the original to the grandmother. Thomas asked Fisa what to do with the photocopy, and Fisa, not realizing that a copy had not been provided to Eisberner, told Thomas to place the copy in the student's file, which Thomas did. Shortly thereafter, the grandmother attended a meeting with Eisberner, who told the grandmother that the school had not received the custody order. This upset the grandmother. Eisberner was embarrassed that she had not received the document and brought the incident to Kellogg's attention.

38. Also in or about early December 2003, at Fisa's request, Kellogg gave Fisa permission to work some evening hours in lieu of some regularly scheduled day time hours, in order to accommodate Fisa's need to care for a sick dependent at home. Fisa normally would transmit her time sheet through the inter-office mail and receive it back the same way, approved by Central Office. Thomas routinely handled the inter-office mail in Fisa's absence and routinely came into contact with staff time sheets in that way. In this instance, sensitive to the fact that Fisa's work outside normal work hours had been a topic of discussion between the

Union and Ryerson in the past, Kellogg planned to deliver the time sheet personally to Central Office for approval. He would seal the return envelope with a cellophane tape "X" on the back, and ask Matthews to retrieve this envelope from the "blue bin" and return it to Fisa directly. Thomas was not aware of the special marking or the confidential status of this mail item. On the evening before the time sheet was due, Fisa worked evening hours and left the time sheet face down on the office counter. Thomas came in the next morning and, in the normal course of business, saw the time sheet on the counter and began to place it in an inter-office envelope, but Kellogg intervened and said he would hand deliver it to Central Office. When the cross-taped envelope addressed to Fisa was returned on December 16, 2003, in the regular inter-office mail, Fisa was not at work. The envelope became mingled inadvertently with other used envelopes in a stack of recycled inter-office mail envelopes. At Kellogg's direction, Matthews sought Thomas' assistance in looking for the envelope. Neither Kellogg nor Matthews explained to Thomas that the envelope or its contents were confidential. Thomas found the envelope in the recycle pile and had begun to open and look at its contents when Matthews noticed that Thomas had the envelope and asked for it. Matthews reported to Kellogg that Thomas had opened and examined the contents of the envelope.

39. The next day, December 17, 2003, Kellogg called Thomas into a meeting also attended by Matthews and Eisberner. At the outset of the meeting Kellogg made Thomas aware that her conduct would be the focus of the meeting, whereupon she asked for a Union representative. When the meeting reconvened later that day with a Union representative present, Kellogg criticized Thomas for opening an envelope addressed to Fisa, directed Thomas not to open any mail that was not addressed to her (Thomas), and stated that he had a general concern with Thomas about confidentiality. He also criticized Thomas for having filed the custody photocopy rather than giving it to Eisberner. According to Kellogg's notes from the meeting, he stated to the effect that "Other information heard in the office and is confidence [sic] in nature should NOT be shared."

40. In or about January 2004, Ryerson again instructed the principals of the District's schools to recommend budget reductions for the upcoming (2004-05) school year that would not affect instructional programs. The process of preparing recommendations was similar to the one followed in the previous school year.

41. On or about February 16, 2004, Kellogg provided Thomas with her fourth annual written performance evaluation. He rated her "Satisfactory" on each of the 22 applicable criteria and "Satisfactory" overall, with no additional commentary of any kind.

42. Over the course of the 2003-04 school year, Kellogg became increasingly less communicative with Thomas, although he maintained a professional demeanor during the conversations that were required in the course of business. By April 2004, he seldom spoke to her unless absolutely necessary. Kellogg's manner with other office personnel was more cordial and conversational than it was with Thomas.

43. In early spring, 2004, Kellogg recommended that Thomas' hours be reduced for the upcoming (2004-05) school year from 28 to 20 hours per week, which would reduce and/or eliminate her eligibility for certain fringe benefits and make her eligible to exercise bumping rights into a position with full benefits, if available. Kellogg did not recommend reducing the hours of any other staff at Howe and did not consider recommending the reduction of hours of the fifth Noon Duty Aide so that Thomas could resume operating the lunchroom computer as she had prior to 2003-04 and thus retain those hours. Although the hours of many members of the Union's bargaining unit were reduced for the 2004-05 school year, the hours of the other two Office Aides II (at Woodside and Mead) were not reduced. Kellogg's stated basis for recommending Thomas for an additional reduction was the efficiencies from the automated lunch system that had been implemented in 2002, as well as other efficiencies he had implemented at Howe, such as having teachers open and inventory their own materials upon delivery to the school, having lunch-related messages to students placed in the teachers' mailboxes rather being hand-delivered by Thomas, and having catalogs and magazines placed on tables from which teachers could choose materials they wanted to use, rather than having Thomas distribute these bulky materials into the teachers' mailboxes. Kellogg did not discuss this reduction with Thomas at any time in connection with formulating or conveying his recommendation.

44. At the time Kellogg recommended that Thomas' hours be reduced for the 2004-05 school year, he was aware that a reduction in hours below 28 per week would reduce or eliminate her eligibility for certain contractual benefits.

45. By letter dated July 22, 2004, the District informed Thomas that her hours were reduced from 28 to 20 for the 2004-05 school year. Thomas lost dental insurance entirely and her contribution toward her health insurance premium was increased.

46. During the first several weeks of the 2004-05 school year, the office staff at Howe was unable to keep up with the regular work load in addition to the tasks traditionally associated with the beginning of the school year. The difficulties were aggravated by a new task originating that school year, i.e., collecting registration fees, which was added to Thomas' duties. Matthews was called upon to assist Fisa and Thomas in performing office duties on a frequent basis during that period of time. The "Weekly Update" for September 7, 2004, reflects that Kellogg had decided to train Matthews how to operate the automated lunch system. The reduction in Thomas' hours directly contributed to the workload problems experienced by the office staff at Howe during this period of time.

47. Handling of confidential documents in the mail and for photocopying purposes had consistently comprised a small portion of Thomas' work from the time she had assumed the her position of Office Aide II at Howe. Despite Kellogg's stated concerns about Thomas handling confidential documents, any reduction in those duties that occurred between September 2002 and September 2004 was minimal.

48. When Kellogg recommended reducing Thomas' hours from 28 to 20 for the 2004-05 school year, Thomas' work had not decreased sufficiently from the lunchroom

automation, Kellogg's other efficiencies, or the minimal reductions in confidential duties to warrant so substantial a reduction.

49. Ryerson and the School Board relied upon Kellogg's recommendation in making and implementing the decisions to reduce Thomas' hours from 30 to 28 for the 2003-04 school year and from 28 to 20 for the 2004-05 school year.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The Respondent District is a "municipal employer" within the meaning of Section 111.70(1)(j), Stats.

2. The Respondent Scott Kellogg was at all times an agent of the Respondent District and acted within the scope of his authority as an agent of the Respondent District, within the meaning of Sec. 111(1)(j), Stats.

3. Beth Thomas was engaged in lawful, concerted activity for the purpose of collective bargaining or other mutual aid or protection, within the meaning of Sec. 111.70(2), Stats., when she engaged in (or was believed by Kellogg to have engaged in) the following activities:

a. participating in the Union's negotiations team for the 2001-04 collective bargaining agreement,

b. (was mistakenly believed by Kellogg to have) reported to the Union that bargaining unit members had been required to supervise children outdoors during excessively cold weather,

c. reporting to the Union that she had been asked to perform the duty of checking for head lice,

d. complaining to the Union and seeking its assistance when her desk and computer had been rearranged,

e. (was believed by Kellogg to have) reported to the Union about Fisa working outside of regular hours,

f. complaining to the Union and seeking its assistance when Kellogg had included the phrase, "anything Wayne needs to know," in setting the agenda for the regular office meetings at Howe,

g. expressing (or believed by Kellogg to have expressed) her belief to other employees and/or to the Union that her hours reduction for the 2003-04 school year had been retaliatory, and

h. requesting Union representation at the December 17, 2003 meeting with Kellogg.

4. Kellogg was aware of Thomas' lawful, concerted activity as set forth in Conclusion of Law 1.a. through h., above.

5. Kellogg was not hostile toward Thomas' participation on the Union's negotiating team, in and of itself, or toward Thomas' request for Union representation at the December 17, 2003, meeting, in and of itself.

6. Kellogg was hostile toward Thomas' exercise of lawful, concerted activity as set forth in Conclusion of Law 1.b. through g., above.

7. Kellogg's decision to recommend that Thomas' hours be reduced from 30 to 25 for the 2003-04 school year was motivated at least in part by hostility toward Thomas for her lawful, concerted activity, and therefore discriminated against Thomas in violation of Secs. 111.70(3)(a)3 and 1, Stats.

8. But for Kellogg's recommendation, which was motivated at least in part by hostility to Thomas' lawful, concerted activity, Ryerson would not have recommended to the School Board that Thomas' hours be reduced for the 2003-04 school year, nor would the School Board have accepted that recommendation. Accordingly, the District violated Sec. 111.70(3)(a)3, and, derivatively (3)(a)1, Stats., by reducing Thomas' hours for the 2003-04 school year from 30 to 28 per week.

9. Kellogg's meeting with Thomas on December 17, 2003, and his oral reprimand during that meeting regarding Thomas' failure to maintain confidentiality were motivated, at least in part, by hostility toward Thomas for her lawful, concerted activity, and therefore discriminated against Thomas in violation of Sec. 111.70(3)(a)3 and, derivatively, (3)(a)1, Stats.

10. Kellogg did not remove a significant amount of confidential duties from Thomas on or after December 17, 2003, and therefore did not discriminate against Thomas in that regard, in violation of Secs. 111.70(3)(a)3 and/or 1, Stats.

11. Kellogg's intentionally limited conversation/interaction with Ms. Thomas during the 2003-04 school year did not constitute discrimination within the meaning of Secs. 111.70(3)(a)3 and/or 1, Stats., and did not violate those provisions.

12. Kellogg's decision to recommend that Thomas' hours be reduced from 28 to 20 for the 2004-05 school year was motivated at least in part by hostility toward her lawful, concerted activity and therefore discriminated against Thomas in violation of Sec. 111.70(3)(a)3 and, derivatively, (3)(a)1, Stats.

13. But for Kellogg's recommendation, which itself was motivated at least in part by hostility to Thomas' lawful, concerted activity, Ryerson would not have recommended to the School Board that Thomas' hours be reduced from 28 to 20 for the 2004-05 school year, nor would the School Board have accepted that recommendation. Accordingly, the District violated Sec. 111.70(3)(a)3 and, derivatively (3)(a)1, Stats., by said reduction in Thomas' hours.

14. In taking the actions set forth in Conclusions of Law 7, 9, and 12, above, Kellogg was acting within the scope of his authority as an agent of the District. Accordingly, Kellogg's conduct did not violate Sec. 111.70(3)(c), Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

1. To remedy its violation of Secs. 111.70(3)(a)3 and 1, Stats., unless the Union and District agree otherwise in writing, the Respondent Wisconsin Rapids School District shall immediately:

- a. Cease and desist from discriminating against Beth Thomas or any of its employees represented by OPEIU Local 95 for engaging in lawful, concerted activity.
- b. Immediately take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:
 - (1) Offer to restore to Beth Thomas the 10 hours per week of work as an Office Aide II by which her hours were reduced (by two beginning in the 2003-04 school year and by an additional eight beginning in the 2004-05 school year), along with all seniority and other rights and privileges associated with those additional 10 hours.
 - (2) Make Thomas whole for all wages and benefits she lost due to the District's unlawful reductions of her hours by paying her an amount of money equal to the difference between the wages and benefits she would have earned and received had her hours not

been unlawfully reduced by two beginning in the 2003-04 school year and by an additional eight beginning in the 2004-05 school year, plus interest at the rate of twelve percent per year² on said amount from the dates of the respective initial reductions to the date she is offered the restoration of hours specified in 1.b.(1), above.

- (3) Expunge from Beth Thomas' personnel file any reference to the December 17, 2003 meeting.
- (4) Notify all of its employees represented by OPEIU Local 95, by posting in conspicuous places in District facilities where such employees generally congregate copies of the Notice attached hereto and marked "Appendix A." The Notice shall be signed by the District Administrator and shall be posted immediately upon receipt of a copy of this Order and remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the District to ensure that said notices are no altered, defaced, or covered by other material.
- (5) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply with it.

2. Except as noted in 1, above, the amended complaint in this matter is dismissed.

Dated at Shorewood, Wisconsin, this 22nd day of January, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

² The applicable interest rate is that set forth in Sec. 814.04(4), Stats., in effect at the time the complaint is initially filed with the agency. WILMOT UNION HIGH SCHOOL DISTRICT, DEC. NO. 18820-B (WERC, 12/83), CITING ANDERSON V. LIRC, 111 WIS. 2D 245 (1983), and MADISON TEACHERS, INC. V. WERC, 115 WIS.2D 623 (CT. APP. 1983).

APPENDIX "A"

**NOTICE TO ALL EMPLOYEES OF THE
WISCONSIN RAPIDS SCHOOL DISTRICT
REPRESENTED BY OPEIU LOCAL 95**

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 represented by OPEIU Local 95 that:

1. WE WILL NOT discriminate in violation of Secs. 111.70(3)(a)3 and 1, Stats., against Beth Thomas or any of our employees represented by OPEIU Local 95 for engaging in lawful, concerted activity.
2. WE WILL immediately offer to restore to Beth Thomas the 10 hours per week of work as an Office Aide II by which her hours were reduced (by two beginning in the 2003-04 school year and by an additional eight beginning in the 2004-05 school year), along with all seniority and other rights and privileges associated with those hours.
3. WE WILL immediately make Thomas whole, with interest at 12% per year, for all wages and benefits she lost due to the District's reductions of her hours as an Office Aide II by two beginning in the 2003-04 school year and by an additional eight beginning in the 2004-05 school year.
4. WE WILL immediately expunge from Beth Thomas' personnel file any reference to the December 17, 2003 meeting.

Dated this ___ day of _____, 2008

WISCONSIN RAPIDS SCHOOL DISTRICT

Superintendent

**THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE
HEREOF AND MUST NOT BE ALTERED OR COVERED BY ANY OTHER
MATERIAL.**

WISCONSIN RAPIDS SCHOOL DISTRICT (KELLOGG)

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

The Union's amended complaint, limited by the dismissal of allegations outside the one-year limitations period, sets forth the following alleged prohibited practices:

1. On and after May 20, 2003, Kellogg effectively recommended that Thomas' work hours be reduced from 30 to 28 hours per week for the 2003-04 school year, at least in part in response to Thomas' lawful, concerted activities, in violation of Sec. 111.70(3)(a)3 and 1, Stats.
2. On or about December 17, 2003, Kellogg reprimanded Thomas for breaching confidentiality and removed confidential duties from Thomas, at least partly in response to Thomas' lawful, concerted activities, thereby interfering with the rights of employees to engage in lawful, concerted activities and also discriminating against Thomas for having so engaged, in violation of Sec. 111.70(3)(a)3 and 1, Stats.
3. By approximately April 2004, Kellogg was refusing to interact with Thomas at the office except where absolutely necessary, at least partly in response to her lawful, concerted activities, which created an adverse working environment and thus interfered with employees in the exercise of their rights to engage in such activities, in violation of Sec. 111.70(3)(a)1, Stats.
4. In and after the spring of 2004, Kellogg effectively recommended that Thomas' hours be reduced from 28 hours to 20 hours per week for the 2004-05 school year at least partly in response to her lawful, concerted activities, in violation of Sec. 111.70(3)(a)3 and 1, Stats.

The Union also contends Kellogg is individually responsible for the foregoing prohibited practices, pursuant to Sec. 111.70(3)(c), Stats.

I. The Sections (3)(a)3 and 1 Allegations

Although the Union has cast these allegations under the rubric of both Sec. (3)(a)1 (interference) and Sec. (3)(a)3 (discrimination), all four claims are essentially rooted in the contention that the District (through Kellogg) took adverse action against Thomas at least partly out of animus toward various protected concerted activities in which she had engaged. Since the essence of these claims lies in retaliation, they are governed by the well-established four-part test that generally applies to alleged violations of Sec. 111.70(3)(a)3, Stats. CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03), at 15-16. Because retaliation against an

employee for lawful, concerted activity inherently restrains other employees in the exercise of such rights, it is also a “derivative” violation of Section (3)(a)1.

To prevail on a retaliation/discrimination claim under Section (3)(a)3, the Union must establish, by a clear and satisfactory preponderance of the evidence, each of the following four elements: (a) that the employee has engaged in lawful concerted activity (or was believed to have so engaged); (b) that the employer was aware of (or believed it was aware of) such activity at the time of the adverse action; (c) that the employer bore animus toward the activity; and (d) that the employer’s adverse action against the employee was motivated *at least in part* by that animus, even if other legitimate factors contributed to the employer’s adverse action. MUSKEGO-NORWAY SCHOOL DISTRICT V. WERB, 35 WIS.2D 540 (1967) and; EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985).

A. Protected Activity

The first element of the foregoing test is largely undisputed here. Section 2 of the Municipal Employment Relations Act (MERA) gives municipal employees, including Thomas, “. . . the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .” These rights are fundamental to MERA’s purposes but, by their very nature, the exercise of such rights can create tension between supervisors and employees. As catalogued in Conclusion of Law 3, above, Thomas engaged (or was believed by Kellogg to have engaged) in a series of activities during the relevant period of time that were either directly associated with the Union or were for “other mutual aid or protection” (such as Kellogg's belief that she discussed with colleagues the idea that her hours had been reduced in retaliation for her union activities). Seeking union assistance to resolve work place problems, and using the negotiations process to raise job-related issues such as cold weather duty, an undesirable change in desk orientation, employees working unpaid overtime, or performing duties beyond one’s classification, are classic examples of conduct protected by Section 2 of MERA. The District at least tacitly acknowledges that these activities fall within the protection of the law and therefore meet the first element of the discrimination/retaliation claim.³

B. Knowledge of Protected Activity

The second element the Union must establish is that the District was aware of Thomas’

³ Whether or not Thomas actually engaged in some of the protected activity that Kellogg attributed to her, it is sufficient for purposes of a retaliation claim that Kellogg believed that she had done so if that belief influenced any adverse actions he may have taken against Thomas. The District does not argue otherwise. Here, the record indicates that Thomas had not actually made the complaints about the cold recess at Howe or about Fisa’s irregular work hours, but, as discussed below in the Memorandum, the Examiner is satisfied from Kellogg’s reactions and comments that he believed both that Thomas had played a role in these issues coming to the attention of Superintendent Ryerson and that such was inappropriate without bringing the concerns first to Kellogg.

this case, the earliest of the alleged prohibited practices was the District's action in spring 2003, based upon Kellogg's recommendation, to reduce Thomas' hours for the upcoming (2003-04) school year. At that time, Thomas had engaged in the first six of the protected activities set forth in Conclusion of Law 3, above. As to several of the activities, Kellogg directly and explicitly responded to the protected activity and the District thus does not dispute Kellogg's timely awareness, specifically: Thomas' participation in negotiations for the 2001-03 contract, Thomas' comment about her "head lice" duty during those negotiations in connection with the Union's successful efforts to obtain an upgrade, Thomas' resort to the Union for help in resolving the desk orientation issue, and Thomas' complaint to the Union that Kellogg included the agenda item "anything Wayne needs to know" during some of the early office staff meetings in the fall of 2002.

The record is less explicit about Kellogg's beliefs regarding Thomas' role in the cold recess complaint in the winter of 2001. It is clear that, at the time, Kellogg suspected the complaint had originated with Thomas, since he called her in and questioned her explicitly the next day, while not questioning any other employees. Fisa was also present at that meeting, but it is apparent that Kellogg did not suspect Fisa since he had delegated to her the responsibility for making cold weather decisions and would not have been likely to complain about her own decision to the Union. In addition, as set forth in Finding of Fact 12, above, Ryerson had called Kellogg during a break in negotiations to discuss the cold recess incident, and Kellogg was aware that Thomas was on the negotiating team. Even if, as it appears, Kellogg accepted Thomas' truthful assertion that she had not originated the complaint, Kellogg nonetheless continued to believe that Thomas had been the likely recipient of the complaint or at least the individual who had brought the issue to the Union. As Fisa testified, "He [Kellogg] knew that the complaint had come through her ... [but] at no time did he accuse Mrs. Thomas of making the original complaint." (Sept. Tr. 94-95). Kellogg's contemporaneous statements in the meeting as well as his testimony at hearing reflected an annoyance that Thomas, once aware of the issue, had not brought it to his (Kellogg's) attention before getting Ryerson involved. Accordingly, the Examiner is satisfied that Kellogg believed that Thomas had played a role in inducing negative feedback to Kellogg on the subject from Ryerson.

An inference is also required in order to conclude that Kellogg believed Thomas had played a role in calling Ryerson's attention to Fisa's occasional off-schedule hours. As set forth in Finding of Fact 19, above, the District made ongoing efforts to keep hourly employees within their schedules and to avoid potential overtime liability. Fisa evidently was not the only employee causing such concern, but it is equally evident that her occasional working of extra hours on evenings and weekends – which was done voluntarily and not submitted for overtime – was a subject of discussion at the bargaining table during the time that Thomas was on the team. Thomas was not the source of the Union's information regarding Fisa, but rather Pankratz had obtained this information by happenstance during a conversation with some District employees he encountered at a Friday night fish fry. There is no evidence, however, that Kellogg was aware of the precise source of this information. The record reflects only that, as was true of the cold recess issue, Ryerson once again telephoned Kellogg to investigate allegations (this time about Fisa's hours) that he had learned during negotiations. Again,

maintain their regular schedules, requiring them to sign a statement acknowledging the directive, and removing their building keys as a method of enforcement. There is no evidence that Thomas had been the subject of any concern regarding hours, and Kellogg did not have similar meetings with any other employees in the building, even other hourly office employees, such as Matthews. Accordingly, Kellogg's response to Ryerson's telephone call is difficult to understand without an inference that he believed Thomas had played a role in either conveying or discussing this information during negotiations – both of which are protected under Section 2. Absent other persuasive explanations for Kellogg's response, the Examiner finds it appropriate to make that inference.

In sum, the Union has submitted sufficient evidence upon which to conclude that Kellogg was aware of Thomas' actual or attributed protected activity as outlined in Conclusion of Law 3, above.

C. Hostility/Animus toward Protected Activity

The third element of a discrimination/retaliation claim – establishing that the employer or its agent harbored animus or hostility toward the employee's protected activity – generally poses a difficult evidentiary hurdle, because the issue relates to a state of mind that may never have been verbalized to others or even consciously acknowledged. Instead, as here, the evidence usually lies in a composite of circumstances that indicate that the employer or its agents were bothered or disturbed by the protected activity. “The exercise of examining inferences from the circumstances ‘draws upon the Commission’s long experience in deciphering situations like the present case, where motives are largely unstated and indicia are entwined subtly within the circumstances,’ and lies squarely within [the WERC’s] specialized expertise.” EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05), at 28, citing VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03), at 19, and WERC v. EVANSVILLE, 69 WIS. 2D 140 (1975), at 150.

As to most of the protected activity outlined in Conclusion of Law 3, above, the Examiner has little difficulty concluding that Kellogg was unhappy with Thomas. It is true, as the District argues, that Kellogg does not appear to have borne animus toward Thomas for her participation in the Union's negotiation team, as such. However, the record amply demonstrates that Kellogg was annoyed when Thomas' Union activity – negotiations or otherwise – affected him or his operations directly. Thus, when Ryerson telephoned Kellogg at home about the alleged cold recess at Howe, Kellogg called Thomas into a meeting the very next day to confront her about her role in the complaint having reached Ryerson. Even if, as Kellogg testified, he was interested in emphasizing the importance of resolving such problems before they reached higher levels, Thomas had a right under Section 2 of MERA to address this issue during negotiations. For purposes of the third, “animus,” element, Kellogg's quick and emphatic reaction (which was also apparent in his testimony) reflects a “thin skin” where work-related matters are being aired in the negotiations process activity.

As discussed above, Kellogg evinced a similar hyper-sensitivity upon learning from Ryerson that Fisa's irregular work hours had been discussed during negotiations. He promptly called a meeting that included Thomas, for no apparent reason other than her connection with the negotiations, and required both her and Fisa (but apparently no one else) to sign a statement indicating an understanding of his directive. While Kellogg's issuing such a directive may have been entirely lawful (and in any case is beyond the one-year limitations period and therefore not at issue here), it does supply additional evidence that Kellogg was unhappy with Thomas' protected activity, where it intersected with his operation of the Howe School.

Particularly persuasive regarding Kellogg's attitude in this regard is his reaction to Ryerson's telephone call following the Union's intervention on Thomas' behalf regarding the orientation of her desk and computer at the beginning of the 2002-03 school year. Although Kellogg had twice refused to modify the arrangement when Thomas had approached him directly and had offered no explanation for having changed the arrangement, Kellogg promptly convened a meeting with Thomas and Fisa after Ryerson's call and told Thomas she could have her desk any way she wanted it. Assuming Kellogg had a legitimate reason for altering the arrangement to begin with and for refusing to reverse it when asked to do so by Thomas, this reaction to Ryerson's call (and thus to the Union's intervention) again evidences hypersensitivity. Even more significantly, Kellogg thereafter added to the regular staff meeting agenda the phrase, "anything Wayne needs to know." This language is strong evidence that Kellogg was irritated about Thomas and the Union intervening with Ryerson, and Kellogg's meandering testimony at hearing was not persuasive in supplying a different explanation for this phrase. (Sept. Tr. 189-92).

Kellogg also reacted immediately and directly to Ryerson's telephone call informing him that Thomas had indicated, in the course of negotiating over an upgrade to the Office Aide II position, that she had been given "head lice duty" at Howe. Although there was no indication that Thomas was currently or imminently performing this duty, such that she should immediately be given a contrary direction, Kellogg nonetheless -- consistent with his reactions in other circumstances -- promptly called her into a meeting and directed her not to perform that duty. This reaction warrants a conclusion that, once again, Kellogg was not happy to receive such attention from the Superintendent, and not reluctant to convey that message to Thomas. This conclusion is reinforced by Kellogg's including "Does work meet job description" as a regular agenda item for his staff meetings with Fisa and Thomas, where the record supplies absolutely no explanation for Kellogg's concern about job duties, other than the negative feedback he had received from Ryerson about Thomas' lice-checking duty.

Kellogg followed a similar pattern in early fall 2003 in responding to the grapevine information that Thomas had told a fellow employee that Kellogg had reduced her (Thomas') hours in retaliation for the cold recess incident. Promptly upon Thomas' return to school, Kellogg held a meeting with her and Fisa. According to Kellogg's contemporaneous notes from that meeting (Ex. 8), he devoted a significant portion to questioning Thomas about whether she had made that statement, on the one hand, and defending his reduction

did not simply accept her denial but indicated he would return to his source for “clarification.” (Ex. 8). Kellogg contends that he legitimately wanted to help Thomas understand that the reduction was legitimate. However, leaving aside the potential unlawfulness of the questioning, which occurred outside the one-year limitations period and therefore is not actionable here, this incident is further evidence of Kellogg’s tendency to react negatively to protected activity that might reflect poorly upon him.

In contrast, as to Kellogg’s reaction to Thomas’ protected activity in requesting Union representation for the meeting he called on December 17, 2003, there is neither specific, direct evidence that her doing so created additional animus, nor sufficient indirect evidence to support a reasonable inference to that effect. Accordingly, Conclusion of Law 6, above, does not include Thomas’ request for Union representation among the protected activities to which Kellogg has been shown to have been hostile.⁴

Finally, the record reflects that Kellogg had become more distant and less communicative toward Thomas as the 2003-04 school year progressed. Thomas credibly testified that Kellogg avoided her except where necessary -- and Kellogg’s own testimony suggests that, although he may not be particularly gregarious and certainly maintains a solid focus on school business, he did regularly engage in conversations with other office personnel, with noon and recess aides, and with the bus aides. Little in the record explains the chill in his conversational relationship with Thomas beyond Kellogg’s annoyance and distrust stemming from her protected activity, particularly her reporting information about Howe to “outsiders.” This chill in the relationship is further evidence that Kellogg had developed animus toward Thomas’ protected activities.

Accordingly, the Union has met its burden of demonstrating by a clear and convincing preponderance of the evidence that Kellogg harbored animus toward Thomas for the exercise of her MERA rights to engage in lawful, concerted activity.

D. Was the Adverse Action Unlawfully Motivated?

It was not unlawful in itself for Kellogg to have developed animus or negative feelings about Thomas’ protected activity. Such reactions are not uncommon, given that such activity by its very nature can be confrontational and challenging to an employer’s and a supervisor’s authority over work place issues. What is unlawful, however, is allowing those feelings to prompt adverse action against an employee, even if there are other, legitimate, reasons as well. Like the animus element, the “motive” or “causation” element of the retaliation/discrimination test is rarely accompanied by direct evidence, such as admissions of improper motivation. Rather, determining what motive or motives may have influenced an employer to take a particular action often depends heavily upon an experienced assessment of circumstances and probabilities and reasonable inferences therefrom. Circumstantial factors that can influence a

⁴ However, as discussed in the following section, the meeting and the resulting verbal reprimand were overreactions on Kellogg’s part to the events involved and were partially provoked by Kellogg’s hostility to what he perceived as Thomas’ propensity for telling tales “out of school” – i.e., to the Union.

expected procedures, and/or the insubstantiality or pretext of the claimed ostensible motive. See generally, EDGERTON FIRE PREVENTION DISTRICT, SUPRA, at 19, and cases cited therein. In this case, the Union contends that Kellogg (and through him the District) did indeed allow his animus to affect his decisions regarding Thomas' employment in four specific ways.⁵

1. *The 2003-04 reduction in hours*

The first alleged unlawful adverse action occurred in the spring of 2003, when Kellogg recommended that Thomas' hours be reduced for the upcoming (2003-04) school year. The District argues that Thomas was one of several bargaining unit members whose hours were reduced, including the Union president, and that the reduction was the natural and logical result of several years of financial troubles in the District. The District accurately notes that the District had developed an overall monetary target, that all building principals had been directed (as a group) to suggest budgetary cuts that would not undermine instruction, that other Office Aide positions had also lost hours, and that Thomas' position was a logical place to cut because of the efficiencies created by the automated lunch system. Finally, the District points out that, ultimately, Thomas lost only two hours per week, leaving her with a 28-hour work week that was sufficient to maintain her full time health and dental benefits.

The circumstances recited by the District carry considerable surface appeal. The Examiner does not doubt that the District's financial needs were genuine and that the initial impetus resulting in Thomas' reduction in hours did not originate with Kellogg, but rather with the Ryerson's message to principals that budget cuts were needed. Also militating in the District's favor regarding the 2003-04 reduction is that Kellogg's most proximate written evaluation regarding Thomas, dated March 7, 2003, rated her as "exceeds expectations," included several additional laudatory hand-written comments, and was overall more favorable than the evaluation from the previous year. In addition, on two occasions subsequent to the evaluation but more or less during the time frame in which he was considering reductions, Kellogg had orally reprimanded Thomas for "reading" some confidential documents she was photocopying and had given her a written reprimand her for helping Eisberner try to obtain physical control of a distraught child. A positive written evaluation followed by two incidents of ostensibly legitimate concern create a context in which Kellogg's animus toward earlier protected activity arguably took on a lower profile than other possible motivating factors.

The Examiner is also mindful that the Union must carry the ultimate burden of establishing improper motive as well as the other elements of the discrimination/retaliation

⁵ As noted earlier, Thomas had been uncomfortable about Kellogg's reactions to her protected activity for some time prior to May 20, 2004, when the Complaint was filed, and several of the prohibited practices alleged in the Complaint related to events that occurred more than one year prior to filing. The allegations were dismissed as non-actionable if they occurred outside the one year limitations period. However, the parties were permitted to submit evidence regarding the earlier conduct to support or refute the alleged prohibited practices that had occurred within the one year limitations period.

Nevertheless, upon much reflection, the Examiner is persuaded that the record establishes by requisite standard of proof that Kellogg was not genuinely trying to cut costs by recommending Thomas' reduction in hours, but rather took the cost-savings directive as an opportunity to make working at Howe less remunerative for Thomas because he saw her as a problem within the office team, someone he did not trust, and someone who might be encouraged to transfer voluntarily if her situation at Howe were sufficiently unfavorable.⁶ This conclusion is based upon two primary considerations: first, the insubstantial, if not pretextual, basis for Kellogg's claim that the school needed Thomas for (as he initially proposed) five fewer hours per week; and second, building on that first premise, the lack of explanation in the record for why Kellogg would seize upon the opportunity other than his aggravation about Thomas' protected activity. Other considerations are also at play, as explained below.

Turning first to Kellogg's purported explanation for reducing Thomas' hours, it is notable that Kellogg was not under any mandate or directive to suggest any particular reduction or amount of savings. The principals as a group were asked to "brainstorm" possible places to cut costs, which did not have to be personnel-related. In response, Kellogg on his own generated the notion of reducing Thomas' hours. His stated justification was that the automatic lunch system had greatly reduced the amount of time she needed to spend on lunch program duties. It is significant, in assessing the authenticity of Kellogg's justification, that Kellogg initially had proposed to Ryerson that Thomas lose five hours per week (one hour per day). Ryerson advised Kellogg to limit the reduction to one-half hour per day (from 30 to 27.5 hours per week), and Kellogg did so. Kellogg continued to maintain at hearing that his initial five hour per week reduction was justified, primarily by the lunch automation. The fact that Ryerson, who had urged the principals to find ways to reduce costs, felt it appropriate to reject partially a cost-savings recommendation from Kellogg indicates that he (Ryerson) found Kellogg's five-hour reduction proposal less than persuasive. That alone calls Kellogg's motives somewhat into question.⁷

More importantly, however, the evidence – including that supplied by the District – indicates that the automated lunch system simply did not create the efficiencies that Kellogg attributed to it and did not warrant the proposed five-hour reduction. District witness Fisa as well as Thomas explained in some detail that, while less time was spent collecting money directly from children especially on Monday mornings, more time was needed under the new system for recordkeeping and running the lunchroom computer. Both witnesses testified that, on balance, the amount of work was about the same. In addition, the record indicates that Thomas did not handle the majority of the lunch program money collection prior to automation, but rather Fisa handled those duties. Of overriding significance, moreover, is the

⁶ The contract permitted more senior employees whose hours were reduced below 28 to "bump" less senior employees holding full time positions.

⁷ The record does not indicate why Ryerson rejected Kellogg's recommendation for a five-hour per week reduction or what explanation he may have offered at the time..

a fifth Noon Duty Aide for an additional 7.5 hours per week in the lunch room. While Kellogg had been seeking an additional Noon Duty Aide for some years without any ulterior design upon Thomas' position, some additional explanation is needed for continuing to pursue this personnel increase while at the same time proposing a decrease in a current employee's position. Yet Kellogg clearly did not even consider assigning Thomas to those hours (or some hours) of Noon Duty Aide duty as a way of avoiding a reduction in her hours. This is particularly telling where, after hiring a fifth Noon Duty Aide, Kellogg had Noon Duty Aides run the automatic lunch program computer in the lunch room, work previously performed largely by Thomas – and work that apparently continued to be performed by the District's two other Office Aide IIs, neither of whom were recommended for or suffered an hours reduction. In its full context, therefore, Kellogg's decision to recommend reducing Thomas' hours by five (or even by two) for the 2003-04 school year cannot reasonably have been motivated by alleged efficiencies from the automated lunch program.⁸

The Examiner is also influenced by Kellogg's failure to provide any notice or forewarning to Thomas that her hours were in jeopardy, despite the administration's apparent instruction to do so (Aug. Tr. 173; see also, Aug. Tr. 112), especially for those employees (like Thomas) whose benefits might be affected by the reduction.. Such notice, or at least an informal discussion within the small office setting where Kellogg and Thomas encountered each other every day, whether or not required by the contract or by the administration, would seem normal and expected. Here, such a conversation may have led to a discussion about supplementing Thomas' reduced schedule with lunchroom duty or other mitigating measures. The absence of any such discussion, under the circumstances present here, casts further suspicion upon Kellogg's attitude and motives.

As set forth above, proffering an insubstantial or pretextual basis for taking adverse action, coupled with a finding of animus toward the protected activity, is a strong indication that animus played a role in the adverse action. However, it is possible that something other than either the asserted reason (lunch program automation) or the animus toward her protected

⁸ The District argues that Kellogg should not be faulted for failing to offer additional lunchroom hours to Thomas in lieu of a reduction in hours, because Noon Duty Aide was a different job category and therefore such an offer would have required union authorization, and because neither Thomas nor the Union asked for the hours to be assigned to Thomas. As to the first argument, it is clear that Noon Duty Aide, like Office Aide II, was a bargaining unit position and that numerous employees filled positions combining two jobs. For example, Matthews was a Health Aid/Instructional Aide. As to the second argument, what is at issue here is Kellogg's thought process and motivation. What the Examiner finds damaging to the District's position is that Kellogg was proposing a more drastic cut to Thomas' position than the Superintendent thought warranted, even though the Superintendent had initiated the cost cutting directive, and that Kellogg was doing so while at the same time he was adding 7.5 hours of bargaining unit work that Thomas was capable of performing but that he did not offer her. This was an intentional effort to harm Thomas, regardless of what the Union might or might not have agreed to had Thomas been offered the combined job. In addition, by the time Thomas returned to work at the outset of the 2003-04 school year and became aware of the additional Noon Duty Aide position, Thomas' hours had been restored to 28, the threshold that maintained her eligibility for full insurance benefits, thus making her testimony quite plausible that she did not have an incentive to ask for what would have amounted to the layoff of a newly-hired Noon Duty Aide.

during the time period in which Kellogg was making his reduction recommendation. In addition, the District suggests that Kellogg had a “personality conflict” with Thomas related to his perception that she had trouble maintaining confidentiality. Once again, however, upon close scrutiny these other potential factors are not sufficient to explain Kellogg’s action, not only because there is little substance to them, but because, carefully considered, they themselves are built upon the same platform of unlawful animus.

The District correctly argues that a “personality conflict” in and of itself is not an unlawful reason for acting against an employee. Here, the record reveals Kellogg’s apparent perception that Thomas was unreliable in terms of maintaining confidentiality. However, Kellogg’s impression to that effect, especially prior to the spring of 2003, is supported by little if any evidence of actual breaches of confidentiality on the part of Ms. Thomas – other than those related to her protected activity in discussing certain work-related concerns with the Union and/or with Ryerson. Kellogg clearly disliked the fact that Thomas had (or he believed she had) discussed various issues about Howe school with outsiders before bringing them to his attention, as set forth in the preceding section of this Memorandum. While Thomas’ 2003 evaluation included a hand-written comment about the importance of confidentiality, Kellogg offered no specific explanation for that comment at hearing. At the time of the evaluation, Thomas inquired about the comment and Kellogg replied that it was just a general reminder to everyone about the importance of confidentiality. Subsequent to the evaluation, Kellogg rebuked Thomas for looking at a document containing confidential student information in a manner that Kellogg interpreted as “reading” it. The evidence indicates that Kellogg’s assumption about Thomas’ behavior was erroneous, since, in fact, she was following directions to photocopy only certain pages of the document and was simply looking for the correct pages. Kellogg’s inaccurate assumption about Thomas’ conduct in that instance (and his failure to investigate before reprimanding) appears more likely to have been an effect than a cause of Kellogg’s distrust, which, on this record, was largely if not entirely based upon Thomas’ protected activity. Similarly, Kellogg’s May 15, 2003 written reprimand, ostensibly in response to Thomas having helped Eisberner obtain physical control over a distraught child, included language about confidentiality. Nothing about the incident in itself or any references to it in the record explains why Kellogg included the confidentiality language. Once again, the explanation appears to lie in Kellogg’s subjective views of Ms. Thomas’ trustworthiness, subjective views that, on this record, appear to have resulted from his hostile reaction to her protected activity.⁹

In short, the Examiner is satisfied that the Union has met its burden to establish that Kellogg was motivated to propose that Thomas’ hours be reduced for the 2003-04 school year at least in part because of his animus toward her protected activity. The District contends,

⁹ Kellogg testified that he believed that Ms. Thomas intentionally attempted to eavesdrop on conversations in his office and that he observed her gradually and intentionally position herself at the end of the office counter closest to his office at times when her work did not warrant that location. The Examiner credits Thomas’ testimony that such did not occur, at least insofar as Kellogg portrayed it as an intentional attempt at eavesdropping.

District School Board harbored animus or improper motives, and, since they ultimately were responsible for implementing the reduction, the Union ought not prevail against the District on this issue. The District notes that Ryerson persuaded Kellogg to limit the proposed reduction to 2.5 hours per week instead of five. After the District notified Thomas of her reduction and received the Union's protest, the District added one-half hour per week to her schedule to bring her to the 28 hours necessary for full benefit status, further demonstrating the District's lack of animus.

The Examiner agrees that the record does not reflect animus on the part of Ryerson or other District officials. However, the Commission has long rejected the notion that an intervening layer of decision makers insulates a municipal employer from liability for prohibited practices instigated by their agents. In *NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NO. 28954-C (WERC, 3/99)*, the Commission stated:

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

Id. at 10. Even in situations like the instant one, involving "one manager acquiescing in the recommendation of a subordinate manager, where both managers exercised some independent discretion," the Commission will hold the municipal employer liable if the evidence indicates that the subordinate manager with the unlawful animus "instigated" or "set in motion" the process culminating in the adverse action. *D.C. EVEREST AREA SCHOOL DISTRICT, DEC. NO. 29946-M (WERC, 6/04)*, at 40-42. In this case, it is obvious that, absent Kellogg's recommendation, Ryerson would not have selected Thomas for a reduction in hours, even the more limited reduction that eventually occurred. Kellogg's animus therefore was a contributing factor in the District's ultimate action and the District is legally responsible for the underlying prohibited practice.

Accordingly, the Examiner concludes that the District's decision to reduce Thomas' hours for the 2003-04 school year was motivated at least in part by animus toward her protected activity, in violation of Secs. 111.70(3)(a)3 and 1, Stats.

2. The December 19, 2003 Meeting

As described above, Thomas engaged in further protected activity after her hours were reduced for the 2003-04 school year. During the summer, the Union had protested her reduction and prevailed upon Ryerson to add a half hour per week so she could maintain her benefits. Thomas may have complained to colleagues that she thought the reduction had been retaliatory, or Kellogg at least believed that to have occurred and confronted her about it at the

to the Union's business representative, who in turn complained to Ryerson who telephoned Kellogg, about Kellogg's rearrangement of her desk/computer and about Kellogg's including the item, "Anything Wayne needs to know" on the agenda for the regular office staff meetings. By late fall of 2003, it is clear from Kellogg's reactions that Thomas' conduct had maintained and added to Kellogg's irritation with her.

This is the backdrop against which the events of December 2003, culminating in the disciplinary meeting and reprimand, must be considered. Were these actions motivated solely by legitimate concerns, or did Kellogg's animus toward Thomas for her protected activity play at least some part? On this issue, the determination is relatively straightforward, both because there was so little legitimate basis for Kellogg's actions and because so much of his reaction can be explained only in terms of his underlying, unlawfully generated, distrust of Thomas.

As to the alleged misconduct regarding Fisa's time sheet, the record reflects (as recounted in Findings of Fact 38 and 39) that Kellogg had developed a special procedure for handling Fisa's time sheet that was designed to avoid Thomas becoming aware of the time sheet's contents. Why? The only explanation reasonably supported by this record is that, since the time sheet would show an irregular hour arrangement for Fisa and since Kellogg believed Thomas had reported Fisa's irregular hours in the past, he wanted to avoid Thomas being in a position to do so again. Circumventing Thomas in this manner is not unlawful, any more than it was unlawful, in itself, for Kellogg not to trust Thomas based upon her protected activity. What was unlawful, however, was Kellogg's angry overreaction upon learning that the scheme may have gone awry and that Thomas may have seen the time sheet despite his effort at preventing that. Kellogg brought Thomas in, made it clear that he was upset with her conduct, and, once she obtained a Union representative, accused her of invading Fisa's privacy by opening the envelope containing her time sheet.

Since Thomas regularly opened inter-office mail, regularly saw other employees' time sheets, and had been enlisted to help Matthews locate the misplaced envelope that morning, and since Thomas had not been alerted to any special privacy concerns regarding that envelope, it is difficult for the Examiner to conclude that any actual misconduct had occurred. While it is not unlawful retaliation for a supervisor simply to have poor judgment or mistakenly assess an employee's conduct, it is unlawful if those judgments or assessments are influenced by unlawful animus. It seems clear in this case that Kellogg would not have found Thomas' behavior so perturbing if he were not viewing it through the lens of distrust generated by what he believed to be her previous protected activity in discussing Fisa's hours with the Union. His real concern is underscored by a comment that he added to the reprimand: "Other information heard in the office and is confidence [sic] in nature should NOT be shared." The situation had no overtones of Thomas inappropriately sharing confidential information. Thus the comment serves only to reveal Kellogg's hypersensitivity to the possibility that Thomas might share information about Fisa with the Union, as she had (he thought) in the past. Accordingly, even if Kellogg genuinely (though unreasonably) believed that Thomas had inappropriately intruded on the privacy of Fisa's time sheet, the Examiner is satisfied that he would not have reacted as harshly if he were not also harboring animus related to Thomas'

As to the angry grandmother incident, it appears to the Examiner that this played a secondary role in the meeting and the reprimand; the time sheet incident was more proximate in time and appears to have precipitated the meeting. For that reason, even if Kellogg's concerns about the angry grandmother incident were wholly genuine, substantial, and lawful, that incident clearly would not in and of itself have prompted the meeting or the discipline. For purposes of the "in part" test for unlawful motive, it is sufficient that Kellogg's animus influenced his reaction to the time sheet incident, and that the time sheet incident contributed to the meeting and the reprimand. Nonetheless, it is worth noting that the record does not reflect any actual misconduct on Thomas' part in the angry grandmother incident. Thomas copied a document as requested, gave the original back to the grandmother, and asked Fisa what to do with the copy. Fisa, without any fault on her part, misunderstood the situation and told Thomas to file it. Thomas filed it. There's no evidence whatsoever that anyone had told Thomas to give a copy to Eisberner. That this incident could result in discipline is hard to understand, except in the context of Kellogg's negative feelings toward Thomas, which have been found to include animus toward her protected activity.

Thus, the Union has established to the Examiner's satisfaction that the December 17, 2003 meeting and reprimand were adverse actions prompted at least in part by Kellogg's animus toward Thomas' lawful, concerted activity and thus violated Sec. 111.70(3)(a)3 and 1, Stats.¹⁰

3. Lack of Interpersonal Communication from Kellogg

The Union contends that the District took a third form of retaliatory adverse action against Thomas when Kellogg more or less stopped communicating with her except as absolutely necessary. According to the Union, this "chill" may have begun in earlier years, but had reached a peak by April 2004, creating a hostile working environment for Thomas in order to encourage her to leave the school. The District denies that this occurred, offering evidence that Thomas was "oversensitive" and that Kellogg was not very "chatty" in the work place in general.

¹⁰ The Union also contends that, beyond reprimanding Thomas on December 17, Kellogg also removed "confidential duties" from her at that time. The Examiner doubts that removing confidential duties, in the instant context, would amount to actionable "adverse action," given the District's generally recognized right to assign and distribute duties, especially those that are reasonably within the confines of bargaining unit work, and the lack of evidence to suggest that losing confidential duties would have an adverse impact upon Ms Thomas. In any event, as set forth in Finding of Fact 47, the record does not support the Union's claim that any significant duties were removed from Thomas as a result of the December 17 meeting. She continued to be primarily responsible for opening and distributing mail, she apparently continued to handle time sheets and record leave time, and, even assuming that Kellogg did restrict her from photocopying or filing confidential documents after December 17, it is not evident that such work ever comprised a significant portion of her duties. Accordingly, the Union's claim in this regard fails for lack of evidence.

As indicated in Finding of Fact 42, and discussed in the animus section, above, the record supports the Union's contention that Kellogg was intentionally keeping a distant and strictly professional relationship with Thomas by April 2004, and that he was less socially interactive with her than with other office employees, noon, recess and bus aides. The Examiner does not doubt that working in a small office environment where one's supervisor is cold and distant can be difficult and hurtful. However, the record does not support a conclusion that the atmosphere was so miserable for Thomas as to inhibit her ability to perform her job. As the Commission has observed, "Concerted activity by its nature often occurs in tense, confrontational, or chilly atmospheres, and some intemperance is to be expected in those situations." VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03), at 25. In that case, the Commission was addressing the lawful boundaries of an employee's remarks to a supervisor, while in the instant case it is a supervisor's words (or lack of words) that is under consideration. Some latitude in expressing feelings is also permitted to management personnel in situations involving protected activity, provided the expressions fall short of threats or coercion.¹¹ Drawing that line can be difficult, but the Examiner is satisfied that MERA does not require a supervisor to remain socially amiable or "chatty" with an employee who has repeatedly caused him difficulties, albeit in a fully protected manner.

Accordingly, the Examiner concludes that Kellogg's lack of anything more than strictly professional communication with Thomas during the one year period prior to filing of the instant Complaint is not an adverse action within the scope of Section (3)(a)3 of MERA.

4. The 2004-05 Reduction in Hours

In the spring of 2004, as in the previous school year, the District again sought recommendations for budget cuts from school administrators. As in the previous year, principals were not given specific targets but were asked to avoid affecting the instructional program. Again, the only cut that Kellogg recommended for Howe was for Thomas to lose an additional eight hours, reducing her from 28 to 20 hours per week. Based on the experience of the previous year, when the District's personnel office had increased Thomas' hours from 27.5 to 28 in order for her to retain her benefits, Kellogg certainly was aware at the time he made the recommendation for the 2004-05 school year that Thomas' benefits would be affected. He again did not consider reducing the recently hired fifth Noon Duty Aide and consolidating those duties with Thomas'. He again did not discuss his recommendation with Thomas at any time or provide her with any formal or informal notice, despite the loss of benefits that she would experience. The reduction required Thomas to pay a prorated portion of her health

¹¹ See, e.g., ASHWAUBENON SCHOOLS, DEC. NO. 14474-A (WERC, 10/77) and JANESVILLE SCHOOLS, DEC. NO. 8791 (WERC, 3/69). (In recognition of the employer's free speech rights and of the general benefits of "uninhibited" and "robust" debate in labor disputes, employer remarks which inaccurately or critically portray the employee's labor organization and thus may well have a reasonable tendency to "restrain" employees from exercising the Sec. 111.70(2) right of supporting their labor organization generally do not violate Sec. 111.70(3)(a)1, Stats., unless the remarks contain implicit or express threats or promises of benefit.)

Kellogg again cited the efficiencies from the automated lunch program as the primary basis supporting his conclusion that Thomas' duties would not require more than 20 hours per week. By the spring of 2004, the automated lunch program had been in place for over two years. As discussed in above in connection with the 2003-04 reduction, automation had not created enough efficiencies to justify even the ultimate two hour reduction the previous year; nothing in the record indicates that anything about the program became significantly more efficient during 2003-04. While Kellogg's transfer of running the lunch program computer from Thomas and Fisa to the Noon Duty Aides may have been facilitated by adding a fifth Noon Duty Aide while decreasing Thomas' hours, that "efficiency" was itself facilitated by the first reduction in Thomas' hours; as a product of Kellogg's unlawful conduct, it cannot provide a justification for an additional reduction in Thomas' hours. As in the previous year, neither of the other two schools with full time Office Aide IIs cut those positions, despite their lunch programs having been similarly automated. In at least one of those schools, the Office Aide II continued to operate the lunchroom computer. (The record does not indicate how that was handled in the other school). While the District rightly points out that the Office Aide IIs did not necessarily perform the same set of duties in each of the three schools, and while this factor therefore would not be particularly meaningful standing alone, it does tend to support the conclusion that the lunch room automation remained a pretextual rationale for reducing Thomas' hours in 2004-05.

Kellogg also cited other efficiencies he had implemented in the office as a basis for reducing Thomas' hours. Instead of having Thomas open and inventory instructional materials that teachers had ordered, he had the teachers themselves do so. Instead of Thomas hand-delivering messages about replenishing student lunch accounts to the students' classrooms, Kellogg had her place those messages in the teachers' mailboxes. Rather than Thomas distributing catalogs and magazines to teachers' mailboxes, especially at the beginning of the year, he had her place the materials on tables for teachers to look through. It is not clear whether these efficiencies were initiated during the 2003-04 school year or earlier. Regardless, the Examiner is not persuaded that they could amount to more than a minimal time savings in Thomas' overall work day and hence is not persuaded that, absent Kellogg's animus toward Thomas, these efficiencies would have led him to recommend an additional eight hour reduction in her work week.

The Examiner is also influenced by the fact that, when the hearing in this case reconvened in the fall of 2004, the evidence demonstrated that, contrary to Kellogg's assertion that the school simply did not need Thomas for more than 20 hours per week, the reduction in Thomas' hours was having a clearly detrimental impact on office productivity. The District had implemented registration fees, which would normally fall within Thomas' financial record-keeping duties, and the office personnel were having difficulty accomplishing this work. There were occasions when the work of opening and distributing daily mail was not completed. Sarah Matthews - whose job responsibilities as Health Aide and Instructional Aide did not encompass office assistance, was being called upon regularly to help out with office duties. While Kellogg suggested that the work would even out as the school year went on, one would

determining office staffing needs. Contrary to Kellogg's assertion, therefore, the Examiner is persuaded that the office could not readily absorb the loss of eight hours per week of Thomas' time.

Other circumstances support the Examiner's conclusion that Kellogg's recommendation to reduce Thomas' hours for 2004-05 was prompted at least in part by his animus toward her protected activity. One consideration is that Kellogg's unhappiness with Thomas appears to have reached its high point during the spring of 2004, such that he was withholding all but strictly professional communication. As discussed in the preceding section, Kellogg's chilly attitude toward Thomas was not in itself unlawful. However, it certainly indicates that the animus he had been developing over the past years had not abated. The Examiner also notes that Thomas' evaluation of February 2004, while not negative, was discernibly less positive than in previous years and, unlike previous years, was devoid of any commentary. Similarly, as in the previous year, Kellogg may have had no contractual duty to offer Thomas any Noon Duty Aide hours or to discuss the reduction with her beforehand; yet his failure to offer these courtesies reflects an insensitivity that is hard to understand except in terms of his animus. None of these circumstances are very weighty in themselves, but, in combination with all of the other circumstances, and the insubstantial or pretextual reasons advanced by Kellogg, they create a persuasive picture of animus-driven action.

For all of the foregoing reasons, the Examiner concludes that Kellogg's recommendation that Thomas' hours be reduced for the 2003-04 school year was motivated at least in part by his animus toward her protected activity, and thus violated Secs.111.70(3)(a)3 and 1, Stats.

II. The Section (3)(c) Allegation

In addition to holding the District responsible for the results of Kellogg's unlawfully-motivated actions, the Union has alleged that Kellogg should be held individually responsible under Sec. 111.70(3)(c) for inducing the District to take unlawful action. Section (3)(c) provides as follows:

It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by para. (a) or (b).

The Commission has recently interpreted the analogous provision in the State Employment Relations Act (SELRA), Sec. 111.84(3), Stats., as "intended to reach individuals or entities who cause unfair labor practices but who are not within the reach of either subsection (1) as an employer or subsection (2) as an employee or a union." COUNCIL 24 AND STATE OF WISCONSIN, DEC. NO. 31397-C (WERC, 6/07), at 18. Subsections (1) and (2) of SELRA are analogous to Sections (3)(a) and (b) of MERA. The Examiner sees no reason to

analogous language. Since Kellogg was acting within the scope of his authority as an agent of the District in taking the actions at issue here, and since the District is within the reach of Section (3)(a) of MERA, Kellogg is not subject to individual responsibility under Section (3)(c).

Accordingly, the alleged violation of Sec. 111.70(3)(c), Stats., has been dismissed.

III. Remedy

As provided in the Order, above, the Examiner has directed the District to provide the conventional remedy for violations of Section (3)(a)3, i.e., to rescind the unlawful actions, restore the employee to the position she would have been in had the employer not acted unlawfully, reimburse the employee for lost wages and benefits attributable to the unlawful actions, and post a notice to employees. SEE, E.G., CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03), at 17.

In this case, the remedy includes a requirement that the District offer to restore to Beth Thomas the 10 hours per week of work as an Office Aide II by which her hours were unlawfully reduced (by two beginning in 2003-04 and by an additional eight beginning 2004-05), along with all seniority and other rights and privileges associated with those additional 10 hours. It also requires the District to make Thomas whole for all wages and benefits she lost due to the District's unlawful reductions of her hours, plus interest at the statutory 12% per year rate from the dates of the respective initial reductions to the date she is offered the restoration of hours pursuant to the Order.

Dated at Shorewood, Wisconsin, this 22nd day of January, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

