STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JENNIFER NOWACK and the MARINETTE EDUCATION ASSOCIATION,
Complainants,

vs.

SCHOOL DISTRICT OF MARINETTE, Respondent.

Case 59
No. 64371
MP-4119

Decision No. 31330-A

Appearances:

Stephen Pieroni, Legal Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin; and **James Blank**, Executive Director, Northeast United Educators, 1136 North Military Avenue, Green Bay, Wisconsin, appearing on behalf of the Complainants.

James Morrison, Attorney, Law Offices of James A. Morrison, 2042 Maple Avenue, P.O. Box 406, Marinette, Wisconsin, appearing on behalf of the Respondent.

EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On January 14, 2005, the Complainants named above filed a complaint with the Wisconsin Employment Relations Commission (WERC). On June 7, 2005, they amended that complaint to allege that the Respondent named above had committed and was committing prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 5 of the Municipal Employment Relations Act (MERA). The Commission appointed the undersigned Marshall L. Gratz as hearing examiner in the matter. On April 7, 2005, the Examiner, by e-mail, denied a March 30, 2005, motion by Respondent requesting dismissal of the Complaint as moot.

Pursuant to notice, the Examiner conducted hearing in the matter on June 10, 2005, at the Respondent's District office in Marinette, Wisconsin. On June 13, 2005, the Examiner notified the parties by e-mail that he was taking official notice of certain file correspondence so that correspondence would be considered a part of the record in the matter. A transcript of the hearing was produced and distributed to the parties, and the parties submitted post-hearing briefs. Briefing was completed on November 1, 2005, marking the close of the hearing.

On the basis of the record, the Examiner issues the following Finding of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Jennifer Nowack (JN) is an individual who has been employed as a teacher at various material times by Respondent District. JN's mailing address for purposes of this proceeding has been c/o James Blank, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin, 54303. ["JN" has been variously substituted for Complainant Nowack's name in this decision in both quoted and other text.]

2. Complainant Marinette Education Association (Association) is a labor organization with a mailing address for purposes of this proceeding of c/o James Blank, United Northeast Educators, 1136 North Military Avenue, Green Bay, Wisconsin, 54303. At all material times, James Blank has been the Association's business representative, and Stephen Pieroni has been the Association's attorney.

3. The Respondent, School District of Marinette (District), is a municipal employer, with offices at and a mailing address of 2135 Pierce Avenue, Marinette, Wisconsin 541543-3998. Among the District's responsibilities is the operation of a K-12 public school system serving the Marinette, Wisconsin area. At various material times, Nancy Hipskind has been the District's Superintendent, and James Morrison has been the District's attorney.

4. At all material times, the Association has been the exclusive collective bargaining representative of the District's teachers bargaining unit consisting of all certified personnel, excluding supervisory, managerial or confidential employees. The Association and the District are parties to a series of collective bargaining agreements, including one with a nominal term of July 1, 2001-June 30, 2003. (Agreement). The Agreement provides, in part, as follows:

> ARTICLE III Board Functions (Management Rights)
>
> A. The Board of Education, on its own behalf, hereby retains and reserves onto itself, without limitation, all powers, rights authority, duties and responsibilities conferred upon and vested in it by applicable law, rules and regulations to establish the framework of school policies and projects including, but without limitation because of enumeration, the right:
>
> 1. To the executive management and administrative control of the school system and its properties and facilities, and the activities of its employees;

2. To employ and reemploy all personnel and subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications and conditions of employment, or the[ir] dismissal or demotion, their promotion and their work assignment;

3. To establish and supervise the program of instruction and to make the necessary assignments for all programs of an extra-curricular nature that, in the opinion of the Board, benefit students;

4. To determine means and methods of instruction, selection of textbooks and other teaching materials, the use of teaching aids, class schedules, hours of instruction, length of school year, and terms and conditions of employment;

5. The exercise of the foregoing powers, rights, authority, duties, and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and Wisconsin Statutes; Section 111.70, and then only to the extent such specific and express terms thereof are in conformance with the Constitution and laws of the State of Wisconsin, and the Constitution and laws of the United States. The Board recognizes that items in this management rights article are subject to negotiation providing said items do not conflict with this agreement and the laws of the State of Wisconsin.

. . .

ARTICLE VI Transfers

A. Voluntary . . . .

B. Involuntary. No vacancy shall be filled by means of involuntary transfer or reassignment if there is a qualified volunteer in the system available to fill the said position.

1. Written notice of the involuntary transfer or reassignment shall be given to the teachers as soon as practicable and except in cases of emergency not later than May 4th.

2. At least five (5) school days prior to the finalizing of the teacher's involuntary transfer, a conference will be held with the teacher by his/her immediate supervisor, at which time a discussion of the intended transfer and the reasons in writing for the intended transfer will be provided by the supervisor.

. . .

ARTICLE VII Grievance Procedure

A. A grievance shall be defined as any problem involving a teacher's wages, hours or conditions of employment or the interpretation, meaning or applications of the provision of this agreement or Board policies dealing with wages, hours or conditions of employment. . . .

Whenever a grievance shall arise, the following procedure shall be followed:

. . .

5. The Association may within thirty (30) days of receipt of the board's decision submit the grievance to binding arbitration. The Wisconsin Employment Relations Commission shall appoint a commissioner or member of its staff to act as arbitrator.

. . .

ARTICLE VIII Teacher Evaluation, Fair Dismissal and Layoff

A. The Board and the Association recognize the importance and value of evaluating the process and success of both newly employed and experienced personnel. The Board and the Association agree that evaluation has as its purpose the improvement of the school program by assisting each teacher to improve his/her professional competencies. The Board shall evaluate teachers to assess job performance. Formal monitoring or observation of work performance of a teacher will be conducted openly and with the full knowledge of the teacher. Informal evaluations, referring to all observations noted and recorded in the normal course of day to day supervision may still take place and may be entered into the personal file. If entered into the personal file the teacher shall be given a copy of such within five (5) working days of observation. Personal file herein mentioned will refer to the one personal file maintained in the central district office.

B. The following procedure will be used in the formal evaluation of teachers:

1. During the early part of the school year, the administration will supply all teachers with copies of the school district's evaluative instruments. Any proposed changes in the evaluative instrument shall be brought to the attention of the Association prior to adoption by the Board.

2. Teachers with less than three (3) years' experience in the district will be observed at least three (3) times each school year by their principal, supervisor or other professional certified administrator. Experienced teachers shall be observed as determined by the administrative team, but not less than one evaluation every three years.

3. Assistance shall be provided to teachers upon recognition of "professional difficulties". The assistance shall begin within five (5) working days following the "recognition" day. For the purpose of this article, professional difficulties shall apply to deficiencies observed in classroom management, instructional skills, pupil evaluative skills, and/or professional preparation, and to deficiencies on matter contained within the schools's [sic] evaluative instrument.

4. The teacher shall acknowledge that he/she has read all evaluations and other materials to be placed in his/her personal file by affixing his/her signature to the file copy. Such signature does not necessarily indicate agreement with contents of such material. The teacher may write a rebuttal statement to be included in the personal file.

5. If a teacher is dissatisfied with the evaluation, he/she may request an evaluation by another administrator mutually agreed upon by the teacher and the superintendent.

C. Teachers will have the right to review the contents of their personnel file and to receive a copy of any documents contained therein. A teacher will be entitled to have an Association representative present during such review. The Board may protect the confidentiality of personal references, academic credentials and other similar documents received prior to the teacher's initial employment.

D. If a teacher indicates that any materials in the personal file are obsolete or inappropriate, the superintendent will review said documents and if he/she agrees, they will be destroyed. All obsolete materials such as personal references or documents relating to prior employment, will be removed from the file and destroyed. Any disagreement over the obsolescence or inappropriateness of documents shall be subject to the grievance procedure beginning at step 2. All documents that fall under state statute language relative to public documents are subject to the seven (7) year limitation. All other written materials shall be exempt from the seven (7) year limitation.

E. Any complaints regarding a teacher that are made to the administration by any parent, student or other person, shall be in writing and signed by the complainant and a copy given to the teacher as soon as possible.

The teacher shall have the right to answer any signed complaints and the answer shall be reviewed by an appropriate member of the administration and attached to the file copy.

F. A teacher is a professional who should be judged by equally professionally trained personnel to determine competence as a staff member. Because contract non-renewal is a serious matter, an orderly procedure must be followed to assure due process to each individual. The following steps (1, 2, 3) are to be followed for nonprobationary teachers.

1. When the administration determines that a member under its supervision is not performing in an effective manner, it should refer said teacher to the supervisor or principal, as the case applies.

2. The administration should counsel said teacher, giving suggestions to help implement corrective action. If, after a reasonable time stipulated by the administration, there is no improvement, the case is referred to the superintendent.

3. After a review of the case, the superintendent makes a judgment. If convinced of the professional difficulties of the teacher, he/she must notify the teacher in writing by the last day of February of the non-renewal of contract, stating reasons for such action in writing. If requested in writing, the teacher shall receive a private conference within five (5) days of this notice.

4. No non-probationary teacher shall be non-renewed, disciplined or dismissed without just and reasonable cause. Each teacher entering this school system for the first two (2) years of service shall be considered a probationary teacher. The probationary teacher prior to dismissal, or non-renewal, shall be provided the right to supervisory counsel and suggestions with the appropriate time for correction on his/her part. No probationary teacher shall be disciplined, dismissed or non-renewed capriciously or arbitrarily.

5. A teacher who is notified that he/she is to be laid off will have the right to displace any less senior teacher system wide whose work he/she is certified to perform. Certified shall mean that the teacher has the necessary certificate or can provide evidence by June 30 that the necessary certificate can be acquired by the beginning of the ensuing school year. No teacher may be prevented from securing other employment during the period he/she is laid off under this subsection. Such teachers shall be reinstated in inverse order of their being laid off, if qualified to fill the vacancies. Such reinstatement shall not result in a loss of credit for previous years of experience. No new appointments may be made while there are laid off teachers available who are qualified to fill

> the vacancies. It will be the teacher's responsibility to notify the superintendent in writing by March 1st each year of his/her availability for reinstatement. Recall rights will be limited to three (3) years.
>
> 6. The School Board may lay off the necessary number of teachers within respective areas of certification only in inverse order of the appointment of such teachers. Notification of layoff shall be in writing by April 30.
>
> . . .

5. JN's employment with the District began in September of 1991. From that time until the District issued her an order of termination on April 14, 2004, JN was employed as a teacher of emotionally disturbed (ED) pupils at the elementary level. At all material times, JN has been certified (i.e., licensed by the Wisconsin Department of Public Instruction) to teach Emotional Behavioral Disability pupils in grades pre-kindergarten through grade 9.

6. The District's Board of Education issued its April 14, 2004, notice of termination to JN following a hearing before the Board over several evenings, generating some 1100 transcript pages. A grievance asserting that the termination violated the Agreement was filed and processed through the Agreement grievance procedure. At the binding arbitration step of the procedure, the parties submitted to WERC staff Arbitrator Peter Davis the following issues:

> Whether the School District of Marinette had just cause for the termination of JN from her employment as a teacher in the Marinette School District and, if not, what the appropriate remedy would be?

Following a hearing and the submission of written arguments, Arbitrator Davis issued his award in the matter on August 23, 2004. The concluding paragraph of the award read as follows:

> In summary, of the allegations upon which I have concluded the discharge can appropriately be based, I have found the record evidence substantiates the allegations of holding JC by the hair, provoking JC, and using obscenities. By the slimmest of margins, based in large part on JN's length of service and prior good record, I conclude that this serious misconduct does not establish just cause for JN's discharge. However, given the severity of the misconduct, JN's reinstatement is without back pay. Should JN engage in any such misconduct again, her immediate discharge will be contractually appropriate.

7. Following the parties' receipt of the award, the District notified JN that it was assigning her to work at the High School supervising five periods of study hall. JN reported as directed and -- except for several absences -- performed high school study hall duties on a full-time basis from the beginning of the 2004-05 school year through October 8, 2004, when she ceased working and began a medical leave. As of the June 10, 2005, date of the complaint hearing in this matter, JN remained on medical leave and JN had not been medically released to return to work.

8. On September 3, 2004, a grievance was filed by JN and the Association asserting that "[JN's] involuntary assignment as a full-time study hall teacher at the High School . . . violated . . . Article VI.B. Involuntary Transfers and Article VIII F. 4 - Discipline Without Just and Reasonable Cause. In regard to the latter . . . that this assignment is a demotion and constitutes discipline for conduct that has been previously adjudicated." By way of remedy, the grievance requested "an assignment of JN to an ED classroom teaching position within her area of certification." The grievance also stated that JN and the Association "will also be filing a prohibited practice complaint with the WERC, alleging a violation of 111.70(3)(a)5 Stats., (failure to accept the terms of an arbitration award)."

9. The District denied the September 3, 2004, grievance at all pre-arbitral steps, and the parties have submitted that grievance to binding arbitration. By joint request of the parties, the WERC designated the undersigned Marshall L. Gratz as both the arbitrator in that case and the examiner in this case. The District's position in response to the September 3, 2004, grievance is outlined in a September 7, 2004, letter from Morrison to Pieroni. That letter reads in pertinent part, as follows:

. . .

> Thank you for your letter of September 3, 2004. I will forward your grievance to Dave Johnson who will process it in a normal course as he would any other grievance.
>
> By way of informal response, it is the position of the District that JN's assignment is neither a demotion nor discipline. The School District has a responsibility to assign, teachers to positions for which they are qualified and in so doing must consider all relevant information to consider that qualification. While the arbitrator ignored all of the testimony of the hearings, the School District cannot because we have every reason to believe that that testimony is credible. Therefore in making an assignment, the District must believe that that information is true.
>
> In addition and entirely separately and completely sufficiently, the arbitrator's finding that JN abused JC in the fashions that he found she did and that she was being returned to her job after two (2) years without pay and "by the slimmest

> of margins" demonstrates that the arbitrator recognized that her conduct with respect to at least that student was seriously wrong. The District cannot place JN in a position where she has the opportunity to abuse other students as the arbitrator found she abused JC.
>
> JN is currently in her position because it is a position for which she is qualified and for which, considering all of the circumstances, poses the least risk to students. It is the position of the administration that JN was not involuntarily transferred but was assigned to a position for which she was qualified. It is the position of the District that she is not currently qualified by reason of her conduct for a position teaching elementary emotionally disturbed students. That is an area in which she has certification. My understanding is that she does not have broad certification but the District was able to accommodate her employment in a meaningful teaching position. There is, parenthetically, no guarantee that that will be the case in the future, and JN would be well-advised to broaden her certifications, as indeed are virtually all other teachers who are working in an industry where we are facing declining enrollment and staff cutbacks.
>
> . . .

10. On January 14, 2005, JN and the Association filed the instant complaint alleging, in pertinent part, as follows:

> Upon receipt of Arbitrator Davis' Award, Respondent, through its Superintendent, refused to return JN to her former position as a teacher of elementary emotionally disturbed pupils. Instead, Respondent directed JN to supervise a study hall at the High School on a full-time basis. Said full-time study hall monitor position had not previously existed in the certified personnel bargaining unit. Said assignment was not sanctioned by Arbitrator Davis' Award and it had the effect of reducing JN's career prospects by preventing her from using her substantial skills and experience such that her skills are likely to atrophy and her career is likely to be stunted. Said assignment has the tendency to interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed by Section 111.70(2), Wis. Stats., in violation of Section 111.70(3)(a)1, Wis. Stats. Further, said assignment discourages membership in the Marinette Education Association by discriminating against JN in terms or conditions of employment in violation of Section 111.70(3)(a)2, Wis. Stats. [The Complainants later amended that statutory reference to 111.70(3)(a)3, Stats.] . . .
>
> Respondent's conduct described . . . above, constitutes a refusal to accept the terms of Arbitrator Davis' Award in which he reinstated JN. The assignment of JN to be a full-time High School study hall monitor is inconsistent with Arbitrator Davis' order of reinstatement and violates Section 111.70(3)(a)5, Wis. Stats.

The relief requested in the complaint is entirely prospective, including, among other things, "that Respondent be ordered to reinstate JN as a teacher of emotionally disturbed pupils consistent with her licenses. . . ."

11. By letter dated January 25, 2005, to Davis in his capacity as WERC General Counsel, Morrison responded to the complaint, in pertinent part, as follows:

> I have a copy of the Prohibited Practice Complaint which Steve Pieroni has forwarded to you with respect to the above matter. I believe you are quite familiar with this matter because you made the Decision which is at the writ of this Prohibited Practice Complaint. The School District obviously admits that you made a Decision but denies that it has failed to follow that Decision in any respect. In fact the Decision that you made, by its terms, expressly excluded the vast majority of the evidence against JN because, as I understand it, you held that members of the administration had that information and did not act upon it in a timely fashion. Nevertheless, you found the conduct of JN to be so seriously problematic that you sustained her suspension for two years and warned in your Decision that any further misconduct on her part would be grounds for immediate dismissal. You did not order that JN be specifically returned to the teaching of emotionally disturbed students. You ordered that she be reinstated to a School District position.
>
> The School District has, under the Collective Bargaining Agreement, the right to assign teachers to teaching positions. A study hall position is a teaching position. It is an appropriate assignment for JN given all of the circumstances in this case. Among other things, your Decision was issued several days into the school year so it would have been impossible to return JN to the same assignment even if the School District believed that was appropriate because there was already a teacher in that position. The School District does not believe that it is appropriate to return JN to a position where you have found she seriously abused students and where there is overwhelming evidence as reflected in the transcript that she serially abused students physically, psychologically and verbally. The School District's primary responsibility, of course, is to the safety and protection of students.
>
> The School District acted in good faith in returning JN to a teaching position balancing its responsibilities under its contract with the teaching staff, which gave you the power to make the award which you did on the one hand, and its primary responsibility to the protection of students. Clearly the School District would have been justified in making such an assignment on far less evidence of misconduct or unsuitability on the part of JN so the District rejects entirely the Prohibited Practice Complaint which has been filed. The study hall position to which JN was assigned did not result in any reduction of pay or benefits.

> Mr. Pieroni complains that it had the effect of reducing her career prospects by preventing her from using her substantial skills and experience. It is the position of the School District that she demonstrated conclusively that she does not have the skills or experience which is appropriate to handling emotionally disturbed students. You did not find to the contrary. You found that the evidence sustained that she had abused students and you did not find that the other evidence was incredible. Rather, you found that you were simply not going to consider it because you believed that School District management had that information and did not act properly upon it. In effect, you applied something of an "exclusionary rule" to such evidence. Presumably that was an appropriate approach for you to take, however that does not make the evidence that was adduced at a six (6) day hearing non-existent. It does not make the conduct which occurred irrelevant to the considerations of JN's future prospects.
>
> It is simply wrong to state that a School District cannot, in the exercise of its discretion under a Collective Bargaining Agreement, consider a teacher's prior conduct in determining an appropriate assignment. The School District can and indeed must consider relevant information to determine where a teacher is most appropriately placed to meet the needs of students. If JN desires to improve her prospects for education, she can obtain additional education or experience, but the School District of Marinette does not intend to return her to a position teaching emotionally disturbed elementary school students given the record of her past history with them. This is not a refusal to implement your award, nor is it a refusal to rehire JN. She has been hired to a real teaching position requiring real teaching skills for which she is paid a real teacher's salary. It is not her assignment of choice but her conduct has indicated that her assignment of choice is not in the best interest of the school children. That is regrettably the fact but nevertheless the fact. Obviously this is a matter that will now have to be considered by Mr. Gratz. Because Mr. Gratz is also hearing a grievance on this matter, Mr. Pieroni and I agree that Mr. Gratz should hear this matter as well. I appreciate your assistance in making this information available to him and making the appropriate assignment so that we can proceed the most expeditious way in this difficult matter. Thank you.

12. During the course of communications concerning hearing scheduling, at the suggestion of the Examiner, the parties agreed to seek clarification of the award from Arbitrator Davis. By e-mail dated February 4, 2005, Pieroni wrote Davis and the Examiner as follows:

> This letter is to advise that the parties have elected to ask Mr. Davis to clarify his award with regard to the reinstatement issue. We ask that Mr. Gratz retain jurisdiction of the complaint and grievance until we have received clarification from Mr. Davis. At that point we will determine what issues, if any, need to be resolved by Mr. Gratz.

> Mr. Morrison and I agree that Mr. Davis may refer to the Complaint and Mr. Morrison's response dated Jan. 25, 2005 for the context of the issue regarding reinstatement of the grievant.
>
> Basically, the parties wish to know what Mr. Davis' Award intended regarding reinstatement of the grievant. If Mr. Davis wishes further information from the parties, please let us know.

13. By e-mail dated March 25, 2005, Davis wrote Pieroni, Morrison and Blank as follows:

> SUBJECT: RE: Marinette School District
>
> My award required reinstatement of JN to her former position. My award did not preclude the District from exercising any contractual right to involuntarily transfer JN to another position or any contractual right to monitor/supervise her classroom performance.
>
> Peter Davis
> Arbitrator

14. By an exchange of letters to the Examiner (dated March 29, 2005, from Morrison and April 7, 2005, from Pieroni), the District, contrary to the Complainants, asserted that the grievance and complaint were rendered moot by Arbitrator Davis' March 25, 2005 clarification, and by the fact that JN had lost no pay or benefits, and by the fact that JN remains on a medical leave that began in October of 2004, such that she is unavailable to accept any assignment. By e-mail dated April 7, 2005, the Examiner denied the District's March 29, 2005, requests for dismissal.

15. As of the June 10, 2005, complaint hearing in the instant matter, JN remained on a medical leave from her employment with the District, and she had not been medically released to return to work.

16. Read in the context of the correspondence requesting award clarification, Arbitrator Davis' reference to "her former position" in his March 25, 2005, clarification meant JN's former position as an ED teacher, not JN's former position as a teacher.

17. The Agreement did not authorize the District, in the fall of 2004, to assign JN to a full-time High School study hall position rather than to her former position as an ED teacher.

18. By assigning JN to a full-time High School study hall position in the fall of 2004, rather than to her former ED position, the District violated the Davis award as initially issued and as clarified, and thereby violated the terms of an arbitration award which the District and Association had previously agreed to accept as final and binding.

19. The District's assigning JN to a full-time High School study hall position in the fall of 2004, rather than to her former ED position, has not been shown to have been motivated in whole or in part by hostility toward JN's or the Association's exercise of MERA rights.

CONCLUSIONS OF LAW

1. By assigning JN to a full-time High School study hall position in the fall of 2004, rather than to her former ED position, the District violated the Davis award, as originally issued and as clarified. The District thereby violated the terms of an arbitration award which the District and Association had previously agreed to accept as final and binding upon them, and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5 and (derivatively) 1, Stats.

2. The District's assigning JN to a full-time High School study hall position in the fall of 2004, rather than to her former ED position, has not been shown to have been motivated in whole or in part by hostility toward JN's or the Association's exercise of MERA rights. The District has therefore not been shown to have either discouraged membership in a labor organization by discrimination in regard to JN's terms or conditions of employment in violation of Sec. 111.70(3)(a)3, Stats., or to have committed an independent violation of Sec. 111.70(3)(a)1, Stats.

ORDER

1. The instant complaint allegation that the District committed a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats., is dismissed.

2. The instant complaint allegation that the District committed an independent prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats., is dismissed.

3. By way of remedy for the violation noted in Conclusion of Law 1, above, the District, its officers and agents, shall immediately:

a. conditionally offer to reinstate Jennifer Nowack to full-time employment as a teacher of emotionally disturbed pupils in some or all grades pre-kindergarten through nine (PK-9), when and if she is medically cleared to return to work by her health care provider(s) before her rights to continued District employment are terminated in a manner consistent with the Agreement on account of the length of her absence on medical leave.

b. Notify all District teacher unit employees represented by the Association by posting in conspicuous places where the employees are employed, copies of the Notice attached hereto and marked "Appendix A". That Notice shall be signed by Respondent's Superintendent of Schools and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered with other material.

c. Cease and desist from violating the terms of arbitration awards which the District and Association have previously agreed to accept as final and binding.

d. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

4. The Complainants' request for an order that the District pay the Complainants' costs and attorneys fees incurred in this matter is denied.

5. The District's request for an order that the Complainants pay the District's costs and attorneys fees incurred in this matter is denied.

Dated at Shorewood, Wisconsin, this 28th day of December, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

_____

Marshall L. Gratz, Examiner

APPENDIX "A"

**NOTICE TO ALL TEACHER UNIT EMPLOYEES
OF SCHOOL DISTRICT OF MARINETTE,
REPRESENTED BY THE MARINETTE EDUCATION ASSOCIATION**

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify the above employees that:

WE WILL immediately:

a. conditionally offer to reinstate Jennifer Nowack to full-time employment as a teacher of emotionally disturbed pupils in some or all grades pre-kindergarten through nine (PK-9), when and if she is medically cleared to return to work by her health care provider(s) before her rights to continued District employment are terminated in a manner consistent with the Agreement on account of the length of her absence on medical leave.

b. cease and desist from violating the terms of arbitration awards which the District and the Marinette Education Association have previously agreed to accept as final and binding.

By _____
Superintendent of Schools

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

Marinette School District

MEMORANDUM ACCOMPANYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint in this case alleges that the District violated the terms of a final and binding grievance arbitration award issued by Arbitrator Peter Davis on August 23, 2004, and committed independent prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 5, Stats., by refusing "to return JN to her former position as a teacher of elementary emotionally disturbed pupils [and instead directing] JN to supervise a study hall at the High School on a full-time basis. . . ." In its answer, the District denies that its assignment of JN constituted a prohibited practice in any respect.

Applicable Legal Standards

Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer "[t]o interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)." Under Section 111.70(2), Stats., the rights protected by Sec. 111.70(3)(a)1, Stats., include, among others, "the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

The Commission has recently held that allegations of independent violations of Sec. 111.70(3)(a)1, Stats., are to be analyzed by use of the four-part test outlined below regarding violations of Sec. 111.70(3)(a)3, Stats., "in cases . . . where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees, such as claims of retaliation. In such cases, if lawfully motivated, adverse actions will not be found violative of (3)(a)1 "simply because it could be perceived as retaliatory." CLARK COUNTY, DEC. NO. 0361-B (WERC, 11/03) AT 15.

For other claimed violations of Sec. 111.70(3)(a)1, Stats., a prohibited practice occurs when employer conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. WERC V. EVANSVILLE, 69 WIS.2D 140 (1975). If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employee(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. BEAVER DAM SCHOOLS, DEC NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC NO. 12593-B (WERC, 1/77). However, exceptions to that general rule have been recognized by the Commission in prior cases. For example, in recognition of the employer's free speech rights

and of the general benefits of "uninhibited" and "robust" debate in labor disputes, employer remarks which inaccurately or critically portray the employee's labor organization and thus may well have a reasonable tendency to "restrain" employees from exercising the Sec. 111.70(2) right of supporting their labor organization generally are not violative of Sec. 111.70(3)(a)1, Stats., unless the remarks contain implicit or express threats or promises of benefit. ASHWAUBENON SCHOOLS, DEC NO. 14474-A (WERC, 10/77); JANESVILLE SCHOOLS, DEC NO. 8791 (WERC, 3/69). SEE GENERALLY, MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC NO. 27867-B (WERC 5/95) AND CEDAR GROVE-BELGIUM SCHOOLS, DEC. NO. 25849-B (WERC, 5/91).

It is also well established that employer conduct which may well have a reasonable tendency to interfere with employee exercise of Sec. 111.70(2) rights will generally not be found violative of Sec. 111.70(3)(a)1, Stats., if the employer had a valid business reason for its actions. E.G., BROWN COUNTY, DEC NO. 28158-F (WERC, 12/96); CEDAR GROVE-BELGIUM SCHOOLS, DEC. NO. 25849-B (WERC, 5/91); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); SEE GENERALLY, WAUKESHA COUNTY, DEC. NO. 14662-A (GRATZ, 1/78) AT 22-23, AFF'D -B (WERC, 3/78) AND KENOSHA SCHOOLS, DEC. NO. 6986-C (WERC, 2/66) (In relation to a claim of interference, "[r]ules established by a municipal employer in effectuation of its public function, which regulate, on a non-discriminatory basis, the activities of its employees and their representatives on the employer's time and premises, and which may arguably limit the rights and protected activities of employees, as established in Section 111.70, Wisconsin Statutes, shall be presumed valid. Whether said rules constitute . . . prohibited practices, will depend on the facts in each case. The rights of the employees and their representatives must be balanced with the obligation and duties of the municipal employer. Those challenging such rules must establish that they were adopted for the purpose of . . . interfering with the lawful organizational activity of the employees involved . . . ". ID. AT 22-23)

Section 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer: "3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement." To establish a violation of Sec. 111.70(3)(a)3, Stats., it must be proved by a clear and satisfactory preponderance of the evidence that the municipal employee was engaged in protected, concerted activity; that the municipal employer's agents were aware of that activity; that the municipal employer, or its agents, were hostile towards that activity; and that the municipal employer's actions toward the municipal employee were motivated, at least in part, by its hostility toward the municipal employee's protected, concerted activity. E.G., CLARK COUNTY, SUPRA, AT 12, CITING MUSKEGO-NORWAY SCHOOLS V. WERB, 35 WIS.2D 540 (1967 AND EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 WIS.2D 132 (1985).

Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer "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 or to accept the terms of such arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them."

Positions of the Parties

In their post-hearing arguments, the Complainants assert that the Davis award, as initially issued, and as clarified, required the District to offer JN reinstatement to her former position as a teacher of elementary emotionally disturbed pupils; that the record does not establish that it would have been impossible for the District to have complied with that requirement; that Agreement Art. VI.B. conditions the District's right to involuntarily transfer or reassign JN to a High School study hall position on, among other things, first seeking volunteers for the position, which the District did not do; that the High School study hall duties the District assigned to JN on a full-time basis do not require a certified teacher, are often assigned to non-certified personnel, and have never before been assigned on a full-time basis to a teacher bargaining unit employee on a full-time basis. Assigning JN such an unprecedented, skill-atrophying and career stunting assignment constitutes a disciplinary demotion without just and reasonable cause violative of Agreement Art. VIII.F.4, which would both have a tendency to interfere with, restrain or coerce employees in the exercise of their MERA rights and which must by its nature have been motivated in whole or in part by JN's having engaged in the exercise of MERA rights. The Complainants request an order requiring the District to offer to reinstate JN as a teacher of emotionally disturbed pupils consistent with her licenses, along with declarative, cease-and-desist and notice posting relief. The Complainants also request that the District be ordered to pay the Complainant's costs and attorneys fees.

In its post-hearing arguments, the District asserts that it has complied with the requirements of the Davis award as initially issued, and as clarified, in that it reinstated JN to her former position as a teacher, at her former salary and benefits levels; that it exercised its Agreement Art. III rights to assign by assigning her High School study hall duties that are routinely performed by both teacher bargaining unit personnel and others, and which do not require DPI certification so that they are not inconsistent with JN's limited licensure. The District asserts that its actions are not disciplinary in nature and not a demotion, since JN continues to receive salary and benefits at her former levels. The District further asserts that the evidence concerning JN's misconduct presented to Arbitrator Davis -- both that which was considered by Davis, and that which was not -- justifies the District's determinations that JN is not qualified to teach emotionally disturbed pupils and that it would not be appropriate to expose emotionally disturbed pupils to the risk of further abuse by JN. The District asserts that its assignment of JN to High School study hall duties was taken for legitimate operational reasons and not because of JN's or the Association's exercise of MERA rights. The District requests that the complaint be dismissed in its entirety and that the Complainants be ordered to pay the District's costs and attorneys fees.

Issues for Determination

From the foregoing, it follows that the issues for determination by the Examiner in this case are:

1. Did the District violate the Davis award as initially issued or as clarified?

2. If so,

a. did the District thereby commit an independent violation of Sec. 111.70(3)(a)1, Stats.?

b. did the District thereby commit a violation of Sec. 111.70(3)(a)3?

3. If any of the above are so, what shall the remedy be? (With regard to remedy, the Association has not requested retroactive relief. [Tr. I, 17])

4. What shall be the disposition of the parties' requests for costs and attorneys fees?

For reasons outlined below, The Examiner has concluded that the answers to 2.a. and 2.b., above, are "no", but that the answer to 1., above, is "yes." By way of remedy, the Examiner has fashioned a remedial order consisting of requiring a conditional reinstatement to JN's former position as a teacher of emotionally disturbed pupils, with conventional cease and desist and notice posting provisions. The Examiner has denied both parties' requests for attorneys fees and costs.

Alleged Violation of Binding Grievance Award and Sec. 111.70(3)(a)5, Stats.

The Examiner has concluded that, read in the context of the parties' correspondence requesting award clarification, Arbitrator Davis' reference to "her former position" in his March 25, 2005, clarification meant JN's former position as an ED teacher, not JN's former position as a teacher.

In their correspondence requesting that Arbitrator Davis clarify his award, the parties asked "what Mr. Davis' Award intended regarding reinstatement of the grievant," and they "agreed that Mr. Davis may refer to the Complaint and Mr. Morrison's response dated Jan. 25, 2005 for the context of the issue regarding reinstatement of the grievant."

In the Complaint, the Complainants alleged that the District had improperly "refused to return JN to her former position as a teacher of elementary emotionally disturbed pupils [and] [i]nstead . . . directed JN to supervise a study hall at the High School on a full-time basis. . . ." (emphasis added). In its January 25, 2005 response, the District wrote to Davis, "[Y]ou did not order that JN be specifically returned to the teaching of emotionally disturbed students. You ordered that she he reinstated to a School District position."

Arbitrator Davis' award clarification read as follows: "My award required reinstatement of JN to her former position. My award did not preclude the District from exercising any contractual right to involuntarily transfer JN to another position or any contractual right to monitor/supervise her classroom performance." (empahsis added).

While Davis' clarification, like his initial award in the matter, did not use the phrase "teacher of emotionally disturbed students," the Examiner is nonetheless persuaded that Davis' clarification used "her former position" as shorthand for "her former position as a teacher of emotionally disturbed pupils." Had Davis intended, as the District argued in its January 25, 2005 response, "that she be reinstated to a School District position," he would have utilized more generic terminology than a reference to JN's "former position," and he would have had no reason to add the statement that "[m]y award did not preclude the District from exercising any contractual right to involuntarily transfer JN to another position."

The Examiner has therefore concluded that, read in the context of correspondence requesting award clarification, Arbitrator Davis' reference in his March 25, 2005, clarification to "her former position" meant JN's former position as a teacher of emotionally disturbed pupils, not JN's former position as a teacher. The Examiner therefore rejects the District's contention that it reinstated JN "to her former position" within the meaning of the Davis award, as clarified.

The District also contends that, in the circumstances of this case, it acted within its contractual rights because (1) the evidence presented at the Board and Davis arbitration hearings demonstrated that JN was not qualified to teach emotionally disturbed pupils because she "failed to use any identifiable methodology that would be appropriate for that group of children at that age group"; (2) the serious misconduct found by Arbitrator Davis demonstrated that JN could not safely be returned to a position teaching emotionally disturbed pupils; and (3) the issuance of the Davis award at the beginning of the school year, when all of the District's ED teacher positions were already assigned to other members of the bargaining unit, made it impossible to reinstate JN to one of those positions at that time.

While the Examiner is persuaded that the District's assignment of JN to the High School study hall position was a good faith response to the District's belief regarding JN's qualifications and fitness to safely teach emotionally disturbed pupils, the Agreement does not permit the District to countermand the requirements of the Davis award as the District has done in this case.

Notably, the deficiencies in JN's teaching methodology cited by the District at the June 10, 2005, hearing in this case were not the focus of the April 14, 2004, termination notice or therefore of the Board and Davis arbitration hearings, and were not subjected to the detailed procedures set forth in Art. VIII for identifying and remedying "professional difficulties." In those circumstances, it is inconsistent with the Agreement and the Davis award for the District to have reassigned JN from ED teacher to full-time high school as it did in this case, on the basis of alleged deficiencies in JN's teaching methodology.

Regarding student safety concerns, the District has available to it various means by which to observe and monitor JN's interactions with emotionally disturbed pupils for the purpose of protecting the safety of those pupils from abuse. The fact, that JN committed the serious misconduct found by Arbitrator Davis despite previous District investigatory efforts and despite the presence of adult education assistants, does not persuasively establish that the District, in the context of Arbitrator Davis' stern warning about the consequences of any recurrence of JN's misconduct and with a now attentive and responsive administration, cannot assure the safety of emotionally disturbed pupils in a class taught by JN.

While the timing of the Davis award coupled with the non-existence of an ED teacher vacancy and the procedural conditions precedent to layoff and involuntary transfer in Agreement Arts. Arts. VIII.F.5-6 and VI.B. undoubtedly made it more complicated, time-consuming and perhaps expensive for the District to comply with the Davis award, the District took no steps toward eventually reinstating JN to an ED position. While the timing and circumstances at the beginning of the school year might well have justified a District decision not to reinstate the Grievant to an ED teaching position immediately, the District's actions were in no way temporary or destined to achieve compliance with the Davis award once the complications and delays that the timing of the award created were overcome. Furthermore, when an arbitrator reinstates a discharged employee it often creates an inconvenience for the employer and sometimes causes another employee to be displaced. Upholding the terms of the agreement ordinarily takes precedence over such other considerations. For those reasons, the Examiner rejects the District's contention that the timing of the award and the non-existence of an ED teacher vacancy gave the District the right to assign JN indefinitely to a full-time high school study hall position as it did.

The Examiner therefore concludes that, notwithstanding the District's good faith bases for preferring that JN not be reinstated to teach emotionally disturbed pupils, the District's general Art. III right to assign employees is superceded by the specific provision in Art. VII.A.5. making grievance awards "binding."

However, as noted, Arbitrator Davis' expressly stated that "[m]y award did not preclude the District from exercising any contractual right to involuntarily transfer JN to another position." That presents the question of whether the District's assignment of JN to a full-time High School study hall position was a contractually valid exercise of the District's involuntary transfer rights.

Article VI.B. constitutes a limitation on the District's general Art. III.2. right to determine a teacher unit employees' work assignment. Its first sentence prohibits the filling of a vacancy "by means of involuntary transfer or reassignment if there is a qualified volunteer available to fill the said position." That requirement, unlike the notice requirement in VI.B.1, makes no express provision for any exceptions to its applicability. It is undisputed that the District did not seek volunteers for the High School study hall position to which it assigned JN in the fall of 2004. While the proximity of the initial issuance of the Davis award to the beginning of the 2004-05 school year would have complicated the process of seeking volunteers and delayed the time at which the District could have involuntarily reassigned JN to the High School study hall position, those difficulties were not sufficient to entirely relieve the District of its contractual obligation to seek volunteers before permanently and involuntarily reassigning JN to the High School study hall position from the ED teacher position to which Arbitrator Davis had ordered JN reinstated.

For the foregoing reasons, the Examiner has concluded that by assigning JN to a full-time High School study hall position in the fall of 2004, rather than to her former position as a teacher of emotionally disturbed pupils, the District violated the Davis award, as initially issued and as clarified. The District thereby violated the terms of an arbitration award which the District and Association had previously agreed to accept as final and binding upon them, and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5 and (derivatively) 1, Stats.

By way of remedy for the statutory violation noted above, the Examiner has ordered the Employer to conditionally reinstate JN to a full-time position as a teacher of emotionally disturbed pupils in some or all of the grades for which JN is certified, pre-kindergarten-9. However, in recognition of the fact that JN had not been medically cleared by her health care provider(s) to return to work as of the date of the complaint hearing in this matter, the Examiner has allowed the District to condition its offer of reinstatement on JN's being medically cleared by her health care provider(s) to return to work, and on her being so cleared before the point in time, if any, at which the Agreement would authorize the District to terminate JN's rights to return to work on account of the length of her absence on medical leave.

The Examiner has also ordered the conventional cease and desist and notice posting remedies associated with a violation of Sec. 111.70(3)(a)5., Stats.

The Examiner has not ordered the additional relief requested by Complainants in the form of reimbursement of the Complainant's litigation costs and attorneys fees. This case does not fall within the narrow scope of those in which the Commission has found such extraordinary remedies appropriate. SEE, CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03).

Alleged Discrimination in Violation of Sec. 111.70(3)(a)3., Stats. and Alleged Independent Violation of Sec. 111.70(3)(a)1., Stats.

With regard to the Complainants' remaining allegations, the Examiner has concluded that the District's assigning JN to a full-time High School study hall position in the fall of 2004, rather than to her former position as a teacher of emotionally disturbed pupils, was a good faith response to the District's belief regarding JN's qualifications and fitness to safely teach emotionally disturbed pupils. The Examiner has further concluded that the Complainants have not proven that the District's assignment of JN in the fall of 2004 was motivated in whole or in part by hostility toward JN's or the Association's exercise of MERA rights. The District has therefore not been shown to have discouraged membership in a labor organization by discrimination in regard to JN's terms or conditions of employment in violation of Sec. 111.70(3)(a)3, Stats. E.G., MUSKEGO-NORWAY SCHOOLS V. WERB, 35 WIS.2D 540 (1967) AND EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 WIS.2D 132 (1985).

For the same reason, and because the essence of the instant alleged independent Sec. 111.70(3)(a)1 violation lies in the employer's motive for taking adverse action against JN, the Examiner also concludes that the District has not been shown to have committed an independent violation of Sec. 111.(3)(a)1, Stats. SEE, CLARK COUNTY, SUPRA, AT 15.

Accordingly, the complaint allegations of independent violations of Secs. 111.70(3)(a)1 and 3, Stats., have been dismissed.

Respondent's Requests for Reimbursement of Attorney's Fees and Costs

The Examiner has denied the District's request that the Complainants be ordered to pay the District's litigation costs and attorneys fees both because a MERA violation by the District has been found in this case, but also because the Commission has held repeatedly in recent years that it is without statutory authority to grant the relief the Respondents are requesting in this case. E.G., MILWAUKEE AREA TECHNICAL COLLEGE, DEC. NO. 30254 (WERC, 1/4/02) at 4 ("We deny the Respondents' request for costs and attorneys' fees because we do not have the statutory authority to grant same in complaint proceedings to responding parties. STATE OF WISCONSIN, DEC. NO. 29177-C (WERC 5/99).")

Dated at Shorewood, Wisconsin, this 28th day of December, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz, Examiner

rb
31330-A