

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**GREEN LAKE EDUCATION ASSOCIATION**, Complainant,

vs.

**SCHOOL DISTRICT OF GREEN LAKE**, Respondent.

Case 12  
No. 66087  
MP-4280

**Decision No. 31805-A**

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**Appearances:**

**John D. Horn**, UniServ Director, Three Rivers United Educators, 104 West Cook Street, Suite 103, P.O. Box 79, Portage, Wisconsin 53901-0079, for the Green Lake Education Association.

**William G. Bracken**, Labor Relations Coordinator, with **Edward J. Williams** on the brief, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, for the School District of Green Lake.

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

On July 18, 2006, Complainant filed a complaint of prohibited practices with the Commission alleging that Respondent had violated Sec. 111.70(3)(a)1, 4 and 5 Stats., by laying off certain teachers in violation of a labor agreement and in violation of its duty to bargain to the extent the actions occurred during a period when the labor agreement was not in effect. On August 3, 2006, Respondent filed an answer to the complaint. On September 13, 2006, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as Examiner. Hearing was conducted in Green Lake, Wisconsin on November 28, 2006. Prior to going onto the record, the parties engaged in extensive pre-hearing discussions, including an effort to resolve the matter. The conclusion of those discussions did not leave sufficient time on November 28, 2006 to start and complete evidentiary hearing. The parties agreed to reschedule the matter to January 16, 2007. On that date, evidentiary hearing was conducted in Green Lake, Wisconsin. At the start of that hearing, the parties agreed that litigation of the

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complaint would focus exclusively on the alleged violation of Secs. 111.70(3)(a)1 and 5, Stats. Kate Worth filed a transcript of the hearing on February 8, 2007. The parties filed briefs and reply briefs by March 28, 2007.

### **FINDINGS OF FACT**

1. The Green Lake Education Association, referred to below as the Association or as the GLEA, is a labor organization which maintains its offices in care of Three Rivers United Educators, P.O. Box 79, Portage, Wisconsin 53901-0079.

2. The Green Lake School District, referred to below as the District or as the Board, is a municipal employer which has its offices at 612 Mill Street, P.O. Box 369, Green Lake, Wisconsin 53901-0079. Since July 1, 2006, Kenneth Bates has served as District Administrator. His predecessor was Nancy Burns. E. Jon Tracy has served as District Principal since August of 2005. Tracy also served as acting District Administrator for the time between Burns' departure and Bates' assumption of the position of District Administrator.

3. The District and the Association have been parties to a series of collective bargaining agreements covering a unit of teachers. The collective bargaining agreement in effect "from July 1, 2005 through June 30, 2007" contains the following provisions:

#### **ARTICLE II BOARD FUNCTIONS**

- A. **RIGHTS** – The Board's right to operate and manage the school system is recognized including the determination of the teaching force, the right to plan, direct and control school activities; to schedule classes and assign workloads; to determine teacher complement; to create, revise and eliminate positions . . .
- B. **EXCLUSIONS** – The foregoing enumeration of the functions of the Board shall not be deemed to exclude other functions of the Board not specifically set forth, the Board retaining all functions not otherwise specifically nullified by this agreement.
- C. **CONTINUITY** – The Board shall not be required to continue any function. . . .

#### **ARTICLE IV LAY OFF**

- A. **DETERMINATION** – Whenever a reduction in teachers during the term of this agreement is deemed necessary by the Board due to reasons such as a decrease in enrollment, educational program changes and budgetary or financial limitations, the procedure set forth in this Article shall be followed. (Reduction in teachers shall also be interpreted to mean partial layoff or reduction in hours.)

The Board will first determine the number of teachers to be laid off and then, in consultation with the District Administrator, will determine the individual teachers to be laid off in accordance with the following steps:

Step 1. Normal attrition

Step 2. Seniority

The Board may consider the performance of extra duties which are important to be maintained and in that event may lay off the next more senior teacher.

. . .

D. RECALL – Recall shall follow use the same criteria as layoff. . . .

J. SENIORITY DEFINED – In the event that seniority is the basis for any decision specified by this Agreement it shall be defined as follows: Full time teachers shall be credited full seniority within the area of certification in which they are serving from the date of hire . . . The school district will provide the GLEA with an updated seniority list by July 1<sup>st</sup> annually.

The following will result in the loss of accrued seniority: If the teacher resigns or quits; if the teacher is discharged or non-renewed; if the teacher leaves the bargaining unit; if the teacher is laid off for a period of time which exceeds the recall period.

## ARTICLE V PLACEMENT

A. ASSIGNMENT – The Board retains the right to make grade, subject and activity assignments as necessary in the best interest of the District. . . . The Board shall inform teachers of their tentative assignments for the following school year by April 1<sup>st</sup>. The GLEA recognizes that many factors can cause changes in these assignments and agrees that such assignments cannot be held as binding upon the Board.

Insofar as practical, assignments and transfers will take into consideration employee professional training, experience, specific achievements and service in the district.

- E. QUALIFICATIONS – If in the opinion of the Board or Administration, a voluntary applicant for a head coaching position does not meet the qualifications expected or necessary to deliver a quality program, the district may fill the position with someone who is not a member of the bargaining unit. . . .

#### ARTICLE VII TEACHING LOAD

. . .

- D. SECONDARY PREP TIME – All full time secondary teachers shall have a minimum of two class periods daily preparation time during the regular eight period student instructional day. A teacher teaching three classes will receive one prep period, four 1.33 prep periods a day and five classes 1.66 prep periods a day. . . .

#### ARTICLE XIII GRIEVANCE

. . .

- C. GRIEVANCE PROCEDURE – Grievances shall be processed in accordance with the following procedure:

. . .

The final step of the procedure established at Article XIII, Section C is a Board response to a grievance. The agreement does not provide arbitration of grievances not resolved in the specified steps. Gary Krahn, Dan Lueck, William Reininger, and Barbara Born are individual teachers included within the bargaining unit governed by this collective bargaining agreement. On the October 13, 2006 seniority list, those teachers have, respectively, the following dates of hire: October 12, 1983; August 14, 1991; July 8, 1992; and August 16, 1995. That seniority list notes Krahn as the District's sole Technology Education teacher; Lueck as a Physical Education teacher; Reininger as the District's sole Business Education teacher and Born as the District's sole Family/Consumer Education teacher.

4. The District is small and does not receive a significant amount of State aid under governing formulas. Recent school years have brought a decline in student enrollment, and the District has historically maintained a lower teacher/student ratio than the statewide average of Wisconsin public school districts. The intersection of declining revenue and increasing fixed costs has caused the District budgetary difficulty. In the Spring of 2006, the District anticipated a deficit for the 2006-07 school year that might reach between \$200,000 and \$300,000. As of February of 2007, the District was operating at a \$100,000 deficit for 2006-07 fiscal year, and anticipated a deficit of \$270,000 for the 2007-08 fiscal year. Concern for

the District's budget prompted Tracy and Burns to discuss means of ameliorating anticipated deficits. In those discussions, Tracy recommended to Burns that the Board set a policy of not offering classes unless at least six students enrolled in it. Burns agreed and recommended the limit to the Board. At its December 21, 2005 meeting, the Board approved the recommendation by approving the publishing of the District's 2006-07 Course Description Book, which stated, at Item 7 under "Guidelines To Registration":

The school board has set the minimum number of students in a class at six. If during the enrollment process a class drops below six, the principal may close a section and the student will be contacted and offered an opportunity to take a different class which may include online, distance learning, or correspondence course.

The Course Description Book offered, within the Technical Education Department, a course entitled "Digital Photography and Graphic Design." Krahn has instructed courses in Photography and in Digital Photography during his tenure with the District, including the second semester of the 2005-06 school year. The District has also offered Digital Photography through the Wisconsin Virtual School (WVS). In WVS, school districts can partner to offer certain courses online. The District offered Digital Photography through WVS in both semesters of the 2005-06 school year, assigning an aide to supervise it.

5. Jan Hauer serves as a School Counselor for the District. She is not a member of the bargaining unit noted in Finding of Fact 3. In conjunction with the Principal and the Superintendent, she creates the class schedule for teachers. She works primarily with the Principal. Broadly speaking, the Principal informs her which teachers are available to teach approved courses. She inputs this information into a computer program which constructs a tentative teaching schedule. This process is ultimately based on a registration process through which students indicate interest in courses. The District has historically started the registration process in February. The registration process starts with an update to the District's Course Description Booklet. Through the 2005-06 school year, students indicated interest in specific courses via completion of District generated forms. After the 2005-06 school year, the District moved this part of the process on-line. Hauer takes the interest statements filed by students, whether in paper or on-line, and creates documents stating the number of students interested in each course offered in the Course Description Booklet. Hauer refers this document to the Principal and Superintendent who decide which courses the District will incorporate into a teaching schedule to be staffed by its instructors. Hauer then creates a draft teacher schedule through a computer program. The schedule is essentially a spreadsheet with individual cells identifying teachers by name; by classroom; by specific course; and by individual period of the eight period instructional day. These drafts are subject to amendment depending on District decisions on which courses to offer and which courses to close. Where course offerings are closed, Hauer will contact affected students and have them re-enroll in available courses. Teaching schedules are subject to frequent revision throughout the Spring and Summer following the initiation of the registration process.

6. The creation of a teaching schedule for the 2006-07 school year was complicated by the budgetary difficulties described in Finding of Fact 4. Hauer worked with Tracy and Burns to create that schedule. Burns and Tracy worked together to create a District budget for the 2005-06 and the 2006-07 school years. In late March of 2006, Burns and Tracy created a document including a wide variety of staff reductions which totaled over \$270,000. Included in that document was the following:

**Costing for Proposed Staff Reductions 2006-2007**

**2007-2008 Administrative team**

Go to one Principal, District Administrator and .5FTE Curriculum Director who is a teacher on our staff. GT, AD could be assigned to either DA or principal and the building split between the two 5-12 and PreK-Grade 4.

**Staffing reductions for 2006-2007**

1.	Gary Krahn 100% to a 71% contract	\$14,837
	...	
3.	Hire 2 PE teachers lay off Dan Lueck	\$74,387
	...	
5.	Barb Born from 58% to 63% contract	+\$ 2,868
	...	

The increase in Born's contract reflects the assignment to her of Work Study. At a meeting on April 12, 2006, the Board voted to reduce the budget for 2006-07 thus: "Reduce Tech Ed position from 100% to 50%; Discontinue elementary French; Reduce secondary French position from 100% to 66%; Increase F/CE position from 58% to 63%; Lay off one elementary teacher; Reduce one physical education position from 100% to 94%; Reduce elementary guidance position from 100% to 80%; Reduce library aide to half-time; Eliminate tae-kwon do from lifetime activities; Eliminate bowling from curriculum; Discontinue using Scantron watermark report card paper; No food accounts for board, staff and students; Cease paying for student insurance; No extra summer custodial help; Reduce technology budget by \$30,000; Reduce building and grounds costs by \$13,500; Reduce class advisors by \$2,000; Collect instrument rental fees per board policy; Collect and issue all band resale items in office."

7. Board deliberation at the April 12, 2006 meeting lasted beyond midnight.. In accordance with the Board's April 12, 2006 deliberations, the District issued notices of layoff, under Burns' signature and dated April 15, 2006. The letter issued to Krahn states:

The purpose of this letter is to inform you that at the April 12, 2006 regular meeting of the Board of Education, members of the school board approved a motion to place you on a .50 FTE lay-off status for the 2006-2007 school year due to a decrease in the number of class sections in your area of certification. This letter is intended to serve as the . . . notice . . . specified in Article IV, B of the Master Agreement.

You were selected for contract reduction based on your seniority. You are the least senior teacher in the area where a reduction in staff will occur next year.

. . .

Lueck received a similar letter, which noted, "the board approved a motion to place you on a .94 FTE contract for the 2006 – 2007 school year due to a decrease in the number of teaching positions in your area of certification and financial considerations." Born received a similar letter, which noted, "at the April 12, 2006 regular meeting . . . the board approved a motion to reduce the number of class advisers for the 2006 - 2007 school year due to financial considerations." Born, however, also received a letter dated April 13, 2006, which states:

The purpose of this letter is to inform you that at the April 12, 2006 regular meeting of the Board of Education, members of the school board approved a motion to increase your contract to 0.63 FTE for the 2006 – 2007 school year due to an increase in high school course offerings in your area of certification. This letter is intended to serve as the . . . notice . . . specified in Article IV, B of the Master Agreement.

You were selected for contract increase based on your seniority. You are the most senior teacher in the area where an increase in staff will occur next year.

. . .

9. In a letter dated April 21, 2006, the Association formally grieved "the District's application of the Agreement to the layoffs for the 2006-07 school year." Between April and June of 2006, the parties processed this grievance, with the Board issuing its denial of the grievance in a letter to the Association dated June 16.

10. In a letter to Lueck dated August 15, 2006, Bates noted, "at the August 9, 2006 Board of Education meeting, the . . . Board approved your recall from layoff." The letter noted that Lueck's ".94 assignment is now a 1.0 F.T.E. position of Health/Physical Education/Athletic Director." The Board increased certain other teaching positions, including increasing the hours of a high school special education position and adding an additional teacher for a four-year-old kindergarten program. The District did not make any change to Krahn's position.

11. Work Study is an elective class and has been treated as a teaching assignment. The District has assigned a teacher to this position in the past. District assignment to teach Work Study has not required specific certification. In the District, Vocational Education teachers have been assigned Work Study, provided they had time in their teaching schedule. Born performed the assignment in the 2006-07 school year as well as the 2004-05 school year. Reininger performed the assignment in the 2005-06 school year as well as in each school year from 1999-00 through 2003-04. Krahn performed the assignment in the 1998-99 school year. For the 2006-07 school year, Work Study provided one credit per semester and was offered through the Course Description Book during the registration process. For the 2006-07 school year, Work Study did not require a specific period during the eight period instructional day. When Hauer constructs teaching schedule, she slots Work Study in whatever period the teacher has available within their schedule.

12. For the 2006-07 school year, teachers supervised all study halls, with the exception of a tutorial study hall program implemented in that school year to address the needs of lower achieving students. The District hired an aide to perform the tutorial study hall assignment. For the 2005-06 school year, an aide supervised two study halls each semester. For the 2004-05 school year, an aide supervised two study halls in the first semester and three in the second. For the 2003-04 school year, teachers supervised all study halls. For the 2002-03 school year, an aide supervised four study halls each semester. For the 2001-02 school year, an Aide supervised seven study halls in the first semester and five study halls in the second. For the 2000-01 school year, an Aide supervised five study halls in the first semester and eight in the second. For the 1999-00 school year, an Aide supervised six study halls in the first semester and five in the second. For the 1998-99 school year, an aide supervised six study halls in the first semester and eight in the second. Throughout this period, the instructional day consisted of eight periods. In each school year from 1998-99 through 2006-07, at least one teacher had less than a 1.0 FTE position while a less senior teacher or an aide supervised a study hall. In September and October of 2003, Burns and Association representatives met to discuss a number of issues, including teacher supervision of study halls. Burns and the Association representatives ultimately agreed to the creation of a job description for "Study Hall Teacher". That document states, "This is a teaching assignment and requires that the staff member fully commit to implementing the following tasks . . .". Hauer has worked for the District for thirty years. At no point in her tenure has a Principal or Superintendent directed her to assign a study hall based on seniority. Throughout her tenure, the District has used teachers and teacher aides to supervise study halls.

13. As of March 1, 2006, twelve students had registered for Digital Photography and Graphic Design in the 2006-07 school year. As Hauer developed a class schedule, however, she had difficulty placing six students who had indicated an interest in the class together in the same instructional period. The most Hauer could slot in an instructional period was four students. At the Board's April 12, 2006 meeting, District administration and the Board discussed this difficulty. At some point in these deliberations, the Board considered offering the course online. However, the larger budgetary issues overwhelmed this discussion and the Board ultimately concluded that it would remove the class from Krahn's teaching



schedule, thus reducing his contract from 0.71 FTE to 0.50 FTE as noted in Finding of Fact 7. Hauer continued, however, to attempt to create a Digital Photography and Graphic Design class, asking the District if she should run the course through WVS. As of June 8, 2006, Hauer had fifteen students enrolled in Digital Photography and Graphic Design through WVS at varying periods of the instructional day over both semesters of the 2007-07 school year. Hauer assumed the course would be supervised by an aide rather than by Krahn. Sometime in June of 2006, the Board determined that it would not offer Digital Photography and Graphic Design, and sometime late in June of 2006, Hauer was directed by District administration to close Digital Photography and Graphic Design as a course offering.

### **CONCLUSIONS OF LAW**

1. The Association is a “Labor organization” within the meaning of Sec. 111.70(1)(h), Stats.
2. The District is a “Municipal employer” within the meaning of Sec. 111.70(1)(j), Stats.
3. Krahn is a “Municipal employee” within the meaning of Sec. 111.70(1)(i), Stats.
4. By reducing Krahn’s teaching load and increasing Born’s teaching load for the 2006-07 school year through the assignment of Work Study, the District violated Krahn’s rights under Article IV, Sections A, D and J of the collective bargaining agreement noted in Finding of Fact 3. The violation of the collective bargaining agreement constitutes a violation of Sec. 111.70(3)(a)5, Stats., and derivatively, of Sec. 111.70(3)(a)1, Stats.
5. With the exception of Conclusion of Law 4, The District acted within its authority under Articles II, IV and V of the collective bargaining agreement noted in Finding of Fact 3. The District thus committed no violation of Sec. 111.70(3)(a)5, Stats., or of Sec. 111.70(3)(a)1, Stats., regarding its creation of Krahn’s teaching schedule for the 2006-07 school year with the exception of the conduct noted in Conclusion of Law 4.

### **ORDER**

1. Those portions of the complaint challenging District conduct covered in Conclusion of Law 5 above are dismissed.
2. To remedy the violation covered in Conclusion of Law 4 above, the District shall take the following actions to effectuate the purposes of the Municipal Employment Relations Act:

a. Cease and Desist from laying off or recalling Vocational Education teachers through the assignment of Work Study without considering their seniority, as specified in Article IV of the collective bargaining agreement.

b. Make Krahn whole, with interest at the interest rate set forth in Sec. 814.04(4), Stats., for the wages and benefits Krahn would have earned for the 2006-07 school year but for the District's assignment of Work Study to Born.

c. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this decision of the steps taken to comply with this Order.

Dated at Madison, Wisconsin, this 17th day of May, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Examiner

**SCHOOL DISTRICT OF GREEN LAKE**

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

**THE PARTIES' POSITIONS**

**The Association's Initial Brief**

After an extensive review of the record, the Association notes that the District "had to consider staff reductions for the 2006-2007 school year to deal with the onerous state revenue controls", and contends that the agreement unambiguously makes seniority "the only criteria for layoff, if attrition does not provide the necessary reduction." The agreement also provides that the reduction must leave qualified teachers and that certification defines "qualified." The layoff provisions of the agreement govern all layoffs, whether full or partial.

The grievance does not challenge District assignment rights, but does challenge whether the District undercut seniority through its lay off. Because Krahn is one of the District's most senior teachers, the issue is whether in "applying reductions in time . . . the District made assignments for the 2006-07 school year consistent with seniority for those qualified to do the assignments" and more specifically regarding Krahn. The Association asserts that a number of "obvious assignments . . . should have gone to Gary Krahn."

As preface to this assertion, the Association notes that its listing of certain assignments should not be taken as exhaustive of the options available to the District. More specifically, the Association contends that Work Study constitutes an elective class treated as a teaching assignment. Beyond this, Work Study has been one of Krahn's assignments in the past and is not period-specific. Barbara Born, a teacher with less seniority than Krahn, had her teaching assignment increased due to the assignment of Work Study. Arbitral precedent confirms that the District violated the labor agreement by assigning Work Study to a less senior teacher.

Study Hall assignments are teaching assignments in this District. This is consistent with relevant arbitral precedent and with a bargained Study Hall Job Description. Witness testimony establishes that the District has, over time and in response to staff reductions, increasingly assigned Study Halls to teachers. Krahn has supervised Study Halls and has greater seniority than teachers who have such assignments. Arbitral precedent confirms that if the District chooses to assign Study Halls to teachers, it must do so consistent with seniority. Examination of the 2006-07 teaching schedule specifically establishes that "Dan Lueck had a full-time schedule, but had been give a reduction in time to 91%." The District made him 100% for the 2007-08 school year even though Krahn was available to teach the "several Study Halls" assigned to the less-senior Lueck.

During the scheduling process preceding the 2006-07 school year, the District initially offered Digital Photography and Graphic Design to students through its Technology Education

Department. It later decided to offer the course through WVS. After the Association filed its grievance regarding Krahn's reduction, the District withdrew the course offering. A review of the chronology establishes that the District "chose to not offer the class to any students because Gary Krahn has the right to teach it under the Agreement." This action is "outlandish and intimidating" and violates MERA.

The Association concludes that it has "created a specific example of a teaching schedule for Gary Krahn that would have been both consistent with the Agreement and the law." The schedule "would have added to his 50% assignment by the addition of Work Study, at least one class of Digital Photography and Graphic Design, a Study Hall and one additional preparation period . . . ." From this, the Association concludes that the District should "be found to have committed the alleged prohibited practices . . . be ordered to make Gary Krahn whole for loss of wages, fringe benefits, and pension contributions with interest at the prevailing rate, and . . . be ordered to post appropriate compliance notices and to take whatever other remedial action is deemed appropriate."

### **Respondent's Initial Brief**

After an extensive review of the evidence, the District notes that the District "was confronted with serious budgetary problems involving an approximate \$200,000 deficit", and contends that its conduct to address that deficit complied with Sections A and J of Article IV. It is undisputed that Krahn's sole certification is Technology Education and that he is "the only teacher teaching Technology Education". He is, therefore, "the least senior." The District's decision to layoff "within the area of certification" thus inevitably and necessarily resulted in his layoff and complied with Section A and J of Article IV.

The Association's grievance seeks to "engraft . . . the requirement of not just seniority, but qualifications" in the application of Article IV. In fact, the sole agreement provision that turns on qualifications is Article V, Section E, which governs "head coaching positions." Arbitral precedent underscores that the express inclusion of "qualifications" in Article V precludes its implication into Article IV.

Beyond this, Article II grants the District broad rights to "schedule classes . . . to determine the work load of teachers as well as to create, revise and eliminate those positions." More specifically, the District had a "very low teacher student ratio" prior to the budgetary shortfall and determined to set a policy requiring "a minimum of six students in a class in order for classes to exist." The specific impact of this requirement on Technology Education was known prior to the development of the schedules disputed here. Witness testimony establishes that low student numbers produced the cancellation of a number of Technology Education classes. Beyond this, although Digital Photography and Graphic Design produced student interest in excess of that demanded by Board policy, the District could not fit more than four such students "into one specific hour of the day of the class schedule." This prompted the District to consider the offering through WVS. The District chose not to, which is its express right under Article II, Section A.

Beyond this, the labor agreement contains no provision requiring the District to assign Work Study or Study Halls to Krahn. Article II, Section A grants the District discretion to make such assignments in the District's "best interests". The definition of seniority at Article IV, Section J concerns only "area of certification in which" a teacher serves. This excludes Work Study or Study Halls, which demand no certification. Witness testimony establishes that seniority plays no role at present and has never played a role in such assignments. Examination of past teacher schedules establishes that the District has not used such assignments to make part-time teachers full-time. Beyond this, Study Halls have not been assigned exclusively to teachers.

"Ample" arbitral precedent establishes that a school district cannot be compelled to assign study halls to teachers to avert layoff in the absence of a "strict" contractual provision. Against this background, the evidence establishes that the District consistently acted within its contractual authority regarding the layoff/class assignment process preceding the 2006-07 school year. Since the District never acted to convey "either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their Section (2) rights", it follows that it committed no violation of Sec. 111.70(3)(a)1, Stats. Its compliance with the provisions of Articles II and IV establishes that the District committed no violation of Sec. 111.70(3)(a)5, Stats. Thus, the complaint should be dismissed "in its entirety."

### **Complainant's Reply Brief**

The District's attempt to equate Work Study with Study Hall as assignments over which it has total discretion is unpersuasive. Born's increase in assignment "was made because of the addition of Work Study to her schedule . . . based on seniority." That Krahn is senior to Born demonstrates the contractual impropriety of the District's position.

Nor is the District's use of Article V, Section E persuasive. That the argument first appeared in the District's brief shows the level of faith the District has in the argument. Beyond this, the argument fundamentally misapplies the principle of "expression unius est exclusio alterius." Article IV, Section A lists no criteria beyond "Normal attrition" and "Seniority." District use of Article V is unjustified under the interpretive principle it cites.

District interpretation of "Certification Area" is "far too narrow." District action toward Born belies its narrow reading of "Certification Area" regarding Work Study. Only "two possible applications" exist to apply seniority to Work Study: "Either the 'area of certification' is all certified teachers, because all teachers are certified to do the work, or it is the Vocational Education area where Barbara Born and Gary Krahn both work." The language of Article IV, Section J and of Sec. 118.33(1)(am), Stats., support the latter, but it makes no difference under these facts, since "Gary Krahn is the most senior teacher in either case." District attempts to restrict "area of certification" to "those teachers who hold specific certifications for particular classes" is unpersuasive. Arbitral precedent confirms this, as does the Wisconsin Administrative Code.

District action regarding Digital Photography and Graphic Design underscores that the District's reading of the contract belies its attempt to thwart Krahn's assertion of the right to file a grievance. This course "would add at least another class period so that alone it would make Gary Krahn 5/8 (63%) rather than 4/8 (50%)."

The District's use of Study Halls is distinguishable from those districts pointed to in the arbitral precedent cited by the District. Bargaining history evidence establishes specific communication from the District to the Association regarding a "commitment for staff members to be full time, if at all possible." In the 2006-07 school year, "some teachers were kept full-time with multiple Study Hall assignments." Under Article IV, "(a)t least one of these assignments must have gone to Gary Krahn."

Since the Association "has created an example of a teaching schedule for Gary Krahn that would have been both consistent with the Agreement and the law", it follows that the District violated contract and law. The schedule "would have added to his 50% assignment by the addition of Work Study, at least one class of Digital Photography and Graphic Design, a Study Hall and one additional preparation period, per Article VII-Teaching Load, D-Secondary Prep Time, thereby making Gary Krahn's assignment 100% for the 2006-07 school year." The remedy requested by the Association must, therefore, be granted.

### **Respondent's Reply Brief**

Building on a quote from Mark Twain, the District contends that the Association's brief rests on fiction, not fact. Article IV, Section J unequivocally defines seniority as "area of certification" and does not link seniority with qualifications. The attempt to link the two seeks something through litigation never gained in bargaining. Krahn was assigned Work Study "for only one year (1998-1999)." From 1999 to 2004, a less senior teacher "was assigned work study." Born got the assignment for 2006-07, in spite of the fact that she was less senior than her predecessor in the position. There is only fiction, and no contractual right for senior teachers "to maintain full-time positions when the District is considering staff reductions."

There is no contractual right for a teacher to claim a Study Hall. From the 1998-99 school year, the District has assigned Study Halls to less senior teachers or aides while more senior teachers served in part-time positions. The 2006-07 school year was the "first time that no teacher aide was assigned a study hall" but this "had nothing to do with the layoff clause or seniority." Nor will bargaining history support the Association. The "study hall teacher job description" dates "from 2003" and governs only those assignments where the District assigns a Study Hall to a teacher. Its existence prompted no grievance or complaint throughout the period the District assigned Study Halls to non-teachers and without regard to seniority among teachers. Beyond this, testimony establishes that the job description was developed in response to the failure of teachers to fully perform the duties expected of them.

Examination of the arbitral precedent cited by the Association is distinguishable from the contract provisions and facts of this complaint. The attempt to color with illegality the District's decision to decline "a Digital Photography class for 2006-07 has no basis in the

record either inasmuch as that is a matter solely vested within educational policy of the District and in management's rights." Beyond that, District testimony establishes that the course "was an elective course that was reduced due to student enrollment." The Association offered no rebuttal evidence.

The evidence establishes that the District's decision to layoff Krahn and others "was based solely on economic and budgetary concerns." The complaint must, then, be dismissed.

### **DISCUSSION**

As noted above, the parties resolved a potential dispute regarding the applicability of the 2005-07 agreement to the complaint. Because the parties agree the contract governs the dispute, there is no issue regarding a contract hiatus under Sec. 111.70(3)(a), 4, Stats., and the complaint poses issues under Sec. 111.70(3)(a)1 and 5, Stats.

The parties dispute, however, whether Sec. 111.70(3)(a)1, Stats., can play any role beyond a derivative violation of Sec. 111.70(3)(a)5, Stats. More specifically, the Association questions whether the timing and implementation of Krahn's layoff reflects interference with a grievance filing, constituting an independent violation of Sec. 111.70(3)(a)1, Stats., see, for example, BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84).

The facts posed here do not, however, lend themselves to an independent Sec. 111.70(3)(a)1, Stats., analysis. Rather, the issue is fully contained within the parties' labor agreement, and thus question the application of Sec. 111.70(3)(a)5, Stats., with Sec. 111.70(3)(a)1, Stats., playing only a derivative role. Article IV, Section A notes the applicability of "reasons such as a decrease in enrollment, educational program changes and budgetary or financial limitations" to layoff. Addressing the "business necessity" doctrine applied by the Commission to some independent violations of Sec. 111.70(3)(a)1, Stats., adds a superfluous statutory layer to the interpretation of Article IV. The statutory issue here is solely whether the District acted within its contractual rights, cf. STATE OF WISCONSIN-UWM, DEC. NO. 30534-B (WERC, 2/05) AT 6.

The argument that the District acted to punish Krahn for filing the grievance is not, in any event, an issue appropriate to the application of Sec. 111.70(3)(a)1, Stats., to the current Commission, which has expressed a desire to address retaliation-type issues under Sec. 111.70(3)(a)3, Stats., see CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03); and DEC. NO. 30534-B, *supra*. These cases have, however, no bearing here. There is no allegation of reprisal under Sec. 111.70(3)(a)3, Stats., cf. GENERAL ELECTRIC V. WERB, 3 Wis.2d. 227 (1958). There is, in any event, no persuasive evidence of proscribed hostility. Hauer's credible testimony standing alone establishes that the District acted throughout the creation of a 2006-07 teaching schedule solely on a desire to fit as wide a variety of instruction as possible within the confines of budgetary reality reflected in Board set minimum class size. The Board did consider whether Digital Photography and Graphic Design would be offered through a traditional teaching format or through WVS. Zuratsky's credible testimony regarding Board

deliberations on the point underscores that financial considerations, rather than proscribed hostility, motivated the District regarding this course offering. The timing of District actions, against this background, lends only the appearance rather than the reality of an issue of proscribed hostility. Loss of the Digital Photography and Graphic Design course followed the filing of a grievance, but the two were not causally related.

The issue thus posed is whether the District acted within the scope of its contractual authority. Sec. 111.70(3)(a)5, Stats., applies because the labor agreement provides a grievance procedure which does not provide for the arbitration of grievances, and because there is no procedural impediment to the Commission's statutory authority to interpret the labor agreement, see MONONA GROVE SCHOOL DISTRICT, DEC. NO. 22414 (WERC, 3/85).

The interpretive issue concerns whether the District violated the labor agreement by not providing Krahn more than the half-time teaching contract he received in August of 2006. The analysis starts with the Association contention that the District should have offered him a full time teaching contract. Crucial to this contention is the Association's view that the agreement required the District to offer Krahn the Work Study assignment made to Born; that the District should have added at least one class of Digital Photography and Graphic Design to Krahn's teaching load; and that the District should have assigned him Study Hall and additional prep to fill out a full time schedule. Because the agreement applies to full and to partial layoff under the first paragraph of Article IV, Section A, Association contentions question whether Krahn should have received any assignment between a 0.50 and a 1.00 teaching contract.

Articles II, IV and V bear on the Association's contentions. Article II generally grants the Board the right to assign teachers and to create workloads. Article V, Section A specifies this general right regarding "grade, subject and activity assignments". Article IV specifically governs the lay off and recall process. Under the parties' agreement, there is no distinction between the criteria governing layoff and recall. Article IV, Section A states the criteria and Section D makes "the same criteria as layoff" govern recall. Thus, whether Krahn was improperly laid off from Work Study or Born improperly recalled to the duty has no significance under this labor agreement.

The District's general right to assign Work Study under Article II does not bear directly on the grievance. Under Article II, the District could have assigned Work Study to either Krahn or Born. Past assignments reflect this. However, Article II, as a general provision, must yield to the specific provisions of Article IV regarding the layoff/recall process.

The Association's argument on this point is persuasive. Article IV, Section A makes "normal attrition" and "seniority" the governing criteria for layoff and recall. There is no dispute that normal attrition plays no role. There is no dispute that Krahn is senior to Born, and thus the interpretive issue is whether Article IV, Section A, Step 2 grants Krahn a superior claim to the assignment. The most forceful argument the District makes on this point is that under the definition of Seniority at Article IV, Section J, Krahn has superior rights to Born only regarding those assignments for which he is specifically certified. Since Krahn is the only



Technology Education teacher, he has no seniority to assert against Born. Under this view, Work Study is an assignment independent of either teacher's "area of certification" and thus a duty which the District can assign, under Articles II and V, in the best interests of the District without regard to seniority and without regard to whether a teacher or aide receives it.

District arguments, applied to the Work Study assignment, unduly strain governing contract language. The reference in Article IV, Section J to "area of certification" does not readily lend itself to the District's restrictive reading. Under that view, general reference to "area of" certification becomes "specific" certification. Past that, there is little support for the view beyond Tracy's testimony, which reflects his own view that District assignment rights are unfettered regarding Work Study and Study Hall. Even ignoring the provisions of Article IV, Section A, his view has little support regarding Work Study. The parties stipulated that Work Study is a teaching assignment. The Course Description Book confirms this, as do past District assignments. Those assignments confirm that Work Study is a for-credit teaching assignment within the Vocational Education Department. Born and Krahn have performed it.

The provisions of Article IV, Section A cannot, however, be ignored. The definition of seniority at Article IV, Section J applies to "any decision specified in this agreement" which turns on seniority. Section A and D of Article IV specify that the layoff/recall decision uses seniority. The District's April 13, 2006 letter to Born advising her of the Work Study assignment acknowledges that seniority played a role in increasing her work load. Against this background, it is unpersuasive to conclude that the decrease in Krahn's workload and the increase to Born's must be characterized as something other than a layoff or a recall. The "area of certification" reference in Article IV, Section J affords no persuasive basis to exclude the Work Study assignment from the scope of the layoff and recall decision. The April 13, 2006 letter belies that assertion. The evidence supports the Association's view that the parties treat all Vocational Education teachers as certified to perform the Work Study assignment, thus bringing it within their "area of certification." Adoption of this view furthers the purpose of Article IV, which calls on the layoff and recall decisions to recognize seniority.

Beyond this, even if the District's view that Work Study is an assignment falling outside of the "area of certification" reference of Article IV, Section J, was accepted, then Work Study remains a duty assignment. The final sentence of Article IV, Section A permits the Board "to consider the performance of extra duties which are important to be maintained." The offering of Work Study to Born confirms the importance of its maintenance. However, that sentence does not grant the District unfettered assignment authority in a layoff situation. Rather, it permits the Board to lay off "the next more senior teacher" to preserve the duty. Since there is no dispute Krahn was certified to perform the Work Study, the District had no basis on which to award the duty to the less senior Born.

That past Work Study assignments have not turned on seniority plays no role here. As noted above, the District has the general right, under Articles II and V, to assign Work Study to either teacher. The District has in fact made such assignments to each teacher, presumably "in the best interest of the District." However, the specific issue posed by the grievance

concerns the layoff/recall decision, which is specifically governed by Article IV, Sections A, D and J rather than the assignment rights of Articles II and V. By reducing Krahn's workload while increasing Born's through the Work Study assignment, the District violated the seniority references of Article IV, Sections A, D and J.

The District and the Association argue that the same contractual analysis applies to Work Study and to Study Hall, but each reach a different conclusion. The analysis stated above would be the same if Study Hall is a teaching duty which the labor agreement allocates between teachers based on seniority. There is some support for this conclusion, but the evidence will not support the Association's argument.

The strongest support for the Association's position is the 2003 Job Description, which states "Study Hall Teacher" is "a teaching assignment". In support of this, it can be noted that teachers supervised all study halls in the 2003-04 and the 2006-07 school years. Arguably, this indicates agreement that Study Halls are teaching assignments. Since Study Hall requires no certification, it can be argued that the assignment falls within the "area of certification" which Article IV, Section J defines as the basis of seniority rights.

This argument, however, lacks persuasive support in contract and in fact. Teacher supervision of all study halls in 2003-04 affords little support for the assertion that the parties viewed the 2003 Job Description to govern the point. The Job Description was not agreed to until the Fall of 2003, while teacher schedules were created in the Spring and Summer of 2003. Use of teachers to supervise Study Hall for the 2006-07 school year ignores that the District created a Tutorial Study Hall for that year, staffing it with an aide.

The District argues a more persuasive view of the Job Description, which is that the parties bargained it to underscore that when a teacher filled the duty, the teacher had to treat it as a teaching assignment rather than as a prep or a duty-free period. More significant than this is the District's long practice of assigning Study Halls to teachers or to aides. The practice preceded and succeeded the creation of the Job Description and affords substantial proof that the parties have not treated the Study Hall assignment the same as Work Study, which is mutually recognized as a teaching assignment to be allocated among teachers covered by the labor agreement. This is not to say the District's scheduling practice is a mutually accepted past practice. Rather, it demonstrates that the parties never bargained that Study Hall is a teaching assignment restricted to certified teaching staff.

The contractual parallels between Study Hall and Work Study are even more tenuous. Work Study is a for-credit course and a teaching assignment shared by certified teachers within Vocational Education. Study Hall requires no certification. While this lends itself to the assertion that all teachers are equally certified for it, the assertion ignores that the definition of seniority at Article IV, Section J is based on "area of certification". This reference presumes "certification". The Association's argument unpersuasively adds "or area in which no certification is required." The significance of this implication cannot be ignored, for it highlights that the Association's arguments stray beyond the layoff/recall decision and into fundamental issues regarding the creation of an instructional workload.

More specifically, the Association uses study halls to make Krahn's schedule full-time. It is not evident how this is to be effected contractually. If Krahn has a superior right to a Study Hall than less senior teachers, how many periods of study hall can he claim and against whom may he claim them? Conceivably, Association arguments could lead to a full time teaching schedule composed solely of Study Halls. This speculative point is not posed by the evidence but highlights the weak contractual underpinning of the Association's position. More to the point, Article IV, Section A grounds layoff decisions in budgetary or policy reasons that demand reductions in teaching staff, effected under Sections A and J via seniority within "areas of certification". This means the decisional process is based on curriculum choices. The Association's use of seniority turns the creation of teacher schedules from student driven curriculum choices to teacher competition for duties based on seniority. Article IV, Sections A and J afford no persuasive support for this.

This is highlighted by the "extra duties" reference of the final sentence of Article IV, Section A. Assuming Study Hall supervisions are "extra duties which are important to be maintained" affords no basis to distinguish between more and less senior teachers, since all are equally qualified to maintain them. That sentence presumes the existence of a duty which can provide a basis to distinguish a greater need for the retention of a less senior teacher.

On balance, none of the language of Article IV or V readily lends itself to the assignment of a Study Hall supervision. This supports the Board's view that Article II governs the assignment of Study Halls as a function of its right to "assign workloads." The evidence establishes that the District created workloads for the 2006-07 school year governed by the same considerations that it applied in the past and consistent with its authority under Article II. It is at least arguable that a Study Hall assignment could fall within the "grade, subject and activity assignments" noted in Article V. Article V, however, grants the Board considerable discretion in making such assignments as opposed to the seniority rights the Association points to under Article IV. Potential abuse of discretion issues are addressed below. In sum, Krahn lacks any right under Article IV or V which could overturn the District's construction of his workload regarding the assignment of Study Halls for the 2006-07 school year.

Article V presumes the sound exercise of Board discretion to act "in the best interest of the District" and with consideration for "employee professional training, experience, specific achievements and service in the district." There is no dispute that Krahn has made and kept over time a strong professional and personal commitment to the District. This is the background against which the Board's action toward the Digital Photography and Graphic Design course must be assessed.

For the Board to act to interfere with the Association's right to file a grievance would be inconsistent with the demands of Article V regarding activity assignments. As noted above, the evidence does not support a conclusion that the District acted in reprisal to the filing of the grievance. That the District has offered the course in the past through Krahn establishes that its continuance for 2006-07 would be consistent with the requirements of Article V. However, Article II, Section C establishes that the District cannot be compelled to continue the offering.

Article IV, Section A establishes that the layoff decision turns on basic policy issues such as “educational program changes” or “financial limitations”. Thus, the issue posed here is whether the District’s exercise of its discretion not to offer the course violated the labor agreement by undercutting Krahn’s contractual rights.

It is evident that the District could have chosen to offer the course. Past that, however, the evidence will not support the conclusion that the District acted beyond the discretion granted it by Articles II, IV and V. As noted above, the delay between February and June regarding the elimination of the course turned not on hostility toward the grievance, but to the uncertainty of whether the class could generate sufficient interest to meet Board policy requiring six students per class. As underscored by the final sentence of the first paragraph of Article V, Section, a change in teaching schedules is not unusual and is a tenuous basis on which to imply a binding duty to make a specific assignment. That more than six students showed initial interest in the class prompted the delay. Hauer attempted, without success, to get at least six students into one period of the teaching schedule. She could do no better than four. The District initially opted to reduce the course from Krahn’s schedule because it was not evident that the course was viable, and the financial shortfall the Board confronted at its April meeting overwhelmed discussion of that single course. Hauer attempted to fit the offering into WVS between April and June. Had she done so, it is not evident that Krahn had a right to instruct the class. Even if he did, there is no persuasive evidentiary basis to conclude that closing the class represents anything beyond District conclusion that the benefit of providing the course exceeded the cost of doing so. On this point, Association arguments strain rights granted under Article IV well beyond the layoff/recall decision. The Association, on this record, asserts less that Krahn was improperly laid off than that the District was contractually bound to build a teaching schedule that maximized his teaching load. This strains Article IV and undercuts the discretion granted the District under Articles II, IV and V.

This is not to say the District could not have chosen to offer the class. The fiscal difficulty faced by the District is no less regrettable than its individual impact on the teaching load of a dedicated teacher. However, the issue posed is whether the grievance points to a contractual basis to compel the offering of Digital Photography and Graphic Design. It does not. Thus, the sole contract violation proven by the Association is the District’s failure to recognize Krahn’s seniority rights under Article IV regarding the Work Study assignment.

The Order does not require extensive discussion. It states a cease and desist requirement, together with make whole relief for Krahn, restricted to the District's failure to recognize his seniority regarding the Work Study assignment.

Dated at Madison, Wisconsin, this 17th day of May, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Examiner

