

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**WAUSAUKEE SCHOOL DISTRICT**, Complainant,

vs.

**WILLIAM LACHAPPELL, DISTRICT ADMINISTRATOR AND  
SCHOOL DISTRICT OF WAUSAUKEE**, Respondent.

Case 50  
No. 65266  
MP-4196

**Decision No. 31621-A**

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**Appearances:**

**Ted M. Lewis**, Director, Northern Tier UniServ, 1901 West River Street, P.O. Box 1400, Rhineland, Wisconsin 54501, appearing on behalf of the Complainant.

**James A. Morrison**, Attorney, Law Firm of James A. Morrison, S.C., 2042 Maple Avenue, P.O. Box 406, Marinette, Wisconsin 54143, appearing on behalf of the Respondent.

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

Wausaukee Education Association filed a complaint with the Wisconsin Employment Relations Commission on October 28, 2005, alleging that District Administrator William LaChappell and the School District of Wausaukee had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, and 4, Stats., of the Municipal Employment Relations Act (MERA) by terminating Kurt Kostecky in retaliation for exercising his bargaining unit rights.

The Complainant amended its Complaint on November 7, 2005 by adding an allegation that the Respondent had pretextually laid-off Kostecky and further amended the Complaint on November 21, 2005 to include violations of Sec. 111.70(3)(a)(3), Wis. Stats.

On December 16, 2005 the Respondent filed a Motion to Dismiss on the basis that the Complaint was filed prematurely in as much as the Respondent had not taken final action on Kostecky's employment when the Complaint was filed.

No. 31621-A

The Complainant and Respondent jointly filed a letter dated February 10, 2006, indicating that they had agreed to have the Complaint and the related grievance filed on behalf of Kostecky regarding the discipline imposed heard concurrently by the arbitrator assigned the grievance arbitration case. The Respondent withdrew its December 16 motion as a result of the combined hearings. The Commission issued an order on February 23, 2006, 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 28, 2006. The stenographic transcript of the proceedings was made and received.

The Complainant and Respondent filed post-hearing briefs by May 2, 2006, 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, Wausaukee Education Association (Complainant or Association), is a labor organization with its mailing address at 1901 W. River Street, P.O. Box 1400, Rhinelander, Wisconsin 54501. The Association serves as the exclusive collective bargaining representative for a bargaining unit of all full-time and part-time certified teaching and professional personnel.

2. The Respondent, School District of Wausaukee (Respondent or District), is a municipal employer, with offices located at N11941 US Hwy 41, Wausaukee, Wisconsin. At all times material herein, William LaChappell was the District Administrator, Pamela Beach was the High School Principal, and Scott McClelland was the Network Administrator.

3. The District and the Association have been parties to a series of collective bargaining agreements. The 2003-2005 collective bargaining agreement contained, in pertinent part, the following provisions:

### **ARTICLE XI – LAYOFF PROVISIONS**

- A. If necessary to decrease the number of teachers, in whole or in part, the Board may lay off the necessary number of teachers, in whole or in part, taking into account and protecting the district-wide seniority of all teachers who are certified for renewal. No teacher may be prevented from securing other employment during the period s/he is laid off under this article. Such teachers shall be reinstated in inverse order of their being laid off, if qualified for and makes application for the vacancies.

Such reinstatement shall not result in a loss of credit for previous years of service. No new or substitute appointments may be made while there are laid-off teachers available who are certified to fill the vacancies and who apply for the position.

- B. If any lay-offs are being contemplated, the Association shall be informed by the administrator at all stages of recommendations and plans regarding said lay-offs.
- C. Teachers affected by a staff reduction will be notified of vacant positions within the district and areas of certification and department from which they were laid off when they occur. To be recalled, a teacher must be certified for the open position. Recalled teachers will be re-employed only if they accept the offer of employment within five (5) days after receiving the offer, or within thirty (30) working days if the offer is made for employment for the beginning of a school term. The notice shall be sent to the last known address of the employee on file in the district records.
- D. A teacher who is on lay-off may continue membership in group insurance by assuming payment.
- E. The limitation of recall rights shall be for a period of three (3) years.
- F. Teachers moved from full-time to part-time positions shall retain their seniority status.
- G. Preliminary notice of layoff shall be given to bargaining unit members affected by April 15 with final notice on or before May 1 of each year. Bargaining unit members being laid-off shall have the right to a private conference with the Board if requested by the bargaining unit member within five (5) days of the preliminary notice. The conference shall be scheduled prior to May 1 unless the parties mutually agree to an extension. No bargaining unit member shall be laid off except by a majority vote of the full membership of the Board.

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#### **ARTICLE X – SENIORITY**

- A. Seniority is defined as length of service, as a full or part-time certified teacher, within the District as of the teacher's first working day. Seniority for part-time teachers shall be pro-rated.

- B. By November 1 of each school year, the board will publish and distribute to all teachers and the Association a seniority list ranking each teacher from greatest to least seniority. This list shall also itemize, after each name, such teacher's area(s) of certification. A finalized list shall be provided to the Association by March 1 of each year. Such list shall include all corrections, deletions, and additions of teachers for the school year. In no event will personnel outside the bargaining unit be included on the seniority list nor will the Board add such personnel to the seniority list in the event of layoff.
- C. In the event of more than one teacher having the same seniority ranking, all teachers so affected will be ranked in accordance with previous teaching experience.
- D. In the event of more than one teacher having the same number of years of teaching experience, all teachers so affected shall participate in a drawing, by lot, to determine position on the seniority list. The Association and all teachers so affected shall be notified in writing of the date, place and time of the drawing. The drawing shall be conducted openly and at a time and place that will allow affected teachers and the Association to be in attendance.

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#### **ARTICLE XVI – FAIR DISMISSAL**

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- G. If a teacher has successfully completed his/her probationary period, s/he shall not be terminated, non-renewed, suspended, disciplined, reprimanded (sic) reduced in rank or compensation except for cause.

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#### **ARTICLE XXIX – TEACHER RIGHTS**

- A. No material derogatory to a teacher's conduct, service, character, or personality shall be placed in his personal file unless the teacher has had an opportunity to review the material within two (2) days of filing. The teacher shall acknowledge that s/he has had the opportunity to review such material by affixing his/her signature to the copy to be filed with the express understanding that such signature in no way indicates agreement with the contents thereof. The teacher shall also have the right to submit a written answer to such material and his/her answer shall

be reviewed by the District Administrator or his designee and attached to the file copy.

- B. No teacher shall be required to appear before the Board or its agents concerning any matter which could adversely affect the continuation of that teacher in his/her office, position, employment or the salary or any other increments pertaining thereto, unless s/he has been given prior written notice of the reason for such meeting or interview and shall be entitled to have a representative of the Association present to advise him/her and represent him/her in such interview.
- C. A teacher shall have the right, upon request, to review the contents of his/her personal file and to receive copies at own expense of any documents contained therein. A teacher shall be entitled to have a representative of the Association accompany him/her during such review. At least once every two (2) years a teacher shall have the right to indicate those documents and/or other materials in his/her file which s/he believes to be obsolete or otherwise inappropriate to retain, they shall be destroyed. The District Administrator or his designee shall have the right to retain any document and shall give the teacher a written explanation for said retention.

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4. Kurt Kostecky is an eight-year employee of Respondent. Kostecky taught Technology Education at the high school level in a full time capacity until the 2005-2006 school-year. Kostecky did not have a disciplinary record nor had the District documented any performance deficiencies prior to the 2005-2006 school-year.

5. At some point during the 2004-2005 school-year, Principal Pamela Beach recommended the termination of Kostecky to the District Board of Education. Beach's recommendation was premised upon performance deficiencies. Kostecky filed a grievance regarding the termination recommendation and ultimately, the Board of Education did not accept Beach's recommendation. Kostecky retained his employment.

By filing a grievance challenging the Beach's recommendation to terminate Kostecky's employment, Kostecky was engaged in protected, concerted activity.

6. At some point after the termination recommendation was denied and during the Spring of 2005, the District issued lay off letters to multiple teachers including Mary Meaney and Kostecky. Meaney received a 50% lay off and Kostecky received a 100% lay off. The lay offs were due to the District's budget shortfall.

Subsequent to receipt of the lay off notice, Kostelecky was assured by LaChappell that when the funding for his position was restored upon passage of the state budget, Kostelecky would be returned to full-time status as a Technology Education teacher with the District. LaChappell made the same statement at Kostelecky's unemployment compensation hearing; that he expected Kostelecky would be returned to full-time employment for the 2005-2006 school-year after passage of the state budget.

7. Beach further testified that the District's decision to lay off Kostelecky was related to his poor work performance. She indicated that due to her observations, she held weekly meetings with Kostelecky during the 2004-2005 school-year and that it was his lack of performance that prompted his lay off.

8. Respondent's decision to lay off multiple teaching staff members, including Kostelecky was due to the District's financial situation and was not pretextual.

9. James Doyle, Governor of Wisconsin, signed the 2005-2007 biennial budget bill in late July of 2005.

10. The District recalled Kostelecky from full lay off to 50% employment prior to the beginning of the 2005-2006 school-year. Kostelecky was assigned to teach two technology education classes.

In addition to Kostelecky, Meaney, who had greater than 30 years seniority in the District, was recalled from partial lay off to full-time employment. Respondent assigned her to teach two technology education classes at the high school level. Kostelecky was expected to, and did, provide Meaney assistance in teaching the technology education courses. Meaney was neither licensed nor provisionally licensed to teach technology education. Meaney is licensed to teach business and office-vocational for grades seven through twelve and pre-kindergarten through eighth grade keyboarding.

11. LaChappell testified that he believed Meaney was assigned to teach the two technology education courses at the start of the 2005-2006 school year because the state budget had not been passed and therefore there were insufficient funds to pay Kostelecky, but that once the state budget was approved, Kostelecky would be returned to the classroom.

12. Beach made the decision to recall Meaney to teach technology education. Beach testified that she reasoned that Meaney's qualifications, her membership in the department, and her seniority justified her recall rather than Kostelecky. Beach testified that she believed that Meaney, with modifications, was qualified to teach in the technology education department. Beach and Meaney discussed the course descriptions for Home Maintenance class and Beach testified that she concluded that Meaney had experience with many of the topic areas, including plumbing, as a result of work that Meaney had done in her own home. Beach knew that Meaney was not certified to teach technology education.

The District's proffered reasons for its recall decisions – Meaney's seniority and qualifications – are pretextual. The actual reason for Kostecky's continued partial lay off was hostility to, and retaliation for, his protected activity.

13. On or about September 1, 2005, Kostecky filed a grievance with the District alleging that the District had violated the labor agreement when it recalled Meaney to teach technology education classes.

Kostecky's recall grievance was addressed by the Board of Education on Wednesday, October 16, 2005. The Board granted the grievance. Although Kostecky was available and willing to return to the classroom full-time the following day, LaChappell proposed and Kostecky agreed, he would return to the classroom full-time the following Monday, October 20, 2005.

14. On October 23, 2005, Beach was returning a student to a classroom and went past Kostecky's classroom. From the hallway, Beach observed students with their heads on their desks. Beach entered the classroom and heard music playing from Kostecky's computer. Beach concluded that the class was unattended and was concerned that Kostecky had misused the District computer by downloading music from an internet site in violation of District's Acceptable Use Policy. Beach administratively suspended Kostecky pending an investigation and directed McClelland to investigate Kostecky's District-assigned computer.

15. McClelland investigated Kostecky's computer and learned that Kostecky had modified the operating system on his District-assigned computer approximately two years prior to August 2005. Kostecky had removed the Windows 95 operating system and replaced it with Windows XP. After he replaced the operating system, he installed two programs, Lava Soft Adaware and Microsoft Adaware and did not re-install the Norton Anti-virus software. Lava Soft Adaware and Microsoft Adaware are security programs.

Prior to making the modifications, Kostecky had spoken to McClelland on more than one occasion and requested McClelland's permission to make changes to the software on his District-assigned computer. Kostecky knew that he needed to obtain McClelland's permission before removing Windows 95 and installing Windows XP on his computer. McClelland denied Kostecky's requests to upgrade his computer. Kostecky knowingly disobeyed Respondent's Network Administrator's directive and modified his computer.

16. Subsequent to October 23, 2005 Kostecky met with McClelland and Beach regarding his District-assigned computer. Kostecky admitted that he had upgraded the computer operating system from Windows 95 to Windows XP approximately two or three years prior to the incident. Kostecky reasoned that the changes were necessary in order for him to efficiently utilize the computer as a tool in his classroom.

17. This was not the first time that McClelland found that Kostecky had modified his District-assigned computer. During January 2004, the District's computer system was unlawfully entered by an unknown user while McClelland was working in the Server Room. McClelland observed data on his desktop moving to the recycle bin for deletion. McClelland removed the cable connecting the server to the network which interrupted the destruction of data within the server. The District did not have a firewall installed which may have deterred or prevented the unlawful entry.

As a result of the incident, McClelland personally investigated every computer in the District to access its status and to determine whether the network had been infiltrated. McClelland discovered additional software programs had been installed on Kostecky's computer. McClelland removed the new programs. Kostecky was not disciplined or warned that modifications to his computer system would subject him to discipline or discharge.

18. The District adopted the following policy entitled, Employee Guidelines for Computer Resources Use during the Summer of 2005:

#### **Purpose and Scope**

Computer resources are extremely important to the operation and success of the Wausaukee School District. The District requires all employees with computer access to use the computer systems carefully and responsibly. These guidelines complement the Acceptable Use Policy (AUP) and employees should become familiar with the A.U.P. This policy applies to all employees of the Wausaukee School District.

#### **Computer Use**

The Wausaukee School District's computer systems, especially the Internet access and e-mail systems, promote access to information, rapid communication with other employees, fellow educators, and families.

Computer systems, including e-mail and Internet access, are District-owned resources and are provided as tools for the educational mission of the schools. To ensure security, do not share User Ids and passwords and always log off or secure workstations when away from them.

Employees are responsible for the access to their computer systems. Spouses, children, and any other friends, associates, or relatives who are not District employees should not be logged in under an employee ID and password. Under no circumstances should a friend or family member perform any manner of technical support or software installations on a District computer or other technology system. All technical support or software installation or removal must be done with the Network Administrators approval.



## **Electronic Communications and Internet Use**

Electronic communications systems access and use are intended for educational purposes. However, the Wausaukee School District permits its employees incidental personal use of its email and Internet systems subject to the following conditions and restrictions:

1. Personal use must be infrequent and must not:
  - 1.1 Involve any prohibited activity (see below)
  - 1.2 Interfere with the productivity of employees or their colleagues
  - 1.3 Consume system resources or storage capacity on an ongoing basis
  - 1.4 Involve large files transfers or otherwise deplete system resources available for educationally related purposes.
2. Employees should not have any expectations of privacy. Because e-mail is not private, employees should avoid sending personal messages that are sensitive or confidential.
3. Personal e-mail communications should not give the impression that they are representing, giving opinions, or otherwise making statements on behalf of the District. Where appropriate, a disclaimer should be included. An appropriate Disclaimer is: "These statements are my own, not those of the Wausaukee School District."

Bring questions regarding what constitutes an inappropriate or prohibited use to the Network Administrator.

## **Prohibited Activities**

Employees are strictly prohibited from using the Wausaukee School Districts (sic) computer systems in connections with any of the following activities.

- Engaging in illegal, fraudulent or malicious activities
- Illegal distribution of copyrighted materials (see below)
- Viewing, sending, or storing material that could be considered offensive, obscene, harassing, or defamatory.
- Annoying or harassing other individuals.
- Sending uninvited email of a personal nature.
- Using another individual's account.

- Attempting to test, circumvent, or defeat security systems.
- Permitting any unauthorized individual to access the Districts (sic) system.
- Distributing or storing chain letters, solicitations, offers to buy or sell, or other non-educational material of a trivial or frivolous nature via individual messages and the distribution lists.
- Partisan political activities and political fund-raising.
- Modifying hardware on laptops, workstations, or servers except by authorized personnel.
- Using or storing unapproved encryption software or software designed to circumvent security systems without written approval from Network Administrator.

### **Copyright**

All users must adhere to the rules of copyright and intellectual property protection, and respect all copyright issues regarding software, information, and authorship. The unauthorized copying, storage, and or transfer of copyrighted materials violate federal and state laws and are strictly prohibited.

### **Software use**

Network Administrator must be consulted before installing or removing any software. Unauthorized software can make a machine inoperable, cause network conflicts, spread computer viruses, and take up valuable computer space.

Only Software purchased by or licensed to the Wausaukee School District may be used on District computers. Use of licensed software must conform to the terms of the agreement.

### **Malicious Code (Viruses or Spyware)**

Computer viruses and Spyware are some of the most common threats from the Internet or other electronic communications. Employees may unknowingly expose their computer or the network to these problems when downloading information from these systems. All files downloaded from the Internet, received from e-mail outside the district or brought in on transportable media should be scanned for malicious code using anti-virus software.

Deliberate attempts to degrade or disrupt system performance of the Wausaukee School District networks any other computer system or network system by spreading viruses constitutes criminal activity under state and federal law.

The District reserves the right to delete any information and files to protect itself from malicious code.

### **Monitoring**

The district does filter Internet access and Internet activity may be logged. Employees should have no expectation of privacy in any computer-related activities. System maintenance or technical support activities may result in the viewing of messages.

### **Obscenity and Harassment**

Users who receive threatening or unwelcome communications should bring them to the attention of the Network Administrator immediately.

### **Violations**

Violators of this policy are subject to progressive disciplinary measures

System users have full responsibility for the use of their Internet and e-mail accounts. The Wausaukee School District has the responsibility to report possible violations on the part of other people using the Wausaukee School District computer systems.

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Staff Member Signature

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Date

The staff member signature indicates having seen/reviewed this AUP.

The Employee Guidelines for Computer Resources Use was distributed to staff during the August 2005 Orientation. McClelland reviewed the Guidelines with teaching staff members, but did not review the disciplinary component to the Guidelines. An earlier version of the Guidelines was not distributed to staff for the 2004-2005 school-year and there is insufficient evidence to confirm that any version of the Guidelines were approved or distributed to staff prior to the 2004-2005 school-year.

The District's Acceptable Use Policy (AUP) was not offered as an exhibit at hearing nor does the record establish that the AUP was ever provided to staff members.

19. Based on the District's investigation of Kostecky, Beach concluded that Kostecky placed the District's computer network in serious jeopardy. Beach determined that due to the gravity of the situation and because it was a continuing offense that the appropriate level of discipline was termination. LaChappell did not independently evaluate Beach's

recommendation for termination, although he testified that he supported the recommendation. LaChappell brought the termination recommendation to the Board of Education. The Board is responsible for making the ultimate decision regarding discipline and may accept or reject the recommendation from administration. The Board did not accept Beach's recommendation to terminate Kostelecky and imposed a six-week unpaid suspension. Had Beach not recommended Kostelecky's termination, LaChappell would not have initiated or recommended that Kostelecky be terminated.

20. During Kostelecky's suspension, the District employed two substitute teachers. Michael Kirschner was an unlicensed December 2005 graduate of Northern Michigan University who, as of the date of the Complaint hearing, had not submitted his application for a Wisconsin teacher's license. Beach failed to ascertain the licensure of Kirschner prior to placing him in the classroom.

21. The District distributed an e-mail to all staff informing them that the installation of a chat program on their computer was not acceptable. The District sent this email in response to its knowledge that some teachers had been utilizing a chat program. The record does not establish when this e-mail was sent to staff.

22. Donna Pintarelli has worked for the Respondent for greater than 25 years as a teacher. Pintarelli continued her education in the area of technology and earned certification as an Instructional Technology Coordinator from the Department of Public Instruction in 2005, although she does not serve in this capacity for the Respondent.

Pintarelli is an Instructional Technology Leader for the District, serves as a member of the District Technology Committee, and is one of three District staff members with Network Administrator authority to the District computer network. In this capacity, she has been involved in the drafting of technology policies for the District. Pintarelli recalled that the District had a policy for acceptable computer use for students and staff was created prior to 2000, that it was distributed to teaching staff in their mailboxes and that this occurred prior to Kostelecky's employment with Respondent. Pintarelli was a member of the technology committee that worked on revising the policy a few years ago, but those revisions were not enacted. Neither Pintarelli nor the Technology Committee was involved in the Summer 2005 revisions to the Guidelines. Pintarelli does not recall the District distributing the Guidelines and expecting employees to acknowledge receipt until December 2005.

23. Pintarelli installed the computer software program, Copernick Search Engine, on her District-assigned computer a number of years ago. Pintarelli removed this program after learning that Kostelecky had been disciplined for installing software on his District-assigned computer.

24. The District affords teaching staff members access to the District network from out-of-District computers through a Virtual Private Network (VPN). The District has not enacted policies or procedures that govern or monitor out-of-District access to the network.

The District does not require that staff utilizing VPN to have anti-virus protection installed on the computer they are utilizing when accessing the Network.

25. Pamela Beach was at all times acting in her capacity as an employee and agent of the District in taking the actions described above.

26. William LaChappell was at all times acting in his capacity as an employee and agent of the District in taking the actions described above.

### **CONCLUSIONS OF LAW**

1. Complainant is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats.

2. Respondent is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats.

3. Respondent, William LaChappell, is not a municipal employer, within the meaning of Sect. 111.70(1)(j), Wis. Stats. Lachappell acted solely as an agent of the Respondent, School District of Wausaukee in the events described above, and he is not properly named as a Respondent.

4. Kostecky engaged in protected concerted activity within the meaning of Sec 111.70(1), Wis. Stats., during the 2004-2005 school-year when he filed a grievance in response to Principal Beach's recommendation for his termination.

5. Respondent's decision to lay off Kurt Kostecky in the Spring of 2005 for the 2005-2006 school-year was for fiscal reasons and was not a pretext for unlawful action.

6. Kostecky engaged in protected concerted activity within the meaning of Sec. 111.70(1), Wis. Stats., when he filed a grievance on September 1, 2005 alleging Respondent had violated the lay off provisions of the parties' collective bargaining agreement when Respondent failed to recall him to full-time employment.

7. Respondent retaliated against Kurt Kostecky in violation of Sec. 111.70(3)(a)1 and 3, Wis. Stats., when it failed to recall Kostecky to full-time employment teaching technology education inasmuch as Beach's decision to recall Meaney in lieu of Kostecky was unlawfully motivated.

8. Respondent retaliated against Kurt Kostecky in violation of Sec. 111.70(3)(a)1 and 3, Wis. Stats., when it suspended Kostecky for six weeks inasmuch as the Board of Education's decision was tainted by Principal Beach's unlawful hostility.

**ORDER**

Respondent School District of Wausaukee, its officers and agents, shall immediately:

- a. Cease and desist from interfering with, restraining or coercing Kurt Kostelecky or any of its employees in the exercise of their rights.
- b. Cease and desist from discriminating against Kurt Kostelecky or any of its employees for engaging in lawful concerted activity.
- c. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:
  - (1) Notify all of its employees in the School District of Wausaukee by posting in conspicuous places where employees are employed in that Department, copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by District Administrator 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 by the School District of Wausaukee that those notices are not altered, defaced, or covered by other material
  - (2) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply with this Order.

Dated at Rhinelander, Wisconsin, this 18th day of July, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/

Lauri A. Millot, Examiner

**APPENDIX "A"**  
**NOTICE TO ALL EMPLOYEES REPRESENTED BY**  
**THE WAUSAUKEE TEACHERS' ASSOCIATION**

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

1. The School District of Wausaukee will not interfere with, restrain or coerce any of its employees in the exercise of their rights.
2. The School District of Wausaukee will not consider an employee's grievances or other lawful, concerted activity when making a decision to recommend that the employee be laid off.
3. The School District of Wausaukee will not consider an employee's grievances or other lawful, concerted activity when making a decision to discipline an employee.
4. The School District of Wausaukee will make Kurt Kostecky whole for any losses suffered, less any amount he earned or received that he would not otherwise have earned or received but for his partial lay off, plus interest at the rate of twelve percent (12%) *per annum* on said amount from the date of his layoff to the October 19, 2005.
5. The School District of Wausaukee will make Kurt Kostecky whole for any losses suffered, less any amount he earned or received that he would not otherwise have earned or received but for his suspension, plus interest at the rate of twelve percent (12%) *per annum* on said amount from the date of his suspension to the date of his return to full time employment.

SCHOOL DISTRICT OF WAUSAUKEE

\_\_\_\_\_  
District Administrator

\_\_\_\_\_  
Date

**THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES REPRESENTED BY DCETA FOR A PERIOD OF SIXTY (60) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED OR OBSCURED IN ANY WAY.**

**WAUSAUKEE SCHOOL DISTRICT**

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

**POSITIONS OF THE PARTIES**

**The Complainant**

The Complainant asserts that Respondent committed prohibited practices when it laid off Kurt Kostecky, when it failed to recall Kostecky to full-time employment, and when it imposed a six-week suspension on Kostecky for upgrading his computer. The Complainant maintains that all of the Respondent's employment actions were precipitated by Complainant's engaging in protected concerted activity and moreover, that Respondent violated the parties' labor agreement when it disciplined Kostecky.

The District retaliated against Kostecky with regard to his lay off. The District undermined student education, violated state law and assumed potential liability when it assigned an unlicensed staff to teach technology education. First, the District violated the labor agreement and assigned a more senior business education teacher to technology education. Although the District maintains that its decision was budgetary, this rationale is inaccurate since the teacher that was assigned the classes was more senior and therefore earned more money than Kostecky. Meaney was not licensed in technology education, was not qualified to teach technology education and the District failed to pursue any certification for her. The District allowed Meaney to take field trips and work with popsicle sticks. This denied the students the hands-on education of working with tools and was inconsistent with the course description. Additionally, the District subjected the students and taxpayers to tremendous liability by placing students in close proximity to potentially dangerous equipment without a properly certified and qualified instructor.

In disciplining Kostecky, the District violated the just cause provisions of the labor agreement. First, it need be noted that McClelland had no authority to discipline Kostecky. Next, Kostecky was never informed that upgrading his computer would result in discipline. Although McClelland had spoken to Kostecky in the past regarding his computer, McClelland neither informed Kostecky of the possibility of discipline nor did he inform any staff members of potential discipline for computer usage. Kostecky had no reason to believe he could be disciplined of an issue that was secondary to his teaching responsibilities, especially one which he was never placed on notice of the potential punishment. Either changing computer software is a serious issue regarding which a principal should speak to a teacher or it is not a serious offense that does not deserve discipline.

With regard to the upgrade that Kostecky made to his computer, it caused no harm to the District and increased the security of the District's computer to potential computer threats. Windows XP is far more secure than Windows 95. Computer expert Harper testified that the



District network's protections would have blocked any viruses or other harmful elements and what Kostecky did was no different than if a teacher connected to the District network from an off-site location. The District does not have security regulations for off-site computers that connect to the District network thus they also may not have virus protections. The District's argument that Kostecky subjected the District computer system to serious harm is speculative and cannot serve as the basis for such a harsh penalty.

The District did not progressively discipline Kostecky. Principal Beach jumped right to the disciplinary sanction of discharge even though it was Kostecky's first offense. Although the Board of Education adjusted the discharge to a six week suspension, that level of discipline is unfair and too severe a punishment. The appropriate level of discipline was a verbal warning since this was a first offense.

Finally, LaChapell and Beach's testimony must be discounted given their demonstrated violations of state law and regulations. Beach placed uncertified teachers in a technology education classroom and was not concerned about the licensure violations or the safety of the students. Although Beach maintains that her actions with Kostecky were proactive, it is clear from the ease to which she failed to check on the license of the substitute teacher and ignored state law and regulations that her method of management is not proactive.

### **The Respondent**

The Respondent argues that the evidence does not support a finding that the District retaliated against Kostecky in retribution for his engaging in protected Union activity.

Kostecky's complaint regarding his recall from lay off lacks merit and logic in as much as Kostecky was successful when he argued his grievance to the Board of Education. The grievance was settled amicably and to his satisfaction. To argue that he was discriminated against, when in fact, the Board agreed that he should have been recalled to full-time employment is unnecessary.

The portion of the Complaint that asserts Superintendent LaChappell was guilty of committing a prohibited practice is not supported by the record. Kostecky repeatedly testified that he has no objection or complaint against LaChapell. Kostecky admitted that LaChappell assisted him in resolving his grievance.

The Complainant's assertion that the placement of an unqualified substitute in Kostecky's position proves that the District was acting in bad faith is without merit. The District placed Mary Meaney in the Technology Education position before Kostecky filed a grievance. The District then placed a substitute in his position while he was on administrative leave. Beach testified that the second substitute was fully qualified.<sup>1</sup> The candidate pool in

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<sup>1</sup> Testimony was not offered at hearing regarding the first substitute for Kostecky while he was serving an administrative suspension.

the small city of Wausaukee for substitutes, whether Kostelecky was on leave, suspended or ill, is limited and the District responded as best it could when placing the substitute in the position.

Moving to the discipline issued, the contract is clear that the District may only discipline for just cause. Kostelecky admitted that he modified his District issued computer, that he knew the Network Administrator did not want him to update the operating system, and that he knew it was bad practice to disable antivirus software. The District acted as a result of Kostelecky's misconduct. The District had a legitimate right to discipline Kostelecky and the discipline that was administered was not for discriminatory reasons.

As to the severity of the discipline imposed, Beach and LaChappell both believed the offense was so serious that Kostelecky deserved discharge. The Board of Education decided a suspension without pay for six weeks was appropriate.

### **DISCUSSION**

The Complainant has alleged violations of Sections 111.70 (3)(a) 1, 3, and 4 for various employment actions that occurred beginning in the Spring of 2005 through his recommended termination in October, 2006.

#### **Applicable Legal Standards**

Section 111.70(3)(a)1, Stats. prohibits a municipal employer from taking adverse employment actions that "[i]nterfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)." Under Section 111.70(2), Stats., the rights 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 . . . ."

Allegations of independent violations of Sec. 111.70(3)(a)1, Stats., are to be analyzed using the four-part MUSKEGO-NORWAY test "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.

Section 111.70(3)(a)3, Stats., prohibits a municipal employer from actions which of "...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." The four elements to establish a successful claim of discrimination based on anti-union animus 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;
- 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, 35 Wis.2d 540 (1967); EMPLOYMENT RELATIONS DEPARTMENT v. WERC, 122 Wis.2d 132 (1985).

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

Additionally, in dual-motive cases, evidence that legitimate reasons contributed to the employer's decision to discharge the employee can be considered by the WERC in fashioning an appropriate remedy.

VILLAGE OF STURTEVANT, supra. at p. 16 citing EMPLOYMENT RELATIONS DEPT., supra, at 143.

The State Supreme Court, when it created the "in-part" test, stated that an employer may not subject an employee to adverse consequences when one of the motivating factors is his or her union activities, no matter how many other valid reasons exist for the employer's action. MUSKEGO-NORWAY, supra. at 562. Moreover, regardless of whether an employer has a legitimate reason for its action, if one of the motivating factors was hostility toward the employee's protected concerted activity, then the decision is unlawful. LACROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-B (WERC, 7/78). As to the legitimate reason, it may be considered when determining the appropriate remedy, but discrimination against an employee due to concerted activity will not be encouraged or tolerated. EMPLOYMENT RELATIONS DEPT. supra. at 141.

### **Alleged Retaliation by Laying Off Kostelecky**

The Union argues that Kostelecky was laid off during the Spring of 2005 for the 2005-2006 school-year in retaliation for filing a grievance during the 2004-2005 school-year.

Kostelecky filed a grievance during the 2004-2005 school-year as a result of Beach's recommendation for his termination<sup>2</sup>. The grievance challenged Beach's decision. The Board of Education heard the grievance and disagreed with Beach's recommendation. Kostelecky engaged in lawful concerted activity and the District was aware of that activity. The first and second elements of a retaliation claim have been met.

As to the third element, the evidence does not substantiate that the District's motivation for lay off was prompted by Kostelecky's first grievance. The District reasoned that its financial situation, prompted by the stalled State budget, caused Kostelecky's lay off. The State budget had not been passed at the time of the lay offs and Kostelecky was not the only staff member in receipt of a lay off notice. LaChappell assured Kostelecky at the time the lay off was issued that the condition precedent to his recall to full-time employment was the passage of the State budget. Although LaChappell's assurance was later found to be hollow, it is relevant to the extent that at the time of the lay off, it evidences LaChappell's intent to return Kostelecky to full-time employment. It further foreshadows Beach's involvement in the decision-making of the District and the ultimate change in the District's position.

As to the fourth element, Kostelecky was laid off. Although Beach testified that Kostelecky's lay off was the result of his lack of performance which culminated with her termination recommendation and his grievance, she recounted and stated that it was for financial reasons. Others in the bargaining unit were also laid off. There is no evidence that Meaney or the other laid off employees engaged in protected concerted activity prior to their lay off.<sup>3</sup> The evidence does not establish that Kostelecky's lay off during the Spring of 2005 was motivated by him engaging in protected activity.

### **Alleged Retaliation by Failing to Recall Kostelecky**

The Respondent recalled Kostelecky to 50% employment, rather than full-time employment, just prior to the 2005-2006 school-year. About the same time, it recalled Mary Meaney to teach two technology education classes. The Complainant maintains that Kostelecky should have been assigned to teach the technology education classes, rather than Meaney, and that the Respondent's decision to assign them to Meaney was retaliatory.

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<sup>2</sup> Principal Beach testified that she recommended to non-renew Kostelecky during the 2004-2005 school year while Kostelecky testified that the District sought to terminate his employment. For purposes of this decision, I will refer to the employment action as a termination.

<sup>3</sup> LaChappell testified that some of the other employees that were laid off filed grievances or requested an appearance before the Board of Education to discuss their lay off notice.

As addressed above, Kostelecky filed a grievance challenging the recommendation for his termination. This occurred prior to receipt of his lay off notice. The Board of Education, Superintendent LaChappell and Principal Beach were aware of his grievance. Elements one and two have been met.

Moving to Respondent's motive, there are sufficient circumstances which lead me to conclude that the District was acting in response to Kostelecky's protected activity when it failed to recall Kostelecky to full-time employment at the start of the 2005-2006 school-year. The District's decision to recall Meaney in lieu of Kostelecky is inconsistent with its assertions to Kostelecky, and inconsistent with its position that passage of the budget was the condition precedent to filling the technology education position.

The District failed to honor LaChappell's assurances to Kostelecky that he would be recalled when funding was restored via passage of the State budget. LaChappell explained to Kostelecky after he received the lay off notice that he would be restored to full-time employment upon passage of the budget. This position was reiterated by LaChappell at Kostelecky's unemployment compensation hearing. The budget was passed during July, thus funding was available and Kostelecky should have been recalled to full time status for the 2005-2006. There is no rational reason why Kostelecky was not recalled at that time.

The District did not recall Kostelecky to full-time employment after the State budget was passed in July 2005. LaChappell testified that he did not know when the State budget was passed, but was sure that it occurred after the start of the school-year, likely in September of 2005. I find it incredible that LaChappell did not know when the budget was passed, and more specifically, that he did not know that it was passed prior to the beginning of the 2005-2006 school-year. If indeed the financial constraints of the District were so severe so as to require the laying off of staff until the monies were restored via passage of the state budget, the date the budget was approved would be significant because it would initiate a return to normality within the District. That would be when the District would have had the funds to operate for the 2005-2006 school-year and it would have likely been when the District took action on a number of staffing and related financial issues.

The District maintained that the passage of the State budget was the condition precedent to Kostelecky's return to full-time employment. The District started the school-year with Kostelecky and Meaney sharing a full-time equivalent technology education position. If the state budget was not passed and therefore funding assistance was not available, no one should have been recalled for technology education since Board of Education had decided when it laid off Kostelecky that technology education would not be taught for 2005-2006 without the funding assistance contained in the state budget. Common sense and the District's own actions in recalling teachers demonstrate that LaChappell was well aware that the date at which the budget was passed and signed into law. I conclude that his claims to the contrary cannot be credited.

The record establishes that Beach made the decision to recall Meaney and that her decision was based on Meaney's seniority, her conclusion that Meaney was part of the department and her belief that Meaney was qualified. Although it is true that Meaney was more senior, she was neither part of the technology department nor did the District's Board of Education read the parties' labor agreement to allow the recall of a more senior teacher to a position in which they are unlicensed when there is a licensed teacher in that area on lay off.

As to Meaney's qualifications, the Department of Public Instruction set the requirements for teacher licensure. It has determined that an individual teaching technology education must hold a license in that area. Beach's opinion as to Meaney's qualifications is extraneous. Beach's stated reasons are inconsistent with the labor agreement and the DPI rules regarding licensure. At a minimum, and recognizing the assurances given to Kostecky, a prudent experienced district administrator would inquire as to the propriety of such a recall decision. Beach and LaChappell's failure to investigate the ramifications of their decision suggest that an external factor, Kostecky's protected activity, was considered.

The Examiner is sufficiently convinced that the Respondent's decision to recall Meaney rather than Kostecky was motivated by hostility to protected activity. The budget was the reason that Kostecky was laid off, its restoration should have initiated his recall to full time employment and the District's proffered reasons for not recalling Kostecky are sufficiently tinged by hostility so as to allow for the conclusion that the District's motivation was unlawful.

#### **Alleged Retaliation by Disciplining Kostecky**

The District argues that Kostecky violated the Employee Guidelines when he modified his District-assigned computer thus justifying the District's imposition of discipline.

Kostecky filed a grievance in the Spring of 2005 challenging Beach's recommendation to terminate him and on September 1, 2005 objecting to the recall of Meaney. The termination grievance was heard by the Board and he retained his full-time employment. The recall grievance was heard by the Board of Education on October 16 following which the District acceded and returned Kostecky to the classroom starting October 20. Elements one and two have been met.

Kostecky was administratively suspended pending discharge on October 23. Timing alone does not generally prove pretext, but it may be persuasive evidence. In this instance, just three days after he was returned to the classroom, Beach went to his classroom, concluded that it was unattended, and suspended Kostecky pending investigation. I do not find that it was coincidental that Beach was in Kostecky's classroom just days after his return to full-time employment.

The District contends that Kostecky was suspended as a result of Beach's concern that he had inappropriately downloaded music from the internet. If Beach's concern had been Kostecky's activities with his computer, confiscating his computer and directing McClelland

to investigate its contents and history was sufficient action and would have afforded the District sufficient information to determine whether it intended to impose discipline. Beach's decision to suspend pending investigation in these circumstances is excessive and incompatible with the generally accepted reasons for administrative suspension pending investigation.

Beach testified that when she entered Kostecky's classroom, she concluded it was unattended and that she had concerns regarding his performance which was the reason she recommended his termination. Beach also testified that Kostecky's lay off was due to his performance and that "it was his lack of performance that – that brought us to this point today." Tr. P. 17. Beach sought to terminate Kostecky during the 2004-2005 school-year and was unsuccessful. Her reason for that recommendation to terminate was lack of performance as was her reason in this instance. Integral to Kostecky maintaining his employment was his filing of a grievance. While it might be that the District's Board of Education would not have followed Beach's recommendation to terminate Kostecky, the fact that he filed a grievance caused the Board to scrutinize the recommendation in a different and likely more dubious manner.

The District asserts that Kostecky was disciplined because he misused the District's computer in violation of computer guidelines. Although Kostecky's computer habits are below standard, this record establishes that Beach was motivated by the facts and circumstances surrounding Kostecky's termination grievance which allowed him to maintain his full-time employment when she found him to be lacking in performance. The District never warned Kostecky that modifying his computer would subject him to discipline. The District knew that Kostecky modified his computer and did not discipline him. Beach's recommendation to terminate Kostecky and the District's decision to suspend him for six-weeks is incongruent with its prior actions and are cause for skepticism.

This record demonstrates a desire on Beach's part to terminate the employment relationship between Kostecky and the District. She was not successful during the 2004-2005 school-year, but continued toward that end when she recommended his discharge in October 2006. While it is not unlawful retaliation to scrutinize the behavior of a teacher as a result of concerns regarding performance, the District's proffered explanations are implausible and lack legitimacy. The District sped to dissect Kostecky. His removal from the classroom was a disproportionate response to the alleged offense and the termination recommendation was extreme given the fact that Kostecky had a history of modifying his District-assigned computer and was never subject to any consequence, disciplinary or otherwise. The District's explanations are pretextual and sufficiently tainted by hostility to Kostecky's protected activity.

### **Alleged Contract Violation**

The Complainant alleged in its Complaint a violation of Sec.111.70(3)(a)4, Stats. and argued a (3)(a)5 violation at hearing and in its brief. Respondent was aware of Complainant's assertion that the just cause provision had been violated, especially in light of the

accompanying arbitration case in this matter. As such and given the parties agreement to consolidate the complaint case and the arbitration case, I am comporting the arguments to the pleading and concluding that Complainant intended to assert a (3)(a)5 violation. Moreover, given the duplicative nature of the assertion and the desire of the parties to receive a decision in the arbitration case, I am deferring the alleged contract violation claim to the arbitration proceeding and as such, am dismissing that portion of the Complaint.

Dated at Rhinelander, Wisconsin, this 18th day of July, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/

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Lauri A. Millot, Examiner



