

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS INC., and TRINA KEITH SPAENI, Complainants,

vs.

**MADISON METROPOLITAN SCHOOL DISTRICT, THE BOARD OF
EDUCATION OF THE MADISON METROPOLITAN SCHOOL DISTRICT,
and ANN FISCHER, Respondents.**

Case 301
No. 65925
MP-4266

Decision No. 31713-A

Appearances:

Richard Thal, Lawton & Cates, S.C., P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of Madison Teachers Inc., and Trina Keith Spaeni.

Malina R. Piontek, Attorney, Department of Human Resources, Madison Metropolitan School District, 545 West Dayton Street, Madison, Wisconsin 53703-1995, appearing on behalf of Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 25, 2006, Madison Teachers Inc. (“MTI”) and Trina Keith Spaeni (“Keith Spaeni”), the Complainants, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Madison Metropolitan School District (the “District”), the Board of Education of the Madison Metropolitan School District and Anne Fischer (“Fischer”) had engaged in prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 3, Stats. More specifically, Complainants contend that Respondents were improperly motivated when they reassigned Keith Spaeni from one teaching position to another position in a different location.

On June 9, 2006, the Commission appointed Kurt M. Stege to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and an Order in the matter, as provided in Sec. 111.07(5), Stats. Respondents filed an Answer on July 5, 2006, admitting certain factual allegations, denying others and raising certain affirmative defenses.

Dec. No. 31713-A

A hearing was held on June 27, 2006 in the Commission's offices, a transcript was prepared and the parties filed their final briefs on October 13, 2006. As explained below, the Examiner concludes that the Complainants have not satisfied their burden of proof in this matter.

The Examiner, having considered the evidence and arguments, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Respondent, the Madison Metropolitan School District (the District), is a Unified School District operating under Subchapter II of Chapter 120, Wis. Stats., and is a municipal employer as defined in Sec. 111.70(j), Stats., with its principal offices located at 545 West Dayton Street in Madison. District management includes:

Arthur Rainwater, Superintendent since 1998.
Steve Hartley, Director of Alternative Programs since 2002.
Anne Fischer, Principal of Affiliated Alternatives, since July 2002.
June Glennon, Employment Manager.

2. Complainant Madison Teachers Inc. ("MTI"), is a labor organization as defined in Sec. 111.70(1)(h), Stats., with its principal offices at 821 Williamson Street. At all pertinent times, MTI was the certified, exclusive collective bargaining representative of all regular full-time and regular part-time certificated teaching and other related professional personnel, not including principals, supervisors and administrators, who are employed in a professional capacity by the District to work with students and teachers. Persons relevant to this proceeding with specific roles in the labor organization include:

John Matthews, Executive Director.
Eve Degen, Executive Assistant for Labor Relations.
Dave Medearis, President-elect.

3. At all times relevant to this proceeding, there has been a collective bargaining agreement in effect between the District and MTI.

4. The District provides various alternative education programs for its students. Steve Hartley has served as the District's Director of Alternative Programs since the 2002-03 academic year. One group of alternative programs is identified as "Affiliated Alternatives." Ann Fischer has been the Principal of Affiliated Alternatives since July 2002 and works out of an office on Brearly Street. Affiliated Alternatives includes Work and Learn Centers (WLC) at two locations: one center is at the Brearly Street site and the other is in rented quarters on Park Street.

5. WLC is an option for students who are in their third and fourth years of high school, are credit deficient, and are at risk of not graduating:

Work and Learn Center (WLC) provides a four-semester sequence of academic courses and related work experiences that emphasize a core academic curriculum for each semester.

In addition to the basic skills, the curriculum focuses on four themes: human interaction, economic/consumer survival, citizenship and law, and identity. During each semester there is an emphasis on the application of basic skills to career planning and employability. Class sizes are 15 to 20, and students are assigned to an individual teacher advisor. During the first year, the vocational component includes one semester of volunteer work at a daycare center or preschool and one semester working with the elderly and United Way's Volunteer Center's Community Agencies. During the second year, the vocational component includes one semester of working with Operation Fresh Start rebuilding houses or working with a private or public employer. The other semester of the second year also includes students selecting a job with a private or public employer. Many students remain on those jobs after graduation. Also during that semester, students can take a class at MATC as part of the vocational component.

WLC does not give credit but uses successful completion of the four semesters as criteria for graduation. Students receive a regular diploma from their home school. WLC students are accepted at MATC. Those going on to four-year colleges must take courses at MATC to meet other college's entrance requirements.

WLC serves a maximum of 120 students who are split equally between the Brearly Street location and the Park Street location.

6. Each team of teachers that provides instruction for WLC students must include teachers or administrators who are appropriately certified. "Business Education" is both a common and logical certification for supporting students in a setting such as WLC which combines academics with a work program.

7. During the relevant period of time, Work and Learn teachers were scheduled with students for daily 3-hour instructional periods, i.e 15 hours of formal student classroom contact per week or 3 class periods per day. The remainder of the teacher's contract day is to be spent working one-on-one with students as permitted by the teacher's work schedule, tutoring and in teacher preparation.

8. “Full-time” for a teacher in the District at the secondary level is set at 25 hours of classroom instruction per week, i.e. “5 classes per day, or 4 classes plus a study hall, or any other combination of assigned regular teaching duties unrelated to extra duty.” CBA III L 7.a.

9. Complainant Trina Keith Spaeni was initially hired by the District as a teacher in 1977. Until 1983, she taught business education at East High School and LaFollette High School, and she became involved in alternative education in 1990. She was hired as the fourth semester teacher at the WLC Park Street site for the 2000-01 school year and conducted classroom instruction every morning. She remained as the fourth semester teacher at the Park Street site until the District reassigned her for the 2006-07 school year (the transaction that is the subject of this complaint).

10. Keith Spaeni had a strong preference to continue as the fourth semester teacher at Park Street.

11. Keith Spaeni received her Masters degree in approximately January of 2002. She has taken additional courses, at least some of which relate to any teaching level. Her Masters degree was based on the fourth semester WLC curriculum. She holds three teacher certifications: a) a lifetime license in “Business Education” for grades 7 through 12; as well as b) a license for grades 7 through 12 in “Business and Office-Vocational”; and c) a license for grades 6 to 12 in “alternative Education Program.”

12. At the Park Street site, the fourth semester classroom work is scheduled for weekday mornings.

13. Every academic department in a high school or equivalent program has a teacher designated as the “department chair.” The designee is entitled to additional compensation and serves as the spokesperson for the department in discussions with the principal, facilitates the exchange of information between department staff and the principal, promotes a collegial relationship between the department members and is often involved in scheduling. Every year, after receiving input from the staff in the department, the principal appoints a department chair. Beginning when she first filled the position with WLC Park Street in 2001, Keith Spaeni had been designated as the Department Chair for the Work and Learn program at that site. There was a separate department chair for the WLC Brearly Street location.

14. Because the Affiliated Alternatives principal split time between the two WLC sites but was headquartered at Brearly Street, she was required to designate someone to be “in charge of the building and the operation of the school” on Park Street in the principal’s absence. Keith Spaeni had served as the “principal’s designee” at the Park Street site since she began working there in 2001.

15. Before he was hired as District Superintendent in 1998, Rainwater had concluded that the existing alternative education program should be revised. He met with Hartley on the day in 2002 that Hartley was hired as Alternative Programs Director and identified specific problems to be addressed: 1) inadequate academic rigor; 2) excessive independence of the individual programs and the teachers, resulting in a lack of coordination between the programs; and 3) the practice of removing a student from an alternative program and returning the student to their regular high school even though the student had already been unsuccessful in that setting.

16. As the Affiliated Alternatives principal since July 2002, Anne Fischer operated with a very different management style than her predecessors. She used a “hands-on” approach and was very direct with staff. Those persons who preceded her were much more deferential to the teachers. Fischer concentrated on the other Affiliated Alternatives programs¹ initially and began making significant changes in the Work and Learn program in the 2004-05 school year.

17. The WLC Park Street program vacated its space during the summer of 2004 so the rooms could be painted and new carpeting installed. Asbestos was discovered and removed during the project.

18. The District has regularly interpreted the collective bargaining agreement to provide that teachers are not entitled to compensation when they pack-up or unpack their classroom materials at the beginning and end of summer vacation. However, the District provides custodial support for transporting the materials in and out of a teacher’s classroom.

19. In an e-mail message dated August 16, 2004, Fischer notified Keith Spaeni that she would be the Department Chair for the 2004-05 school year and wrote:

We need to talk about WHEN you guys want custodial help during the coming weeks. I spoke with Barb to make sure she understood it’s a team effort . . . she says her daughter might come in to help . . . when you guys need him, Jay [the custodian at the Brearly site] is ready and willing. He is caught up enough at Brearly, he could give a couple pms for cleaning. If more time/custodial help is needed I just need to contact Bob Darm. I have asked Stopple to take care of windows/blinds (including rehanging).

Have you guys ever thought of moving all those file cabinets to the rear corner of your room, and then using that little spot as another office? We could probably run computer drops . . . not sure. (Emphasis in original.)

¹ Alternative Education Resource Options, the Cluster Program, School-Age Parent Program.

20. In a responsive e-mail dated August 18, Ms. Keith Spaeni wrote:

Just wanted you to know that the union has been informed of the asbestos abatement at WLC-Park for documentation in the interest of the “safety” of all who have been in the building Everyone thought it was a good idea to get verification from the removal company and the district for future reference.

Also, staff members at Park will be coming in to get ready for school. As of today a date has not been set because all had plans for most of the week. Friday, August 20, would be the first possible date I can “see” and that is not confirmed with anyone. I will try to give notice for Jay. . . .

21. In mid-August 2005, Keith Spaeni also had a telephone conversation with Principal Fischer in which Keith Spaeni stated that she did not have to show up on a certain day to rearrange her room/teaching materials.²

22. MTI’s Executive Assistant, Eve Degen, also wrote Ms. Fischer on August 18. The letter read, in part:

It has come to our attention that . . . you have directed staff to clean and move furniture and teaching materials before the contractual school year begins. Please be advised that the first mandatory contract day of the 2004-05 school year is August 31, 2004; therefore, any work by staff before that time cannot be unilaterally assigned/directed by you. . . .

23. Ms. Fischer responded to Ms. Degen by letter dated August 25 which read, in part:

Please understand that I have not asked staff at the Work and Learn Center to clean or move furniture. Workers were hired to move all items out of all the classrooms, storage area and the main office. I received the necessary custodial assistance from Building Services to clean and move furniture. After the new carpet was installed, I requested the landlord to paint all surfaces.

I advised staff that they were required to be prepared for instruction starting September 1, 2004. I indicated that their teaching materials were not where the teachers would want them. I believe that this is a result of having movers hired to move items. Accordingly, not everything got back exactly where it belonged. I have indicated that staff needs to let me know what needs to be moved so that I can obtain the necessary help from custodians to do so. If

² Complainants allege that Fischer responded by stating: “I can make you come in and I will.” However, the weight of the evidence does not support the allegation.

they wait until August 31, 2004, custodial help will be limited. I don't estimate any teacher's responsibility to be any more than a teacher who moved from one classroom to another and needs to place items where they would like them. I have been careful to remind the Department Chair, Trina Keith-Spaeni, that there was to be no moving or cleaning if the staff did not want to do so.

24. Principal Fischer instituted various policy changes relating to the Affiliated Alternatives programs, including WLC, during her tenure.

25. She reconfigured the work assignments of the administrative support staff for the Affiliated Alternatives programs. She moved the only full-time employee in this group from his private office on the second floor of the Brearly building into the main office area on the first floor and did so without consulting him.

26. During a meeting with the WLC department chairs and Affiliated Alternatives program leaders on August 26, 2004, Principal Fischer stated that she wanted to extend the WLC instructional periods so they were a "block" and so that more than 135 minutes of instruction time were provided to the students. Keith Spaeni and Erik Shager, the other WLC department chair, interpreted the comment to mean that the WLC instructional periods were being revised so they corresponded to the "90-minute block" schedule that was in effect at LaFollette High School. After the meeting, both Keith Spaeni and Shager told their colleagues about the possible change. MTI learned of Fischer's comment and on August 31, Matthews sent Superintendent Rainwater an e-mail asking that he direct Ms. Fischer to "cease and desist the implementation" of the change. He referenced a Memorandum of Understanding that had been reached between MTI and the District providing that the "Four Block scheduling format shall not be implemented at any other high school [than LaFollette] within MMSD"

27. Alternative education programs other than WLC have used the 90-minute periods or have eliminated the break between periods.

28. Fischer held a meeting with all WLC staff on August 31, 2004, but she did not announce any change to the 3 x 45 minute instructional schedule that had been in effect during the previous school year.³

29. At some point in 2005, Superintendent Rainwater spent a morning meeting with the alternative education principals. During the course of the conversation, it became apparent to Rainwater that the District was still dismissing students from the alternative programs and forcing them to return to the regular high schools, and that individual teachers were making at least some of the dismissal decisions. He specifically instructed the principals to stop the practice.

³ While Complainants contend that Fischer made a comment during the meeting to the effect that teachers who had raised the matter with MTI, rather than coming directly to her about their concerns, were "whiny babies," there was insufficient evidence in the record to support the allegation.

30. At another point in the 2005-06 school year, Fischer was involved in an expulsion hearing for a student who was carrying a gun while on the sidewalk outside of the Park Street site. The District took the position during the expulsion proceeding that the student had possession of the gun while on school property. Based upon that assertion, Ms. Fischer concluded that the sidewalk had to be viewed as school property and that because students were not allowed to smoke on school grounds, they could not be allowed to smoke on the sidewalk. In order to insure that students did not cross the street to smoke on someone else's sidewalk, she instituted a closed campus policy that barred students from leaving school property during instructional time. This policy was announced at the end of January, 2006, and it went into effect on February 7. On the same day the policy became effective, Ms. Fischer learned of one or two students who were smoking on school property and suspended them. During a leadership meeting with Fischer and other staff that was held the same day, Keith Spaeni said that she would have merely warned the students rather than suspending them and that the new policy amounted to micro-supervision of the WLC students. She knew that her comments caused Fischer to conclude that Keith Spaeni did not support the new smoking policy.

31. Andrew was a disruptive student in Keith Spaeni's fourth semester class for the fall term of the 2005-06 school year. He had a full-time job in addition to his academic work at WLC. His mother typically interceded with District staff when Andrew was disciplined for inappropriate school behavior, and the mother assigned a significant portion of the reason for the classroom problems to Keith Spaeni rather than to her son. Keith Spaeni and Fischer met during both September and October of 2005 to discuss Andrew and develop a strategy for dealing with his behavior as well as with his mother. Fischer understood that Keith Spaeni wanted to have Andrew dismissed from the WLC program, an action that would have been consistent with prior practice but contrary to Superintendent Rainwater's directive to change policy in this area. Fischer was committed to retaining Andrew in the program rather than returning him to a regular high school.

32. Andrew's inappropriate conduct continued and on or about October 20, Keith Spaeni commented that she might need an MTI representative present during the next meeting that she and Fischer had scheduled with Andrew's hostile parent. Fischer informed Keith Spaeni that confidentiality requirements would preclude an MTI representative from attending a parent-teacher meeting and that Fischer would insure Keith Spaeni felt safe during the meeting. She also stated that Keith Spaeni was "threatening with the union" by requesting an MTI representative, but Fischer's statement reflected disagreement rather than hostility.

33. After the mid-November parent-teacher conference and at least one additional incident with Andrew in the classroom that indicated there was continuing friction between Andrew and Keith Spaeni, Fischer and Steve Hartley met with Keith Spaeni on December 8 and gave her a choice of either having Andrew transferred from the Park Street WLC site to the Breatly site or having Keith Spaeni provide him with individualized instruction opportunities during three afternoons a week at the Park Street location. Keith Spaeni continued to express her desire that Andrew be dismissed from the WLC program.

34. Keith Spaeni reluctantly accepted the afternoon option. It meant that Andrew would perform the bulk of his academic work independently, but would be present in the WLC

Park Street site for two hours (12:30 to 2:30) on three afternoons a week, when he would go to the computer lab. He could also use the time he spent at the Park Street site to exchange new and completed assignments with Keith Spaeni and to ask her questions. The afternoon option also meant that Andrew no longer attended morning classes with the other fourth semester students and that he could still graduate on time with his classmates in the WLC program.

35. Two teachers at other levels in the WLC program had similar arrangements with students.

36. On several occasions, Keith Spaeni asked how she “might be compensated for the approx. 25-30 hours involved in implementing this plan” for Andrew. She raised this question in writing on December 9. At some point during this general period, Hartley explained to Keith Spaeni why no additional compensation would be appropriate but indicated he would check further.

37. Andrew and his mother were informed of the special instructional plan during a meeting with Keith Spaeni, Fischer on December 13, 2005. Immediately after that meeting, Keith Spaeni met with Fischer and Hartley and again raised the question of how she would be compensated for the time she spent on Andrew. Keith Spaeni specified that she was “asking for everybody” and that her colleagues had the same concern about whether the District could assign responsibilities beyond the basic teaching schedule. Fischer commented that she was disappointed Keith Spaeni had made a request for additional compensation and threatened to assign Keith Spaeni or any WLC teacher additional duties if Keith Spaeni further pursued the compensation question.

38. After this meeting, Keith Spaeni discussed Fischer’s comments with her WLC colleagues, including Dave Medearis, who was president-elect of MTI and served as the second semester teacher at Park Street. Medearis e-mailed Executive Director Matthews, and Matthews in turn e-mailed Steve Hartley. Matthews’ January 27, 2006 e-mail to Hartley read, in part:

I have been holding off entering into this issue, because it appeared to me that you were going to have it corrected. As you are aware, Trina was directed, in addition to her regular full time assignment, to provide instruction to a student 12:30 – 2:30, three days per week through the end of the first semester.

Given the above, the Contract provides that Ms. Spaeni is to be paid three-fifths of a double overload, for each of the days on which such instruction was provided. See #19, page 18, of the Contract.

This and other correspondence on the topic specifically referenced Keith Spaeni’s responsibilities relating to Andrew rather than describing the question in terms of any teacher who might be directed to oversee an independent study program for any student. Fischer was aware of Matthews’ efforts to intercede on behalf of Keith Spaeni.

39. During Affiliated Alternatives staff meetings held during the second semester of the 2005-06 year, Keith Spaeni would sometimes roll her eyes and have side conversations while Fischer was discussing changes to the WLC program.

40. Sometime early in 2006, Fischer learned definitively that Jim Foley, the first semester WLC teacher at the Brearly site, was retiring before the 2006-07 school year.

41. The collective bargaining agreement permits principals to reassign teachers from one position to another provided the teacher has the requisite certification for the new position.

42. Every spring, June Glennon, the District's Employment Manager, meets with each principal in the District to review the principal's staffing plan for the subsequent school year. The meeting between Glennon and Fischer for the 2006-07 year was held in the morning on Thursday, April 6, 2005. Fischer indicated that she wanted to reassign Keith Spaeni from the position as the fourth semester WLC teacher at the Park Street site to the first semester WLC teacher slot at the Brearly Street site. She offered the following reasons for the move: 1) Fischer's superiors wanted changes made to the WLC program; 2) Keith Spaeni was particularly resistant to changes in the program; 3) a staffing adjustment would make it easier to implement program changes at the Park Street location; and 4) Keith Spaeni's certifications and teaching background would mesh well with the Brearly Street staff. Fischer asked Glennon for advice on how best to inform Keith Spaeni of the reassignment because Fischer anticipated that Keith Spaeni would be distressed by the news.

43. About half of the approximately 50 District employees, including principals, who supervise teachers will reassign a teacher in a given year. There are typically between three and six teacher reassignments in the District each year that are made in order to facilitate implementation of program changes.

44. In addition to the transaction that is the subject of this complaint, Ms. Fischer has initiated the following teacher/educational assistant reassignments during her tenure as Affiliated Alternatives principal:

Mike Parrish (from one program (AERO) to another (WL))

Renee Ramsdell (from both WLC sites to only one site)

Jim Foley (from one semester to another in WLC)

Heidi Walters-Kahn (from one program to another and later from the second program to a third)

Patti McCormick (from one program to another)

Carol Mullen (50% of her duties were reassigned from one program to another)

Bill Clark (from one WLC site to the other)

Daniella Porro (assignments added but not removed)

45. Fischer met with Keith Spaeni early in the afternoon of April 7 and informed her of the reassignment to the first semester position at Brearly Street. During the meeting, Fischer expressed various reasons for the reassignment, none of which reflected adversely on

Keith Spaeni. Keith Spaeni immediately refused to teach the sex education portion of the first semester curriculum and Fischer offered to have the second semester teacher handle it instead. Fisher's notes of the meeting accurately reflect what occurred:

. . . I explained my plans about focusing on the vocational piece of WLC, and described my recent meeting with Gabrielle Banick who coordinates Vocational/Career Education [for the District].

I then explained to Trina that given the need to enhance our vocational/career/work aspects of WLC, I looked to teacher certification and skill to make some staffing reassignments. I told her that I would be reassigning her to the vacancy in WLC-Brearly, Semester 1 due to the retirement of Jim Foley. I described my enthusiasm for the leadership I believed she could bring to both teams as a "First Semester" teacher, where the focus is on instilling strong vocational/work skills.

Trina asked what the curriculum would be. I explained that it would be a typical "1st semester" curriculum, but that I was looking forward to and encouraging her to teach to her strengths – meaning that the content of the curriculum could certainly be different, and would most likely be unique to her skills. I acknowledged too, that her instructional strategies might be different.

She said she was very uncomfortable with the concept of health education and sex education. I assured her that this was a piece which we could easily address. I suggested that it may be we move this aspect of the curriculum to 2nd semester, with Heidi who has certification. With Trina's business certification, she might then logically address some of the "consumer skills" typically covered in Semester 2. . . .

Trina asked what type of support she could expect regarding the development of the curriculum. I suggested that both [former Level 1 teachers] Janice Lange-Morris and Jim Foley would share their career/vocational skills more fully, and that this would be part of the work accomplished prior to the end of the year. . . .

46. On April 25, 2006, Keith Spaeni was invited to be an observer at a meeting when the Lafollette High School career and technical education staff developed curriculum. During the course of the session, Keith Spaeni resisted applying the 22 standards that had been developed by the Department of Public Instruction in lieu of the 10 standards already being applied at the two WLC sites, even though the DPI standards are mandatory.

47. In a memo to Keith Spaeni dated April 29, 2006, Fischer reiterated her commitment to making the reassignment a positive experience for Keith Spaeni and offered assistance with the transition. The memo stated, in part:

I believe you possess the skills and certification which best match the Level One teacher, and the direction of the Work and Learn Program. You have a thorough knowledge of the career/vocational expectations that students will move through towards graduation. You have an ability to create a learning environment with high expectations as well as the flexibility to work towards the success of all students. I believe that your business ed certifications will greatly benefit our preparation of students as they enter our work force, and require significant employability training.

In addition, the Coordinator of Career and Technical Education, Gabrielle Banick, shares my enthusiasm in working with you as a Level 1 teacher, shaping the career and vocation competencies for all levels. We have already begun this process by meeting with Gabrielle to review our current state of the vocational/career competencies. A full day of staff development is being planned as well. Our other Level One Teacher, Norma, possesses similar, complimentary [sic] certifications of: 210, Family and Consumer Education; 216, Home Economics Related Occupations – HERO, and; 211 Family/Consumer Education: Child Services.

I also offer you time to meet with myself, Jim Foley, [two other teachers] or former WLC Level One teacher, Janice Lange-Morris, to review the curriculum and work sites for Level One students at Brearly. Jim Foley is prepared to introduce you to the various worksites we typically have relied upon. You can also review the information generated at the WLC staff development days last school year. . . .

48. All four teachers who remained at Park Street, as well as the administrative clerk, opposed Keith Spaeni's reassignment to Brearly Street.

49. As of the date of hearing, Fischer had not made a "department chair" designation for the Brearly site for the 2006-07 year. Erick Shager, the fourth semester teacher at Brearly, had been the Brearly WLC department chair in the past.

50. The District anticipated making additional and substantial changes to the Work and Learn program.

51. Keith Spaeni's certifications were consistent with her placement in the Level 1 position at Brearly Street.

52. Keith Spaeni was commonly viewed as a leader of the Work and Learn staff.

53. Keith Spaeni resisted change to the Work and Learn program.

54. Fischer's decision to reassign Keith Spaeni from fourth semester responsibilities at Park Street to first semester responsibilities at the Brearly WLC was not motivated in part by hostility toward Keith Spaeni's request for a union representative during a parent-teacher conference or for additional compensation relating to her responsibility for Andrew's independent study program.

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

CONCLUSIONS OF LAW

1. Pursuant to Sec. 111.70, Stats., the Commission has jurisdiction over this matter.
2. At all material times, Principal Fischer was acting in her capacity as an officer or agent of the District.
3. By reacting to Fischer's request that teachers participate in classroom set-up in advance of the 2004-2005 school year, asking to have union representation during a meeting with a student and parent, and requesting additional compensation for independent study instruction, Keith Spaeni exercised her rights under Sec. 111.70(2), Stats., to engage in lawful, concerted activity.
4. Complainants have not established by a clear and satisfactory preponderance of the evidence that Respondents violated Sec. 111.70(3)(a) or 3, Stats., by reassigning Keith Spaeni to the Level 1 position at Brearly WLC.

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

ORDER

This matter is dismissed.

Dated at Madison, Wisconsin, this 2nd day of April, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Kurt M. Stege /s/

Kurt M. Stege, Examiner

Madison Metropolitan School District

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

The issue in this case is whether the District violated the Municipal Employment Relations Act (MERA) by reassigning Trina Keith Spaeni from a fourth semester teaching position at the Park Street site of the Work and Learn program to a 1st semester position at the Brearly Street site.

MTI contends that Keith Spaeni's reassignment violated Sec. 111.70(3)(a)1, Stats., by interfering with, restraining or coercing a municipal employee for having engaged in lawful, concerted activities for mutual aid or protection, and also violated Sec. 111.70(3)(a)3, Stats.⁴ by discouraging membership in a labor organization by discriminating in regard to terms or conditions of employment. The Commission has concluded⁵ that in cases such as this, where the employer has allegedly retaliated against the employee for engaging in lawful, concerted activity, it is appropriate to analyze the matter in the context of whether the Complainant has established the following elements by a clear and satisfactory preponderance of the evidence: 1) the municipal employee engaged in lawful, concerted activity within the scope of Sec. 111.70(2), Stats.; 2) the employer was aware of the employee's protected activity; 3) the employer was hostile to the protected activity; and 4) the employer took action against the employee based at least in part upon such hostility. EMPLOYMENT RELATIONS DEPT. V. WERC, 122 WIS.2D 132 (1985). While Complainants have satisfied, at least to a limited degree, the first three elements of the analysis, Complainants have failed to establish the final element. Each element is addressed separately below.

Protected Activity

The question presented by the first element of the requisite analysis is whether Keith Spaeni engaged in "lawful, concerted activities for the purpose of . . . mutual aid or protection." Sec. 111.70(2), Stats. Resolution of this question requires a case-by-case analysis. In CITY OF LACROSSE, DEC. NO. 17084-D (WERC, 10/83), AFF'D, CIR. CT. CASE NO. 83-CV 821 (1985), the Commission held:

It is impossible to define 'concerted' acts in the abstract. Analysis of what a concerted act is demands an examination of the facts of each case to determine

⁴ The two relevant provisions of Sec. 111.70(3), Stats., read:

(3) Prohibited Practices and their prevention. (a) It is a prohibited practice for a municipal employer individually or in concert with others:

1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2). . . .
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

⁵ CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03).

whether employee behavior involved should be afforded the protection of Sec. 111.70(2) of MERA. At root, this determination demands an evaluation of whether the behavior involved manifests and furthers purely individual or collective concern.

In VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03), the Commission held that creation of a document voicing concerns that were shared and had been discussed by the other employees, as well as by the document's creator, and which had been collectively advanced by the union, constituted "lawful, concerted activity . . . for purposes of mutual aid or protection" within the meaning of Sec. 111.70(2), Stats. As noted in CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03), "[c]oncerted activity need not be associated with a union, as such, or coincide with a union's point of view in order to have a purpose of 'mutual aid or protection.'" (Citations omitted.)

MTI contends that Keith Spaeni engaged in protected activity when: 1) she reacted to Fischer's request that teachers participate in classroom set-up at Park Street in advance of the 2004-2005 year; 2) she asked in October 2005 to have union representation during a meeting to be held with a student, Andrew, and Andrew's mother; and 3) she sought additional compensation in December 2005 as a response to the plan for teaching Andrew independently of the rest of the fourth semester Park Street students. Respondent asserts that these actions by Keith Spaeni were individualized rather than concerted activities and are not protected.

During the summer of 2004, all of the contents of the classroom space at the WLC Park Street site had to be moved in order to re-paint and re-carpet the rooms. When the work was completed, Principal Anne Fischer sought to insure that the classrooms were ready for the arrival of the students at the beginning of the 2004-05 academic year. She contacted Keith Spaeni who had served as the department chair for teaching staff at the Park Street site in 2003-04 and had been selected by Fischer to continue in that role for the subsequent year. Keith Spaeni was the conduit through which Fischer dealt with the entire Park Street teaching staff relating to classroom set-up in August 2004.⁶

⁶ Respondents raise two defenses targeted solely at the contention relating to classroom set-up. First, Respondents argue that the allegation fails to satisfy the one-year statute of limitations established in Sec. 111.07(14), Stats. However the statute of limitations applies to the action or practice that is alleged to be illegal/retaliatory, rather than to the conduct that arguably generated the underlying animus. The limitations period is unrelated to the date of the protected activity that allegedly served as the motivation for the subsequent retaliatory action. Respondents also argue that the classroom set-up topic was not identified as a protected activity in the complaint filed with the Commission. The applicable administrative rule, ERC 12.02(2)(c), Wis. Adm. Code, provides that "the complaint shall contain . . . [a] clear and concise statement of the facts constituting the alleged prohibited practice or practices, including the time and place of occurrence of particular acts and the sections of the statute alleged to have been violated thereby." While it is true that the topic is not mentioned in the complaint, Respondents did not object at hearing to testimony about 2004 classroom preparation and there is no indication that Respondents were prejudiced in terms of the ability to respond. In fact, Respondents' case included testimony on the subject by Fischer and a relevant exhibit. It is also significant that the incident that was brought up at hearing but not mentioned in the complaint was an instance of alleged protected activity, rather than an alleged incident of illegal retaliation. Compare, VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03), p. 18.

There is no support in the record for the District's contention that Keith Spaeni's activities in August of 2004 furthered her "purely individual" concerns. Fischer chose, very reasonably, to deal with Keith Spaeni as the representative of the Park Street staff rather than contacting each staff member individually. When she had concerns whether Principal Fischer was asking the staff to perform work not required by the bargaining agreement, Keith Spaeni contacted MTI's Executive Assistant for Legal Affairs, Eve Degan, who mailed a letter to the District on the topic. Keith Spaeni's efforts supported the collective concerns of the teaching staff rather than merely her own interests.

More than a year later, Keith Spaeni worked with both Principal Fischer and Fischer's supervisor, the Director of Alternative Programs, to develop a strategy for interacting with Andrew, one of her fourth semester students, as well as with Andrew's mother. Andrew had engaged in disruptive classroom behavior and his mother actively intervened with WLC employees on behalf of her son. In October 2005, Keith Spaeni commented to Fischer that she had concerns about her personal safety and that she might want or need an MTI representative to be present during the next meeting that she was scheduled to attend with Fischer, Andrew and Andrew's mother.⁷ The District argues that because the proposed meeting between Keith Spaeni, Fischer and Andrew's mother "had absolutely no relation to, or impact on, the terms and conditions of Keith Spaeni's employment, it was not a situation entitling her to representation" and Keith Spaeni's suggestion about representation could not be a protected activity. The District's argument focuses incorrectly on whether Keith Spaeni had the right to have an MTI representative present during the meeting with the parent. The argument has no bearing on the question of whether Keith Spaeni's inquiry about union representation is, itself, a lawful concerted activity for mutual protection. Keith Spaeni's suggestion to Fischer related to the fundamental contractual right of having a union representative accompany the employee under certain circumstances,⁸ thereby falling within the scope of a protected activity.

MTI asserts that Keith Spaeni's efforts to obtain compensation for the afternoon hours when Andrew was at the Park Street site (in lieu of attending the morning classes with the remainder of the fourth semester students) was also a protected concerted activity. Keith Spaeni broached the compensation topic on several occasions with Fischer and/or her immediate superior, Steve Hartley. She also conferred with her co-workers, including Union president-elect Medearis, who in turn corresponded with MTI's Matthews on the topic. Even though the immediate focus of Keith Spaeni's questions was on her own compensation, she appeared to believe that she was entitled to "overload" compensation under the bargaining agreement.

⁷ On a later date, Keith Spaeni had contact with the MTI executive director on the topic of whether she could have MTI staff present when meeting with Andrew's mother. Complainant's contention is that Keith Spaeni's request in her conversation with Ms. Fischer was a lawful and concerted activity protected by Sec. 111.70, Stats. The subsequent contacts that Keith Spaeni had with MTI on this topic are not relevant to the question of whether Keith Spaeni's statement to Fischer was protected.

⁸ "Teachers shall be entitled to representation by Madison Teachers in any meeting which in the opinion of the administrator affects the teacher's continued employment." CBA, IV, U.

During her December 13th meeting with Fischer, Keith Spaeni specified that she was “asking for everybody” and that her colleagues had the same concern about whether the District could assign responsibilities beyond the basic teaching schedule.⁹ The written correspondence from Matthews to Hartley cited the contract and suggested that Keith Spaeni was entitled to “three-fifths of a double overload.” Keith Spaeni’s actions are comparable to “filing and processing a grievance advancing colorable claims” which is presumptively protected activity “absent a strong showing to the effect that the grievance is wholly unlawful in manner of presentation or purpose.” MONONA GROVE SCHOOL DISTRICT ET AL., DEC. NO. 20700-G (WERC, 10/86), at 24. Keith Spaeni’s requests for additional compensation were protected activities within the scope of Sec. 111.70(2), Stats., rather than personal activities unrelated to collective employee interests.

Knowledge of the Protected Activity¹⁰

As already noted, the complaint is based on allegations of three separate protected activities. Principal Fischer had received an April 18, 2004 letter from MTI raising an objection to any effort to direct staff “to clean and move furniture and teaching materials” prior to the first mandatory contract day of August 31, 2004. Fischer had initially brought up the topic of classroom readiness two days earlier, in an August 16 e-mail to Keith Spaeni. As a consequence, there can be little question Fischer was aware that Keith Spaeni played an important role in bringing the issue to the attention of the union. There can also be no dispute that Fischer was aware of Keith Spaeni’s suggestion that she have a union representative present when she met with Andrew’s mother.¹¹

In terms of Ms. Fischer’s knowledge of the alleged third protected activity, involving Keith Spaeni’s requests for additional compensation for Andrew’s independent study program, the evidence shows that Keith Spaeni made at least one direct request of Fischer in an effort to obtain supplemental pay for the afternoon hours she spent with Andrew. It is unnecessary to

⁹ In its reply brief, the District contends there was “no evidence that anyone other than Keith Spaeni had any concern” about the question of whether she would be additionally compensated for Andrew’s independent study program. However, Keith Spaeni’s testimony indicated that her colleagues shared her concerns; President-elect Medearis (another WLC teacher) took it upon himself to engage MTI Executive Director Matthews on the topic, and Matthews corresponded with Hartley about it on a couple of occasions. The correspondence and discussions between MTI and the District were clearly focused on the facts relating to Andrew’s independent study program, but the consequences related directly to all of the WLC teachers.

¹⁰ In determining whether this element has been satisfied, the question has to be answered in the context of the person or persons who allegedly took the retaliatory action. It would be of no consequence to determine that Superintendent Rainwater was aware of Keith Spaeni’s protected activities because the record shows it was Principal Fischer who, after speaking with both the Director of Alternative Programs, Steve Hartley, and District Employment Manager June Glennon, who effectively decided whether or not to reassign a teacher from one WLC position to another.

¹¹ The District contends that the record contained no evidence any of its representatives were aware Keith Spaeni had contacted MTI relating to her suggestion of having a representative from the union present when she met with Andrew’s mother. As already noted, the protected activity occurred during the conversation with Fischer rather than later when Keith Spaeni went to MTI.

reach a conclusion in terms of whether Fischer was also aware of other contacts that Keith Spaeni made with MTI or with Hartley on the same topic. However, to the extent the District takes the position that Fischer was unaware of the correspondence between Hartley and MTI's Matthews regarding the overload issue, the bulk of the evidence supports the conclusion that Fischer knew Matthews was directly involved in the question of whether Keith Spaeni qualified for overload compensation. Matthews advised Hartley in a January 27, 2006 e-mail that, according to the bargaining agreement, "Ms. Spaeni is to be paid three-fifths of a double overload for each of the days on which such instruction was provided." Hartley's response, dated January 30, included an attached document (entitled "Work and Learn: Overload") that summarized Keith Spaeni's particular circumstances in light of the Work and Learn teaching schedule. The attachment included the following statements:

All along Trina asked about compensation. She was told by both Anne Fischer and Steve Hartley this was part of the time built into the Work and Learn model. Trina had the ability to adjust her schedule accordingly.

When she was asked at hearing to identify the date she first saw the attachment, Fischer said she imagined that it was around January 30, the date at the top of the document. She subsequently acknowledged she would not be surprised if Hartley had informed her he was preparing the January 30th e-mail and attachment. The first paragraph of the attachment was included, word-for-word, at the beginning of the March 14, 2006 document entitled "Work and Learn: Program Model Staff Responsibilities" that Fischer acknowledged she had a hand in developing and that Hartley supplied to Matthews on March 15. In his March 15 cover e-mail, Hartley justified the delay in his response by writing that he had been out of the office and he "also wanted to consult with Anne [Fischer]." This combination of evidence justifies a conclusion that Fischer was aware of Matthews' efforts to intercede on Keith Spaeni's behalf on the question of compensation arising from a student's independent study, as well as knowing directly from Keith Spaeni that she wished to pursue the matter.

Hostile Action

Evidence of hostility and illegal motive may be direct, such as with overt statements of hostility, or as is usually the case, inferred from the circumstances. CITY OF RACINE, DEC. NO. 17605-C (WERC, 10/82). If the record contains no direct evidence of hostility, then, as is usually the case, one must determine whether the total circumstances surrounding the matter give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. See COOPERATIVE EDUCATION SERVICE AGENCY #4, ET AL., DEC. NO. 13100-E (Yaffe, 12/77)), AFF'D, DEC. NO. 13100-G (WERC, 5/79).

MTI asserts that in four incidents spread over the period from summer of 2004 until December 2005, Fischer exhibited hostility in response to various protected activities: 1) She expressed anger and made a threat when Keith Spaeni did not volunteer to set up classrooms prior to the 2004-2005 academic year; 2) on August 31, 2004, she described teachers as

“whiny babies” in terms of their reaction to her comments about changing the class schedule to 90 minutes; 3) she was upset on or about October 20, 2005 when Keith Spaeni suggested having a union representative present for meetings with Andrew’s mother, and commented that Keith Spaeni was “threatening with the union”; and 4) on December 13, 2005, she said she was disappointed in Keith Spaeni for even requesting additional compensation for Andrew’s independent study program, and subsequently stated that the workload of all the other WLC Park teachers would increase if Keith Spaeni pursued the compensation issue.

The District makes the generalized argument that because Fischer had encouraged staff to contact the union for assistance in other instances, she would not have expressed hostility about union-related activities at the four times referenced in MTI’s contentions. This argument has been considered in deciding whether Fischer actually expressed hostility on each of the four occasions, but it is hardly determinative of what occurred at those times.¹²

1) *Classroom set-up contention*

Keith Spaeni described the circumstances of the relevant conversation with Fischer as follows:

[A]s the summer went on, the idea that we had to have everything back [in the classrooms] and we weren’t going to get help and other people weren’t there to help as well didn’t sit well with me, and I told Anne that I didn’t have to come and do the things that she was expecting me to do, that I didn’t have to show up on a certain day and put my books away and make sure that everything was back where it was supposed to be. And as a result of that conversation, I was actually on my cell phone in the garage when my husband came home, and Anne said to me at that time, “I can make you come in, and I will. I will make you come in on the new contract days, and you will have to have that room ready to go because every teacher has to have their room ready for students to come in.”

And I said, “I don’t think I have to come in on the new teacher days,” and she told me that I did. So I immediately called the union and said can she do that.

In contrast, Fischer denied stating that she could direct Keith Spaeni to come in to the Park Street facility to organize her room prior to the first day that continuing staff were required by the contract to be on site.

On the surface, the Complainants’ version of events would appear to be strengthened by the April 18 letter from MTI’s Eve Degen to Fischer. That letter shows Keith Spaeni had already reported to Degen that Fischer had unilaterally “*directed staff to clean and move*

¹² Approximately five witnesses testified that Fischer encouraged them to contact the union when they had questions about pay or benefits. Another witness denied that Fischer directed her to the union.

furniture and teaching materials before the contractual school year begins.”¹³ However, Keith Spaeni’s testimony was merely that she said she would not show up to “*put my books away and make sure that everything was back where it was supposed to be.*” The discrepancy indicates that Keith Spaeni overstated her conversation with Fischer and it undermines her additional contention that Fischer said she could force her to show up at the school before the date provided in the contract.

The date of Degen’s letter also works against Keith Spaeni’s version of events. The date and time of the alleged “I can make you” phone conversation is not specified in the record. Yet we know that on August 18, Keith Spaeni sent Fischer an email with a cooperative tone: Keith Spaeni wrote that staff would be coming in to get ready for school, a specific date had not been set for doing so, August 20th was the earliest possible date, and she would try to give notice for the benefit of the custodian. The email must have preceded any antagonistic conversation because it would be inconsistent with either an earlier or a contemporaneous verbal exchange between the two in which Keith Spaeni says she refused to show up early to “put my books away and make sure that everything was back where it was supposed to be” and the alleged retort by Fischer that she could order Keith Spaeni to the school. Nevertheless, Degen’s letter, dated April 18, already references the alleged directive by Fischer and takes the view that Fischer cannot unilaterally direct staff to work before August 31.

On balance, the Complainants have failed to show Fischer exhibited hostility relating to classroom set-up.

2. “Whiny babies” allegation

There is also directly conflicting testimony as to whether Ms. Fischer referred to certain teachers as “whiny babies.” According to Keith Spaeni and a second teacher in attendance, Fischer made the reference during an all-staff meeting on August 31, 2004, and used it to describe those teachers who reacted by contacting MTI when, during a leadership team meeting a few days earlier, she had spoken of extending the WLC instructional periods. The second teacher, Walters-Kahn, had previously spoken directly to Fischer in opposition to the implementation of a “block” schedule so her recollection could have been colored by that perspective. Fischer denied making a “whiny babies” comment and a fourth witness confirmed her testimony. The fourth witness, Michael Parrish, also taught at WLC and had a family history of union activity. He specifically denied that Fischer had referred to WLC staff as “whiny babies” and there is no reason to question the motivation for his testimony.

The burden of proof in this matter rests with the Complainants. Fischer and Keith Spaeni are both interested parties. The comment attributed to Fischer is of a type that one would expect those present at the meeting to recall, yet Mr. Parrish, a disinterested party,

¹³ Degen’s letter went on to express the position that Keith Spaeni could not be directed to perform the work in question before August 31.

denied hearing it. There were several additional hearing witnesses who did not testify on this topic even though they would have been present at the August 31, 2004 meeting of WLC staff. However, neither party asked anyone other than Keith Spaeni, Fischer, Parrish and Walters-Kahn about what occurred at that staff meeting. In light of the burden of proof, the lack of testimony from other witnesses and Walters-Kahn's admitted opposition to changes in the instructional schedule, Complainants have not established hostility by Fischer during the relevant staff meeting.

3. *"Threatening with the union" allegation*

According to this contention, Fischer was upset by Keith Spaeni's suggestion that she was entitled to union representation when meeting with Andrew's parent and consequently exhibited hostility toward Keith Spaeni, commenting on either October 19 or 20, 2005 that Keith Spaeni was "threatening with the Union." The alleged hostility extended beyond this particular statement. According to Keith Spaeni's testimony:

At the point that we were talking about the mother, I said, you know, maybe I need MTI representation here. And I got a response from Anne that totally took me aback and took me by surprise because she was sitting in the green chair in our office and she went back, and she just looked at me, and it was like – she said, "How dare you? You can't have representation when a parent's involved, a parent and a student involved. You're not entitled to it. And, you know, you're a liar. All this time I thought that you were interested in kids and about their success, and now you're threatening with union."

And I was so shocked that I started to cry. I couldn't believe that she responded to me that way, and I got up to get a Kleenex. LuAnn [Clausen] was there. She saw that I was crying

Based on her demeanor at hearing and the testimony regarding her conduct by relatively disinterested witnesses, it would have been far out of character for Fischer to have called Keith Spaeni a liar. It is more reasonable to believe that Keith Spaeni's emotional state at the time was such that she imagined the comment. Keith Spaeni was accustomed to dropping someone like Andrew from the WLC program. She had safety concerns regarding Andrew's mother who she considered to be verbally abusive. Approximately 6 years earlier, an MTI representative had accompanied her during a meeting with a LaFollette student and the student's mother so she had at least some reason to believe that her request to have an MTI representative present for the meeting with Andrew's mother would be acceptable. Fischer testified that she was "a little disturbed that [Keith Spaeni] was unaware that inviting a third party to a parent-teacher conference would violate that student's privacy rights." The examiner is satisfied that Fischer's query about "threatening with the union" was a frank assessment of the request for representative based on Fischer's familiarity with student privacy rights and practice, rather than a hostile threat. See VILLAGE OF STURTEVANT, Decision

No. 30378-B (WERC, 11/03), p. 18. Complainants have not sustained their burden of establishing that Fischer acted with hostility when she made the statement that “you’re threatening with the union” after Keith Spaeni asked about union representation at the upcoming parent-teacher conference.

4. *Fischer’s alleged comments on December 13, 2005*

Keith Spaeni met with Fischer twice on December 13. The first meeting was also attended by Andrew, Andrew’s mother and Steve Hartley. Only Fischer and Keith Spaeni participated in the second meeting later that day. Keith Spaeni described what occurred during the second meeting as follows:

So I asked Anne in the meeting that we were having alone about the compensation.

Q Okay. And what did Principal Fischer say?

A She looked at me and said that Steve [Hartley] had talked to her, asked her about her opinion was about me being compensated and her response was, no absolutely not, I didn’t deserve it, that I was doing what I needed to do for the student, that she could make me do that because I had all the time in the afternoon and that that was her right, and I kind of leaned back and said wait a minute. You know, I’m just – don’t shoot the messenger here. I’m asking for everybody.

This is a concern that all of my colleagues have, and between the 8th of December and the meeting on the 13th, this assignment that I felt I was being given was discussed with both staffs at the Brearly Street site and at the Park Street site, and there were huge concerns as to what that meant about the future for everyone and have the principal or whomever be able to assign us more than what we thought was our assignment for the workday.

So first she told me no. I said, you know, “I’m just the messenger.” She told me that she and Steve were very disappointed and angry with me that I would even ask to be compensated. At that point she continued to tell me that the time frame that I – that we have as Work & Learn teachers, she can assign us any way – any time she wants, to whatever she wants, that we’re entitled to one prep hour per day and that’s all. She can do whatever she wants the rest of the time. And I questioned that, and I said, you know, again this is for everybody we’re questioning this.

And she told me that if I pursued this any further, that it would affect everyone, she would assign anyone and everyone in Work & Learn to whatever she wanted during all of their time. . . .

The minute I left the Brearly site building, I picked up my cell phone and I called Dave Medearis, who is my colleague and was the MTI president-elect . . . and reported to him what had just been said to me and how upset I was.

This testimony was reasonably consistent with both Keith Spaeni's written notes of the events on December 13th and with an e-mail of the same date that was sent by Dave Medearis to Matthews. In contrast, Fischer specifically denied having told Keith Spaeni that she didn't deserve the pay and denied having told Keith Spaeni that she (Fischer) was insulted that Keith Spaeni had asked for additional compensation. Fisher expressly denied threatening to assign additional duties to any of the WLC staff if Keith Spaeni further pursued obtaining compensation for the time she spent on Andrew. The balance of the evidence, and mostly due to the propt reports and timely record of the conversation, satisfies me that Fischer made hostile comments to Keith Spaeni arising from her request for compensation.¹⁴

Motivation

Complainants have shown that Principal Fischer directed hostile statements at Keith Fischer in mid-October of 2005 ("you're threatening with the union" when Keith Spaeni asked to have a union representative present) and mid-December of 2005 (expressing anger that Keith Spaeni had asked to be paid for the additional time she spent on Andrew's independent study program, and threatening to assign additional responsibilities to WLC staff if Keith Spaeni pursued the compensation question), but the ultimate question is whether hostility toward Keith Spaeni's protected conduct served as a motivating factor in her reassignment, announced several months later, from a position at the Park Street site to Brearly.

It is irrelevant that an employer has legitimate grounds for its action, if one of the motivating factors was hostility toward the employee's lawful, concerted activity. See LA CROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-B (WERC, 7/78). In setting forth the "in-part" test, the Wisconsin Supreme Court noted 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 actions. See MUSKEGO-NORWAY C.S.J.S.D. NO. 9 v. W.E.R.B., 35 Wis.2D 540, 562 (1967). Although the legitimate bases for an employer's actions may properly be considered in fashioning an

¹⁴ Steve Hartley testified he had not expressed anger or disappointment to Fischer about Keith Spaeni's request nor had Fischer expressed anger or disappointment about the request to Hartley. Hartley, however, was not present during the relevant meeting on September 13 so his testimony is of little value.

appropriate remedy, discrimination against an employee due to lawful, concerted activity will not be encouraged or tolerated. See *EMPLOYMENT RELATIONS DEPT. V. WERC*, 122 Wis.2d 132, 141 (1985).¹⁵

In *VILLAGE OF STURDEVANT*, Dec. No. 30378-B (WERC, 11/2003), the Commission explained the nature of the analysis typically employed when determining whether there is a motivational nexus between an unlawful animus and an adverse action:

[D]etermining the existence of unlawful animus and its nexus with adverse action is usually an exercise in drawing logical inferences from the totality of the established facts. This exercise draws upon the Commission's long experience¹⁶ in deciphering situations like the present case, where motives are arguably unstated and indicia are entwined subtly within the circumstances. Circumstantial factors that can influence a finding of improper motive include timing, failure to offer prior warning of the seriousness of the ostensible misconduct, failure to have seriously investigated the ostensible misconduct, and failure to inform the employee contemporaneously of the reason. Offering pretext in itself has been found to suggest unlawful motive. (Citations omitted.)

While improper motive may be inferred, the inference "must rest upon more than suspicion or speculation." *WAUKESHA COUNTY*, DEC. NO. 30789-B (WERC, 2/05).

In the present matter, one of the more important undisputed facts is that Fischer did not create a vacancy so she could reassign Keith Spaeni. Fischer was confronted with a vacancy in an existing program within the scope of her responsibilities and she was required to come up with a plan for filling the vacancy. This circumstance can be distinguished from a supervisor's decision to discipline a subordinate employee, which is a more typical basis for a claim of illegal discrimination or retaliation. While it is obviously not determinative as to the question of motivation, it is entitled to weight.

¹⁵ The Supreme Court quoted with approval the following language from the underlying decision of the Commission:

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. 122 Wis. 2d 132, 143.

¹⁶ The Examiner does not pretend to possess such "long experience."

Another factor to weigh in determining whether there was a causal relationship between Keith Spaeni's reassignment and the incident in December of 2005 is the relative proximity in time of the alleged cause and effect. Fischer testified that she knew from the beginning of the 2005-06 school year that Mr. Foley was expecting to retire at the end of the academic year, but that she did not obtain definitive confirmation of the upcoming retirement until around February 2006. She concluded sometime before the staffing meeting with District Employment Manager Glennon on April 7, 2006, that she wanted to reassign Keith Spaeni into the Foley vacancy, although the reassignment was not finalized until Glennon concurred. This was a relatively brief period and there is no indication that there were any other actions that might have been taken earlier that would have been viewed by Keith Spaeni as comparably negative, so this factor tends to support a causal relationship.

The action involved here was an involuntary reassignment¹⁷ rather than the imposition of discipline, so the questions of whether there was either a "failure to warn of the seriousness of the ostensible misconduct" or a "failure to have seriously investigated the ostensible misconduct," both questions that are identified in the Commission's decision in the VILLAGE OF STURDEVANT, are irrelevant to the question of motivation in the present matter.

Although reassignments are not particularly common throughout the District,¹⁸ Fischer has a history of using them relatively often. According to Glennon, about half of those District employees who have the authority to make an assignment in a given year will exercise that authority. The record shows that Fischer was not at all reluctant to reassign staff. Using a liberal definition of reassignment, she has exercised her authority to reassign on 10 different occasions over of approximately 4 years. This evidence undermines the contention that the reassignment was motivated, in part, by Keith Spaeni's protected activities. In contrast, it shows that Fischer has a strong pattern of using reassignments to make changes that strengthen the programs under her control. It is also consistent with Fischer's practice of taking a very direct approach when she confronts a situation that has an adverse effect on her programs.

Principal Fischer testified that she reached her conclusion on how to best fill the vacant Level 1 position because she "needed to develop a stronger vocational" portion of the overall WLC program and because Keith Spaeni's certifications better complemented those of other staff at the Brearly site. Fischer further testified that she was motivated by the strengths, but not the weaknesses, of the individuals involved. A key factor in deciding the ultimate question raised by this complaint is whether the evidence tends to support these justifications or whether there is an absence of such evidence so as to support an inference that the justifications are pretextual.

¹⁷ The reassignment meant a different work place and a different curriculum. If the move caused Keith Spaeni to no longer be designated as a "department chair" (a question that had not been resolved at the time of hearing), it would also result in a loss of pay.

¹⁸ Superintendent Rainwater regularly reassigns his administrators once they have been in the same position for from five to ten years. He believes it is sound educational practice to reassign staff as a method to avoid having the individual become "stale" in a particular building or program.

Stronger Vocational Piece

“Vocational piece” and “vocational component” are interchangeable phrases used to refer to the non-academic portion of the Work and Learn program. The vocational component for Level 1 (first semester) students is volunteer work at daycare center or preschool for Level 2 is work with the elderly and United Way’s Volunteer Center’s Community Agencies for Level 3 is working with Operation Fresh Start rebuilding houses or working with a private or public employer, and for Level 4 is working in a job with a private or public employer or taking a class at MATC.

Keith Spaeni had years of experience supervising work site placements for Level 4 students. Even though her direct experience did not extend beyond Level 4, the length of her tenure with the Work and Learn program and her central role with the program insured that her level of program and vocational knowledge was at the high end of the range for WLC faculty.

Gabrielle Banick, the District’s Coordinator of Career and Technical Education and Executive Director of the Business and Education Partnership, proposed changes in the Work and Learn program in light of a model curriculum that was to be applied in another school in the District. The fact that Keith Spaeni was one of only two WLC staff who observed Lafollette High School staff develop a related curriculum supports the conclusion that Fischer intended to rely heavily on Keith Spaeni in terms of WLC vocational matters.

Fischer also explained the basis for the reassignment by noting that Keith Spaeni had the advantage of a thorough knowledge of the final stage and the goals of the program, so she was in a particularly advantageous position to present the first semester portion of the program so it was consistent with those ultimate goals. This is a reasonable consideration in deciding who should fill the Level 1 vacancy and it is unrelated to Keith Spaeni’s protected activities.

Finally, Fischer’s action to reassign Keith Spaeni is consistent with her decision to move a key full-time administrative support employee (Lawrence Palm) from his “cozy” private office on the second floor of the Brearly Street building to a spot in the main office on the first floor of the same building. Because of the move and the availability of the full-time employee as well as the two part-time employees who were already in the main office, the students were better served and the various Affiliated Alternatives programs were better integrated. However, the day-to-day working conditions for Mr. Palm were substantially less desirable from his perspective. Fischer did not discuss the change with Palm before she told him it was about to occur.

Complementary certifications

Keith Spaeni held certifications in Business Education, Business and Office-Vocational, and Alternative Education Program. As noted in Fischer’s April 29 memo, the Park Street Level 1 teacher, Norma Kohlenberg, was certified in Family and Consumer Education, Home Economics Related Occupations, and Family/Consumer Education: Child Services.

Kohlenberg's certifications are clearly focused on non-vocational areas, so this evidence supports the view that once she had been reassigned to the Level 1 Brearly vacancy, Keith Spaeni's certifications were complementary.

The record also shows that for two years, the Brearly site had been lacking a teacher with business education certification as well as vocational certification.¹⁹ There is no evidence of record to indicate that some other teacher who might have served in the Level 1 Brearly position would have carried a more appropriate set of certifications for the position and the site.

Strengths, rather than weaknesses, of the individuals

In her conversation with Keith Spaeni on April 7 as well as in the April 29 memo and her testimony at hearing, Fischer consistently addressed the positive attributes of Keith Spaeni to explain the reassignment decision and made no mention of any negative characteristics. The fact that Fischer may have expressed additional reasons to other members of District management and the fact that the additional reasons included negative attributes does not make them "conflicting" in the typical sense, but consistent. The consistency is further supported by Glennon's testimony that Fischer sought advice on how to best inform Keith Spaeni of the reassignment, and by Fischer's testimony that Glennon had accurately described their conversation on April 6.

Resistance to change

In its brief, the District contends that in addition to the justifications that she had identified to Keith Spaeni, Fischer "had some concerns about Keith Spaeni's resistance to changes that were starting to be implemented in the program and, for that reason, too, thought the move would be positive for the program." This contention is supported by Glennon's testimony²⁰ and Fischer's testimony,²¹ and it is also consistent with Hartley's testimony.²²

¹⁹ The Brearly team had been in compliance with certification requirements due to Fischer's own certification.

²⁰ According to Glennon, Fisher identified the following reasons for the reassignment: 1) Fischer's superiors wanted changes made to the program; but 2) Keith Spaeni was resistant to program changes; 3) it would be easier to make the changes if Keith Spaeni was out of the Park Street location; and 4) Keith Spaeni's experience and certifications would blend well with the other staff at Brearly.

²¹ As already noted, Fischer acknowledged the accuracy of Glennon's description of their April 6 meeting.

²² Hartley offered the following explanation for *his own* conclusion:

Q And why did ultimately – why ultimately was the decision made to move Ms. Keith Spaeni to Level 1 [at Brearly]?

A I think *for me* the piece that was outstanding was the vocational part. She had done vocational planning, she had put kids on jobs. We really were moving into are there a set of pre-vocational skills that we can begin to teach students to make that more successful, and so I

Complainants argue that Keith Spaeni was, in fact, not resistant to “necessary” changes to the Work and Learn program and that, consequently, the proffered rationale is pretextual. Different people obviously have different views in terms of what were “necessary” changes to the program. However, it is management’s prerogative (rather than Keith Spaeni’s) to determine what changes are appropriate and to then facilitate those changes in a manner that is consistent with the collective bargaining agreement and applicable law. Contrary to the Complainants’ argument, there is extensive evidence in the record showing that Keith Spaeni had a negative and reflexive reaction to changes in the Work and Learn program.

Paramount to this conclusion is Keith Spaeni’s desire to drop Andrew from the program to return him to a traditional high school setting. Superintendent Rainwater had very clearly expressed his intention to end this practice, while Keith Spaeni had shown her reluctance to do so. Fischer knew that the topic would reappear whenever WLC teachers encountered particularly disruptive students and felt that moving Keith Spaeni out of her very established position and role as the Level 4 teacher at the Park Street site would make it easier to implement this significant change to past practice.

Fisher announced a significant change to the smoking policy and the change went into effect on February 7, 2006. Fischer immediately suspended either one or two students for violating the new policy, but on the same day, during a leadership meeting with Fischer and other staff, Keith Spaeni voiced disagreement with the suspensions and offered that the new policy amounted to micro-supervision of the WLC students. Keith Spaeni acknowledged that her comments caused Fischer to conclude that Keith Spaeni did not support the new smoking policy.

LuAnn Clausen, the third semester teacher at the WLC Park Street site for the past three years, is a very close friend of Keith Spaeni and took the Park Street job in order to work with her. Clausen met with Fischer on April 10 and told her that she thought part of the

think that was the biggest piece for me. . . .

I mean in general I would say it’s been my experience that at the beginning stages of working with students is where we put – we get most success. . . .

So that is my belief, same about the Work & Learn program, that we really need to focus in on that first semester group of kids. That’s where we really engage them, that’s where we really begin to start the path. . . .

Q Did that factor into your decision that Ms. Keith Spaeni be reassigned from Level 4 to Level 1?

A I think that was a part of it, yes.

Later in his testimony, Hartley acknowledged that he had one or more conversations with Fischer in which they had discussed Keith Spaeni’s weaknesses, specifically in terms of her inability to recognize that the program ultimately adopted for Andrew could have positive application in other circumstances, and also in regard to the degree of her acceptance of the no smoking policy.

support changes that had been instituted at Park Street. If a close friend and teacher at Park Street thought a failure to support changes was a reason for the reassignment, the Examiner has no reason to believe otherwise.

Keith Spaeni's general resistance to change is also reflected in events that occurred after Fischer decided to reassign her.

During her meeting with Fischer on April 7, immediately upon learning that she was being reassigned to the Level 1 position at Brearly, Keith Spaeni refused to teach the sex education portion of the Level 1 curriculum due to her religious beliefs, presumably with the expectation that her refusal might be enough to change Fischer's decision. It is clearly not inappropriate for a teacher to identify a religious conflict with a particular responsibility, but Keith Spaeni presented the conflict by refusing to perform rather than by pointing out a problem for resolution.

Keith Spaeni also expressed resistance ("We can't do that") when she was attending the late-April vocational curriculum workshop once she learned of the DPI-mandated standards that exceeded those satisfied by the existing Work and Learn curriculum.

Finally, Keith Spaeni would roll her eyes when Fischer was discussing the numerous program changes during second semester 2005-06 Affiliated Alternatives staff meetings.²³ Keith Spaeni's attitude was hardly something that would make Fischer look forward to another year of the status quo.

This recitation of events results in an ineluctable conclusion that Keith Spaeni had a visceral resistance towards changes in the Work and Learn program as she had come to know it. She had an attitude toward change that, were she to remain as the Level 4 teacher at Park Street, could very reasonably be expected to interfere with Fischer's vision of success for the program.

Conclusion

Determining someone's actual motivation for a particular action is often a difficult and subjective proposition.

The level of hostility expressed by Fischer towards Keith Spaeni on December 13, 2005, was relatively low. There is no evidence that Keith Spaeni's protected activity was either a great inconvenience or a significant embarrassment to Fischer. Approximately four months passed before Fischer finalized her reassignment decision.

There is no evidence that someone else would have been a better fit than Keith Spaeni for the Level 1 vacancy at the WLC Brearly site. Keith Spaeni had attributes that were appropriate for the position and her reflexive resistance to program change was an important

²³ It is unclear whether these meetings occurred before or after the reassignment.

reason not to maintain her in her existing position. Finally, Fischer had never been shy about making changes that were consistent with her vision for the program, as reflected in her reassignments of other employees and her decision to relocate the office of an administrative employee.

The inference of improper motivation must be based on “more than suspicion or speculation.” WAUKESHA COUNTY, DEC. NO. 30799-B (WERC, 2/05). The weight of the evidence of record supports the conclusion that Fischer was not motivated by hostility toward Keith Spaeni’s protected conduct, and the Examiner so finds.

Dated at Madison, Wisconsin, this 2nd day of April, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Kurt M. Stege /s/

Kurt M. Stege, Examiner

