STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PORT EDWARDS EDUCATION ASSOCIATION and DEBORAH N.M MARTIN, Complainants,

vs.

PORT EDWARDS SCHOOL DISTRICT and MICHAEL ALEXANDER, Respondents.

Case 20
No. 65522
MP-4223

Decision No. 31744-A

Appearances:

Mr. Michael D. Phillips and **Ms. Melissa Cherney,** Attorneys, Wisconsin Education Association Council, 33 Nob Hill Drive, P. O. Box 8003, Madison, Wisconsin, appearing on behalf of the Port Edwards Education Association and Ms. Deborah N.M. Martin.

Mr. Christopher M. Toner, Attorney, Ruder Ware, L.L.S.C., 500 Third Street, Suite 700, Wausau, Wisconsin, appearing on behalf of the Port Edwards School District and Mr. Michael Alexander.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Port Edwards Education Association and Deborah N.M. Martin filed a complaint with the Wisconsin Employment Relations Commission on January 25, 2006, alleging that District Administrator Michael Alexander and the Port Edwards School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, and 3, Stats., of the Municipal Employment Relations Act (MERA) by refusing to consider Deborah N.M. Martin for a full time mathematics instructional vacancy.

The Commission issued an order on March 30, 2006, authorizing Examiner Raleigh Jones 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 matter was scheduled for May 17, 2006.

On the scheduled date of hearing, Complainant moved to reschedule the hearing which Mr. Jones granted. On May 24, 2006, Complainant's counsel sought the recusal of Mr. Jones. Mr. Jones recused himself from the case on May 30, 2006.

The Commission reassigned the case and issued an order on July 20, 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 September 13, 2006. The stenographic transcript of the proceedings was made and received. The Complainant and Respondent filed post-hearing briefs and Complainant filed a reply brief on February 4, 2007, 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, Port Edwards Education Association (Complainant or Association), is a labor organization with its mailing address at Central Wisconsin UniServ Council, P.O. Box 158, Mosinee, Wisconsin 54455-0158. The Association serves as the exclusive collective bargaining representative for a bargaining unit of all full-time and part-time contract teaching employees, guidance employees and librarians in the Port Edwards School District.

2. The Respondent, Port Edwards School District, (Respondent or District), is a municipal employer, with offices located at 801 2nd Street, Port Edwards, Wisconsin 54469. At all times material herein, Michael Alexander was the District Administrator and Steven Lutzke was the Middle School and High School Principal.

3. The District and the Association have been parties to a series of collective bargaining agreements. The 2001-2003 collective bargaining agreement contained, in pertinent part, the following provisions:

ARTICLE IV

ASSOCIATION RIGHTS

> The Board agrees that the individual teachers shall have 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 protections as specified in applicable law and such employees shall have the right to refrain from any and

all such activities, subject to any and all limitations contained in applicable statues.

. . .

ARTICLE V

BOARD RIGHTS

Except as otherwise provided in this agreement, the board hereby retains and reserves unto itself all rights and responsibilities that it has by the laws and Constitution of the State of Wisconsin and of the United States including the general right to operate and manage the school system including but not restricted to the determination of the teaching force, the right to plan, direct and control school activities to schedule classes and to determine teacher complement except as specifically nullified by the terms and provisions of this agreement. The Board possesses the sole right to operate the school system and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct all operations of the school system;
B. To establish reasonable work rules and schedules of work;
C. To hire, promote, transfer, schedule and assign employees in positions within the school system;
D. To suspend, demote, discharge and take other disciplinary action against employees;
E. To relieve employees from their duties in whole or in part;
F. To maintain efficiency of school system operations;
G. To take whatever action is necessary to comply with State or Federal law;
H. To introduce new or improved methods of facilities;
I. To change existing methods or facilities;
J. To determine the kinds and amounts of services to be performed as pertains to school system operations; and the number and kind of classifications to perform such services;
K. To contract out for goods;
L. To determine the methods, means and personnel by which school system operations are to be conducted;
M. To take whatever action is necessary to carry out the functions of the school system in situations of emergency.

Nothing in this article is to be interpreted as limiting the negotiability of any of the items mentioned herein in subsequent negotiations.

. . .

ARTICLE IX

VACANCIES, TRANSFERS, AND ASSIGNMENTS

VACANCIES

A copy of notice of vacancies will be posted on the office bulletin board in each school within ten (10) days of formal Board approval of such vacancies. Teachers within the school system who are interested in the vacancy may apply for such positions. The Board and Administration agree to give due consideration to their application. The successful applicant will be issued a contract.

. . .

ASSIGNMENTS

Teachers shall be employed and assigned on the basis of their professional training, special achievements, service in the district and shall be certified in accordance with the certification standards, recognizing that the instructional requirements and best interests of the school system and the pupils are the primary considerations.

. . .

4. Complainant Deborah N.M. Martin (hereinafter "Martin") is a 12 year teaching employee of the District. Martin was hired to full-time employment assigned to teach mathematics and physics, but voluntarily reduced her status to part-time in 2000. Martin was employed at 83 percent full-time equivalency for the 2004-2005 school-year. Martin is the most senior teacher in the math department.

5. Martin met with Principal Lutzke, on March 16, 2005 to discuss the pending retirement of Pat McGrath, a full-time mathematics teacher with Respondent. Martin inquired as to the how to apply for the vacancy. Lutzke stated he did not have a problem increasing Martin to full-time and that he thought she would do a good job in the seventh/eight grade level. Lutzke recommended that Martin schedule a meeting with Administrator Alexander and told her not bring a Union representative to the meeting. Lutzke opined that Alexander would not meet with her if she had a Union representative because Alexander did not believe a Union representative was necessary for meetings with staff unless the purpose of the meeting was to discuss disciplinary action.

6. The District posted a notice for an anticipated opening in the position of "7-12 Mathematics – 1.0 FTE" on March 31, 2005. Martin responded to the notice on April 7, 2005 by submitting a letter to Alexander indicating her interest in the full-time position.

7. The District posted a Math Instructor vacancy with the state job seeker website during May, 2005. The vacancy was identified as teaching grades 7-8 and high school math. A memorandum was posted internally for the same position on May 16, 2005.

8. The District interviewed four candidates for the vacant 7-12 position. The District did not consider Martin for the position and did not offer her an interview. The District offered the full-time teaching position to Erin Mitchell. Mitchell held the position for one year and resigned to accept a position in another school district.

9. On April 27, 2005 Martin met with Alexander to discuss Respondent's decision to not consider her for the vacant full-time mathematics position. Alexander acknowledged that Martin was a good teacher, but she was "not an excellent employee" because of the grievances that she had filed "against him" both individually and in her capacity as a union representative. During their meeting, Alexander directed the conversation to the grievances she filed, the employee discrimination complaint that Martin filed the prior year, and the parties' unsettled successor collective bargaining agreement. Alexander stated that Martin was not "loyal" to Respondent and he would not reward a disloyal employee with a full-time teaching contract. Alexander also stated that he believed more qualified candidates would apply if Respondent was hiring for a full-time rather than part-time position. Alexander sought a guarantee from Martin that she would stay in the District. Ultimately, Alexander agreed to review the budget to determine whether there were monies available to assign Martin ATS resource person responsibilities or to split a class into two and assign the second to Martin for the purpose of increasing her to full-time.

10. Alexander sent an email response to Martin on May 20, 2005 regarding their April 27 meeting and her need for full-time work. Alexander's email read as follows:

> Deb…
>
> I have looked at the budget for next year. It isn't going to happen. I already have Tammie with an open time slot..>I can put her in the Core 3 if we decide to split the class.
>
> I understand if you have to go to another district for full time work. Quite frankly, Deb, I don't feel you have been happy here at Port…and it would probably be beneficial if you were to seek another position where you could be happy.

11. Martin was evaluated in the classroom by Lutzke on six occasions between October 2000 and October 14, 2004. In each instance, Luztke observed her teach a class and

provided comments. In all instances, Lutzke commented positively. Martin was satisfactorily performing her responsibilities as educator.

12. Alexander considered Martin to be an "excellent classroom teacher".

13. Martin has a history of engaging in protected concerted activities. Martin filed three grievances alleging her rights had been violated since 2000. Martin filed grievances on the Association's behalf during the same time period. Martin wore a red tee shirt which read "WEAC Wear Red Day," an orange button which read "PSEP" when contract negotiations were not settled, and all black on a day in support of the Union.. Respondent was aware of Martin's union activities.

14. In the Spring of 2001, Alexander offered Martin the Activities Director responsibilities as a result of the impending departure of Brian Skortz. Alexander believed Martin had knowledge in sporting activities and was interested in sports. Martin was the only part-time teacher in the District. Martin declined. The activities responsibilities accounted for a .17 full-time equivalency and had Martin accepted, she would have been full-time. Alexander was aware of Martin's protected concerted activity at the time he offered her the Activities Director position.

15. Alexander owns the book entitled, *The Worm In the Apple: How the Teacher Unions Are Destroying American Education*. The author of this book seeks to convince its readers that the teachers' unions are a "political and economic monopoly that is choking the education system" and that it is time to "bust the Teacher Trust". Alexander stores this book on the bookcase in his District office with the front cover facing out so that visitors to his office see cover rather than the spine of the book. Alexander purchased this book as a resource for his thesis paper. Alexander's decision to put in view the cover and title of this book communicates his support for the content of the book.

16. In advance of the 2006-2007 school-year, the District posted the full-time mathematics teaching position vacated by Mitchell. There is no evidence in the record that indicates Martin applied for the position. The District hired Kyle Thompson.

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, Michael Alexander, is not a municipal employer, within the meaning of Sect. 111.70(1)(j), Wis. Stats. Alexander acted solely as an agent of the

Respondent, Port Edwards School District in the events described above, and he is not properly named as a Respondent.

4. Deborah N.M. Martin engaged in protected concerted activity within the meaning of Sec. 111.70(1), Wis. Stats., when she filed grievances for herself and on behalf of the bargaining unit and wore pro-union paraphernalia.

5. Respondent violated Sec. 111.70(3)(a)1, Stats., when it refused to consider Martin for a full-time mathematics teacher position for the 2005-2006 school-year due, in part, to her history of engaging in protected concerted activities.

6. Respondent retaliated against Martin in violation of Sec. 111.70(3)(a)1 and 3, Wis. Stats., when it failed to consider her application for the full-time teaching position in the mathematics department following the retirement of Pat McGrath, inasmuch as Alexander's decision was motivated by anti-union animus.

ORDER

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

a. Cease and desist from interfering with, restraining or coercing Deborah N.M. Martin or any of its employees in the exercise of their rights.

b. Cease and desist from discriminating against Deborah N.M. Martin 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 Port Edwards 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 Port Edwards 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 7th day of May, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/
Lauri A. Millot, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES REPRESENTED BY THE PORT EDWARDS 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:

The School District of Port Edwards will not interfere with, restrain or coerce any of its employees in the exercise of their rights.

The School District of Port Edwards will not consider an employee's grievances or other lawful concerted activity when deciding whether to consider an employee's application for a different position within the District.

The School District of Port Edwards will make Martin whole for any losses suffered, less any amount she earned or received that she would not otherwise have earned or received but for the District's failure to increase her full-time equivalency to 100 percent employment, plus interest at the rate of twelve percent (12%) *per annum.*

SCHOOL DISTRICT OF PORT EDWARDS

_____

District Administrator Date

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES REPRESENTED BY PORT EDWARDS TEACERS ASSOCATION 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.

PORT EDWARDS SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

The Complainant

Employees are protected from invidious discrimination based on concerted union activity. Respondent has clearly committed a prohibited practice when it failed to consider and offer Martin a full-time teaching position and therefore, Martin is entitled to a make whole remedy.

Complainant recognizes that the law is clear that it must meet four elements to establish a retaliation claim. Complaint maintains that the evidence supports a finding that the elements have been met.

Martin engaged in lawful concerted activity. She attends union meetings, files union grievances, serves on the union bargaining committee, wears union paraphernalia and has participated in the Homecoming Parade as a union member.

Respondent was aware of Martin's union activities. Respondent admitted as such at hearing.

Respondent was hostile to Martin's activities. Martin worked in an environment that contained both circumstantial and direct statements of union animus. Respondent Administrator Alexander dislikes organized labor and not only articulated to Martin the same, but displayed publications that communicated his dislike to anyone in his office. In Alexander's first year of employment with Respondent there were 13 formalized grievances which is 13 more than the composite total number of formal grievances filed in the ten years prior to his arrival at Respondent.

Alexander admitted at hearing that he felt Martin had filed grievance against him rather than with the Respondent. Alexander's testimony establishes that personalized her actions and viewed them as an affront. Alexander additionally imposed his intolerant view of labor relations by denying employees the opportunity to have a note taker at meetings between him and an employee or risk Alexander refusing to meet.

Alexander's own words establish that he was motivated by hostility when he refused to consider Martin for the full-time teaching position. When Martin met with Alexander to discuss why he would not consider her for the position, Alexander responded that she was a "bad employee" and defined a "bad employee" as someone who filed grievances against him.

He challenged Martin's loyalty and concluded that since she was loyal to the Union, then she was not loyal to the District.

Alexander admitted Martin was an "excellent classroom teacher" and refused to explain why he believed she was not loyal to the District. Since her professional competence is not at issue, then Complainant asserts that Respondent's actions were discriminatory. Case law supports a finding of pretext in this circumstance given Alexander's refusal to explain his conclusion that Martin was not loyal. See QUALITY CONTROLS ELECTRIC INC., 155 LRRM 1014 (323 NLRB No. 29), OPERATING ENGINEERS, 150 V. NLRB, 172 LRRM 2072 (7th Cir. 2003) and MCGEE V. S. PENISCOT SCHOOL DISTRICT, 712 F.S2D 339 (8th Cir. 1983).

The Respondent

Respondent denies that it has committed a prohibited practice. Respondent maintains that it had a legitimate non-discriminator business reason for its decision to hire not hire Martin to the full-time vacant mathematics teacher position.

The management rights clause in the parties' collective bargaining agreement grants the District the right to hire the applicant of its choosing to fill vacant positions. The District exercised this right in a reasonable and non-discriminatory manner. The District was in need of hiring a full-time math position. Teachers with proficiency in teaching math and science are difficult to find and retain. Applicants with these specialized skills are more likely to seek out and ultimately accept full-time employment and higher compensation. Therefore, when the District decided it would post a full-time rather than part-time position, its decision was reasoned and legitimate given the hiring market.

Respondent does not contest that Martin was an active member of the Association or that it was aware of her activities. But, the evidence does not establish that the District was hostile to Martin's union activities. Martin signed grievances on behalf of the Association and herself throughout her career with Respondent. In spite of this, she was offered the Activities Director responsibilities by Alexander in 2004. If Respondent or Alexander was hostile to Martin's concerted activities, then it would not have approached her with the additional work and additional compensation.

With regard to the conversation between Martin and Alexander on April 27, 2005, Respondent does not dispute that they discussed Martin's prior grievances. This does not prove that Respondent was hostile to the activity. It is not a violation of law to discuss past grievances. Moreover, it is illogical for Respondent to deny an excellent teacher an increased teaching load because she unsuccessfully filed grievances against the Respondent in the past.

The Association's contention that Alexander "dislikes organized labor" as evidenced by the high number of grievances filed during his tenure lacks merit. The fact that the labor organization exercised its contractual right to file grievances is not evidence of hostility or motive on the part of Respondent. Rather, it is only evidence that the Association is litigious.

District Administrator Alexander's opinion that a note taker is unnecessary in meetings between employees and management is not unlawful nor does it support a finding that Alexander bears anti-union motivation. As to Alexander's display of a book which the Union dislikes, there is no evidence as to whether Alexander agrees or disagrees with the conclusion reached by the author. Alexander testified that he didn't even read the book. It is ironic that the Complainant contends that Martin's rights were violated, but fails to consider that it is denying Alexander his First Amendment right to read publications of his choosing.

Complainant in Reply

The Complainant recognizes that is usually difficult to prove hostility to protected concerted activity. This case is not so difficult. The District has acted transparently in both its hostility to union activity and its willingness to invoke union activity as the reason for denying Martin full-time employment.

Respondent's "talent pool" argument is false. Alexander did not offer this as the reason Martin was not considered for the full-time position during their meeting of April 27 even though that was the purpose of their meeting. Rather, Alexander told her she was disloyal and reviewed the grievances she had filed against him and the District. Had the reason been a desire to post a 100 percent position, why wouldn't he have said so at their meeting?

Accepting that there is a shortage in the pool, why would the District search for a full-time unknown candidate when it had an excellent teacher on staff seeking the full-time position? It makes little sense, especially in light Alexander's email of May 20 where he asks Martin to resign which would result in two vacancies.

Respondent acted with an unabashed heart of union animus. The Examiner should order the District to place Martin in the full-time position and make her whole for any wages lost as a result of the District's unlawful actions.

DISCUSSION

The Complainant has alleged violations of Sections 111.70 (3)(a) 1 and 3, Wis. Stats. when Respondent refused to consider Deborah N.M. Martin for a full-time mathematics instructional vacancy.

Applicable Legal Standard

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., those 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).

Elements one and two are fact specific. In analyzing the third and forth elements,

> 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.

Evidence of hostility and illegal motive may be direct, such as with overt statements of hostility or hostility may be inferred from the circumstances. MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT), DEC. NO. 31228-A (Shaw, 7/06). When there is insufficient direct evidence of hostility or illegal motive, then the totality of the circumstances are evaluated to determine whether the established facts logically support an inference of pretext. *Id*.

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. LA CROSSE 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.

Merits

Complainant alleges that Respondent interfered and retaliated against Martin when it failed to consider her for full time employment as a mathematics teacher.

Martin was an active member of the labor association. She performed administrative functions for her Union by filing grievances on behalf of the membership and she filed grievances individually. Martin further participated in various organized activities in the workplace including wearing a specific red tee shirt and wearing buttons which communicated her solidarity to the local and state Union. The facts establish that Martin met the first two elements and Respondent concedes the same.

Complainant cites various sets of circumstances that it argues are indicative of Respondent's unlawful motive. Complaint first points to District Administrator Alexander's personal dislike for unions as demonstrated by his practice of only allowing union members a representative during meetings if the purpose of the meeting is disciplinary. The parties' labor agreement does not provide bargaining unit members the right to a union representative during all meetings with management. As such, absent any other facts or circumstances, Alexander personal practice of not allowing a union member to non-disciplinary meetings is well within his right.

Complainant next relies on Alexander's personal affront to the filing of grievances. Alexander testified that the grievances were "filed against him". Alexander is the highest ranking management employee for the District. It is not unreasonable or unique for a district

administrator to view grievances or other related processes challenging a management decision as a personal critique since it is generally the decision of the district administrator that is the subject of review. However, Alexander's decision to intermix Martin's filing of grievances with his decision to not consider her for the full-time teaching position is problematic.

During Martin's meeting with Alexander on April 27, he brought up the topic of the grievances in the context of discussing the District's decision to not consider Martin for a full-time vacancy. There was no reason for Alexander to confer regarding past grievances, especially if Respondent's assertion in its brief that the District was meritorious in all instances is accurate. Alexander's choice to address past grievances during a meeting which was scheduled for the purpose of ascertaining the reasons for Martin's non-consideration for full-time work is an indicia of Alexander's motivation when making the decision.

Alexander concluded that Martin was not a "loyal employee" to the District and communicated this to Martin during the April 27 meeting. Alexander was unwilling to explain what he meant when he described Martin as not loyal to the District. The topics discussed during the April 27 meeting all related to Martin's union activities and the union's role in the District. It is reasonable to infer that Alexander's reference to loyalty or Martin's lack thereof was related to her union affiliations.

Complainant next maintains that Alexander's promotion of the book entitled, *The Worm in the Apple: How the Teacher Unions Are Destroying American Education*, in his office is further evidence of hostility to concerted activity. Owning and inconspicuously housing a book in a bookcase in an office is not evidence of hostility. This is not a situation where the ownership of the book was unremarkable. The evidence establishes that Alexander placed the book in a location where it was in full view to visitors in his office. Although Alexander testified that he had not even read the book, I find it unbelievable that a school district administrator would purposefully display a book which has a title and message so concentrated as that of this book and not understand that it may draw the ire of the union membership.

Respondent argues that Alexander has a first amendment right to read books of his choosing. Alexander is an employee of Respondent. Employees' personal rights are sometimes limited in the context of an employment setting. While I recognize that Alexander has a personal right to read such a book in the privacy of his home, he does not enjoy that same right while in his place of employment when the manner in which he chooses to exercise that right is inconsistent with the statutory obligations.

As to Alexander's testimony that he had not read the book, I find it incredible that he would display a book with such an inflammatory title that he had not read. Common sense dictates that one does not flaunt anti-union rhetoric in such a conspicuous location unless there is an intent to communicate the message.

Respondent argues that it did not consider Martin for the full-time position for a legitimate non-discriminatory reason. Specifically, it was searching for a high-quality teaching

staff member and it knew that it would recruit stronger candidates if it posted a full-time position rather than a part-time position. There is no evidence to contradict Respondent's conclusion that the candidate pool is stronger in the discipline of math and science if the position that is posted is full-time. Respondent had a bona fide reason to post a full-time rather than part-time vacancy.

Respondent next points to its willingness to offer Martin the activities director responsibilities as evidence that it was not deterred from considering Martin for additional or different District positions as a result of her union activities. Respondent explained that Martin was identified for the activities responsibilities due to her interest in sports and because of her part-time status and the ease at which it could be added to her schedule. The responsibility was offered to Martin in 2001. The evidence establishes that the union-related topics discussed by Alexander with Martin on April 27 were post-2001 matters and that Respondent considered those matters when making its decision to not consider Martin for the 2005-2006 full-time vacancy.

Martin sought to be considered for a vacant full-time teaching position and was denied. Martin had a history of engaging in protected concerted activity and Respondent was aware of her history. Respondent's proffered reason for not considering Martin for the position is valid. Respondent was additionally motivated by unlawful union animus and in retaliation for Martin's record of engaging in concerted activities. Consistent with MUSKEGO-NORWAY, *supra*, the evidence establishes that Respondent was motivated, in-part, by Martin's protected concerted activity when it denied her full-time employment in violation of applicable law.

Dated at Rhinelander, Wisconsin, this 7th day of May, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lauri A. Millot /s/
Lauri A. Millot, Examiner

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