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-B

Appearances:

Patricia A. Lauten, Jeffrey S. Hynes & Associates, Attorneys at Law, 2300 N. Mayfair Road, Suite 390, Wauwatosa, Wisconsin 53226, appearing on behalf of Local 95, Office and Professional Employees International Union, AFL-CIO.

Jeffrey T. Jones, Ruder Ware, Attorneys at Law, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of Wisconsin Rapids School District and Scott Kellogg.

ORDER ON REVIEW OF EXAMINER'S DECISION

On January 22, 2008, Examiner Marshall L. Gratz issued Findings of Fact, Conclusions of Law, and Order in the above-captioned matter, holding that the Respondent Wisconsin Rapids School District (District) violated Secs. 111.70(3)(a)3 and 1, Stats., by reducing the work hours of Beth Thomas, an employee of the District and a member of the bargaining unit represented by the Complainant Local 95, Office and Professional Employees International Union, AFL-CIO (Union), and by taking certain other adverse actions against her, in retaliation for her lawful, concerted activity. The Examiner dismissed certain other aspects of the Union's complaint, including the Union's claim against Respondent Principal Scott Kellogg as an individual. To remedy the District's prohibited practices, the Examiner ordered the District to restore Thomas' lost hours and to reimburse her for any lost wages and benefits attributable to the lost hours, with interest as set forth in Sec. 814.04(4), Stats.

On February 12, 2008, the District filed a timely petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. Both parties filed briefs in support of their respective positions, the last of which was received on September 4, 2008.

Having reviewed the record and being fully advised in the premises, and for the reasons set forth in the Memorandum that accompanies this order, the Commission makes and issues the following

ORDER

The Examiner's Findings of Fact, Conclusions of Law, and Order are affirmed.

Given under our hands and seal at Madison, Wisconsin, this 8th day of January, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

I dissent.

Paul Gordon /s/
Paul Gordon, Commissioner

WISCONSIN RAPIDS SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER ON REVIEW OF EXAMINER'S DECISION

The Examiner's Decision and the Issues on Review

The amended complaint in this matter alleged that the District had taken various actions against Ms. Thomas in violation of her rights under the Municipal Employment Relations Act (MERA). Some of the alleged violations were based upon incidents that occurred more than one year prior to May 20, 2004, the date the complaint was filed, and therefore were outside the applicable one-year limitations period established by Secs. 111.07(14) and 111.70(4)(a), Stats. The Examiner granted the District's motion to dismiss the untimely allegations, but, consistent with Commission precedent, permitted the Union to introduce evidence pertaining to these incidents for any light they may shed upon the remaining, timely, allegations.

The Examiner conducted a hearing on August 10, September 29, and November 4, 2004, followed by briefs, reply briefs, and supplemental briefs, the last of which was filed on April 13, 2005. On January 22, 2008, the Examiner issued his decision, holding that the District violated the law in three ways: (1) by reducing Thomas' hours from 30 to 28 for the 2003-04 school year; (2) by disciplining Thomas on December 17, 2003; and (3) by reducing Thomas' hours from 28 to 20 for the 2004-05 school year. The Examiner dismissed the allegations that the District (through Kellogg) had violated the law by removing confidential duties from Thomas or by failing to interact in a friendly manner with Thomas on a day to day basis.[1] The Examiner also dismissed the allegation that Kellogg was individually liable for prohibited practices pursuant to Sec. 111.70(3)(c), Stats.

The District has petitioned for review regarding the three violations found by the Examiner. In its petition, the District stated that it contested 17 of the Examiner's 49 enumerated findings of fact, specifically 12, 17, 20, 26, 27, 28, 29, 32, 35, 37, 38, 42, 43, 44, 46, 47 and 48. However, the District's brief in support of its petition did not discretely address these asserted factual challenges. Rather, taking its arguments as a whole, the District

[1] The District appears to have misconstrued the Examiner's decision in some respects. For example, while the District acknowledges that the Examiner properly based his decision upon the four-prong retaliation analysis under Sec. 111.70(3)(a)3, Stats., the District's brief quotes extensively from cases, such as CITY OF OSHKOSH, DEC. NO. 28971-A (MAWHINNEY, 8/97), cited at page 13 of the District's brief, involving the significantly different analysis of interference under Sec. 111.70(3)(a)1, Stats. The District also challenges the Examiner for concluding that the District unlawfully removed confidential duties from Thomas; in fact, the Examiner held that the District did not remove confidential duties from Thomas and therefore did not violate the law in this regard. Finally, the District argues that one issue on review is whether Kellogg retaliated against Thomas by "not talking to her or saying 'hello' in the morning," (Dist. Br. at 6). The Examiner expressly ruled in the District's favor on this issue, concluding that Kellogg's behavior toward Thomas in their day to day interactions – while *evidence* of antipathy or distrust – was not adverse action and did not violate the law. Examiner's Decision at 29-30.

appears to challenge the inferences the Examiner drew in reaching his findings, particularly regarding Kellogg's motives as set forth in the Examiner's Conclusions of Law. The validity of those inferences will be addressed in the discussion, below. As to the Examiner's 49 Findings of Fact, they are amply supported by the record and are affirmed. No attempt is made here to summarize those extensive findings, all of which are important for understanding the context of the claims.

The District presents four main arguments on review: (1) as to the element of unlawful animus, the Examiner erroneously relied solely upon inference, speculation, and evidence not asserted in the Union's complaint; (2) as to holding that the District reduced Thomas' hours for unlawful reasons, the Examiner erroneously relied upon Kellogg's unrelated hiring of a fifth Noon Aide and erroneously disregarded the fact that Thomas' hours were reduced in connection with legitimate District-wide budget and staff cuts; (3) in concluding that what the District characterizes as Kellogg's "directive" to Thomas regarding confidential duties was unlawfully motivated, the Examiner erroneously failed to give sufficient weight to the District's legitimate concerns about Thomas' handling of confidential materials; and (4) the Examiner's delay in issuing his decision prejudiced the District by unwarrantably increasing its back pay liability. Each argument is addressed in turn.

1. Evidence of Animus

As the Examiner stated and the parties recognize, a retaliation claim under Sec. 111.70(3)(a)3, Stats., requires that four elements be established by a clear and satisfactory preponderance of the evidence: (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).

Here, as is often the case, the last two elements are the primary focus, i.e., whether Thomas' lawful, concerted activity engendered "animus" in Kellogg, and, if so, whether that animus contributed *at least in part* to Kellogg's recommending that her hours be reduced in two sequential school years (2003-04 and 2004-05) and/or to his reprimanding her in December of 2003.

As to animus, the District contends that no evidence supports the Examiner's conclusion that Kellogg bore animus towards Thomas, and that the Examiner improperly allowed the Union to meet its burden of proof solely through "inferences" about Kellogg's state of mind. The primary flaw in the District's argument is its assumption that inferences are somehow insufficient or improper for reaching a conclusion about animus. To the contrary, however, inferences from circumstantial evidence are nearly always the basis for finding

animus in a Section (3)(a)3 case. It is exceedingly rare for a record to contain direct evidence of animus, such as an overt statement of hostility toward protected activity. The Wisconsin Supreme Court has explicitly recognized this point:

> As the key element of proof involves the motivation of [the employer] and as, absent an admission, motive cannot be definitively demonstrated given the impossibility of placing oneself inside the mind of the decisionmaker, [the employee] must of necessity rely in part upon the inferences which can reasonably be drawn from facts or testimony.

EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985) at 143 (quoting with approval from the Commission's decision). The Commission itself has also elaborated on this point:

> 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.

In the instant case, an examiner with more than 30 years of experience "deciphering situations like the present case," id., painstakingly reviewed the web of events leading up to the alleged retaliatory actions and perceived in those events a pattern of hypersensitivity on the part of Howe School Principal Scott Kellogg whenever Thomas' union activity either caused or seemed to cause Kellogg to get a phone call from his boss, Superintendent Ryerson. From Kellogg's hypersensitive reactions, which the evidence amply displays, the Examiner inferred that Kellogg had developed a distrust and antipathy towards Thomas, who, as the Union puts it, "was the common link" in the series of telephone calls Kellogg received from his boss, Ryerson, about various work place matters.

Many of the work place matters underlying this case were quite minor, not only in terms of what Thomas may have been complaining about, but also in terms of Ryerson's apparently moderate comments to Kellogg and in terms of Kellogg's reactions. They involved sub-zero recess duty, Kellogg's secretary's off the clock overtime, the duty of checking for head lice, the orientation of Thomas' desk, the appearance of "Anything Wayne needs to know" on the office agenda, and Kellogg's gradually more chilly attitude toward Thomas.

Taking each incident individually, the District's proffered explanations for Kellogg's reactions are plausible and, indeed, the Examiner took these explanations into account. In general, as the dissent states, Kellogg had a "right" to remove keys, establish and remove

duties such as checking for head lice, take steps to handle problems internally, rearrange office furniture, or even refrain from anything except business conversation with office workers. However, viewing the events and circumstances as a whole, the Examiner discerned, as we do, a supervisor growing increasingly distrustful of an employee who repeatedly went "outside" with things the supervisor would have preferred to manage internally. We agree with and adopt the Examiner's careful explanation at pages 20 to 22 of his decision about how and why he drew an inference of animus from the circumstances before him. We specifically address only the most salient of the Examiner's points here.

As the Examiner explained, we do not view it as unlawful, but quite normal, for Kellogg to have preferred to handle work-related issues internally and to be irritated about having to explain himself to his boss, Ryerson, on one occasion at 10 p.m. in the evening. As the Examiner noted, irritation with an employee's union activity is not uncommon and is not in itself unlawful. Importantly, and contrary to the District's characterization, the Examiner did not find these incidents to be a pattern of unlawful *actions*; rather the Examiner inferred from the pattern of Kellogg's reactions and words that Kellogg had developed a *state of mind* that was distrustful of Thomas. Since that state of mind stemmed from Thomas' lawful, concerted activity, it constituted "animus" in satisfaction of the first element of the retaliation paradigm.[2]

In challenging the Examiner's inferences regarding animus, the District repeatedly and erroneously conflates the animus element with the retaliation element.[3] Animus is a state of

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[2] We acknowledge, as the District points out, that various witnesses testified that they did not believe that Kellogg would act out of animus towards any employee, but rather would always have the best interests of the school in mind. We have no reason to doubt Kellogg's general good faith in running his school. He may have genuinely believed that Thomas was untrustworthy and that her repeatedly going outside about internal matters was not a good way to address internal work place complaints. Indeed, it is quite possible that Kellogg would not have resented or overreacted to Thomas' complaints if she had kept them "internal" to the Howe School. He may legitimately have believed that her inability to get along with him and the other office staff was a "personality conflict" and an operational problem that he needed to address. He doubtless would not have put the label "animus" on this belief or perception and may have been only vaguely aware of it. EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05). However, because Kellogg derived his perception of Thomas' "personality" from her having engaged in activity that the law protects (going "outside" to the Union with work place issues), it is not a lawful basis on which to take action.

[3] Our dissenting colleague may also afford less distinction to these two elements (animus, on the one hand, and the act of retaliation, on the other) than we think appropriate. Thus, the dissent suggests the Commission is being inconsistent or self-rationalizing when concluding that Kellogg acted unlawfully in reducing Thomas' hours, while still emphasizing that Kellogg's irritation with Thomas' concerted activity may have been quite understandable and lawful in itself. In fact, there is no inconsistency in the two conclusions. The law is clear that animus (irritation) in itself is not unlawful, but acting on it is. The dissenting opinion also seems to erect a higher evidentiary hurdle for establishing animus than the case law warrants. In doing so, the dissent erroneously suggests that evidence of animus must be found in statements or actions of such aggressiveness or hostility that the statements/conduct violate the law in themselves, as interference or threats within the proscription of Subsection (3)(a)1. Thus, the dissent cites SCHOOL DISTRICT OF WESTOSHA, DEC. NO. 29671-B (MAWHINNEY, 5/00), where an examiner had exonerated a school official's overtly anti-union comments, but where the Commission later reversed the examiner on that issue, concluding that the official's remarks were so hostile as to constitute an independent violation of Sec. 111.70(3)(a)1 even though the Commission (without discussion) affirmed the examiner's conclusion that the animus reflected in the official's remarks did not in that case contribute to any adverse action. DEC. NO. 29671-C (WERC, 8/00). We also respectfully note that the dissent relies upon prior Commission cases (often unreviewed examiner decisions) in a manner that attributes more universality to the holdings than is warranted in such intensively factual cases. For example, the dissent cites

mind that is a prerequisite for finding a violation, but it is the retaliatory adverse action, not the animus, that violates the law. One reflection of conflating the two elements is the District's erroneous argument that the Examiner improperly found animus by relying upon certain events (such as the head lice incident) that the Union had not alleged in the complaint. The purpose of a complaint is to notify a respondent of the conduct that is alleged to have violated the law. The instant complaint should and did allege each action by the District or its agents that is claimed to have been unlawful. However, while a retaliation complaint should also allege the existence of animus, which is an element in establishing such a claim, a complaint need not spell out every item of evidence that may show animus. Here, for example, the Union did not allege nor did the Examiner find that the lice incident or the keys incident were unlawful, but rather that aspects of these incidents and Kellogg's reactions to them tended (however modestly) to establish animus. The actions that were alleged to be unlawful – principally the two successive reductions in hours – were properly alleged in the complaint/amended complaint. Accordingly, the District's argument on this point is without merit.

Blurring the distinction between animus and an unlawful act of retaliation also leads the District to misdirect certain arguments on the animus issue. For example, the District argues regarding Thomas' cold recess complaint that, "There is no evidence that Kellogg questioned Thomas [about the cold recess] out of union animus or for purposes of retaliation because the Union had raised the issue in negotiations." District Br. at 49. However, the Examiner did not conclude that Kellogg had questioned Thomas "for purposes of retaliation." Rather, the Examiner discerned from the nature of Kellogg's questioning (and from Kellogg's own testimony at hearing) that Kellogg was not happy about getting a call from Ryerson at home at 10:00 p.m. regarding an issue that had been taken "outside" before being brought first to Kellogg.[4] The Examiner properly concluded that this annoyance, however understandable, contributed to Kellogg's growing distrust of Thomas, i.e., to his animus.

CEDAR GROVE, DEC. NO. 25849-B (WERC, 5/91), for the proposition that "animus is not established because an employer takes action in response to a matter called to management's attention while a labor organization is engaged in protected activity." While it is true that animus was not established in CEDAR GROVE, the case does not stand for the proposition that animus cannot be established in such a case.

[4] As the Union points out, Kellogg himself explained his reference to "Wayne" [the Union representative] as an effort to find out "is there anything we need to talk about, *rather than going outside,* . . ." (Union Br. at 25) (emphasis added). We reiterate that it may have been perfectly legitimate for Kellogg to want to solve problems internally and to be annoyed when this did not occur. The point here is simply that he was annoyed and that the annoyance was related to Thomas' union activity. In challenging our view of this situation, the dissent asserts that Kellogg "accepted" Thomas' answer that she was not responsible for the cold recess complaint to the Union and did not thereafter hold her responsible. This is not accurate. While Kellogg accepted Thomas' statement that she was not the original complainer, Kellogg's secretary Fisa herself testified that Kellogg "knew" the complaint had gone through Thomas to the Union even if it had originated with a different employee. It is reasonable to infer that Fisa (Kellogg's secretary and the District's witness) would have been familiar with Kellogg's state of mind as to Thomas having a role in the incident. Further demonstrating Kellogg's annoyed reaction, it was only Thomas and Fisa, and no other bargaining unit members, who were called into the meeting after Kellogg received Ryerson's call. Fisa's presence at the meeting makes sense because she, as school secretary, was responsible for deciding whether recess would be held outdoors. Thomas' presence has no similarly apparent explanation. We find the Examiner's inference – that Thomas was questioned because of her role on the Union's negotiating team, where Ryerson heard of the complaint, well supported by the evidence.

The District also argues that, "(t)here is simply no evidence that Kellogg reconfigured the position of Thomas' computer for the purpose of retaliating against her. . . ." District Br. at 56. Again, the Examiner did not find the desk reorientation to have been retaliatory and therefore unlawful. Instead, the Examiner found, and we agree, that no matter what Kellogg's business reasons were for reorienting the desk, the incident led to annoyance with Thomas because she complained about it to the Union, which in turn led Ryerson to again telephone Kellogg. It is not "speculation" as the District argues, but compellingly logical, to conclude that Kellogg expressed this irritation by placing the item "Anything Wayne needs to know" (Wayne being Thomas' Union representative) on the agenda for subsequent weekly office meetings. The District again misses the point with its argument that "there is no retaliation inherent in asking a Union member if there is something a bargaining representative needs to know." District Br. at 56 and 57. The Examiner did not find, nor do we, that it was retaliatory for Kellogg to add that agenda item or that it was unlawful or illegitimate for Kellogg to prefer to handle matters internally. It is, however, *evidence* that Thomas' going to the Union had gotten under Kellogg's skin. "Wayne" was clearly on Kellogg's mind.[5]

Accordingly, we find the Examiner's inferences regarding animus well-founded in the evidence and entirely appropriate.

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[5] The District and our dissenting colleague also believe that the Examiner drew unfair inferences from Kellogg's decision to remove building and office keys from Thomas, after the Union had raised a concern to Ryerson about Kellogg's secretary Fisa working unpaid overtime hours causing Ryerson to telephone Kellogg, and from the "head lice" incident. As to the keys, the dissent asserts that "no evidence" indicates that Kellogg viewed Thomas as the source of Ryerson's information about Fisa's hours. On the contrary, however, as the Examiner explained, he inferred Kellogg's suspicion of Thomas from the record evidence that it was the Union who brought Fisa's hours to Ryerson's attention during negotiations, that Kellogg was aware that Thomas (and only Thomas, from Howe) was on the bargaining team, that Kellogg believed that Thomas had been the conduit for the earlier cold recess complaint, and that Kellogg called only Fisa and Thomas, but no other office employees, into the meeting and removed their keys. We find the Examiner's inference supported by that evidence. As to the head lice incident, in the process of negotiating with the Union about an upgrade for office aides like Thomas, it came to Ryerson's attention that Thomas was sometimes asked to check for head lice. Ryerson called Kellogg about this, and Kellogg called Thomas in immediately the next day to tell her not to check for head lice. The Examiner concluded that Kellogg's reaction seemed a bit hypersensitive, since Thomas was not at the time handling that duty. All that said, the District and the dissent significantly overstate the role either of these incidents played in the Examiner's analysis. The Examiner did not conclude that removing Thomas' keys or telling her not to check for head lice was unlawful or retaliatory; indeed, Kellogg obviously had a "right" to remove the keys and to make sure employees did not work unpaid overtime and did not perform inappropriate duties. But having a "right" does not necessarily mean it was logical to take the actions Kellogg took. Kellogg was aware that it was Fisa, not Thomas, who had a tendency to work extra hours to complete her work. He did not remove keys from any other office employees, including aide Sarah Matthews. Within a short time Kellogg returned the keys to Fisa, but not to Thomas. Kellogg's explanation is that at least one person besides himself and the custodian needed to have a master key and Fisa was a logical choice. That is a reasonable explanation for returning the keys – but, to us, it also undermines the logic of the initial decision to remove them from Fisa (who had the overtime problem) and Thomas (who did not). As to the head lice, that relatively minor episode is far from pivotal in our conclusions about Kellogg's growing distrust of Thomas. However, to the extent either of these incidents lends a modicum of support to the Examiner's overall conclusion that Kellogg displayed sensitivity/overreacted to negative feedback that he attributed somewhere along the line to Thomas, we agree with the Examiner.

We agree with the District and the dissenting opinion that a "personality conflict" between a supervisor and an employee is not in itself unlawful, even if the mutual animosity stems from protected activity. The law does not oblige a supervisor in Kellogg's position to like or trust an employee like Thomas or even to maintain an overtly friendly demeanor.[6] The law, however, does prohibit a supervisor from taking adverse action even partly in response to that negative feeling. As discussed in the following sections, we concur with the Examiner that Kellogg's actions against Thomas were, at least in part, a result of his animus.

2. The Reductions in Hours for 2003-04 and 2004-05

Regarding the two consecutive reductions in Thomas' hours, the District contends on review that the Examiner was wrong to find that Kellogg's motives were "pretextual," whereas in fact Kellogg's actions each year were obviously triggered by a bona fide budget shortfall and a directive from the Superintendent to find ways to cut spending. The District argues (and the dissent agrees) that the budget situation was in and of itself what caused Thomas to lose hours, just like many other employees throughout the District.

The District's argument seems to assume that Kellogg's asserted legitimate motives would have to be found entirely "pretextual" in order to conclude that the District violated the law. To the contrary, however, the law recognizes that employers are often prompted by a mixture of lawful and unlawful motives. Precisely because it can be so difficult to distinguish the lawful from the unlawful motives, the Commission has long held it to violate Sec. 111.70(3)(a)3, Stats., if an employer takes an action that is motivated in any part by animus towards protected activity, even if the action also was prompted by other, lawful motives. MUSKEGO-NORWAY SCHOOL DISTRICT V. WERB, 35 WIS.2D 540 (1967) and; EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985). Thus, the District is simply wrong in its repeated contention that, "To the extent that an employer can establish reasons for its employment action which do not relate to hostility to an employee's protected activity, it has met its burden of rebuttal," (Dist. Reply Br. at 5) (emphasis in original).[7] Even

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[6] The dissenting opinion asserts that "MERA does not outlaw lack of tact or lack of professional courtesy," quoting from SCHOOL DISTRICT OF JEFFERSON, DEC. NO. 28653-A (GRECO, 2/97), AFF'D BY OPERATION OF LAW, DEC. NO. 28653-B (WERC, 3/97). Nothing in this decision speaks to the contrary. Indeed, as noted in footnote 1, above, the Examiner dismissed the Union's allegation that the District had violated the law when Kellogg displayed a chilly attitude toward Thomas during the 2003-04 school year. More importantly, however, lack of tact and professional courtesy – while not unlawful in themselves - can be, and in this case were, evidence of animus/ distrust/displeasure by Kellogg toward Thomas.

[7] The District's citation of ERD V. WERC, 122 WIS.2D 132, SUPRA, in support of that proposition is not only wrong but turns that case on its head, as the Court explicitly and at length expressed its approval of the "in part" test. Similarly, the District's other citations in support of that proposition are misplaced, including NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NOS. 28954-C AND 28954-D (WERC, 3/99), and VILLAGE OF UNION GROVE, DEC. NO. 15541-A (DAVIS, 2/78), AFF'D BY OPERATION OF LAW, DEC. NO. 15542-B (WERC, 3/78). The employers prevailed in those cases because the Commission concluded, based upon the specific facts in those cases, that the employers' actions had been lawfully motivated in their entirety, and were not motivated even in part by animus.

if Kellogg's two successive recommendations to reduce Thomas' hours were not wholly pretextual, and were partially prompted by a desire to comply with Ryerson's budget directives, those actions will still violate the law if Kellogg's animus also played a role in selecting her for the reductions.

To the extent the District is arguing, consonant with ERD v. WERC, that evidence of legitimate motivation "weakens the strength of the inferences" of improper motivation, 122 Wis.2d at 143, the District is correct. In this case we acknowledge (as did the Examiner) that Kellogg's recommendations to reduce Thomas' hours in each of the two years were instigated by the Superintendent's district wide budget directives. The Superintendent's directives, however, did not require a principal to reduce any particular employee or any category of employees for reduction. The directive did not require reductions in every school or set a quota for any particular school. Considerable discretion was left to the principals about how to save money. In this context, the Examiner's detailed assessment of the circumstances led him to conclude that Kellogg used that discretion to focus on Thomas, at least in part out of the distrust he had developed for her, a distrust that, in turn, stemmed from her protected activities.

Among other considerations, a major element in the Examiner's analysis was the weakness he perceived in Kellogg's proffered explanation for selecting Thomas for reduction, i.e., Kellogg's claim that the computerized lunch system had created efficiencies that reduced the need for Thomas' services. The Examiner looked closely at this assertion for each of the two school years, carefully balanced the competing evidence over several pages of his discussion, and ultimately concluded that Kellogg's explanation did not withstand scrutiny. As to the 2003-04 school year, the Examiner wrote, in part:

> 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 fact that, while proposing to remove five hours from Thomas for 2003-04, Kellogg was *adding* 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.

Examiner's Decision at 24-25.

As to the 2004-05 reduction, Kellogg again proffered the automated lunch system as his primary reason for needing fewer hours from Thomas. The Examiner remained unconvinced:

> 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 insurance premium and lost eligibility for dental insurance entirely.
>
> 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 [sic] 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.

Examiner's Decision at 30-31.

In addition to finding the lunch automation an unpersuasive justification, the Examiner relied upon a number of other factors in reaching his conclusion that animus played at least a part in Kellogg's decision to respond to the Superintendent's general budget directive solely by recommending a significant reduction in Thomas' hours. We find the Examiner's lengthy rationale (at pages 23-27 and 30-32 of his decision) to be persuasive and we adopt it here.

On review, the District faults the Examiner for relying so heavily upon Kellogg's hiring of the fifth Noon Aide. The District contends that the Examiner should not have addressed this issue at all, since the Union had not "raised the issue of the fifth Noon Aide as a basis for a prohibited practice complaint. . . ." (District Br. at 37). Here, again, the District fails to distinguish between evidence of a prohibited practice, which need not be alleged in a complaint, and the prohibited practice itself. The Examiner did not hold that the District committed a prohibited practice by hiring a fifth Noon Aide. Rather, the Examiner properly considered the evidence about the fifth aide as part of his analysis of whether the District had proffered a bona fide justification for reducing Thomas' hours. The Examiner concluded, and we agree, that hiring a new employee to do work that Thomas had been doing in connection with the lunch room, while claiming that Thomas' lunch duties had been so reduced that her hours could properly be cut, is persuasive evidence against that asserted justification. Hence, the Examiner did not err in relying in part upon the fifth Noon Aide evidence in reaching his conclusion that Kellogg acted out of animus toward Thomas in reducing her hours.[8]

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[8] We emphasize, as did the Examiner, that both Thomas and District witness Fisa testified that the automation had not decreased the amount of lunch-related work. Also supporting this conclusion is the fact that Thomas' counterpart Office Aide IIs at the other two large elementary schools, who also handled the lunch program and also experienced the automation, did not have their hours cut. (The dissent asserts that other "office aides" were reduced in hours, but the record is clear that no hours were cut in either year from an Office Aide II, like Thomas, all of whom were 30-hour per week employees performing duties similar to hers, including the lunch room duties that Kellogg asserted had become so efficient as to call for a reduction in Thomas' hours.) Moreover, as to the additional eight hours removed from Thomas for 2004-05, the record supports the Examiner's conclusion that the office was not functioning well as a result of the reduction, as evidenced, among other things, by the fact that Matthews – who was not an office aide – was being called upon to assist in office tasks on a regular basis. Contrary to the dissent's conclusion that, "None of the reasons shown by the Respondent School District for Kellogg's actions were proven to be false . . . [or] pretextual," we agree with the Examiner that the District's principal justification – the lunch room automation -- has been proven to be both false and pretextual. While the dissent asserts that Kellogg tried to make the reduction in hours easier on Thomas by establishing "flexibility" in her schedule, the evidence to that effect lies solely in Kellogg's post hoc testimony

Second, the District criticizes the Examiner for concluding, in the District's words, that "Kellogg should have considered awarding the Noon Aide position to Thomas." District Br. at 37. The Examiner, however, reached no conclusion about what the District "should have done" regarding the additional aide. He was making a quite different point. The Examiner drew a negative inference about the authenticity of Kellogg's motives from his decision to add a Noon Aide, assign Noon Aides the work of running the computer in the lunch room that Thomas had been doing, and at the same time cut Thomas' hours for an alleged lack of work. It is true, as the District points out and the Examiner found, Kellogg had been trying to obtain an additional Noon Aide position for several years. On this ground the District argues there was no connection between the additional aide hours in the lunch room and Kellogg's recommendation to cut Thomas' hours. The problem for the District, however, is that it is logically dissonant to hire a new employee to do work that you claim is no longer necessary. We, like the Examiner, believe this dissonance calls for an explanation. Lacking a convincing legitimate explanation, it is reasonable to infer that Kellogg's decision to cut Thomas' hours was not, in fact, justified by the lunch system automation.[9]

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about having that motivation, accompanied by his other testimony that the adjustment in Thomas' hours in 2004-05 was primarily designed to ensure that the office always had sufficient coverage despite Thomas' reduction. Nothing in the record suggests that there were other hours available to Thomas anywhere in the District, let alone at the Howe School. Even if helping Thomas adjust to her reduction were Kellogg's sole motivation, this hardly counteracts the plethora of evidence leading us to conclude that he reduced her hours in the first place for pretextual reasons and at least in part out of animus.

[9] The District also misses the mark in arguing that the fifth Noon Aide position should be disregarded because: (a) the contract required the position to be posted and, though posted, Thomas did not apply for it, and (b) the new position could not have been awarded to Thomas in 2004-05 without "bumping" the new hire in violation of the contract. As the Examiner explained in footnote 8 of his decision:

> . . . 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.

3. The December 17 Meeting/Reprimand

The third way in which the Examiner held that the District violated the law was by conducting a disciplinary meeting with Thomas on December 17, 2003, and orally reprimanding her during that meeting, for reasons that were at least partly related to Kellogg's animus toward Thomas for her lawful, concerted activities.

On review, the District argues that Thomas had a history of mishandling "confidential" documents, that the December 17 meeting resulted from legitimate problems with the way Thomas had handled certain materials, and that Thomas was not reprimanded during that meeting, but merely given a directive not to handle confidential duties in the future. The District again criticizes the Examiner for relying on inferences and "speculation" in discerning anything other than legitimate grounds for this event.

This incident is certainly minor in comparison with the other two prohibited practices involving Thomas' reductions in hours. This event is perhaps more noteworthy for the additional insight it provides into Kellogg's exaggerated sense of distrust toward Thomas - distrust, as the Examiner found, that is explained largely by Thomas' having repeatedly gone "outside" to the Union with problems arising at Howe.

The December 2003 incident involved two alleged acts of misconduct by Thomas: (1) Thomas having opened an envelope containing secretary Fisa's timesheet; and (2) Thomas having filed a grandmother's custody order rather than first photocopying it for guidance counselor Eisberner. While the District gives the impression that Thomas had a history of being unreliable with confidential materials, in fact nearly every citation to the record that the District offers in its brief (at page 45) is related to one of the two incidents that were at issue in the December 17 meeting.[10] As the Examiner noted, the record contains little reliable evidence of any actual breaches of confidentiality on Thomas' part. Nonetheless, Kellogg, inexplicably, had made critical remarks to Thomas about confidentiality during 2002-03 and 2003-04. Absent evidence supplying a legitimate basis for Kellogg's concerns about Thomas' confidentiality, the Examiner inferred that Kellogg's sensitivity stemmed from his annoyance that (Kellogg believed) Thomas had several times brought "internal" Howe School issues to the attention of outsiders like the Union and Ryerson. We agree with the Examiner's inference.

[10] One of the District's references is to an incident to which Eisberner testified in a very general manner. According to Eisberner, at come unspecified time Thomas had received a shipment of testing materials (not yet administered to students) and put them into the storeroom rather than giving them directly to Eisberner, causing Eisberner some delay in locating them. It is difficult to tell from this very limited evidence whether this was a serious or a trivial incident, but, more importantly, it does not appear to involve a breach of *confidentiality* that would be akin to the accusations involved in the December 17 meeting. Before the Examiner, the District also pointed to another incident, where Kellogg had reprimanded Thomas for looking at confidential student records instead of just photocopying them. We, like the Examiner, find it significant Kellogg did not contemporaneously seek an explanation from Thomas and that Thomas was able to explain the incident at hearing: that she had been asked to photocopy only a portion of the document and was paging through it looking for the appropriate pages. Although Kellogg testified in response that Thomas did not need to look at the document in order to find the right pages to copy, we, like the Examiner, find that defense unpersuasive.

Turning to the two issues that precipitated the December 17 meeting, the Examiner first placed the event in context, noting that the fall of 2003 had seen an increase in friction between Kellogg and Thomas, including the computer orientation incident and the "Anything Wayne needs to know" incident. The Examiner then examined the two precipitating events for the December 17 meeting and found "so little legitimate basis" for Kellogg's calling Thomas into a meeting and reprimanding her for breaching confidentiality that, in the Examiner's view, Kellogg's reaction "could be explained only in terms of his underlying, unlawfully generated, distrust of Thomas." Examiner's Decision at 28.

Thus, as to Fisa's time sheet, the Examiner concluded that Thomas had inadvertently interrupted a plan between Kellogg and Matthews to have Fisa's time sheet reflect certain evening hours that Kellogg had allowed Fisa to work in lieu of day time hours, to accommodate her need to care for an ill relative. Since Thomas regularly handled other employees' time sheets and had no reason to know this one was unusually confidential, the Examiner attributed both the plan to keep it secret from Thomas and Kellogg's reaction to the secrecy being breached to Kellogg's fear that Thomas would once again bring Fisa's evening hours to the attention of the Union and/or the Superintendent, as had occurred (he believed) previously.

As to the grandmother custody order, the Examiner concluded that Thomas had simply followed Fisa's directive to file the document and had committed no misconduct at all.

Here on review, the District contends that the Examiner essentially concocted his version of the Fisa time sheet incident through "inferences" and "speculation." To the contrary, however, the record contains straightforward and undisputed evidence about this event. The testimony clearly indicates that the time sheet in question somehow reflected that Kellogg had allowed Fisa to work evening hours instead of her regular hours, that the issue of evening/weekend hours had been a subject of discussion within the District and between Ryerson and Kellogg, that Kellogg had asked Matthews to watch for the specially-marked envelope that would contain Fisa's timesheet, and that, when Matthews somehow failed to intercept the envelope, she asked Thomas to help her find it without indicating to Thomas that the envelope or its contents were confidential. The evidence is also undisputed that Thomas regularly saw other employees' time sheets in connection with her office duties and regularly handled and opened mail. These facts are not "speculative" or even inferential. These circumstances create the reasonable inference that Kellogg's irritation about the breach of "confidentiality" was not related to anything Thomas actually did wrong, but rather to his concern that she might reveal the work hour arrangement "outside" the Howe School.

Finally, while the December 17 meeting involved relatively minor adverse action, we agree with the Examiner that it was essentially disciplinary in nature and therefore sufficient to constitute adverse action. We also agree with the Examiner that Kellogg's reaction to two non-culpable actions on Thomas' part was not prompted by legitimate confidentiality concerns,

but instead by antipathy engendered by Thomas' previous protected activity in discussing overtime hours with the Union and in going "outside" with work place concerns.[11]

4. The Examiner's Delay

The Commission maintains a guideline for issuance of Examiner decisions in prohibited practice cases, which is 60 days after the record (including post-hearing briefs) is closed. In this case, the District rightly complains that the Examiner's decision was issued approximately two years and 8 months after the record was closed, very far outside the guideline. The District contends that this exceptionally lengthy delay has caused it prejudice, by increasing its liability for back pay and interest. The District contends that it could/would have complied earlier if the Examiner's order to reinstate Thomas' hours had been issued earlier, thus reducing its liability.

The 60-day guideline for issuance of examiner decisions derives from the statute itself, Sec. 111.07(14), Stats., incorporated into the Municipal Employment Relations Act at Sec. 111.70(4)(a), Stats. However**,** the Supreme Court long ago held, in a case involving a decision issued nine months past the 60-day time limit, that the 60-day reference was directory rather than mandatory. The Court stated that, to hold otherwise, would interfere with the purpose of the law, "the promotion of industrial peace through the maintenance of fair, friendly and mutually satisfactory employment relations." MUSKEGO-NORWAY V. WERB, 32 WIS.2D 485 (1967), at 485.

In the instant case, we do not condone the Examiner's inordinate delay in issuing his decision. The agency constantly expresses and acts internally upon its goal of timely decisions. The majority of agency decisions are issued reasonably close to the published guidelines. However, we know of no authority (and the District has cited none) that would require the agency to withhold standard monetary relief from a wronged party based upon the tribunal's delay in ordering the relief. Thomas herself is in no way responsible for the delay, yet she would suffer the consequences.

In addition, while the District's complaint about the delay is legitimate, we are not persuaded that the District has been prejudiced in a manner that would warrant withholding the

[11] The dissenting opinion, in rejecting the Examiner's conclusion that animus played any causal role in the District's adverse actions against Thomas, points to an asserted disconnect in timing between the animus incidents, which happened over an 18-month period, and the adverse actions that occurred in spring 2003 and in the 2003-04 school year. This point would carry more weight if nothing had occurred between the earliest of the animus-engendering incidents (the cold recess report in spring 2001) and the reduction in hours in spring 2003. In fact, however, incidents continued to recur throughout the time frame, transforming what may initially have been a minor irritation into a more substantial antipathy. The Examiner's point, which we affirm, is that Kellogg's distrust developed over a series of successive incidents, each reinforcing the earlier ones, the last of which occurred well into the 2003-04 school year. By the spring of 2003 and even more so by the spring of 2004, it was strong enough for Kellogg to use the budget directives as an opportunity to take action against Thomas.

standard make-whole relief in cases of this nature. Had the Examiner's decision been issued sooner, and had the District complied with the order, the District would be in essentially the

same position financially as it is now. That is, from date of issuance, the District would have been paying Thomas for a 30-hour week instead of a 20-hour week, with any retroactive pay that had accumulated before the decision was released. We acknowledge that, to the extent the decision was more timely, the District would have been receiving services for those additional hours, not merely paying back pay, but that does not change the District's out of pocket costs. We also note that it was at all times within the District's control whether to reinstate all or a portion of Thomas' hours, to allay its concern with the accumulation of back pay.[12]

One unquestionable difference in out of pocket costs attributable to the delay lies in the 12% statutory interest accumulating on the back pay. The Union has estimated that interest to be approximately $2,400.00 over the entire five year time frame – presumably some of which would have accrued even if the Examiner's decision had been more timely. While that amount is not negligible, neither is it so onerous as to warrant an unprecedented departure from the Commission's long-standing remedies.

We are also concerned that it would be inherently unfair to the parties to create and administer an exception to the standard make-whole relief based upon an arbitrary degree of delay in issuing a decision, a circumstance that can be affected by a wide variety of factors that would be impossible to standardize.

For the foregoing reasons, we deny the District's implicit request for a reduction in the amount of make-whole relief/interest it has been ordered to pay Thomas.

Dated at Madison, Wisconsin, this 8th day of January, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSIN

Judith Neumann /s/
Judith Neumann, Chair

Susan J. M. Bauman /s/

[12] We have recently declined a request by an employer that a union contribute to the district's back pay liability in a case where the district had violated the employee's rights by discharging her and the union arguably had exacerbated the district's back pay liability by unlawfully failing to pursue the grievance. We stated, "MPS, having discharged Bishop, presumably believed it could sustain the discharge; . . . MPS was entitled to rely upon its proof, but having done so, having no clear affirmative reason to believe the Union had released MPS from its grievance liability, and having at all times the sole power to reinstate Ms. Bishop and avoid liability, MPS would have difficulty making a case for contribution from the Union here . . ." MILWAUKEE PUBLIC SCHOOLS, DEC. NO. 31602-G (WERC, 8/08) at 6 n. 2.

Susan J. M. Bauman, Commissioner

Wisconsin Rapids School District

DISSENT OF COMMISSIONER PAUL GORDON

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

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

Here, I am persuaded that Respondent (through Principal Kellogg) was motivated by legitimate reasons when it acted as to Thomas. I am further persuaded that Kellogg was not hostile to Thomas' concerted activities or to the Union generally. Thus, consistent with EMPLOYMENT RELATIONS DEPT., SUPRA., I dissent.

There are four elements to a claim under Sec. 111.70(3)(a)3, Stats., which must be established before the Union can prevail in its complaint: a) that the employee has engaged in a 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. EMPLOYMENT RELATIONS DEPT., SUPRA. The third and fourth of these elements have not been established by the Union and their claim must fail. There was no anti-union animus or hostility by Kellogg towards Thomas, her protected activities, or the Union. It follows that animus was not any part of the employer's motivation in any manner as concerns actions that affected Thomas. There was no animus, and there was no retaliation because there was no adverse action motivated by animus. Neither exists.

The majority opinion contends that the District blurs or conflates the distinction between animus and retaliation. It does not. The District argues those items separately in discussing the four elements to the Union's claim, and, for example, points out the distinction itself at page 12 of its Brief in Support of Petition for Review.[13] But whether the District conflated, blurred or got it right, the record here still fails to establish the four requisite

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[13] The District brief argues at p. 12:

> . . . In other words, the fact that hostility exists between a supervisor and an employee does not constitute a per se violation of Wis. Stat. § 111.70(3)(a)3. The employee bears the burden of proving that the supervisor's (i.e., employer's) hostility was, in fact, because of the employee's concerted activity protected by Wis. Stat. § 111.70(2), and that the supervisor's conduct was motivated, in part, by hostility toward the protected activity. Barron County, Dec. No. 26065-A (Burns, 1/90); Village of Union Grove, Dec. No. 15541-A."
> (emphasis supplied)

elements to prove a violation of the statute.

When concluding that Kellogg was hostile to Thomas' concerted activity, the majority relies on a series of events - several of which occurred well before the 2004-2005 reduction in Thomas' hours that is the focal point of this litigation. As to each of these events, I view the evidence in the record differently than does the majority.

Cold Weather Recess

As referenced in Finding of Fact 12, in February 2001, Principal Kellogg of Howe School received a call from Superintendent Ryerson expressing a concern as to whether students and employees had inappropriately been outside during very cold weather. Ryerson indicated that he had heard of the matter during a bargaining session from Union representative Pankratz who, it turn, had learned of the issue from an unidentified employee at the Howe School where both Kellogg and Thomas worked. The next day, Kellogg asked Thomas if she was the employee who made the call to Pankratz. Thomas told Kellogg she was not.

It was appropriate and responsible for Kellogg to inquire of Thomas where the complaint originated. This was a matter of school cold weather policy that Kellogg is responsible to carry out, and it is a matter of child and employee safety. The subject matter was called to Kellogg's attention during a break in a negotiation session when Ryerson called him. This was not a matter kept peculiarly within the Union caucus or considered only by Union members in that it was called to the attention of the School District by the Union and its business agent. It should be looked into promptly by the School District. That is just what happened. Ryerson called Kellogg about 10:00 p.m. at Kellogg's home as soon as Ryerson found out about it. There is no evidence that Ryerson was critical of Kellogg over this incident. Kellogg looked into it the next morning. A prompt response is to be commended, not criticized.

The Commission recognizes that animus is not established because an employer takes action in response to a matter called to management's attention while a labor organization is engaged in protected activity. For example, in CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (WERC, 5/91), no hostility was established by the School District reviewing certain bargaining unit members' hours after that had been the subject matter of a grievance. Here, Kellogg did not accuse Thomas of having made the complaint, he merely wanted to find out the source so that he could look into the incident. Similar to the situation in CEDAR GROVE-BELGIUM SCHOOL DISTRICT, he needed to determine if there was merit to the complaint. The fact that Thomas was on the Union's bargaining team makes it perfectly reasonable that he should ask her about it because the subject came up during a negotiation session where Thomas had been. There was no focus on union or concerted activity. Rather, the focus was on what had occurred, or not, during a cold recess. There is no implication here that protected activity had anything to do with Kellogg's questioning about the cold recess event.[14] This was not a complaint that Thomas had made about Kellogg or her

[14] This is also indicative that the matter was not a motivating factor in Kellogg's recommendation to reduce Thomas's hours in 2003-2004 and the year thereafter. The Commission recognizes that the timing between an

working conditions, and at the meeting between Thomas, Kellogg, and Fisa everyone knew that. Thomas admits that Kellogg accepted her answer, and she continued to have a good working relationship with Kellogg. Given all the foregoing, I conclude this incident is not evidence of animus and does not support an inference thereof.

Head Lice Duty

As reflected in Finding of Fact 14, in early 2002, about a year after the cold weather recess matter, Thomas told Pankratz that she had been asked to check students for head lice. Pankratz raised the issue with Ryerson who, in turn, talked to Kellogg about the matter. Kellogg then directed Thomas not to check for head lice in the future.

As was true of the cold weather recess matter, the subject matter of checking for lice was brought to the Respondent's attention during negotiations. As was true for the recess issue, reacting to this concern is not evidence of animus. This was not a complaint made by Thomas to her union about Kellogg or any work issue she was having. There was some inconsistency among the various schools and employees as to their duties, including checking for head lice. Thomas' job description does not show checking for head lice as a duty. The School District has a right to determine the duties to be assigned to a position and to see what duties are or are not being performed. For the District to be able to responsibly perform its management rights and determine job duties, it is appropriate to review those duties and what particular classes of employees are actually doing in order to both manage the District and to respond to classification issues. It is not illegal for an employer to make sure employees are not performing duties outside their classification when a classification issue arises. It is not evidence of animus for an employer to reassign job duties. See, e.g., MENOMONIE JOINT SCHOOL DISTRICT, DEC. NO. 14811-C (MCGILLIGAN, 3/78); AFF'D BY OPERATION OF LAW DEC. NO. 14811-D (WERC, 4/78). There is nothing in the record to suggest that Kellogg received any negative feedback from Ryerson about the head lice matter. Thus, Kellogg had no reason to be hostile to Thomas for having raised the issue. Therefore, I conclude that the head lice matter does not provide evidence of illegal animus by Kellogg against Thomas.

Building Keys

Finding of Fact 19 details the Respondent's Spring 2002 concern over employees entering the school building after hours, working outside their normal schedule and thereby acquiring overtime. Pursuant to that concern, Kellogg met with Thomas and her co-worker Fisa, directed them not to work hours outside their normal schedule and had them give back

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event and a perceived adverse action may have a bearing on whether there was illegal motivation. Here, the cold weather event was in February 2001, with Kellogg asking Thomas about it shortly thereafter. The 2003-2004 and 2004-2005 reduction in hours was from a recommendation of Kellogg made much later. This passage of time makes it all the more unlikely that the cold recess event and its question by Kellogg had any bearing on the reduction in hours recommendations. The same can be said for the head lice duties and building keys matters. However, because I am also satisfied that there was no anti-union animus held by Kellogg in the first place, animus could not have been a motive for the reductions in hours. Thus, neither the third nor fourth elements necessary to prove a violation of Sec. 111.70(3)(a) 3, Stats., have been established.

their building keys.

There is nothing in these facts that implies animus in Kellogg's review of Thomas' and Fisa's work hours or use of building keys. This was not a complaint from Thomas and there is no evidence that Kellogg felt that she had complained about him. It was not a subject that was being bargained. This subject matter was brought to the attention of the School District by the Union business agent. The overtime issue had been going on in the District for up to five years. Ryerson directed all the administrators, not just Kellogg, to be sure the hours were being respected. The Human Resources Director sent follow up memos to administrators about this. Compliance with contract language and overtime laws is one of Kellogg's duties. He did that by speaking to Thomas and Fisa. Limiting the availability of keys is a way to do that. One of the complaints had been about a person in Kellogg's office, Fisa, working during the evenings and on weekends. This does not single out Kellogg for any individual attention by Ryerson for which he might have or could have developed any illegal animus. There is nothing in the record to show that Kellogg experienced any negative feedback from Ryerson over the hours matter. Preventing access of employees to the building is an effective way to ensure that they are not in the building working.

The keys were taken in response to overtime and work hours concerns to be in compliance with the terms of the collective bargaining agreement and the wage and hour laws, not because of any union or protected activity. This has nothing to do with protected activity. Thomas has no need for a key. She had no right, collective or otherwise, to a key. The record does not support any conclusion that she was singled out from other employees to be deprived of a key to the building. Kellogg's later reconsideration on letting Fisa have a key is a reasonable reconsideration. Sometimes decisions are reconsidered. It was done because there would then be three, and only three, master keys available. In the event that Kellogg or the custodian (who had the other key) were not available and an emergency developed, then the additional key would be helpful. Therefore, I conclude that limiting the number of keys (and keeping Thomas' building key) was a legitimate action and does not provide evidence of illegal animus.

Computer Orientation and Desk Location

As reflected in Findings of Fact 20 and 23, in the Fall of 2002, Kellogg moved Thomas' work station, the Union raised the issue with Ryerson, Ryerson discussed the issue with Kellogg and ultimately Kellogg restored Thomas' work station to its original location.

Office configuration matters are within Kellogg's discretion. He had had other work stations and office equipment reconfigured before, such as the guidance counselor's desk location, and the photocopy machine location. Other employees in the office have work station configurations similar to the change Kellogg made as to Thomas. As to the functionality of the workstation orientation to accommodate the lunch money duties, Kellogg and the District have the right to make the change and the right to be wrong about it as a business matter. See, e.g. SCHOOL DISTRICT OF JEFFERSON, DEC. NO. 28653-A (GRECO, 2/97); AFF'D BY OPERATION OF LAW, DEC. NO. 28653-B (WERC, 3/97).

This was the first and only incident where Thomas had made a complaint or request of her Union that found its way back to Kellogg. Ryerson did not give Kellogg a directive to change the desk back. Kellogg then acceded to Thomas' request and the computer work station was reconfigured. He cooperated with the request she had made through the Union. As he testified, this is no big deal. There is no evidence in the record that this or any other matter was the subject of Ryerson directing Kellogg to do anything or take any action in response to any complaint or action made by Thomas. There is no evidence in the record that Ryerson was critical to Kellogg about the desk configuration. There is nothing in the record which demonstrates Kellogg was experiencing any criticism from Ryerson about the way he was doing his job or the decisions he was making as to the work station configuration or any other matter. Therefore, I am not persuaded that this matter provides evidence of illegal animus by Kellogg.

Weekly Meeting Comment

As reflected in Finding of Fact 25, in the Fall of 2002, Kellogg added an item to the written agenda for two office staff meetings stating "Anticipate any problems? Anything Wayne needs to know." Kellogg then asked Thomas at these meetings if there was anything "Wayne" needed to know. Thomas then complained to Union representative Wayne Pankratz who, in turn, asked Ryerson to intervene. Ryerson did so and thereafter the agenda item and follow up question ended.

While that "Wayne" phrase may carry a questionable implication, the context reveals otherwise. Ryerson had suggested having the meetings to clarify task responsibility, as many in the District do with their clerical staff. Both the Union and the School District encourage direct communication between individuals on matters affecting their work. Business agent Wayne Pankratz testified that he wanted his members to deal with issues directly if possible before going to him. Ryerson wants potential problems brought up so he can fix them if there is a problem. Kellogg understandably wanted to be close to issues in his building. That can include labor relations issues. Even the contractual grievance procedure provides that employees, with or without union representation, should contact their supervisors with issues. See Article XII, Section 1205. Discussion of job functions, working conditions and activities that may very well overlap with protected activity have been encouraged between the parties by the parties themselves. The weekly meetings themselves were designed to increase communication, including communication by and with Thomas.

In addition, the record is clear that Fisa and Thomas had some communication issues with each other. Fisa would sometimes tell Thomas that she, Fisa, was having a bad day and was uncommunicative. The minutes of the office meetings have at least one reference to Fisa biting Thomas' head off. The guidance counselor, Eisberner, testified that she had at first been friendly with Thomas but that changed and they became more collegial, rather than friendly, later on. Thomas herself testified and admitted that she was oversensitive and took things too personally.

Under all of these circumstances it was appropriate for Kellogg to hold meetings to try to enhance positive communications on the workings of the office.

It is important to note that the Municipal Employment Relations Act (MERA) does not outlaw lack of tact or lack of professional courtesy. See, e.g., SCHOOL DISTRICT OF JEFFERSON, SUPRA. The Commission recognizes that hostility in an inter-personal relationship is not the type of animus that the statute prohibits. Rather, prohibited hostility involves an aggressive response by an employer to encourage or discourage membership in a labor organization See, e.g. COLUMBIA COUNTY, DEC. NO. 30197-A (MCLAUGHLIN, 11/01) AFF'D BY OPERATION OF LAW, DEC. NO. 30197-B (WERC, 12/01). The "Wayne" comment does not demonstrate such prohibited hostility. The "Wayne" phrase was used twice. It is not overtly hostile. Even statements evincing serious disagreement with unionism are not, in context, sufficient to find anti union animus. See, CENTRAL HIGH SCHOOL DISTRICT OF WESTOSHA, DEC. NO. 29671-B (MAWHINNEY, 5/00)[15] WESTOSHA was appealed to the Commission, which held that there had been no Sec. 111.70(3)(a) 3 violation and upheld the examiner on that point. Dec. No. 29671-C. The Commission found the statement to have been a Sec 111.70(3)(a)1, Stats., violation instead, which is quite a different matter and which does not effectively advance any argument that there is animus in this case. Even though Kellogg's use of the phrase is unfortunate, the overall circumstances reflect an attempt to provide a positive working environment rather than hostility to protected activity. The subsequent decreasing frequency of the meetings shows some success at meeting that goal. In this context, the "Wayne" comment does not imply hostility or animus. It implies cooperation, however ill worded.

Recommended Loss of Hours for 2003-2004

As reflected in Finding of Fact 29, in the Spring of 2003, the District asked administrators to make recommendations of possible budgetary savings. Kellogg suggested reducing Thomas' hours. As reflected in Finding 31, as a result of Pankratz's intervention, the recommended reduction in Thomas' hours was partially restored by Ryerson to allow Thomas to retain fringe benefits.

A school principal may not know all of the aspects or ramifications of a collective bargaining agreement. Kellogg did not know that reducing Thomas' hours below 28 per week would impact her benefits.[16] He was simply providing a recommendation sought by the District in tough budgetary times. It is noteworthy that other employees had their hours cut

[15] The Complainants had asked the Examienr to draw inferences of anti-union animus and hostility toward Watson for her role as Union President based on Sorensen's one remark in a meeting regarding holidays in which he said that she took a "union philosophy," that he did not like "union philosophy," and that he was not going to give her any more "perks." No animus was found.

[16] This is similar, again, to CEDAR GROVE-BELGIUM where the principal was not conversant with the hours formula that had been grieved.

across the District. In this context, I conclude that the recommended reduction in hours does not demonstrate animus by Kellogg.[17] Moreover, here the 2003-2004 hours reduction was restored, as hours were restored to other employees, to retain benefits. Thomas had not been singled out to have her hours reduced to a level that eliminated some benefits. Kellogg did not object to having these hours restored to Thomas. His lack of objection to the readjustment upwards to restore the number of hours to retain benefits is an implication that he did not harbor any hostility or animus towards her.

2004-2005 Hours Reduction

As reflected in Findings of Fact 43 and 44, in the Spring of 2004, Kellogg recommended that Thomas' hours be reduced from 28 to 20 per week for the 2004-2005 school year and that reduction was implemented in the Fall of 2004. I do not find that the reduction reflected animus toward Thomas' protected MERA activity.

The reduction in hours was prompted by the need to make budget cuts while still preserving the educational mission. There were not a whole lot of places to look to cut. Nothing exempted Thomas from a reduction in hours. Some employees lost their employment entirely. There is no evidence that Thomas sought other hours or positions in the District to fill out her hours in addition to her office aide work. The Union did not seek to have the Noon Aide hours given to Thomas. The Aide II position at Howe held by Thomas had more hours than several other Aide positions even if they were not Aide IIs previously working 30 hours. Each principal in each school made budget adjustments as they saw fit, and were not dependent on what the other principals did. And there had been some adjustment in daily duties in the office. The goal of those changes was to save time in duties performed by Thomas. The District may or may not be right as to whether it saved time. But it is the District's right to be wrong on those business decisions.

It is important to note that in the context of the hours reduction, Kellogg added flexibility to adjust Thomas' start and end times because he then knew it would improve the potential for her to seek other Howe School positions to keep more hours and to keep her level of benefits. He clearly anticipated she would be staying in the office to work the remaining 20 hours there and was making it easier for her to do so. This does not evidence animus. This instead creates an inference that he did not harbor any hostility or animus against her.

The majority, adopting the reasoning of the Examiner, sees a pattern of activity on the part of Kellogg towards Thomas which, they opine, reflects animus or hostility because Kellogg was hypersensitive to Thomas' activities and had developed a state of mind that was distrustful of Thomas stemming from her concerted activities. The majority accepts the contention that Kellogg had to explain himself to Ryerson rather than having matters handled internally. This is the majority's theory of animus. But, there is no evidence of Kellogg being

[17] I also note that even where prior animus was present, the Commission concluded that the non-renewal of an employee in the face of other business reasons does not justify a finding that animus motivated the action. See, e.g., FENNIMORE JOINT SCHOOL DISTRICT NO. 5, DEC. NO. 14305-B (WERC, 12/78).

hypersensitive, thin skinned, or anything of the sort. There is no evidence that any of his actions were so motivated. There is no evidence, and no rational basis, to believe that the sum of his non-hostile and otherwise legal actions somehow becomes hostile or reveals a feeling of animus. A series of actions which are not motivated by animus or hostility simply does not equate or amount to animus.

The majority opinion states:

> Thus, as the Examiner explained, and contrary to the misconception the dissent apparently has regarding our opinion, we do not view it as unlawful, but even quite normal, for Kellogg to have preferred to handle these matters internally and to have been irritated about having to explain himself to Ryerson, on one occasion at 10 pm in the evening.

There is no misconception here. It is not unlawful for Kellogg to prefer to handle matters internally and nothing in this dissent alludes to the majority thinking otherwise. As to Kellogg being irritated, again, there is no evidence of that. The majority's reliance on Kellogg being irritated goes to their theory of animus and they tie that to a supposed mistrust of Thomas due to her protected activities. If the majority finds that this is not unlawful, as being at least in part Kellogg's motivation as their statement implies, then they seriously weaken the logic of their finding of animus. The majority view appears to be more of a rationalization to support a result. The majority footnote 3 correctly points out that "[t]he law is clear that animus (irritation) in itself is not unlawful, but acting on it is". But when the record in this case is applied to that point of law, the facts do not sustain either an unlawful animus or Kellogg having acted on it.

The majority opinion carefully notes the lengthy experience of the examiner in discerning animus from the pattern of Kellogg's conduct. They are perfectly able to so note. However, lengthy experience does not amount to infallibility, and the statutory system of review requires an independent de novo review of the examiner decision by the Commission.

Summary

Complainants have not established illegal hostility or animus by Kellogg toward Thomas.[18] Every single Respondent action cited by the Complainant as a basis to infer illegal animus was based on a more compelling business reason. None of the reasons shown by the

[18] It is noteworthy that Kellogg's annual reviews of Thomas always had her doing satisfactory or better work.

Respondent School District for Kellogg's actions were proven to be false. None of the reasons for Respondent's actions have been shown to be pretextual. Thus, the strength of any inference of animus which the Complainant asks to be drawn is substantially weakened. Therefore, the complaint should be dismissed.

Dated at Madison, Wisconsin this 8th day of January, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/
Paul Gordon, Commissioner

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