

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant,

vs.

TURTLE LAKE SCHOOL DISTRICT, Respondent.

Case 40
No. 63913
MP-4085

Decision No. 31238-A

Appearances:

Mr. Tim A. Schultz, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Complainant.

Mr. James M. Ward, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators (hereinafter "Complainant" or "NUE") filed a complaint with the Wisconsin Employment Relations Commission on August 16, 2004, alleging that School District of Turtle Lake (hereinafter "Respondent" or "District") had committed prohibited practices within the meaning of Sec. 111.70(3)(a)1 and 5, Stats., of the Municipal Employment Relations Act (MERA) by not to assigning Sybil Thompson a duty in violation of Articles VII and VIII of the parties' collective bargaining and retaliating against Thompson for her prior protected activity. The District filed its Answer on February 14, 2005, denying it had committed any prohibited practice.

The Commission issued an order on February 10, 2005, authorizing Examiner Lauri A. Millot to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.70(4)(a) and 111.07, Stats.

Hearing on the Complaint was held on February 16, 2005. A stenographic transcript of the proceedings was made and received.

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The Complainant and Respondent filed post-hearing briefs by April 20, 2005, and informed the Examiner on May 2, 2005, that the parties did not intend to file reply briefs, whereupon the record was closed.

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

FINDINGS OF FACT

1. The Complainant, Northwest United Educators, a labor organization with its mailing address at 16 West John Street, Rice Lake, Wisconsin, 54868. The Complainant serves as the exclusive collective bargaining representative for all regular full-time and regular part-time certified teaching personnel of the Turtle Lake School District including classroom teachers, guidance counselors, and librarians, but excluding substitute, administrative, interns, practice teachers, teacher aides, office and clerical employees, custodians, cooks and bus drivers.

2. The Respondent, School District of Turtle Lake, is a municipal employer, with offices located at 277 15½ Avenue, Turtle Lake, Wisconsin, 54889.

3. At all times material herein, NUE and the District have been parties to a series of collective bargaining agreements. The 2003-2005 Agreement contained, in pertinent part, the following provisions:

VII. ASSIGNMENTS AND REASSIGNMENTS

- A. The teacher shall not be required to teach outside the limits of his teaching certificate and field of study.
- B. The Board shall make a determined effort to list grades or subjects on the individual teacher's contract. Beginning in the 2002-03 school year, co-curricular assignments will be listed as separate contracts. The Board shall make subsequent changes only after consulting with the teacher involved. (All co-curricular assignments, coaching, etc. as listed on the contract shall be agreed to by April 15th of the preceding school year.)

- C. In making voluntary and involuntary teaching and co-curricular assignments the Board will honor the wishes and seniority of the individual teacher to the extent that they do not conflict with instructional requirements or best interest of the school system and the student.
- D. A teacher shall be notified in writing of their specific daily schedule at least two weeks before the beginning of each school year.
- E. Any teacher who is required to use their prep time to take another teachers class or study hall in grades K-12 shall be reimbursed at the rate of \$17.44 per class period for the 2003-04 school year and \$18.16 for the 2004-05 school year. This article shall apply to addition of students to a teacher's regularly assigned study hall only if there are more than 20 students added to the study hall.
- F. Every effort will be made to assure that employees covered by this Agreement will not be responsible for the collection of lunch money and playground duty.
- G. Each teacher in grades 7-12 will receive one period per day of prep time. Each teacher in grades K-6 will receive the equivalent of an average of 50 minutes per day for prep time exclusive of before and after school and a 30 minute lunch break.

VIII. LAYOFF

- A. When the Board in its discretion determines that it is necessary to decrease the number of teachers for any reason other than the teaching performance of a particular teacher or teachers, the board may lay off, in whole or in part, the necessary number of teachers according to the following procedure:
 - 1. The Board determines the assignment area (certification) in which the layoff shall occur.
 - 2. The teacher with the least seniority teaching in the assignment area at the time of the layoff shall be laid off except:
 - a. If the Board can demonstrate that by the layoff of a teacher, a vacancy in a dual teaching assignment (one which requires dual certification) will occur for which no qualified replacement can be found within two weeks of receipt of the

notice of layoff, the teacher with the dual teaching assignment and dual certification shall be exempt from layoff.

3. Teachers who have transferred voluntarily or involuntarily within the District shall have their total seniority in the District utilized for purposes of computing seniority within the teaching assignment area.
4. The laid-off teacher shall have bumping rights, based on seniority, into other teaching areas for which he/she is certified. Bumping rights shall be exercised within two (2) weeks of receipt of the layoff notice.
5. Seniority shall commence (sic) on the date and time a signed contract is received for new staff members hired. This date and time will be used to determine seniority in the event of a layoff.
6. When a teaching position is made available and there is a qualified teacher who is laid off, that teacher shall be recalled. Any teacher who has not been contractually employed by the District for more than three school years shall not be entitled to recall, but the Board shall favor all former laid-off teachers over new applicants, qualifications being relatively equal.
7. If there are two or more laid-off teachers with recall rights who are qualified for an available position, the teacher having the greatest seniority shall be recalled.
8. No teacher may be prevented from securing other employment during the period laid off under this section.
9. A teacher on layoff status shall accrue no benefits (including seniority) while on such status but if recalled while on layoff shall retain benefits accrued at the time of being laid off.
10. Any teacher on layoff offered reinstatement must within 15 days of such offer agree in writing to accept such reinstatement. Failure to either accept reinstatement or return to employment shall be deemed a waiver of any right to employment.
11. If a layoff occurs during the term of a collective bargaining agreement which has an effect on wages, hours or conditions of

employment, the Board agrees to reopen negotiations to bargain the impact on the employees remaining after the layoff.

- a. If a teacher is notified of a layoff prior to June 1st for layoff to occur during a subsequent contract year, there shall be no severance payment nor insurance benefits paid to the teacher being laid off.
- b. If a teacher who has received an individual contract by June 1st for employment in subsequent school year receives a notice of layoff, and;

. . .

XI. BOARD RIGHTS

- A. It is recognized that the Board has and will continue to retain the rights and responsibilities to operate and manage the school system and its programs, facilities, properties and activities of its employees within the scope of their employment. The exercise of Board rights and responsibilities, whether or not specifically hereinafter enumerated, shall not be inconsistent with the terms of this Agreement.
- B. Without limiting the generality of the foregoing (paragraph A.), it is expressly recognized that the Board's operational and managerial responsibilities includes:

. . .

- 12. The right to establish hours of employment, to schedule classes and assign workloads; and to select textbooks, teaching aids, and materials.

. . .

XIII. GRIEVANCE PROCEDURE

The purpose of this Article is to provide an orderly method for expeditiously resolving grievances. A determined effort shall be made to settle any such differences at the lowest possible level in the grievance procedure. Meetings or discussions involving grievances or these procedures shall not interfere with teaching duties or classroom instruction.

Definition: For the purpose of this Agreement, a grievance is defined as any difference or dispute regarding the interpretation or application or enforcement of the terms of this Agreement. "Days" are defined as school days, except during the summer recess when "days" shall mean calendar days, exclusive of weekends and holidays.

. . .

Step II. If the grievance is not settled at Step I and the teacher wishes to appeal the grievance to Step II, the teacher may file the grievance in writing to the Superintendent of Schools within ten (10) days after receipt of the principal's written answer or failure of the principal to answer. Written grievance shall give a clear and concise statement of the alleged grievance, including the fact upon which the grievance is based, the issues involved, the agreement provisions involved, and the relief sought. The Superintendent or his representative shall thoroughly review the grievance, arrange for necessary discussions, and give a written answer to the teacher no later than ten (10) days after receipt of the written grievance.

Step III. If the grievance is not resolved in Step II or the Superintendent fails to answer within the ten (10) day limit, the grievant may file the grievance in writing with the Clerk of the Board, provided that said grievance shall be filed within ten (10) days after the answer or failure of the superintendent to answer. Failure to file with the Clerk of the Board within ten (10) days shall deem the grievance resolved against the teacher.

The Board shall consider the grievance at its next meeting, or the following regular meeting, or at any special meeting called for that purpose in the interim.

The board shall, within ten (10) days after the meeting, advise the teacher in writing of the action taken with regard to the grievance.

. . .

5. Sybil Thompson has been employed by the District as a teacher since 1977. Thompson's certification is in the area of family and consumer education. Thompson is the sole member of the family and consumer education department at the high school and is the third most senior teacher at the high school.

Thompson is involved outside the District in labor advocacy, currently serving as Treasurer for the NUE Executive Committee and a member of the WEAC Board of Directors. Thompson testified before the Legislature's Joint Finance Committee on behalf of WEAC in 1997.

Thompson held various positions with the local bargaining unit during her employment with the District. Thompson filed and represented employees during grievance meetings with the District. These grievances included a 1998 grievance involving the death benefits of a teacher and a 2001 grievance relating to the basketball coaches. Thompson was a member of the bargaining team starting in 1983 and most recently for the 2001-2003 and 2003-2005 bargains.

Thompson personally filed grievances with the District. In 1997 or 1998, she filed a grievance regarding the usage of compensatory time for an open house. The grievance was denied by then District Administrator Mark J. Collins. In 1989, Thompson filed a gender discrimination against the District alleging an unlawful lay-off. Thompson prevailed before the Equal Employment Opportunity Commission and in federal court.

6. Mark J. Collins was the District Administrator from 1988 until his retirement on June 30, 2004. Collins participated in budget formation and teacher assignments for the 2004-2005 school-year.

Charles Dunlop was hired to the District Administrator position effective July 1, 2004, as District Administrator. Dunlop was not part of the decision-making process for the 2004-2005 teacher schedule, although the schedule was finalized during Dunlop's employment.

7. For the 2004-2005 school-year, the District changed the high school schedule from four 90-minute blocks of instruction and a homeroom at the end of the day to an eight period day of eight 40 to 45 minute periods.

A full-time teaching load for the 2004-2005 academic-year is six teaching periods, a preparation and a duty.

8. As a result of declining enrollment accompanied by a reduction in state aid, the District eliminated programs and staff to balance its budget for 2004-2005. Program areas cuts included agriculture, elementary music, high school social studies, family and consumer education, summer music, and cheerleading and an after-school bus route was eliminated. The District eliminated two full-time teacher positions and issued lay-off notices to one secondary social studies teacher and to elementary teacher.

Partial lay-off notices were issued to Thompson, Shandra Lamb and Pauline Mert.

Thompson was initially reduced from full-time to one-half time. The District re-evaluated Thompson's schedule after a grievance was filed and it was increased from one-half time to five-eighths time. Thompson's 2004-2005 schedule included four teaching hours and one preparation hour. Thompson began teaching the 4th hour of each day.

Lamb is the elementary music teacher and was reduced from full-time to 80 percent and worked a four-day per week schedule.

Mert is an elementary physical education teacher. Mert's teaching schedule was supplemented to full-time with teacher aid responsibilities. Mert has worked a combined teaching and teacher aid schedule for at least 15 years with the District. Mert is paid both a teacher salary pursuant to the teachers' salary schedule and hourly aide pay based on the support staff labor agreement. Mert received full-time benefits due to her combined teacher/aide position.

The District did not offer Thompson aid work to supplement her teaching schedule and make her eligible for full-time benefits.

9. Collins prepared the preliminary schedule for 2004-2005. At that time, Thompson was scheduled for four classes and was one-half time. The schedule assigned a keyboarding class to Spanish teacher Pacholke. Pacholke's predecessor had taught the keyboarding class. Pacholke was not certified to teach keyboarding.

Thompson communicated her desire to exercise contractual bumping rights in order to add the keyboarding class to her teaching schedule. Thompson had greater seniority than Pacholke. Thompson was not certified to teach keyboarding. The District was aware that Thompson was considering bumping Pacholke from the keyboarding class. The District sought advice from the Department of Public Instruction regarding the licensure requirements for keyboarding and from its legal counsel regarding teacher bumping rights.

The second schedule for the 2004-2005 academic-year removed the keyboarding class from Pacholke and assigned it to the business education teacher, Moen. Moen held the requisite Department of Public Instruction certification to teach the keyboarding class.

The District replaced the keyboarding class in Pacholke's schedule with an elementary Spanish class. The District had not previously offered a Spanish class for its elementary students. The District's decision to create an elementary Spanish class was prompted by its desire to provide Pacholke a full-time teaching schedule so that she would remain an employee of the District.

10. The District employed one Agriculture teacher, Don Dipperry, for 2004-2005. Dipperry is certified by the Department of Public Instruction to teach agriculture and science. In addition to his agriculture classes, Dipperry was assigned science classes to supplement his schedule. Dipperry had been full-time for 2003-2004.

11. The District employed one Vocational Education/Technical Education teacher, Jake Ritchie, for 2004-2005. Ritchie was assigned five classes, one preparation and one supervision. Ritchie was a seven-eighths full-time teacher. Ritchie's assigned supervision was lunch duty during the fifth period. Ritchie was a second year teacher with the District and

therefore had less seniority than Thompson. The District could have assigned Ritchie's lunch period supervision to Thompson.

The District did not consider Thompson's seniority when it assigned Ritchie, a less-senior teacher a supervision.

12. In addition to the Grievant and Ritchie, the District employed two part-time teachers, Bergmann, and Wicklund, at the high school for the 2004-2005 school year. Both teachers were assigned classes to teach during the seventh and eighth period of the day and neither were assigned a supervision or study hall.

13. NUE filed a grievance on April 22, 2004, alleging that the District had violated Article VII in as much as Section G:

states, in part, "Each teacher in grades 7-12 will receive one period per day of prep time." This clause does not differentiate between full-time and part-time teachers. Every other teacher, including those with less seniority than Ms. Thompson, are also scheduled for a study hall. Thus, a teaching load of six periods is a full-time load. Ms. Thompson is scheduled to teach four periods, but is having her contract reduced to 50%. NUE submits that the District has violated her rights under the Agreement by reducing Ms. Thompson to 50%.

In order to resolve this grievance, NUE demands that Sybil Thompson be assigned both a preparation period and a study hall for 2004-2005, therefore increasing her to at least a 75% contract.

. . .

The District agreed with NUE's interpretation of the contract language as it related to the assignment of a preparation period, but did not agree to NUE's assertion that the District was obligated to assign Thompson a study hall.

NUE filed a Step III grievance on May 11, 2004. The District Board of Education denied the Step III grievance on May 24, 2004.

14. The District proposed and the parties negotiated language that diminished the insurance benefits for partially laid off employees for the contract years encompassed within the 2001-2003 and 2003-2005 school years. NUE countered and the District agreed to a Sunset Clause. The language reads as follows:

. . .

- D. Any teacher working less than full-time shall be eligible for prorated premium payments at the same rate as their teaching contract.

Teachers working less than full time as the result of partial layoff shall not have their premium payments prorated.

Teachers working less than full-time as the result of partial layoff shall have their premium payments prorated. This provision will be for the 2001-2003 and 2003-2005 contract years.

The District shall provide benefits similar to those provided under the WEAIT comprehensive major medical with \$100 deductible, no co-insurance, no \$2/\$7 co-pay drug card, with chiropractic and \$300 stop-loss family limit. The District may change the coverage or self-fund the program provided substantially equivalent or superior benefits are provided.

The District shall pay dollar amounts which will be 95% of the District's actual family or the District's actual single premium.

. . .

The District did not propose the Side Letter language with the intent to deny Thompson health insurance benefits.

15. In 2003-2004, the District employed Tara Martini in a five-eighths capacity teaching capacity. Martini's schedule included two blocks and a preparation. Martini was not assigned a supervision.

Martini was hired to replace teacher Amy Lakner. Lakner was full-time in 2002-2003 and left the District's employ in 2003-2004 to pursue a degree in Library Science after she was reduced to five-eighths full-time equivalency.

CONCLUSIONS OF LAW

1. Complainant is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.
2. Respondent is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. The Examiner, pursuant to Wis. Adm. Code ERC 12.02(5) conformed the evidence to the pleadings and amended the Complaint by changing the Complainant's Sec. 111.70(3)(a)1, Stats., violation to a Sec. 111.70(3)(a)3, Stats., violation.

4. Sybil Thompson has engaged in protected concerted activity for at least 15 years, including participation in negotiations for the 2001-2003 and 2003-2005 labor agreements. The District was aware of Thompson's protected activities. The District's decision not to assign a supervision/study hall to Thompson was not motivated by hostility to her union activities and was not unlawful differential treatment due, in part, by Thompson's protected activity and therefore the District did not violate Sec. 111.70(3)(a)3, Stats.

5. The District did not violate the parties' collective bargaining agreement when it did not assign by seniority supervision/study hall responsibilities and therefore, the District did not violate Sec. 111.70(3)(a)(5), Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The Northwest United Educators complaint of prohibited practice is dismissed in its entirety.

Dated at Rhinelander, Wisconsin this 17th day of November, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/

Lauri A. Millot, Examiner

TURTLE LAKE SCHOOL DISTRICT

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

POSITIONS OF THE PARTIES

The Complainant

The NUE maintains that the District committed a prohibited practice in the manner in which it treated Sybil Thompson. NUE poses the question, why did the District not afford Thompson equal treatment when it made teaching assignments for the 2004-2005 school-year?

There are two clauses of the labor agreement that control this situation. First, Article VII, Section C provides that the District will “honor the wishes and seniority of individual teachers” when making assignments. There is an additional qualifier in this section that states that seniority is to be considered “to the extent that (seniority does) not conflict with the instructional requirements or best interest of the school system and the student.” The District has not argued that this qualifier applies, therefore seniority should have been the determinative factor in making the supervision assignment.

The second clause of the labor agreement relevant to this case requires that the District lay-off the least senior teacher. There are four references in Article VII, Section A, that designate seniority should be relied upon when making lay-off decision. The District did not afford seniority its due weight and partially laid off the more senior teacher.

As to the District’s argument that supervision is not covered by Articles VII and VIII, the District has consistently made supervision assignments a part of the teacher’s teaching assignment and therefore these sections apply. For the 2002-2003 and 2003-2004 school years, the high school used a four-block schedule. Each block was roughly equal to two class periods for the 2004-2005 schedule. Another block was split between preparation and duty. The District, in making that assignment, has regarded supervision as a part of the teacher’s teaching assignment and therefore, it is subject to the seniority provisions of the labor agreement.

This Complaint compares Thompson, who was reduced from full-time to one-half time for 2004-2005 without a supervision to second-year, part-time teacher, Ritchie, who was assigned a lunch duty during 5th period. Ritchie was not assigned a supervision in 2003-2004 when he was five-eighths time. The District took Thompson’s supervision and assigned it to Ritchie in contravention to Thompson’s desires. This violates Article VII, Section C.

NUE regards the District's action of removing the supervision from Thompson and giving it to Ritchie as a "bump." Ritchie "bumped" Thompson out of her supervision. Article VII, Section A, paragraph 4, allows for bumping, but it must be "based on seniority." The District ignored seniority when it allowed this bump.

The District has gone out of its way to make assignments to keep less-senior teachers in the District while making no effort to assist Thompson. Although Collins testified that this was done because the District "really needs to keep the core programs intact" the teachers that the District has protected through the scheduling process do not teach core programs.

Finally, the District has not provided a valid rationale for denying Thompson a supervision. Having provided no explanation, the Association can only conclude that the District's actions are anti-union animus due to Thompson's status as a long-time union advocate. Ben Pringle and Thompson testified to Thompson's long record of protected activity within the District thus meeting the first and second elements of a discrimination case under Section 111.70. As to elements three and four, NUE points to COUNTY OF WAUKESHA, DEC. NO. 30799-B (WERC, 2/05) and maintains that the in-part motivation exhibited against Pantelis' in that case is similar to the in-part hostility that the District has shown to Thompson. In addition to the fact that Thompson is the only teacher at the high school without a supervision, the District's maneuverings when assigning the keyboarding class show that the District was hostile to Thompson.

NUE requests that the District be required to extend at least a 75% contract to Thompson for 2004-2005, making Thompson whole, with interest, for all salary and benefit payments lost and that the District be required to post the decision regarding this complaint in local newspapers and in public places and keep it posted for a reasonable period of time.

The Respondent

The Respondent did not violate any provision of the parties' labor agreement when it did not assign Thompson a study hall for the 2004-05 academic-year. Moreover, there is no basis in the record to find that the District's decision was motivated by anti-union animus.

The negotiated management rights clause affords the District the right to make assignments including the assignment of a less senior teacher to a supervision. There is wide latitude in the discretion granted to the District and there is no express provision of the labor agreement that controls this situation. Moreover, there is a considerable history of case law that supports the conclusion that bumping rights and seniority based job assignment rights do not apply to study halls. Arbitrator Lionel Crowley found that a 28-year veteran teacher in a one-person department whose contract was reduced due to the elimination of some of his classes was not entitled to bump less senior colleagues from study hall supervision periods because:

. . . There is simply no strict requirement to assign such duties (study hall or preparation periods) based solely on seniority. If there were such a requirement, carried to its logical extreme, a senior teacher, in order to be retained, might end up being assigned all study hall work while it caused the partial reduction of seven or eight other teachers, in subject areas, who each had one study hall assignment. This would be an unreasonable result, based on this language.

SCHOOL DISTRICT OF ALMA, MA-3794 (CROWLEY, 3/86) AT 4-5.

Moreover, the first step of the layoff process requires that the District first determine the “assignment area (certification)” and then complete the lay-off. Study hall supervision requires no type of certification. The parties did not intend to include supervision as part of the areas in which an employee may bump a less-senior employee.

Moving to the Association’s reliance on Section C of Article VII, there is no contractual requirement for the District to consider the “wishes and seniority” of Thompson. Br. p. 7. Section C requires the District to consider the wishes and seniority of teachers when making teaching and co-curricular assignments. Supervision and/or a study hall assignment is neither a teaching or co-curricular assignment and therefore the District did not violate this section when it assigned the supervision to a less senior teacher.

As to the Association’s allegation that the District’s decision to assign the supervision to Ritchie rather than Thompson was motivated by anti-union animus, there is insufficient evidence to support such a claim. The District acknowledges the visibility of Thompson’s union activism, but this awareness does not equate with anti-union animus.

Looking to the four required elements to establish a successful retaliation claim, the District concedes elements one and two, but there is no evidence that the District displayed any modicum of hostility toward Thompson. NUE failed to place any direct evidence in the record of the District’s anti-union animus, and there is nothing in this record that would lead the Examiner to draw an inference of anti-union animus from the circumstantial evidence.

None of the three teachers NUE compares Thompson to are comparable nor is there any factual support to the allegation of differential treatment. When looking at Thompson’s circumstances in comparison to the three teachers, it is an apple to orange comparison. They are not in the same circumstance as Thompson and therefore there was no differential treatment.

NUE’s assertion that the parties’ negotiated on the benefits reduction for part-time layoff candidates to harm Thompson’s is without merit. The District had a valid, non-

discriminatory economic reason for seeking the language. The District, knowing it would be confronting layoffs and partial layoffs in the future, sought to maximize the final savings of layoffs and negotiated prorated fringe benefits to correspond with the teacher's full-time equivalency. Lacking any evidence of hostility, the fourth element is effectively eliminated.

For all of the above reasons, the District maintains that NUE has not met its burden of proof and the matter should be dismissed.

DISCUSSION

The Complaint filed in this case alleged violations of Sec. 111.70(3)(a)1 and 5, Stats., precipitated by the partial layoff of Sybil Thompson for the 2004-2005 school year. The Complainant argued at hearing and in its post-hearing brief that the failure to assign Thompson a supervision was motivated by anti-union animus which is a Sec. 11.70(3)(a)3, Stats., violation. Complainant applied MUSKEGO-NORWAY C.S.J.S.D. NO. 9 v. WERB, 35 Wis.2D 540 (1967) 35 Wis.2D 540 (1961) to analyze its case.¹ Respondent was aware of the Complainant's discrimination argument and similarly framed its argument based on the MUSKEGO-NORWAY, ID standards. An Examiner is afforded the right to conform the pleadings to the proof and as such, my analysis shall follow a Sec. 111.70(3)(a)3 violation See Wis. Adm. Code, ERC 12.02(5).

Alleged Sec. 111.70(3)(a)3, Violation

The four elements of a successful claim of discrimination in violation of Section (3)(a)3 are as follows:

- 1) that the employees were engaged in lawful concerted activities;
- 2) that the employer was aware of those activities;
- 3) that the employer bore animus towards those activities;

¹ Complainant alleged in the conclusion of its brief that the District had "committed a prohibited practice within the meaning of Section 111.70(3)(a)1, 3, and 5, Wisconsin Statutes." Citation of a statutory violation in a brief does not comply with the case filing procedures nor the amendment procedures, but does provide guidance to the Examiner as to what the Complainant's dispute encompasses VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) AT 18, CITING MUSKEGO-NORWAY C.S.J.S.D. NO. 9 v. WERB, ID.; EMPLOYMENT RELATIONS DEPARTMENT v. WERC, 122 WIS.2D 132 (1985).

4) that the employer took adverse action against the employees at least in part out of animus toward those activities. VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) AT 18, CITING MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, ID.; EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 Wis.2d 132 (1985).

The record is replete with evidence that establishes that Thompson has a long history of engaging in lawful concerted activities, is a strong advocate for the rights of collective bargaining units, and has communicated this opinion to the District. There is no question that the District was aware of Thompson's activities and the District has not denied such knowledge. Thus, the first two elements have been met.

Moving to the third element, an unlawful motive may be inferred from logic and an experienced assessment of the circumstances in the absence of direct evidence. COUNTY OF WAUKESHA, DEC. NO. 30799-B (WERC, 2/05). There must be evidence to support the inference and such a conclusion cannot be based on solely suspicion or speculation. Id. Relevant circumstances which may lead to finding of an unlawful motive include timing, failure to offer prior warning of the seriousness of the ostensible misconduct, failure to have seriously investigated the ostensible misconduct, and failure to inform the employee contemporaneously of the reason. Id.

NUE identified two incidents which it believes support a conclusion that the District was motivated by hostility to Thompson's activities. The first incident cited was the District's willingness to increase the teaching load equivalency of less senior teachers, Ritchie and Pacholke, while decreasing the percentage of employment for Thompson. Ritchie was a second-year teaching Vocational Education/Technical Education and while the record does not include the tenure of Pacholke, a Spanish teacher, there is no question that she was less senior than Thompson. Collins, the retired District Administrator, testified that in making staffing decisions, he considered the area of subject matter that the teacher taught, the likelihood that the teacher would remain in the District, and whether the subject matter being taught by the teacher was a required subject or an elective subject. The first two of Collins' reasons are reasonable business justifications. The labor pool for foreign language and technical education is limited and teachers will consider seeking different employment when offered a part-time teaching schedule rather than a full-time teaching schedule. It is also generally true that the longer an individual resides in a community, the less likely they are to leave. Thus, based on the first two reasons cited by the District, I do not find that the decision contained any inference of hostility.

With regard to elective versus required course material, it is factually false in these circumstances because the classes taught by Thompson, Ritchie and Pacholke are all elective. As such, it is possible to draw an inference that the District was motivated by Thompson's protected activity, but on balance, I find that the first two reasons presented are of greater significance and negate a finding that the District's decision was unlawfully motivated.

The second incident of hostility cited by NUE was the District's staffing maneuvers with the keyboarding class. This class was originally assigned to Pacholke to teach for the 2004-2005 school year. Pacholke is a Spanish teacher and the prior Spanish teacher had taught keyboarding. Neither Pacholke nor Thompson were certified by the Department of Public Instruction to teach keyboarding. After Thompson communicated that she was considering exercising bumping rights and therefore acquire the class, the District reviewed the licensure requirements and learned that the class needed to be taught by a licensed instruction. The class was removed from Pacholke's schedule and re-assigned to the business education teacher who had taught it the prior year. The fact that the District obtained information regarding the licensure requirements for teaching the keyboarding class after Thompson indicated an interest in teaching the class could be evidence of the District's intent to deny Thompson the class, but there is no evidence to indicate that the denial was prompted by her protected activity. Moreover, the district similarly denied Pacholke, a teacher with no history of engaging in protected activity in this record, the keyboarding class. Given that both Pacholke and Thompson were similarly treated and the lack of sufficient evidence in this record to support an inference of hostility, I cannot conclude that the District's decision was unlawfully motivated.

Having found that there is insufficient evidence to support a finding of hostility, I cannot uphold a claim of discrimination based on the Complainant's protected concerted activity.

Alleged Contract Violation

The parties' labor agreement does not provide for final and binding arbitration of grievances. As such, labor disputes are resolved through a prohibited practice complaint.

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

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

If the District's conduct was contrary to the Agreement, then the Association has established a violation of this section.

The Complainant asserts that Article VI, Assignment and Reassignment, applies to Thompson's situation. Complainant is in error. Thompson was laid off, i.e. reduced from full-time to five-eighths time, for the 2004-2005 school-year. Thus, the rights which govern

her initial lay-off are contained in Article VIII and control the issuance of her 2004-2005 contract. Complainant has not challenged that there are less classes for Thompson to teach in her certification area and since Thompson is the only individual in her certification area, she is both the most senior and the least senior. Once the district determined it would offer less classes in Family and Consumer Education, it had the right to lay-off, in whole or in part, the Complainant. It is therefore, the reinstatement rights set forth in Article VII, Section A, sub-section 4, that are determinative herein. Specifically, whether these reinstatement rights entitle the Grievant to be assigned any of the study halls and/or supervision which were assigned to less senior teachers? Sub-section 4 reads as follows:

The laid-off teacher shall have bumping rights, based on seniority, into other teaching areas for which he/she is certified. Bumping rights shall be exercised within two (2) weeks of receipt of the layoff notice.

This sub-section expressly states that bumping rights are limited areas in which a teacher has certification. Certification is the area in which the Department of Public Instruction issues a teacher a license. Licenses are not issued for supervision and study halls. The District did not violate Article VII, Section A, sub-section 4 when it did allow Thompson to bump into a supervision or study hall and displace a less senior teacher.

Article VII, Section A, sub-section 6, requires the District to recall a laid off teacher when “a teaching position is made available and there is a qualified teacher who is laid off.” “Teaching positions made available” are positions which were either previously filled by another individual that become available or are newly created positions. Moreover, these are “positions” and not single sections. Thompson’s recall rights did not extend to individual supervision or study hall sections.

In conclusion, the evidence does not establish that the District violated the terms of the collective bargaining agreement when it laid off Thompson for the 2004-2005 school year and when it did not assign supervision/study hall duties based on seniority and the desire of the teacher.

Dated at Rhinelander, Wisconsin this 17th day of November, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/

Lauri A. Millot, Examiner

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Dec. No. 31238-A