STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LAVONNE CROWE, Complainant,

vs.

WEBSTER SCHOOL DISTRICT, Respondent.

Case 30
No. 59884
MP-3732

Decision No. 31072-A

Appearances:

LaVonne Crowe, 7535 Water Street, Danbury, Wisconsin 54830, appearing on her own behalf.

Kathryn J. Prenn, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the Respondent, Webster School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 23, 2001, the Webster Educational Support Staff filed a complaint with the Wisconsin Employment Relations Commission against the Webster School District, herein the District. The complaint alleged that the District had committed prohibited practices within Sec. 111.70(3)(a)5, Sec. 111.70(3)(a)3 and Sec. 111.70(3)(a)1 of the Wisconsin Statutes in its termination of LaVonne Crowe from her position as Instructional Assistant under the District's Title IX Program. On January 2, 2002, an amended complaint was filed by Webster Educational Support Staff and LaVonne Crowe, which added Ms. Crowe personally as a Complainant. Subsequently, the parties advised the Commission that they were in negotiations and requested that the case be put on hold. Thereafter, the action was held in abeyance pending the outcome of a discrimination action Ms. Crowe had commenced against the District in federal court. On January 7, 2004, the Webster Educational Support Staff advised the Commission that it was withdrawing from its participation in the case. Complainant Crowe subsequently advised the Commission that she wished to proceed against the District *pro se*.

On August 19, 2004, the District filed an Answer to the amended complaint. On September 14, 2004, the Commission appointed John R. Emery, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07 and 111.70(4)(a), Wis. Stats. On September 29, 2004, a hearing was conducted in Webster, Wisconsin. The proceedings were transcribed and the transcript was filed on October 22, 2004. The parties filed their initial briefs by January 5, 2005, and their reply briefs by February 23, 2005, whereupon the record was closed.

The Examiner, having considered the evidence, the applicable law and the arguments of the parties and being advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. LaVonne Crowe is a Wisconsin resident, residing at 7535 Water Street, Danbury, Wisconsin 54830, and was employed by the Webster School District from August 19, 1998, to January 15, 2001.

2. The Webster School District (the District) is a municipal employer and maintains offices at 26428 Lakeland Avenue South, P.O. Box 9, Webster, Wisconsin 54893-0009.

3. Chequamegon United Teachers (the Union) is a labor organization and maintains offices at 213 East First Street, P.O. Box 311, Hayward, Wisconsin 54843-0311.

4. At all times pertinent hereto, a collective bargaining relationship existed between the District and the Union, wherein the Union was recognized as the exclusive representative of a bargaining unit consisting of:

> . . . all regular full-time and regular part-time employees of the School District of Webster including custodians, bus drivers, instructional assistants, secretaries, teacher aids, cooks, cafeteria workers and school nurse, but excluding instructional employees (professional), supervisory, confidential, managerial and all other employees . . .

5. During Ms. Crowe's employment with the District, she held the position of Title IX Tutor/Coordinator, the job description for which was as follows:

TITLE:	Title IX Tutor
REPORTS TO:	Building Principals
SUPERVISED BY:	Building Principals
EVALUATED BY:	Building Principals

WORKDAYS: Monday thru Friday (according to school calendar)

QUALIFICATIONS:

Associate Degree or better in Elementary/Secondary Education (or) Native American studies desired, or: at least five (5) years of experience in either field.

The successful candidate must be familiar with Title IX policies and procedures, the Elementary and Secondary Education Act, the Indian Education Act, Public Law 93-638 (Johnson/O'mally Act), State content and State student performance standards, Educate America Act, and Goals 2000, and working knowledge of Native American History, dance, teachings, society, music, and the arts.

The successful candidate shall be able to develop and incorporate traditional Native American values and teaching methodology into an overall academic tutorial program.

SUPERVISES: Native American students

JOB GOALS:

1. To provide academic mentoring and guidance assistance to Native American students in such a manner that encourages their academic improvement where appropriate, and fosters attitudes that encourage students to remain active participants in school until their graduation.

2. To maintain cultural values of the Native American students and instill cultural awareness to the overall student population as well as school staff members.

3. To encourage educational success in all Native American students.

JOB RESPONSIBILITIES – The Title IX Tutor shall:

1. Maintain an active list of Native American students enrolled, their class schedules, their family history, and their 506 forms.

2. Participate in conferences with teachers, building principals and guidance counselors with requested to do so by parents/guardians, students teachers and/or building administration.

3. The tutor will tutor Native American students in the classroom setting and individual tutoring when the need arises.

4. Tutor Native American history, language and the arts regarding life past and present as practiced and outlined in the program requirements.

5. Regularly actively participate in the Local Indian Education Committee meetings.

6. Accompany, when needed for safety reasons, the Home School Coordinator on home visitations.

7. Encourage Native American students to mainstream in school life and to graduate from high school.

8. Assist in promoting parental involvement with school activities for the benefit of their children.

9. Assist in programs/projects that raise the self-esteem of Native American students.

10. Write grant for the Title IX Project.

11. Assist in the writing and updating the Indian Education Committee's by-laws for the Local Indian Education Committee.

12. Attend necessary meetings and workshops to update skills and maintain a line of communication between government agencies (federal, state and country).

13. Attend staffings with other tribal staff person when necessary.

14. Develop a student-coach contact schedule that allows for regular meetings with each student.

15. Help identify Native American students who are, or may become, "At Risk" students.

16. Complete and file all necessary reports in a timely manner.

17. Provide each Building Principal with a list of the student's names for who he/she is responsible for at the beginning of each school year. The list is to be kept current during the course of the year.

18. And other duties as assigned by the Building Principals.

. . .

6. At all pertinent times, the District also had a position entitled Instructional Assistant, the job description for which is as follows:

Title: Instructional Assistant

Reports To: Classroom Teacher

Job Goal: To provide a well-organized, smoothly functioning class environment in which students can take advantage of the instructional program and resource materials.

Performance Responsibilities:

1. Assists individual students with their instructional program or in need of special attention.
2. Provides instructional leadership with small instructional groups.
3. Performs necessary clerical task such as copying, filing, ordering and taking inventory of instructional materials.
4. Supervises and monitors students as directed by the classroom teacher.
5. Corrects assignments, tests, quizzes and other evaluations and assists in the record keeping of both.
6. Assists the teacher with non-instructional classroom duties such as snacks, clothing routines, wash-up, and toilet routines.
7. Assists in the monitoring and maintenance of student supervisor in the classroom, on field trips, recess, and assembles.
8. Provides release time for other school personnel as directed by the classroom teacher.
9. Assists in maintaining bulletin boards, other classroom learning displays, and the general up keep of the room.
10. Alerts the teacher of any problem or special information about an individual student.
11. Serves as the chief source of information and help to any substitute teacher assigned in the place of the regular teacher.
12. Treat all information confidentially.
13. Carry out OT/PT exercise programs as direct by OT/PT specialist.
14. Assumes all other related duties as may be assigned both in the classroom and outside the classroom.

7. At some point in the Fall of 2000, Ms. Crowe spoke to the local Union President about having her position included in the bargaining unit.

8. On November 22, 2000, Union Representative Barry Delaney sent the following letter to District Administrator Russell Helland:

. . .

> It is our understanding that the District has a Title IX Coordinator who is being paid under the wage rates for instructional assistant.
>
> Currently, the District is not deducting Union dues from the person holding the Title IX position. Does this mean that the District does not consider this position as part of the support staff bargaining unit? If not, why not? The recognition provision of the Agreement (Article 2) would seem to include this position within the bargaining unit.

. . .

Although the District had maintained the position of Title IX Tutor/Coordinator since at least 1985, at no previous time had the Union made inquiry about the position, or sought its inclusion into the bargaining unit.

9. On December 1, 2000, Mr. Helland sent a letter to Mr. Delaney, as follows:

. . .

> The question you posed in your letter of November 22, 2000, in regard to the Title IX position, will be placed on the Agenda for our regular Board Meeting on the 18th of December. Following the Board discussion I will respond to your questions.

. . .

10. On December 4, 2000, Ms. Crowe met with High School Principal Kevin Whelihan regarding problems with "at risk" students, wherein Mr. Whelihan raised concerns about Ms. Crowe's lack of communication with faculty and problems concerning her job performance.

11. On December 5, 2000, Kenn Johnson, a member of the School Board and Chair of the Danbury/Webster Local Indian Education Committee (LIEC), sent a letter to Mr. Helland, as follows:

. . .

> During the last week of November it was brought to my attention that the Danbury / Webster Title IX Tutor, Ms. LaVonne Crow had went to the Luft

residence, located in the Webster School District, and approached a Mr. Leo Luft and asked him to sign a Program form identified as a "506 Form. [sic]

On December 5, 2000 the Danbury / Webster Local Indian Education Committee Chairman Kenn Johnson called Mr. Luft, he was not available, so another call was placed to Ms. Gail Luft's residence.

The complainant stated that Ms. Crow was very pushy, insistent, and somewhat sarcastic, in both her letters and conversations. Mr. Luft stated to Ms. Crow that he was not the parent or guardian, and that he had no right to sign forms. Mr. Luft does not reside with Ms. Gail Luft the parental guardian. Ms. Crow is alleged to have informed Mr. Luft that anyone at this address could sign the form, again Mr. Luft stated that Gail was not at home, and that he would pass the form on to her.

The complainant stated that this is the point where Ms. Crow became very pushy and insistent that the form needed to be signed now. Mr. Luft signed the form, so she would leave. Mr. Luft informed Gail upon her arrival at home.

Ms. Luft stated today that she has pulled her children out of the program, until such time that Ms. Crow does not run the program. She stated that she has the utmost respect for Ms. Taylor but not Ms. Crow and is sorry that he [sic] children cannot take advantage of such an excellent program.

This complaint is being provided to you the School Administration, as you are the coordinator of the program and the employee supervisor according to the State Statutes and program guidelines.

The Danbury / Webster Parent Committee wishes that this matter be handled in a timely manner and with appropriate action.

. . .

12. On December 13, 2000, Mr. Helland met with Mr. Whelihan and members of the LIEC to discuss concerns with Ms. Crowe's job performance. At the conclusion of the meeting, Mr. Helland determined to recommend that the School Board terminate Ms. Crowe's employment.

13. On December 18, 2000, the Webster School Board held its regular monthly meeting. While in executive session, the Board discussed the Union's inquiry regarding the Title IX position and decided to table action on the matter until legal advice on the matter could be obtained. The Board also received the Administration's recommendation regarding the termination of Ms. Crowe and determined to place her on paid administrative leave pending further action.

14. On December 20, 2000, Mr. Helland sent a letter to Mr. Delaney, as follows:

. . .

> The Webster School Board met on Monday, December 18, 2000, and in Executive Session tabled the matter regarding the Title IX position being part of the union, to confer with legal counsel. We will respond to y our letter at that time.

. . .

15. On January 8, 2001, the Board issued a Notice of Consideration of Termination to Ms. Crowe, as follows:

. . .

> This letter is to advise you that the Board of Education is considering the recommendation that your employment be terminated. The reasons for the recommendation include the following:
>
> 1. Failure to follow administrative procedures
> 2. Poor communication skills with parents, staff and students
>
> The Board will be considering and acting on this recommendation during a meeting of the Board, scheduled for 7:00 p.m., January 15, 2001. The Board will afford you the opportunity to have a private conference with the Board prior to the Board taking final action on the recommendation. The private conference will be held in closed session, unless you request that it be held in open session. You are further advised that you have the right to be represented at the conference and that you have the right to call witnesses and to submit evidence on you behalf.
>
> This letter is also to advise you that you are being placed on paid administrative leave pending the Board's decision following the private conference.

. . .

16. On January 15, 2001, the School Board held a private conference to consider the recommendation to terminate Ms. Crowe's employment. At Ms. Crowe's request, the conference was conducted in open session. During the conference, the Board received evidence and heard arguments from the Administration and Ms. Crowe. After the conference,

the Board convened in executive session to deliberate and unanimously agreed to terminate Ms. Crowe's employment for failure to follow administrative procedures and poor communication with parents, staff and students.

17. On January 16, 2001, Board President Mark Elliott sent Ms. Crowe a letter informing her of the Board's decision, as follows:

. . .

> This letter is to confirm that when the Board returned to open session following their deliberations during the January 15, 2001, Board meeting, the Board passed a motion to accept the recommendation of the Administration that your employment be terminated effective immediately.

. . .

18. On or about January 16, 2001, the Union notified the District that it was grieving Ms. Crowe's termination.

19. On January 23, 2001, the District's counsel sent Barry Delaney a letter, as follows:

. . .

> This letter is written to you on behalf of the District in response to the Union's inquiry regarding the status of the position.
>
> The Title IX Coordinator position has existed in the District for at least 15 years. Throughout that period of time, the position has been a non-union position and has not been included in the support staff bargaining unit. Your letter of November 22, 2000, is the first written inquiry received by the District regarding the status of this position. In response to the Union's request to have the position treated as a bargaining unit position, I am authorized by the District to state that the Board would be willing to accrete the position to the support staff bargaining unit subject to negotiations between the parties with respect to modifications to the support staff bargaining agreement necessitated by the addition of the position to the bargaining unit, including by not limited to, Article 2; Article 6, Section 3; and Article 21. If the parties are able to successfully negotiate the issued relating to these provisions, the District will agree to voluntarily add the position to the bargaining unit.

> Until such time as the position is added to the bargaining unit, it is the District's position that the provisions of the collective bargaining agreement do not apply to the position, including the former incumbent, LaVonne Crowe. Therefore, I have advised the District to not acknowledge and/or further process the grievance set forth in your January 16, 2001, letter to Superintendent Helland as the grievance attempts to provide bargaining unit status to a non-bargaining unit position.
>
> If you have any questions or concerns following your review of this letter, please do not hesitate to contact me.

. . .

20. At no time prior to her termination as Title IX Tutor/Coordinator was LaVonne Crowe a member of the bargaining unit described in Finding 4.

21. The District's actions in the termination of LaVonne Crowe's employment were not retaliatory based upon her request or desire to be included in the bargaining unit.

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

CONCLUSIONS OF LAW

1. For the purposes of this proceeding, the Complainant, LaVonne Crowe, does not constitute a municipal employee as defined in Sec. 111.70(1)(i), Wis. Stats.

2. For the purposes of this proceeding, Respondent, Webster School District, constitutes a municipal employer as defined in Sec. 111.70(1)(j), Wis. Stats.

3. In terminating LaVonne Crowe's employment as Title IX Tutor/Coordinator, the District did not violate Sec. 111.70(3)(a)3, Wis. Stats.

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

ORDER

The amended complaint is dismissed.

Dated at Fond du Lac, Wisconsin this 19th day of April, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Examiner

WEBSTER SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In 1998, LaVonne Crowe was hired by the Webster School District as a Title IX Tutor/Coordinator to work with Native American students in the District. The Title IX program was a federally funded, cooperative program between the District and the St. Croix Tribe and according to District records the position of Tutor/Coordinator had existed since 1976.

Chequamegon United Teachers has, for many years, been the exclusive bargaining representative for the bargaining unit made up of the District's non-professional employees. At all times pertinent to this action, however, the position of Title IX Tutor/Coordinator was not included in the recognition clause of the collective bargaining agreement between the District and the Union, nor had the incumbents of that position ever paid Union dues or participated in Union membership.

At some point during her employment by the District, Ms. Crowe approached the District Administrator to inquire about being permitted to join the Union. She was told that she should properly approach the Union with any such request and further that matters related to Union membership were handled by the School Board rather than the administration. In October, 2000, she approached the local Union President about her request, who, in turn, passed it on to the Union Representative for Chequamegon United Teachers.

On November 22, 2000, the Union Representative inquired with the District about the status of the Title IX position and suggested that it might qualify for inclusion in the bargaining unit under the heading of Instructional Assistant. The District Administrator agreed to raise the issue with the Board at its next regular meeting. At approximately the same time, the Administrator, in consultation with other administrative staff and members of the Local Indian Education Committee, determined to seek Ms. Crowe's termination, ostensibly due to a number of work related problems, primarily dealing with conflicts and communication problems between Ms. Crowe, administrators, other staff members, parents and students.

At its December 18, 2000 meeting, the Board deferred action on the issue of adding the Title IX position to the bargaining unit until a legal opinion about its options could be obtained. At the same time, the Board decided to move ahead with the process of terminating Ms. Crowe and scheduled a private conference, in effect a termination hearing, for January 15, 2001. At Ms. Crowe's request, the January 15 conference was held in open session and evidence and arguments were presented to the Board by the Administration and Ms. Crowe. After the conference, Ms. Crowe was summarily dismissed by a unanimous vote of the Board.

On January 16, 2001, the Union Representative contacted the District to initiate the grievance procedure over Ms. Crowe's termination. On January 23, 2001, the District, through its counsel, advised the Union of its position that the Title IX position was not included in the bargaining unit and that, therefore, the District would not process the grievance. Thereafter, on April 23, 2001, the Union filed this action, alleging that in refusing to arbitrate the grievance as provided by the collective bargaining agreement, the District had violated Sec. 111.70(3)(a)5, Wis. Stats. The Union further alleged that the termination of Ms. Crowe had the effect of discouraging union membership and interfering with the rights of municipal employees, contrary to Secs. 111.70(3)(a)1 and 3, Wis. Stats. On January 2, 2002, the complaint was amended to add LaVonne Crowe as a complainant.

On November 24, 2003, the Union filed a unit clarification petition with the Wisconsin Employment Relations Commission, seeking to have the position of Title VII Coordinator (formerly Title IX Coordinator) included in the bargaining unit. On January 5, 2004, the Union advised the Examiner that it was withdrawing the allegations regarding the District's refusal to arbitrate and, further, that it was withdrawing as counsel for Ms. Crowe, but that she would continue to pursue the other claims in the amended complaint *pro se*. On March 10, 2004, pursuant to contract negotiations, the District and Union reached a tentative agreement to include the Title VII position in the bargaining unit as of the effective date of the parties' 2004-2006 collective bargaining agreement. On July 23, 2004, the District informed the Union that it would no longer be employing a Title VII Coordinator and that the equivalent services would in the future be provided by the St. Croix Tribal Education Center.

POSITIONS OF THE PARTIES

The Complainant

The Complainant asserts that her position as Title IX Tutor/Coordinator was the equivalent of an Instructional Assistant, a classification included within the recognition clause of the collective bargaining agreement. She notes that all the other non-represented support staff, except the Title IX position, are excluded by one of the statutory exceptions provided in Sec. 111.70(1)(i), Wis. Stats. It should, therefore, have been included in the bargaining unit.

The record indicates that the District had a desire to keep the Title IX position out of the Union, reflected by the Board minutes of December 18, 2000. It is more than coincidental that as soon as the Complainant began the process to obtain union status, the District began seeking to terminate her. It is apparent from the evidence that in early December, after receiving the Union inquiry about the Title IX position, the Administrator, the High School Principal and a School Board member engaged in a joint effort to bring about the Complainant's termination. Then, at the December 18 meeting, the Board indicated its preference to keep the position out of the Union, tabled the issue for further study and began the process of terminating the Complainant.

At the January 15, 2001, private conference, the Complainant presented parents, staff and students to testify in her defense, nonetheless, the Board voted to terminate her. In the termination process, the Complainant was denied due process in that the Board considered written complaints without hearing testimony from the authors, two of the complaints were written by persons who weren't in the native community and didn't have children in the program, the Complainant had never received any discipline or negative performance evaluation prior to termination and the District's counsel had a conflict of interest in that she both presided at the private conference and provided legal counsel to the Board.

The Board's anti-Union motive is further revealed by the fact that it ultimately did agree to add the Title IX (now Title VII) position to the bargaining unit, only to eliminate the position shortly thereafter and turn it over to Tribal administration. The Board's actions and conduct reveal that its true motivation in terminating the Complainant was to retaliate against her for attempting to join the Union in violation of Sec. 111.70(3)(a)1 and Sec. 111.70(3)(a)3, Wis. Stats.

The District

The District denies that it interfered with the Complainant's rights in violation of Sec. 111.70(3)(a)1 and 111.70(2), Wis. Stats. In order to sustain such an allegation, the Complainant has the burden to prove that (1) she was a municipal employee, (2) she was engaged in lawful concerted activity, (3) the municipal employer was aware of and hostile to such activity and (4) the employers took action against the employee at least in part due to that hostility. GREEN BAY AREA PUBLIC SCHOOL DISTRICT, DEC. NO. 28871-B (WERC, 4/98); EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122, WIS.2D 132 (1985); MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 WIS.2D 540 (1967). If, however, the employer had valid business reasons for its actions, employer conduct which might tend to interfere with employee rights under Sec. 111.70(2), will generally not constitute a violation of Sec. 111.70(3)(a)1. BROWN COUNTY, DEC. NO. 28158-F (WERC, 12/96); CITY OF OCONTO, DEC. NO. 28650-A (CROWLEY, 10/96); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27867-B (WERC, 5/95).

The Complainant has alleged that the District's termination decision was based upon hostility toward her request to be included in the Union. In fact, after the Union's request, the District engaged in discussions with the Union over inclusion of the position. Subsequent to the Complainant's termination, the District agreed to the inclusion of the Title IX (now Title VII) position in the bargaining unit as part of contract negotiations. The record shows that this is similar to the process used by the parties in comparable situations in the past. This proves that the District was not hostile to the Union's request that the position be included in the unit.

The District had valid business reasons for terminating the Complainant, which weren't related to any hostility toward the Union's request. The Administration's rationale for

terminating the Complainant was presented to the Board at a private conference at which the Complainant also appeared and presented evidence on her own behalf. The Board's decision was based on the Administration's arguments presented at that meeting.

The Complainant's argument is based largely on the timing of the termination decision, which occurred in the same time frame as the request for her position to be put in the Union. The record shows, however, that the Administration's reasons for recommending termination predate the request to have the position added to the Union. The Complainant was an employee-at-will and could have been terminated summarily based on complaints about her performance going back to December, 1999. Nevertheless, the District continued to retain her until the accumulation of job performance concerns led to her termination. It is purely coincidental that this occurred at about the same time as the Union's request and nothing in the record suggests otherwise.

"Hostility," as that term is used in the statute, requires that the employer act aggressively to discourage union membership. There was no such aggressive action here, but only a decision based on accumulated evidence of valid concerns about the Complainant's job performance. The Complainant has attempted to assert that the reasons given for her termination were pretextual, but in her previous discrimination case the Court, in granting summary judgment, specifically found that there was no genuine issue of material fact to show such pretext. The Complainant is, therefore, precluded from relitigating that issue here.

The Complainant in Reply

At the hearing, the Board President testified that the Board was reluctant to place the School Nurse position in the Union and also wanted to keep the Title IX position out of the Union, if possible. Despite the Union's request in November, 2000, the District did not move forward with negotiating the inclusion of the position until June, 2003, after District Administrator Helland left the District.

At the termination hearing, the Complainant presented witnesses and evidence in her defense, which were disregarded by the Board. Documentary complaints presented by the Administration in support of termination were never substantiated. The complaints about the Complainant not reviewing lessons plans or following administrative directives were specious. Other Instructional Assistants did not have to review lesson plans and the Complainant followed all administrative procedures, except staying out of the Union. The evidence presented regarding complaints by Rita Joy Staples and Gail Hess was hearsay and should have been disregarded by the Board. The District states that the Complainant did not raise the argument that the termination was based on her desire to join the Union. The District did not offer the minutes of the termination hearing, however, so there is no evidence to support its position.

The District offers as a defense the fact that it did eventually include the Title IX (Title VII) position in the Union. The record shows, however, that the District delayed the process for more than two years before it agreed to add the position and once the position was added, it eliminated it. The District merely made a show of cooperation, but never acted in good faith.

Sec. 111.70(2) requires that if a municipal employee refrains from joining a union, they must pay fair share dues. The Complainant was an employee since 1998, but never paid fair share dues. Had she done so, the Union would have been aware of her position and sought Union status for it earlier. Once the Complainant did raise the issue, the District put it on hold and she was terminated. There were no valid business reasons for termination, as the District asserts. The allegations against the Complainant were not substantiated, there was no previous discipline in her personnel file and the termination was, in her opinion, the result of her request to join the Union.

The District argues that it had valid business reasons for the termination, but they were not substantiated at the hearing. The Complainant was never previously disciplined and none of the "predated" concerns were ever raised prior to the request to join the Union. Further, the District never raised the issue of the Complainant being an at-will employee until the termination. The District demonstrated "hostility" by aggressively moving to terminate the Complainant rather than consider the Union's request to add her position. After the District had decided to terminate the Complainant, documents were taken from her office and information removed from her computer. The Complainant was not notified of the termination proceeding until January 8, 2001, after the information had been taken or deleted. The Complainant asserts that while she was employed the Title IX program was the best the District had ever had, that parents, students and staff testified in her defense and that after she was terminated, students walked out of school in protest.

Finally, the Complainant asserts that the decision by the federal district court in her discrimination suit is not binding here. That case was based on a claim of racial discrimination and Judge Crabb's decision that the termination was not pretextual has no relevance in a case concerning union membership.

The District in Reply

The District reasserts the arguments and citations to the record in its initial brief in support of its position. Further, the District takes issue with a number of factual assertions in the Complainant's brief which are not supported by the record. To wit:

1) the Complainant's assertion that she performed all the duties in the job description for an Instructional Assistant except #13. (p.2)

2) any reference to the Complainant's unemployment case. (p. 7)

3) an assertion that two letters were written by non-native community members who did not have students in the District. (p. 10)

4) claims that the Complainant received compliments on her job performance from Board members, administrators, staff, parents and students. (p. 11)

The Complainant appears to argue that she was really an Instructional Assistant and should, therefore, have been included in the bargaining unit. The job descriptions for an Instructional Assistant and the Title IX Tutor (Employer Ex. 4 and 5), however, are markedly different both as to qualifications and job responsibilities. If she were an Instructional Assistant, there would have been no need for the Union to pursue accretion of her position. She also listed her job as Title IX Tutor, not Instructional Assistant when she applied for group insurance after her hire. Clearly, both she and the District were aware that the positions were different.

Finally, the District takes issue with the Complainant's contention that the timing of her termination was suspicious. In fact, it appears that the Union's inquiry about the status of her position was suspiciously timed in a last minute attempt to save the job of an employee with a long history of performance problems. This is supported by the fact that after the termination the Union did not pursue accretion of the position further until negotiations over the 2004-2006 contract.

DISCUSSION

The Complainant here has alleged that her termination on January 16, 2001, was motivated by the antagonism of the District toward her efforts to have her position included in the bargaining unit. It appears that her argument proceeds along two separate lines of attack. First, she asserts that her position of Title IX Tutor/Coordinator was functionally equivalent to that of an Instructional Assistant, which is listed in the recognition clause. Whether by oversight or design, her position was never treated as a union position, which the District should have corrected upon the issue being raised. Second, and in the alternative, she argues that her position should properly have been in the bargaining unit by virtue of being part of the District support staff and not qualifying for exclusion under any of the standard statutory exceptions. In either event, she maintains that once the issue was raised by an inquiry from the Union in November, 2000, the administration of the District manufactured a case for her termination in order to prevent her from joining the Union.

As noted in Findings 5 and 6, the District maintained two separate positions of Title IX Tutor/Coordinator and Instructional Assistant, which have markedly different qualifications and job responsibilities. The recognition clause in the collective bargaining agreement makes specific reference to the position of Instructional Assistant being included in the bargaining

unit. It makes no reference to the position of Title IX Tutor/Coordinator. While the testimony at the hearing revealed that there was some overlapping of duties between the Title IX Tutor/Coordinator and the Instructional Assistants, the Title IX position had also several unique and exclusive features separate from the Instructional Assistants. Contrary to the Complainant's assertion, therefore, her position was not the functional equivalent of an Instructional Assistant and was not automatically entitled to bargaining unit status under that rubric.

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer to "encourage or discourage a membership in any labor organization by discrimination in regard to . . . tenure or other terms or conditions of employment." To establish a violation of this section, the Complainant must prove by a clear and satisfactory preponderance of the evidence that: (1) the Complainant was engaged in activity protected by Sec. 111.70(2), Wis. Stats.; (2) the District was aware of this activity; (3) the District was hostile to the activity; and (4) the District acted toward the Complainant, at least in part, based upon hostility to her exercise of protected activity. MUSKEGO-NORWAY C.S.J.S.D. NO. 9 v. WERB, 35 WIS.2D 540 (1967), as discussed in EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985). In order to prevail, it is the Complainant's burden to establish each element of her claims by a clear and satisfactory preponderance of the evidence. WEST ALLIS-WEST MILWAUKEE SCHOOL DISTRICT, DEC. NO. 20922-D (SCHIAVONI, 10/84).

Here, there is no question that the Complainant has met the criteria set forth in points (1) and (2) of the MUSKEGO-NORWAY test. The activity protected by Sec. 111.70(2) includes ". . . the right to form, join or assist labor organizations . . ." At some point in the fall of 2000, the Complainant expressed interest to the District Administrator in having her position accreted to the bargaining unit. At his suggestion, she approached the local Union President about the matter, who passed her request along to the Union representative. This constitutes protected activity under the statute. The inquiry from the Complainant to the Administrator, along with the Union Representative's November 22, 2000 letter, also establishes that the District was aware of the Complainant's activity. The District does not dispute either issue.

As to the third element, the Complainant maintains that the District's hostility to her activity was manifested in two ways. First, when presented with the Union Representative's letter at its December 18, 2000 meeting, the Board minutes reflect that the Board wanted to keep the position out of the Union, if legally possible, and that legal advice on the matter would be pursued. Second, at the same meeting, the Board was presented with an Administration request to terminate the Complainant and began the termination process at that point. In the Complainant's view, the Board minutes are prima facie evidence of hostility to her attempt to be included in the Union because they indicate that the Board opposed the request and immediately moved to get rid of the employee making it.

Likewise, in the Complainant's view the evidence of District action against her based on its hostility is comprised of the termination proceeding, which took place shortly after the Union request to accrete the position into the bargaining unit. She sees these events as cause

and effect and supports her argument by asserting that she had never been disciplined before, was unaware of complaints against her and that the District didn't give proper weight to the arguments in her defense. For the reasons set forth below, I do not find merit in these contentions.

The Complainant's initial inquiry about union membership was made to District Administrator Helland. Mr. Helland testified that he had no opinion on the subject, pro or con, and nothing in the record suggests otherwise. Further, there is no evidence that Mr. Helland took a position on the matter with the Board. Although the Board indicated it preferred to keep the position out of the Union, it did seek legal counsel, as it indicated it would on December 18 and on January 23, 2001, the Board, through counsel, informed the Union that it ". . . would be willing to accrete the position to the support staff bargaining unit subject to negotiations between the parties with respect to modification of the support staff bargaining agreement necessitated by the addition of the position to the bargaining unit . . ." (Employer Ex. 3) Indeed, the record contains no evidence that, at any time after receiving Union Representative Delaney's November 22 letter, the Board took any action to subvert the process of adding the Title IX position to the bargaining unit. As the District points out, after receipt of the District's January 23, 2001 response, the Union took no further action to negotiate the accretion until 2003, for which the District cannot be held accountable. It is difficult to make the leap, therefore, that the termination of the Complainant was in any way in retaliation for her request to be included in the Union.

As noted, the Complainant places great emphasis on the coincidence of her termination coming on the heels of the Union request to add her position to the unit. Understandably, she sees the Board's response as evidence of hostility toward her protected activity and, further, as action based on that hostility. Again, however, there is no evidence in the record that the Administration or Board confronted her about her protected activity, made negative comments to her or others about it, or based any of its decisions with regard to her employment on her protected activity. In fact, the only "evidence" that the Board's decision was based on an impermissible motive is an inference drawn entirely from the coincidence of the proximity of the termination to the Union request. While the Complainant states in her brief that the Board deliberately delayed the termination process to give time for necessary documents and files to be removed from her desk and computer, there is no support for this allegation in the record.

In fact, the record reveals that the District had a substantial number of documented concerns about the Complainant's job performance, including problems with administrators, other staff and parents of students in the program she was operating, that these concerns had existed in some cases for several months prior to the Complainant's dismissal and that the administrators had met with the Complainant at various times in the past to address them.[1]

[1] At the hearing, the Complainant attempted to attack the merits of the termination and challenge the sufficiency of the evidence presented by the District at the termination hearing. The Examiner ruled such an inquiry to be beyond the scope of his authority, except insofar as there was any evidence that the Board's termination decision was based on the Complainant's protected activities.

While the Complainant argued that she had not been disciplined in the past, since she was not a bargaining unit member, she was not contractually entitled to progressive discipline or covered by the just cause provisions of the collective bargaining agreement. Rather, as an at-will employee, it was the District's prerogative to discharge her at any time for any legal reason.

In sum, the timing of the Complainant's termination was, perhaps, unfortunate, coming as it did during the same period of time that the Union was beginning to pursue accretion of her position in to the bargaining unit. Beyond that, however, there is absolutely no evidence in the record to support an allegation that the Board's decision was based on impermissible motives under the MUSKEGO-NORWAY test. I find, therefore, no violation of Sec. 111.70(3)(a)3, Wis. Stats., based on the Board's decision to terminate the Complainant.

As to the Complainant's allegations of a violation of Sec. 111.70(3)(a)1, Wis. Stats., that statute prohibits conduct tending to " . . . interfere with restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)." The Commission has held, however, that in discipline or discharge cases, the same analysis applies as with an alleged violation of Sec. 111.70(3)(a)3. CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03). In that case, the Commission held that " . . . a Section (3)(a)3 type analysis is sufficient and appropriate to apply to alleged violations of Sec. 111.70(3)(a)1, Stats., in cases like the present one, where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees. If the circumstances demonstrate that the adverse action (e.g., termination, discipline, layoff) was lawfully motivated, we will not find it unlawful under Section (3)(a)1 simply because it could be perceived as retaliatory." On that basis, therefore, I find that the District's action in terminating the Complainant was not a violation of Sec. 111.70(3)(a)1, Wis. Stats.

Dated at Fond du Lac, Wisconsin this 19th day of April, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Examiner

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