STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PESHTIGO EDUCATION ASSOCIATION, Complainant,

vs.

PESHTIGO SCHOOL DISTRICT, PESHTIGO BOARD OF EDUCATION and KIM EPARVIER, Respondents.

Case 46
No. 67825
MP-4410

Decision No. 32421-A

Appearances:

Attorney Melissa Thiel Collar, Legal Counsel, Wisconsin Education Association Council, 2256 Main Street, Green Bay, Wisconsin 54311, appearing on behalf of the Complainant.

Davis & Kuelthau, S.C., by **Attorney Robert W. Burns**, 318 South Washington Avenue, Suite 300, Green Bay, Wisconsin 54301, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On March 4, 2008, the Peshtigo Education Association filed a prohibited practice complaint against the Peshtigo School District, Peshtigo Board of Education and the Peshtigo District Administrator, Kim Eparvier, alleging that the Respondents had committed numerous violations of Sec. 111.70(3)(a)1, 3 & 4, Wisconsin Statutes. The complaint, in part, alleged numerous actions by the Respondents during the 2007-2008 school year, which it is contended were in violation of the status quo during a period when the parties were in a contract hiatus. The complaint further alleged numerous actions by the Respondents against individual members of the Complainant Association, as well as against Association members, which it is contended were in retaliation for protected concerted activity by the Association and its members. The Commission appointed John Emery, a member of its staff, as Examiner to issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07 and 111.70(4)(a), Wis. Stats. The Association amended its complaint on May16, 2008, and again on June 9, 2008, to raise additional claims. On June 27, 2008, the Respondents filed an Answer to the

Complaint. A hearing was conducted in Peshtigo, Wisconsin on July 7, 8, and 21 and August 18, 19 and 20, 2008. The proceedings were transcribed and the transcript was filed on September 8, 2008. The parties filed initial briefs by November 5, 2008 and reply briefs by December 21, 2008, whereupon the record was closed.

The Examiner, having considered the evidence, the applicable law and the arguments of the parties and being advised in the premises, hereby makes and issues the following

FINDINGS OF FACT

1. The Peshtigo Education Association, the Complainant herein, is a labor organization maintaining its principal place of business at 1136 North Military Drive, Green Bay, Wisconsin.

2. The Peshtigo School District, a Respondent herein, is a municipal employer maintaining its principal place of business at 341 North Emery Avenue, Peshtigo, Wisconsin.

3. The Peshtigo Board of Education, a Respondent herein, is a municipal employer maintaining its principal place of business at 341 North Emery Avenue, Peshtigo, Wisconsin.

4. Kim Eparvier, a Respondent herein, has served as the District Administrator of the Peshtigo School District since 1995. Eparvier is an agent of the Respondent District and, as such, is a municipal employer maintaining his principal place of business at 341 North Emery Avenue, Peshtigo, Wisconsin.

5. The Complainant and Respondent are in a collective bargaining relationship, but at the time of the events referenced herein the collective bargaining agreement covering the period from July 1, 2005 through June 30, 2007 had expired and the parties were in negotiations over a successor agreement.

6. Under Article II of the 2005-07 collective bargaining agreement, the Complainant is recognized "…as the exclusive bargaining representative on wages, hours, and conditions of employment for all certified teaching personnel employed by the Board including classroom teachers, librarians, guidance counselors, psychologist, nurse, reading coordinator or specialist …"

7. During the 2007-08 school year, the Association officers were Danny Smith – President, Paula Fochesato – Vice President, Terry Gaedke – Secretary and Miriam Schahczenski – Treasurer. The Association is affiliated with the Wisconsin Education Association Council and is represented by UniServ Director Kim Plaunt of United Northeast Educators (UNE).

8. The Peshtigo School District operates a high school, a middle school and an elementary school, which is denominated the Peshtigo Early Learning Center (PELC).Grades K – 6 are housed in the PELC, although 6th Grade is technically part of the Middle School.

9. In order to help older elementary students transition to the middle school structure, the 5th and 6th Grades are both departmentalized by curriculum and the school day is broken into distinct periods, with students passing from one class to the next throughout the day.

10. The last period of the day, from roughly 2:15 p.m. – 3:00 p.m., is unstructured time and has variously been known as Study Hall and A.R.E., which stands for application, review and enrichment. During this period, music students attend Band and Chorus on alternating days. The remainder are assigned to classrooms overseen by the 5th and 6th Grade teachers, where they work on homework and may obtain assistance with their work from the teachers. The teachers do not prepare for this period and no formal instruction occurs at this time.

11. In April 2007, the District posted a position for a 6th Grade Reading teacher. One applicant applied for the position, but was not hired to fill the position. The posting was subsequently withdrawn and replaced with a posting for a long term substitute 6th Grade teacher, which did not offer benefits.

12. In early August 2007, Eparvier informed Smith that he wanted to hire a long-term substitute to fill the 6th Grade opening for 2007-08. Smith consulted with Plaunt and the Association executive committee and subsequently advised Eparvier that the Association would not agree to the hire of a full-time teacher without benefits.

13. Later in August, Patsy Moore, who had been a Title I teacher in the District for several years, approached Eparvier and offered to fill the 6th Grade vacancy for 2007-08. After consulting Elementary Principal Lisa Peitersen, Eparvier notified Moore that her request was approved and Moore thereafter taught 6th Grade Reading during the 2007-08 school year.

Findings of Fact Regarding the Title I Grievance

14. Title I is a federally subsidized program whereby support services are provided to students who have academic problems. Guidelines for Title I requirements are promulgated by the U.S. Department of Education and the Wisconsin Department of Public Instruction.

15. The District did not initially hire a Title I teacher for 2007-08 to fill the vacancy caused by Moore's transfer. Instead, Peitersen directed Jackie Shier and Angie Flett, who had taught Title I in 2006-07, to provide Title I services at the outset of the school year until the administration was able to gain a better understanding of its Title I needs for the school year.

16. Subsequently, Peitersen notified the 5th and 6th Grade Math and Reading teachers – Kay Sodini, Cheryl Lange, Virginia Malmstadt and Patsy Moore – that if the District did not hire another Title I teacher they would be responsible for providing Title I Math and Reading instruction in addition to their regular teaching duties.

17. On August 30, 2007, Sodini, Lange, Malmstadt and Moore sent a memo to Eparvier advising him that, inasmuch as they had been directed to provide Title I services in addition to their regular teaching duties, they were requesting additional compensation under Article XX, Sections F and G of the collective bargaining agreement.

18. Article XX, Section F. provides, in pertinent part:

> "Classroom Driver Education, Homebound Instruction and Extra class rate pro-rated: 1/7 of 192 days of contract. Extra class shall be defined to mean any contact period in excess of five, however, preparation periods and study halls do not constitute contact with students. Furthermore, the District shall only be obliged to pay the 1/7 extra compensation if it assigns the extra class."

19. Article XX, Section G. provides, in pertinent part:

> "A teacher taking another teacher's class shall be paid 1/7 of 1/192 of the substituting teacher's basic contract pay (excluding extra-curriculars). This includes elementary teachers who are required to take gym, music and/or art classes when substitute teachers are not hired. A teacher who substitutes for another teacher in lieu of a regularly assigned class shall receive no extra pay."

20. On September 10, 2007, Peitersen directed Sodini to develop and administer an evaluation tool to identify students in need of Title I services, which she did.

21. On October 11, 2007, Malmstadt sent Peitersen an e-mail regarding providing Title I services, as follows:

> "Lisa,
>
> Cheryl, Pasty [sic], Kay & I feel we need a little direction with teaching the Title I classes. I know I would like to see the federal guidelines to make sure I am doing the job correctly, and how it is supposed to be done. What is the paper work I need, etc. Also when do we start? When are we to teach this class? Where are we to teach this class? Are we going to be paid for the extra duty? Do we get any Prep time? These are a few of the questions we have. So before we begin we would like to meet and iron out the details. Thanks Ginny M"

Peitersen responded later that day, as follows:

> "We'll talk"

22. There was not a subsequent collective meeting between Peitersen and the Title I teachers, but Peitersen separately informed Malmstadt and Sodini that the teachers would not be receiving extra compensation for providing Title I services.

23. On October 17, 2007, at the outset of the second academic quarter of the school year, Peitersen instructed Sodini, Lange, Malmstadt and Moore to commence providing Title I instruction to qualified students. Instruction was to occur during the last period of the day, during which time they were overseeing Study Hall/A.R.E.

24. Sodini, Lange, Malmstadt and Moore provided 5th and 6th grade Title I instruction from October 17, 2007 until the District winter break, commencing after December 21, after which the responsibility for providing Title I services was assigned to teacher Jackie Shier. The teachers submitted requests for extra compensation for the provision of Title I instruction, but were not compensated.

25. On November 12, 2007, the Association filed a grievance on behalf of Sodini and Malmstadt seeking compensation for their provision of Title I services and also seeking to have Title I positions posted rather than assigned in the future.

26. On November 16, 2007 the grievance was denied at the Step 1 level by Peitersen.

27. On November 28, 2007, the grievance was advanced to Step 2.

28. On December 10, 2007, the grievance was denied at Step 2 by Eparvier.

29. On December 19, 2007, the grievance was advanced to Step 3.

30. On February 25, 2008 the School Board held a hearing on the Step 3 grievance at which evidence was presented on behalf of the Association by Plaunt and on behalf of the Administration by Eparvier. The Board denied the grievance.

31. Due the fact that the parties were in a contract hiatus, the Association did not request grievance arbitration.

Findings of Fact Regarding the Fochesato Grievance

32. Paula Fochesato and Jerome Hurley are Elementary Physical Education teachers with the District and Fochesato was, at all pertinent times, the Vice President of the Association. In addition to being licensed to teach physical education, Hurley is certified to teach adaptive physical education to special needs students.

33. Prior to the 2007-2008 school year, the District had contracted with CESA 8 for the teaching of adaptive physical education. The District did not contract with CESA 8 for the teaching of adaptive physical education for 2007-2008.

34. In September 2007, Hurley was directed by the District's Special Education Director, Dr. Ronald Kapp, to begin teaching adaptive physical education at the high school in addition to his elementary physical education classes.

35. In order to release Hurley to teach adaptive physical education, Peitersen directed Fochesato to teach Hurley's 3rd and 5th Grade physical education classes two days per week, along with her own classes.

36. Prior to combining Hurley's classes with her own, Fochesato met with Peitersen and told her she planned to submit pay requests for covering another teacher's classes, pursuant to Article XX, Section G., of the contract. Peitersen agreed and instructed Fochesato to submit her pay requests to the school secretary.

37. During the 2005-2006 school year, Fochesato had substituted for Hurley on one occasion in April 2006, for which she was compensated pursuant to Article XX, Section G.

38. Fochesato began teaching Hurley's classes on October 16, 2007. Her own class sizes varied from 17 to 24 during the 2007-08 school year. During the periods when Hurley's students were combined with her own, her 3rd and 5th Grade classes averaged between 38 and 46 students. Although being taught by Fochesato, Hurley's students remained assigned to him and were ultimately evaluated and graded by Hurley for the second quarter of the school year.

39. In November 2007, Fochesato submitted a pay request for October 16, October 23 and October 30, reflecting 240 minutes of teaching time. Fochesato's November 9, 2007 pay check included $168.36 in extra duty pay, reflecting the time she spent teaching Hurley's students.

40. Fochesato also taught Hurley's classes in November and during the beginning of December 2007 and submitted extra duty pay requests in the same fashion as she had for October. The pay request for November reflected 240 minutes of teaching time and the pay request for December reflected 80 minutes of teaching time. The amount of time Fochesato spent teaching Hurley's students is not disputed.

41. In early December 2007, Fochesato went on medical leave and did not teach for the remainder of 2007.

42. Fochesato was not paid for the time she spent teaching Hurley's students in November and December. Further, Fochesato's December 7, 2007 pay check, which she received by mail, reflected a $168.36 deduction, representing recoupment by the District of the extra duty pay she had received for October. She was not notified in advance that the extra duty pay request was denied or that the October payment was being deducted.

43. On December 10, 2007, Fochesato received an e-mail from Peitersen informing her that her request for extra duty pay for teaching Hurley's classes was denied.

44. On December 19, 2007, Fochesato filed a grievance over the District's refusal to give her extra duty pay for teaching Hurley's classes. The grievance was processed through the contractual grievance procedure in a timely manner and the grievance was denied at each

step. Due the fact that the parties were in a contract hiatus, the Association did not request grievance arbitration.

45. On January 8, 2008, Eparvier met with Fochesato in the gymnasium and asked that she come to his office later for a meeting. She asked if she should bring representation and he said no, that she should come alone and that the meeting was not disciplinary, but was about physical education scheduling.

46. Later on January 8, Fochesato sent Eparvier an e-mail stating that she was not comfortable meeting with him alone and would only meet with him if she could have Association representation with her. She proposed to meet between 11:15-12:00 that day. Eparvier responded agreeing to the time and stating that the meeting involved scheduling of physical education, not her grievance.

47. At the appointed time, Fochesato went to Eparvier's office along with two other teachers, Shelly Zander and Marcia Thurow. Eparvier met them there and was upset at the presence of Zander and Thurow. He ordered Zander and Thurow to leave, which they refused to do unless Fochesato accompanied them. As Fochesato was leaving with Zander and Thurow, Eparvier told her he was disappointed she was unwilling to meet with him and that she would "get it in writing." There was no follow up by Eparvier thereafter.

Findings of Fact Regarding the Hurley Grievance

48. In the fall of 2007, Hurley began teaching adaptive physical education at the Peshtigo High School, as set forth in Findings 33-35.

49. During the second quarter, two of Hurley's classes were assigned to Fochesato, as set forth in Finding 35. The assumption of adaptive physical education duties required Hurley to perform assessments of the students enrolled in the program and to design lesson plans for them.

50. The scheduling of the adaptive physical education classes was determined based upon the schedules of the students involved and Hurley's pre-existing teaching schedule.

51. On January 3, 2008, Kapp notified Hurley that Fochesato would no longer be needed to cover his physical education classes while he was teaching adaptive physical education and informed him of what the new schedule for adaptive physical education would be. The new schedule required Hurley to teach adaptive physical education during his preparation time.

52. On January 8, 2008, Hurley e-mailed Peitersen regarding his desire to receive extra compensation for having to teach adaptive physical education during his preparation time. Peitersen responded and agreed to meet with Hurley to discuss the matter.

53. Hurley met with Peitersen on Wednesday, January 9, 2008, at which time Peitersen informed him that he would not be compensated for teaching adaptive physical education.

54. For the spring semester of the 2007-2008 school year, Hurley submitted pay requests for 22 hours and 20 minutes of teaching adaptive physical education, for which he calculated he was entitled to $528.21 in extra duty pay. The requests for extra duty pay were denied.

55. On January 15, 2008, Hurley filed a grievance over the District's refusal to give him extra duty pay for teaching adaptive physical education during his preparation period. The grievance was processed through the contractual grievance procedure in a timely manner and the grievance was denied at each step. Due the fact that the parties were in a contract hiatus, the Association did not request grievance arbitration.

Findings of Fact Regarding the Schahczenski Grievance

56. Article XIII, Section B. provides as follows:

> "Teachers shall adhere to the daily schedule and shall make no commitments which will preclude their being present in their assigned responsibilities. Request for exceptions must be submitted to the principal prior to the anticipated teacher absence and/or late arrival or early leaving. Salary deductions will be made on a per diem basis or a pro rata share thereof of unapproved absence, late arrival or early leaving. Teachers shall not leave the building to which they are assigned during class. During preparation periods, or at other times when not in class, a teacher may leave the premises by signing a checkout sheet in the office providing their leaving is not in conflict with any other duly authorized responsibilities."

57. Over the years a practice developed whereby teachers would cover for one another from time to time, without pay, during the last period of the day, described in Finding 10, or at other times when instruction was not occurring, in order to facilitate medical appointments and other personal commitments off school premises. Occasionally, teachers would also cover for one another during instructional time.

58. On December 20, 2007, the day after the filing of the Fochesato grievance, set forth in Finding 44, Eparvier, Peitersen and High School Principal Steve Motkowski issued the following e-mail to the District staff:

> "The Association has taken the position that administration is in violation of Article II and Article XX of the Master Agreement by allowing teachers to take other teacher's [sic] classes without pay. We would like to take a pro-active approach to avoid any potential grievances in the future, or to allow double

> standards to be taking place at the discretion of the teachers. Therefore, administration can no longer allow teachers to take other teacher's [sic] classes for any reason. When two classes are joined for movies or special presentations, all classroom teachers must be present to supervise their students.
>
> If you have any questions regarding this, please see administration."

59. In furtherance of the change in policy, Eparvier promulgated a Teacher Absence Form requiring teachers to formally request to leave the school premises during the school day and providing that any teacher leaving the premises during the school day, whether or not the absence was approved, would be subject to a pro rata salary deduction.

60. In response to the e-mail, the Association filed a grievance over the discontinuation of the practice.

61. In discussions over the grievance the Association and District Administration entered into an agreement on April 16, 2008, signed by Smith and Eparvier, establishing a new policy whereby teachers, on rare occasions and with the prior approval of the building principal, could leave the premises early and request coverage of their students from another teacher during that teacher's preparation time, without pay. The teacher requesting to leave would either be deducted pay for the absence, or would be deducted sick leave, depending on the circumstances of the absence. Under current practice, sick leave could be used only in increments of one-half day or more. As a result of the agreement, the Association withdrew the grievance.

62. For some time the District has maintained a policy regarding use of the District's computers and computer network, which is applicable to all District staff. The policy provides, in pertinent part:

> **TECHNOLOGY AND NETWORK ETIQUETTE**
>
> You are expected to abide by the following rules:
>
> . . .
>
> 6. Wasting technology resources including file space and printers (toner and paper) is prohibited.
>
> . . .
>
> 9. Be polite. Use appropriate language. Do not swear, use vulgarities or any other inappropriate language. Illegal activities, including violations of copyright law, are strictly forbidden.

. . .

11. All files retrieved by or stored on the computer system are the property of the Peshtigo School District and may be treated the same as school lockers. Note that electronic mail (e-mail) is not guaranteed to be private. People who operate the system do have access to all mail. Messages related to or in support of illegal activities may be reported to the authorities.

63. Historically, the technology policy has not been interpreted to prohibit personal use of the computer hardware or e-mail system, or use of the computer hardware or e-mail system for Association business.

64. On December 20, 2007, Miriam Schahczenski, in her capacity as a member of the Association Executive Committee, sent an e-mail on the District's system to all Association members regarding the memorandum set forth in Finding 59, as follows:

"The e-mail (below) which was sent to all staff is certainly telling.

This clearly shows the pettiness and foolishness of the distict [sic], especially when a fair grievance has been filed..
When staff members attempt to **save the district money** by having another staff member simply **supervise** students in order to attend an appointment at day's end...and now we are told not to...I presume you will need to get a substitute for a ½ day...**thus costing the distict [sic] money.**

The members of the negotiations and grievance committees will continue to work on behalf of the PEA and indirectly on behalf of the students of our district.

Mimi

65. At some point Eparvier became aware of Schahczenski's e-mail and, on January 10, 2008, Eparvier hand delivered the following notarized letter to Smith in his classroom:

January 10, 2007 [sic]

Danny Smith, President
Peshtigo Education Association

I am hereby putting you on notice that this attached e-mail that was sent out by Mimi Schahczenski to PEA members is considered to be serious personal harassment against me by Mimi, and all other union officials and officers that

knowingly tolerated and condoned such action. By using public property and resources while in union positions to promote personal and union biases on work time as a means to promote personal and professional dissension between the membership and myself is nothing short of "bullying" in the workplace.

This action and behavior shall seize [sic] and desist immediately or legal action may be pursued.

Respectfully,

Kim Eparvier, Superintendent
Peshtigo School District

66. On January 11, 2008, Smith responded, as follows:

January 11, 2008

Mr. Eparvier, Superintendent
Peshtigo School District

While I fail to see the harassment in the supplied e-mails from Mrs. Schahczenski, I will proactively address the issue of harassment with the Peshtigo Education Association on Monday, January 14 during our regularly scheduled meeting.

I will remind all members, including officers and officials to not use school (public property and resources) "to promote personal and professional dissension" in **our** work place. I will specifically address the use of computers, e-mail and phone usage.

As union president, I will do everything possible to prevent "bullying" from our staff as well as the "bullying" of our staff. I hope you will unite with me in this task.

Respectfully,

Danny Smith
PEA President
Peshtigo School District

67. After presenting the letter to Smith, Eparvier discussed the Schahczenski e-mail with Peitersen and directed her to discipline Schahczenski, but, at Peitersen's request, gave her discretion in determining the degree of discipline to be imposed.

68. On January 16, 2008, Peitersen had a meeting with Schahczenski and Terri Gaedke wherein she informed Schahczenski that she had been directed by Eparvier to discipline Schahczenski as a result of the e-mail, which was deemed to be a violation of the technology policy. At that time, Peitersen issued Schahczenski an oral reprimand, which was not documented, and considered the matter closed. Schahczenski did not grieve the oral reprimand.

69. Thereafter, on January 21, 2008, Eparvier sent Schahczenski an e-mail requesting a meeting on January 25 to discuss her involvement in a potential violation of the District's Technology Code.

70. On January 25, 2008 Schahczenski and Plaunt met with Eparvier and Peitersen, whereupon Schahczenski was presented with three questions in written form. She was asked whether she wrote the December 20 e-mail, to which she replied "yes." She was asked to whom the e-mail was sent, to which she replied "the PEA membership." She was asked whether the e-mail was sent during the work day, to which she replied, "lunch period." She refused to provide written answers to the questions and her answers were recorded by Peitersen. At the meeting, Peitersen stated that she had already issued an oral reprimand, but Eparvier indicated that he did not consider the reprimand by Peitersen to be discipline and that he was investigating the incident further.

71. On January 28, 2008, Eparvier issued a memo imposing additional discipline on Schahczenski, as follows:

> To: Mimi Schahczenski
> From: Kim Eparvier, Superintendent
> Re: Discipline related to Staff Technology Code of Conduct
> Date: January 28, 2008
>
> At a meeting on Friday, January 25, 2008, you attested to the fact that you sent out an e-mail to the PEA membership that management's decision on a matter, "Clearly shows the pettiness and foolishness of the district, especially when a fair grievance has been filed."
>
> It is management's position that your use of the District's e-mail system on this matter is a violation of Policy 523.4 (pertaining to the section, Technology and Network Etiquette, #6 and #9).

Furthermore, management considers your behavior as "harassment" and "bullying" within the workplace, with an intent to create dissension between management and the PEA.

This correspondence will serve as a "written reprimand" that will be maintained in your personnel file in the District Office. The consequence for this violation will result in a restricted use of technology which will be limited to tasks and responsibilities specifically necessary to conduct school business such as e-mail, newsletters and notices to parents, online grading, progress reports, and internet searches which are required to support student learning. This restriction will remain in effect through March 28, 2008.

Any further violation of the Staff Technology Code of Conduct will result in progressive discipline up to and including termination of employment with the Peshtigo School District.

Copies: Personnel File in District Office
Lisa Peitersen, PELC Principal

72. Article XII, Section C. of the contract sets forth a commitment to progressive discipline and the standards upon which a finding of just cause for discipline is to be based, as follows:

ARTICLE XII
DISCIPLINE AND DISCHARGE

A. It shall be the policy of the District to use progressive discipline where appropriate.

. . .

C. A non-probationary teacher shall not be refused employment, dismissed, suspended or discharged except for just cause. The following tests shall be used in whole or in part to determine whether just cause exists:

1. Did the Board or designee forewarn the teacher of the possible consequences of his or her conduct?
2. Was the rule or order involved reasonably related to proper school operations and/or performance the Board or designee might reasonably expect from an employee?
3. Before administering discipline, did the Board or designee make an effort to discover whether the teacher did, in fact, violate or disobey the order?

4. Was the Board's or designee's investigation conducted fairly and objectively?
5. In the investigation, did the Board or designee obtain substantial evidence or proof of the teacher's guilt?
6. Has the Board or designee applied its rules, orders and penalties even-handed to employees in like circumstances?
7. Was the degree of discipline reasonably related to the seriousness of the offense and the teacher's past record?

73. On February 1, 2008, Schahczenski filed a grievance over the issuance of the written reprimand and suspension of her technology privileges, alleging that she had been disciplined without just cause. The grievance was processed through the contractual grievance procedure in a timely manner and the grievance was denied at each step. Due the fact that the parties were in a contract hiatus, the Association did not request grievance arbitration.

Findings of Fact Regarding the Allegations of Retaliatory Conduct

74. Prior to Kim Plaunt becoming the Union Representative for the Association, that position was held by James Blank, a UniServ Director for United Northeast Educators (UNE). Prior to the 2006-07 school year, Blank announced his pending retirement, which would occur at the end of 2006.

75. In August 2006, Plaunt was hired by UNE as a UniServ Director and worked with Blank as representative to the Association until Blank's retirement. After Blank's retirement in December 2006, Plaunt became the Association's sole Union Representative.
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76. In April 2007, Danny Smith was elected as President of the Association. Previous to Smith, Tavia Schoen had served as President for a number of years.

77. After the Association rejected the District's request to hire a long-term substitute, and the ensuing dispute and grievance over the District's decision to have Sodini, Lange, Malmstadt and Moore teach Title I in addition to their regular teaching assignments, as set forth in Findings 12-31, the relationship between Eparvier and the Association leadership began to deteriorate.

78. At some point during the 2007-08 school year, Eparvier had a discussion with Smith in which he intimated that Smith was not in control of the Association as he should be and that outside persons had too much influence in the handling of issues between the District and the Association. Smith agreed that it would be preferable to resolve issues between the District and Association, with as little intervention from outside persons, such as attorneys or arbitrators, as possible.

79. In October 2007, Eparvier approached Schoen and expressed his frustration at the current relationship between the administration and the Association leadership. He cited

Smith's inexperience and reliance on Plaunt's assistance, which Eparvier did not welcome, in comparison to the working relationship Eparvier had with Schoen when she was President, prior to Blank's retirement. Eparvier indicated to Schoen that Plaunt had no credibility with the Board and that they laughed at her. Eparvier sought Schoen's increased involvement in Association leadership, but Schoen declined, due to differences between herself and Smith.
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80. On January 8, 2008, preparatory to the scheduled Board hearing on the Title I grievance, which had been scheduled for January 30, Plaunt sent Eparvier a letter, as follows:

> RE: Title 1 Grievance
>
> Dear Mr. Eparvier:
>
> Pursuant to Wis. Stats. §111.70 and §103.13, the Peshtigo Education Association (PEA) makes the following request in response to your denial of the above noted grievance.
>
> 1. Any and all documentation, electronic or written relating to the history of the Title 1 position and/or teacher(s) who may have held the position or instructed students in the Title 1 areas for school years 2003-2004 through 2007-2008, including the percentages of contract time, name, subject taught, and whether or not they were CESA employees.
>
> 2. Copies of all semi-monthly extra-duty payroll slips or similar documents as the District may term them for all elementary and middle school teachers for school years 2003-2004 through 2007-2008.
>
> 3. Copies of all individual contracts for those elementary and middle school teachers who had overloads or extra-duties assignments for school years 2003-2004 through 2007-2008.
>
> 4. Copies of any and all correspondence related to the Title 1 grievance, including e-mail correspondence between District Administration, the named grievants, any and all Title 1 teachers.
>
> 5. Copies of all schedules or similar documents as the District may term them for all middle school and elementary school instructors for the 2007-2008 school year and the 2006-2007 school year.
>
> Please provide the above requested documents by Friday, January 18, 2008.

Thank you in advance for your cooperation in carrying out this document request.

Sincerely,
Kim Plaunt
UNE UniServ Director

81. On January 9, 2008, Eparvier and Plaunt had a conversation regarding the document request, which Eparvier followed up with an e-mail to Plaunt on January 10, as follows:

Hi Kim,

Per our conversation yesterday, when do you plan on coming up to collaboratively work on your documents request? I am available all day on January 16th and 18th. It is likely we may need two full days to fill such a comprehensive request.

Secondly, are we tentatively scheduled for January 30th at 6:00 for the Title I Grievance Hearing? If so, please make sure that all past and present Title I teachers, all present 5th and 6th grade core area teachers, the present grievance chairs and the current president of the Association are available for questioning by administration during the hearing. If all these people are not present, it will likely disadvantage administration in its position and evidence on this matter.

Please respond ASAP as I will have to attempt to get all nine Board members present on the 30th if that date works with you and the staff.

82. In response to Eparvier's e-mail, Plaunt sent him another letter dated January 10, 2008, as follows:

RE: Title 1 Grievance request for information

Dear Mr. Eparvier:

I am writing in response to your phone call on January 9, 2008 and follow-up e-mail to me on January 10, 2008 regarding my information request for the upcoming Title I Grievance hearing. If I sounded a bit perplexed in our phone conversation yesterday at your request that I come up and get the records myself, by looking through your computer records with your computer technician, that would be an accurate assessment.

I have to tell you, it is highly unusual for a district to allow a third party access to confidential material without the district first redacting the names of the parties involved. If the School Board and you are comfortable with me having access to all of the names of the people involved as we search through the documents together, then I am happy to come to Peshtigo to search the documents with the technician. I would be available to do a records search on January 21, 22, or 23rd. Please advise me of which date(s) will work for your technician.

In response to the second issue in your e-mail, dictating that I gather members of your staff for questioning, perhaps I do not understand your request. I plan on having individuals present that I believe are necessary for the Association to present its grievance to the Board. If you would like certain individuals present for the District's case, you are certainly permitted to gather those individuals that you wish to question. I am unaware of any obligation of the Association to make available certain individuals the District wishes to question in the presentation of its case.

Your e-mail seems to indicate that this hearing will not follow the same format as the Custodial/Food Service Grievance we previously presented, where information was exchanged and comments were taken. It appears you are attempting to run this hearing in a format more reflective of an arbitration hearing. As such, I am formally requesting that you provide me with the format the District intends to use for this hearing.

I would also like to request some additional records for the Title 1 grievance. Pursuant to Wis. Stat. §111.70, the Association requests the following:

1. Copies of all postings for the Title 1 positions posted internally or externally, or similar documents as the District may term them, for school years 2003-2004 through 2007-2008.

2. Copies of all itemized contract addendums or similar documents as the District may term them, for grade school and middle school teachers for school years 2003-2004 through 2007-2008.

I look forward to your responses.

Sincerely,
Kim Plaunt
UNE UniServ Director

83. Later on January 10, after receiving Plaunt's requests, Eparvier sent an e-mail to all members of the District's e-mail system regarding the requests, as follows:

> Hi All,
>
> I received a public records request from the UNE UniServ Director. One area of the request asks for "Copies of any and all correspondence related to the Title I grievance, including e-mail correspondence between District Administration, the named grievants, any and all Title I teachers.
>
> Anyone sending or receiving an e-mail from anyone relative to this matter is required to provide me with a hard copy or send an electronic copy to my attention ASAP. I thank you for your cooperation in advance as this cooperation is likely to save the District substantial time and money.

84. Subsequent to receiving Plaunt's requests, Eparvier also prepared a packet of information for the School Board's regularly scheduled January meeting, attaching Plaunt's correspondence and adding the following comments:

> Relating to the comprehensive list of "request for information", several District employees will be working with union members to complete the request. Perhaps, with all the copies requested, BPM may have to hire more people to fill paper orders, and the photocopiers may have a shorter life!
>
> Relating to the document from Kim Plaunt, UNE dated January 10, 2008, I'm not sure how she interpreted the phone conversation or my e-mail, but I will not, nor did I ever intend to compromise confidentiality. I will be following up with Kim to hopefully clarify these matters.

85. On the morning of January 14, 2008 Eparvier and Peitersen approached Elizabeth Bradley, the Elementary Library/Media Center Director and Association Grievance Chair, and told her to cancel her classes and come to the office to assist them in filling Plaunt's document request. Bradley feared that refusal could result in discipline and subsequently called Wisconsin Education Association Council Staff Attorney Melissa Thiel Collar about the directive. Thiel Collar, in turn, had a telephone conversation with Eparvier.

86. Later on January 14, Thiel Collar sent Eparvier a letter regarding the document request, as follows:

> Dear Mr. Eparvier:
>
> This letter is a follow up to our conversation this morning regarding the Ms. Plaunt's [sic] document request on behalf of the Association for the Title I

Grievance. It is my understanding that this morning you, along with the elementary principal approached Ms. Bradley and demanded that she assist you in preparing the document request.

As I indicated to you in our conversation, the document request was made by Ms. Plaunt on behalf of the Association. Ms. Bradley was not involved in making the document request. Thus, it would be unproductive for Ms. Bradley to "assist" you in preparing the document request given her lack of background and familiarity with such request.

Furthermore, the Association is very concerned about the manner and timing in which you demanded Ms. Bradley to assist you in responding to the Association's document request made under Wis. Stat. §111.70. I am wondering what authority in Wis. Stat. §111.70 you are relying for your position that the District can demand and select any member of the Association to assist it in fulfilling its own document request. As such, any retaliation on your part to Ms. Bradley will not go unnoticed.

Therefore, on behalf of the Association, I am formally requesting that you cease and desist from demanding that Ms. Bradley assist you in preparing the document request made by Ms. Plaunt. Ms. Plaunt provided you three dates that she would be available to assist you in gathering the documents – January 21, 22, and 23, 2008. In our conversation this morning you indicated to me that you were available January 21, as well. Thus, I am confirming on behalf of Ms. Plaunt that she will be in Peshtigo at your office on Monday January 21st to assist you in preparing the document request. Please provide me in writing with the specific time of the day you wish Ms. Plaunt to be at your office.

You indicated that you needed to fulfill this request in a timely manner so that the District could prepare for the Board hearing. As I stated to you today in our conversation, I am unaware of the relevancy of the Association's document request to the District's ability to prepare for such hearing. Thus, at this point there seems to be no need to reschedule the January 30, 2008 Board hearing. However, should you believe this to be the case, you certainly can have that discussion with Ms. Plaunt on January 21, 2008 when she assists you in retrieving the documents.

I do need to tell you that I have been made aware of the situation in Peshtigo, specifically the facts and events surrounding the District's action relative to this grievance and other grievances with the teacher bargaining unit and ESP unit. Taken in totality, the District's approach seems to have a flavor of interference with and restraint of our members in their lawful protected concerted activity. Please note that all such unlawful activity on behalf of the District will be considered and any legal remedy pursued if necessary.

If you have any questions or concerns regarding the above, please contact me at the phone number listed on this letterhead.

Sincerely yours,
Melissa Thiel Collar
Legal Counsel

87. Ultimately, the meeting between Plaunt and Eparvier to fill the document request was postponed until January 31 and February 1, 2008 and the Board hearing was postponed until February 25, 2008.

88. On January 31 and February 1, 2008, Plaunt was at the District Offices in Peshtigo to fill the document request. Plaunt was provided with information regarding which persons to obtain particular documents from and was permitted to work with a photocopier in the Board room to copy the requested documents. Plaunt made copies for herself and Eparvier. At some point, while Plaunt was working with Peitersen, Eparvier pulled Peitersen aside and warned her about speaking to Plaunt, which Peitersen shared with Plaunt.

89. Prior to the Board hearing on the Title I grievance on February 25, 2008, Eparvier told Smith that if the Association prevailed in its assertion that the final period of the school day was a study hall he might lay off teachers or reduce them to .85 FTE and use non-certified staff to monitor the study halls. He later reiterated this position at the hearing.

90. At the Board hearing on the Title I grievance on February 25, 2008, Plaunt and Eparvier made presentations for the Association and Administration, respectively. As indicated in her January 10, 2008 letter, set forth in Finding #82, Plaunt called witnesses in the presentation of the Association's case, but did not produce the witnesses requested by Eparvier, nor were they summoned by the Administration for the hearing. Both Eparvier and the Board expressed disappointment that the witnesses were unavailable for questioning.

91. At the Board hearing, Eparvier also produced e-mails and documents that he had retrieved from the computers of Miriam Schahczenski and Betsy Bradley and offered them as evidence of the amount of time teachers have at school for non-school related activities.

92. At the March 12, 2008 School Board meeting one of the agenda items concerned the consideration of a candidate for hire as Softball Coach, who was supported by Eparvier. At the meeting, the Board rejected the candidate.

93. On March 13, 2008, Tavia Schoen had a conversation with Lisa Peitersen during the school day in which the Board meeting was discussed and Schoen stated that she was happy with the Board's decision, despite Eparvier's support for the candidate. During the conversation, Schoen made a comment to Peitersen to the effect that "Eparvier is going down." Peitersen subsequently informed Eparvier of the conversation.

94. Eparvier subsequently filed a complaint against Schoen for her comments under Board policy and reported the incident to the Peshtigo Police Department. Eparvier requested a meeting with Schoen to discuss the complaint and Schoen requested Plaunt to accompany her. Eparvier objected to Plaunt's involvement and the meeting did not take place.

95. On April 8, 2008, Eparvier sent an e-mail message to members of the Board and the three school Principals, as follows:

> Please open the attachment. I consider the actions and strategies of the PEA, PESPA, Kim Plaunt and the Melissa Thiel Collar [sic] to be ongoing harassment. I am also aware of a letter sent to the Board of Education over the weekend with many slanderous remarks and undocumented and unsubstantiated allegations.
>
> I feel I have no choice but to request immediate action by this Board of Education to address the chain of events. I have sat down with the PEA President, Danny Smith on several occasions to address the chain of events. In order to address any of the other issues, he demanded that I remove a letter of discipline on a technology infraction and apologize for my actions to this individual.
>
> Additionally, I have had a disturbing threat by a teacher directed at me. When I filed a complaint to have this teacher explain this matter to me through Policy 872, Kim Plaunt has taken into her own hands that she will circumvent the Policy and insist that she be involved in this meeting. Again, I addressed this issue with Danny Smith and he said I am overreacting to a threat that "Eparvier is going down." Danny's position on this matter is that as Superintendent, I should be subject to threats and not take them seriously or overreact.
>
> I request that this matter is addressed as a personnel matter at tomorrow nights Finance, Personnel, and Negotiations Meeting so I and the rest of the Board can get immediate attention on this matter.
>
> It will be unfortunate that the parents/employees will be subject to Kim Plaunt and the UNE's attorney when they want to address concerns.

96. On April 9, 2008, Peitersen issued a verbal reprimand to Schoen for a number of incidents of "inappropriate comments and behavior," including the comments about Eparvier referenced in Finding #91. Specific to that incident, the reprimand stated, as follows:

> **Thursday, March 13:** (10:05 A.M.) The second graders were coming in from outside. Tavia was on duty and was walking in with them. I stopped to quiet the students as they entered; Tavia thanked me for helping. I mentioned to her that I didn't see her at the Board Meeting last night and she said that she couldn't

> attend. She said that she was happy with the Board's decision not to hire Kim Barrette. I told her I was surprised at the Board's decision since Kim (Eparvier) was in support of the hire. She said, "Yeah, it's nice that the Board did my dirty work for me." I told her that I didn't want to hear anything, know anything or get involved with any of that stuff." I said that I heard that parents were going to come and support the hiring of Kim Barrette as well. Tavia responded, "All I know is that Eparvier is going down." I walked away.

The notice of reprimand informed Schoen of her right to offer a written rebuttal, which she did not do. The reprimand was not grieved.

97. On April 16, 2008, Eparvier called Mary Bell, President of the Wisconsin Education Association Council, to express his frustration with, and complain about the conduct of Plaunt and Thiel Collar. He told Bell that his relationship with Plaunt was a struggle compared to the relationship he had had with her predecessor and that he felt she was trying to circumvent the grievance process. Eparvier did not ask Bell to take any specific action with regard to Plaunt or Thiel Collar.

98. Bell called Plaunt about Eparvier's complaint and referred the matter to UNE President Mike Kaczmarzinski, but inquired with WEAC staff about the complaint against Thiel Collar, who was a WEAC employee. Bell determined that Thiel Collar's actions in dealings with the District were appropriate.

99. Kaczmarzinski discussed Bell's call and the situation at Peshtigo with Plaunt, but took no action regarding the situation.

100. During the 2007-08 school year, the District employed two Middle School/High School Special Education Teachers – Donna Biernasz and Donna Lauerman. Late in the school year, Biernasz announced her retirement, leaving a Special Education position open for the 2008-09 school year.

101. Subsequently, Lauerman filed a request to voluntarily transfer into Biernasz's position for the 2008-09 school year, pursuant to Article XIV, Section B. of the contract, which provides:

> B. Voluntarily Reassignment: **(Except as provided in subsection D)** Teachers who desire a change in the assignment may at any time file a written statement to that effect with the superintendent. Such requests shall be considered at any time the openings occur. All requests must be reviewed annually. No openings shall be filled by persons not currently District teachers if a qualified current teacher desires and applies for the position; providing, however, that a qualified teacher is available to fill the vacancy created by such reassignment.

The District accepted Lauerman's request, which then left Lauerman's position open for the 2008-09 school year.

102. Subsequent to acting on Lauerman's request, in April 2008 the District administration determined that 4th Grade teacher Rebecca Gensler, who was also certified to teach Special Education should be involuntarily transferred into Lauerman's vacated position for 2008-09, pursuant to Article XIV, Section C. of the contract, which provides:

> C. Involuntary Reassignment: An involuntary reassignment will be made only after a meeting between the teacher involved and the superintendent or his designee, at which time the teacher will be notified in writing of the reason therefore. When an involuntary reassignment is necessary, a teacher's current area of instructional competence, major or minor field of study, grade or subject from which reassignment is contemplated, will be considered in determining which teacher will be reassigned. If all other factors are equal, district wide seniority shall be the determining factor.

A meeting was subsequently held between Special Education Director Kapp, Peitersen, Gensler and Gaedke wherein Gensler was informed of the decision. At that time Gensler expressed her extreme unhappiness over the transfer.

103. The District and the Association are also parties to a Memorandum of Understanding regarding Filling Positions that provides, as follows:

Memorandum of Understanding Regarding Filling Positions

- Following the determination of staffing needs by administration, administration will provide the PEA leadership with a current seniority list of position needs including certification requirements for those positions.

- The PEA leadership will review the requirements for the needed positions and call a meeting for all interested teachers. The PEA leadership will make placement recommendations according to certification and seniority.

- The PEA will submit the placement recommendations made at the meeting to administration the next school day following the meeting.

- Administration will review the placement recommendations submitted by the PEA to assure that each teacher has the certification required under Management rights in the Master Agreement to teach in his/her assigned position.

- In the event that the PEA and administration disagree with any placements, the PEA executive committee will meet with administration to discuss the placements.

- This memorandum provides for a procedure whereby the PEA and District management work together to fill teaching assignments but in no way changes any management or PEA rights under the Master Agreement.

104. In furtherance of the Memorandum, a practice developed within the District, known as "Bump Night," whereby the District would provide the Association a list of positions to be filled for the coming school year and on one evening late in the school year the faculty would gather and qualified teachers could bid among themselves for the available openings. The following day the Association would provide the administration with a list of position requests and the administration would act on the requests in accordance with the provisions of the Memorandum.

105. In 2008, Peitersen was informed by the President of the School Board of a desire that Bump Night, which usually occurred in May be moved up in order to accommodate parents who wished to make specific teacher requests for their children for the coming school year. Peitersen forward the request to the Association, which accordingly scheduled Bump Night for April 28.

106. In accordance with the Memorandum of Understanding, on April 29, 2008 the Association delivered to Peitersen a memorandum setting forth its recommendations following Bump Night, as follows:

> Dear Mrs. Peitersen,
>
> According to the *Memorandum of Understanding Regarding Filling Positions*, following the determination of staffing needs by the administration, the PEA leadership reviews requirements for needed positions and calls a meeting for interested teachers.
>
> After yesterday's PEA meeting for that purpose, we make the following recommendations according to certification and seniority:
>
> | | |
> |---|---|
> | 4K: | Justin Woulf and Angela Flett |
> | Grade 2: | Melissa Christianson |
> | Grade 3: | Cheryl Lange |
> | Grade 4: | Tavia Schoen |
> | Grade 5: | Nancy Gerdt (if unable to fill the position with a teacher with a reading license) |

MS/HS Special Education: Rebecca Gensler

The Gensler request was made, despite her involuntary transfer, because the Association was requesting that Gensler be assigned to the position to which Lauerman had voluntarily transferred, that is Biernasz's former position, in light of Gensler's greater seniority. The result would have been that Lauerman would have remained in her former position for 2008-09.

107. On May 7, 2008 the administration delivered a responsive memorandum to the Association, as follows:

To: PEA Executive Committee
From: Administration
Date: May 7, 2008
Subject: 2008-09 Tentative Staffing Assignments

Assignments will be as outlined below:

4K Justin Woulf

4K Angela Flett

Grade 2 Melissa Christianson

Grade 3 Cheryl Lange

Grade 4 Tavia Schoen

Grade 5 Nancy Gerdt

** The parameters as suggested by the PEA Executive Committee that Nancy Gerdt only fills this position if the District is unable to fill the position with a teacher with a reading license is not supported by the administration. Building level administration has already communicated with the 5th grade team that all teachers will be teaching their own reading section, therefore, a reading license is not required by DPI.

MS/HS Special Education Rebecca Gensler

**Mrs. Gensler is assigned to the position held by Donna Lauerman during the 2007-08 school year.

108. In response to the administration's memorandum, on May 12, 2008 the Association resubmitted its original recommendations, including the following as pertained specifically to Gensler:

> MS/HS Special Education (the position held by Donna Biernasz during the 2007-08 school year: Rebecca Gensler
>
> *The rationale for this assignment is as follows:*
>
> - *Mrs. Gensler has more seniority than Mrs. Lauerman who previously had signed to post into that position. Mrs. Gensler did not sign to post into that position because at that time, she did not know she was definitely being moved to the MS/HS.*
> - *Mrs. Lauerman posting into that position does not remove her from the "pecking order" when seniority is considered for an involuntary transfer.*
> - *Mrs. Lauerman was hired for the position she seeks to leave. She is obviously certified to teach the position. Mrs. Gensler is certified to teach the position she would prefer (Mrs. Biernasz's).*
> - *Returning Mrs. Lauerman to the position she has taught since she was hired and placing Mrs. Gensler in the one to be vacated by Mrs. Biernasz fulfills certification requirements and placed two qualified teachers into MS/HS special ed. Positions.*
>
> We appreciate the opportunity to work cooperatively with you to fill these teaching assignments.

109. On May 14, 2008, Eparvier sent Smith an e-mail wherein he informed Smith that the District's position regarding Gensler's transfer remained unchanged.

110. Subsequently, Smith and Peitersen had a meeting wherein they discussed a new Kindergarten position that had been posted and its implications for the Bump Night recommendations, specifically as they affected Gensler. As a result of that meeting a proposal was developed whereby the Bump Night recommendations would be rescinded and Gensler would be allowed to remain in her 4th Grade position.

111. On May 27, 2008, the Association memorialized the proposal in a letter to Peitersen, as follows:

> Dear Mrs. Peitersen,

> The Peshtigo Education Association agrees with the following voluntary transfers with the stipulation that Becky Gensler be transferred to 4th grade provided that the district finds a qualified quality teacher to fill the MS/HS Special Ed. Position.
>
> Kindergarten: Nancy Gerdt
> Grade 2: Tavia Schoen
> Grade 5: Melissa Christianson
>
> These transfers rescind earlier moves made during "Bump Night." It is the wish of the PEA that next year this event be held later in May in order to alleviate the need for changes such as those that occurred this year. It was scheduled earlier this year in order to appease parents who are requesting teachers at the elementary level and who wish to know the teachers assigned to each grade.
>
> We again appreciate the opportunity to work cooperatively with you to fill these teaching assignments.

Peitersen agreed to pass the recommendations along to Eparvier and reported back to Smith that Eparvier agreed to consider the recommendations if they were made in writing. On May 28, 2008, the Association directed a copy of the May 27 memo personally to Eparvier.

112. Later on May 28, Peitersen met with Eparvier to discuss the proposal. At that time they agreed that the proposal would not be accepted.

113. Also on May 28, Smith sent Eparvier the results of a Climate Survey that the Association membership had conducted earlier in the spring. The survey results reported an attitude among particularly the Elementary teachers that was essentially negative about the environment in the District and the relationship between the teachers and the administration and particularly Eparvier. Eparvier, in turn, passed the survey results on to the School Board, referring to it as the work of the Union's anonymous school climate committee.

114. On May, 29, 2008, Eparvier sent an e-mail to Gaedke regarding the proposal, as follows:

> Thank you for your letter regarding voluntary transfers. It is my understanding that the "bump night" memo of understanding was designed to address staffing needs in a one session, timely manner. It is also my understanding that the District received over 200 teacher requests from parents with an understanding that staff member changes would likely be limited from that point forward. Changes of this magnitude may have a detrimental effect on public relations with the parents we serve. Based on this information, administration continues to stand on its decisions as outlined in the correspondence following the bump night. As you recall, administration agreed with a majority of the PEA's

Executive Committee recommendations following the bump night activity. Thank you.

115. Later on May 29, Gaedke responded to Eparvier's e-mail, as follows:

Thank you for your message regarding voluntary transfers.

I do have some concerns regarding your choice to stand on your decision as outlined following bump night and your fear that the voluntary transfers outlined in my letter would have a "detrimental effect on public relations with the parents we serve":

- Parents requesting teachers were not made aware of any reassignments following bump night. In fact, they would assume that Mrs. Schoen was going to be in 2nd grade next year and that Mrs. Gensler (Becky Dellise) would be in 4th grade and would base any requests on that information.

- I also question the use of the phrase, "changes of this magnitude…". Four teachers are involved in the voluntary transfer letter. Two of them would be teaching in the same position that they did this year, which does not constitute a change. The other two involved would have to move to another position anyway due to a reduction in the number of sections at the 1st grade level (Mrs. Christianson) and at the 6th grade level (Mrs. Gerdt).

I look forward to the continuation of an open and honest dialogue regarding this subject. Thank you.

116. The District's refusal to pay extra compensation to Kay Sodini, Cheryl Lange, Virginia Malmstadt and Patsy Moore for teaching Title I in the 2007-08 school year constituted a unilateral change in wages, hours and conditions of employment.

117. The District's refusal to pay extra compensation to Paula Fochesato for teaching two of Jerome Hurley's physical education classes in the 2007-08 school year constituted a unilateral change in wages, hours and conditions of employment.

118. The District's refusal to pay Jerome Hurley for teaching adaptive physical education during his preparation period in the 2007-08 school year constituted a unilateral change in wages, hours and conditions of employment.

119. The issuance by Eparvier of a written reprimand and 60 day suspension of technology privileges to Miriam Schahczenski after she had previously received an oral

reprimand from Peitersen for the same incident constituted a unilateral change in wages, hours and conditions of employment.

120. The rescission by Eparvier of the early leave practice following the filing of the Fochesato grievance had a reasonable tendency to restrain, coerce, or interfere with Association members in the exercise of their protected rights.

121. The insistence by Eparvier that Fochesato meet him without representation on January 8, 2008 and his ordering Shelly Zander and Marcia Thurow to leave his office when they accompanied Fochesato had a reasonable tendency to restrain, coerce, or interfere with Association members in the exercise of their protected rights.

122. The double discipline imposed on Miriam Schahczenski for her e-mail regarding the rescission of the early leave practice had a reasonable tendency to restrain, coerce, or interfere with Association members in the exercise of their protected rights.

123. The increased presence of Eparvier in the hallways of the Elementary School after the filing of the Title I grievance did not have a reasonable tendency to restrain, coerce, or interfere with Association members in the exercise of their protected rights.

124. Eparvier's use of and direction to the District's administrators to conduct observations of the Elementary teachers during Study Hall/A.R.E. periods did not have a reasonable tendency to restrain, coerce, or interfere with Association members in the exercise of their protected rights.

125. Eparvier's refusal to accommodate the Association's request to reassign Becky Gensler for 2008-09 after the Bump Night event on April 28, 2008 did not have a reasonable tendency to restrain, coerce, or interfere with Association members in the exercise of their protected rights.

126. Eparvier's discussion with Smith about his wish to resolve differences locally without outside influences did not have a reasonable tendency to restrain, coerce, or interfere with Association members in the exercise of their protected rights.

127. Eparvier's conversation with Peitersen wherein he characterized the behavior of Schahczenski and Gaedke as cancerous did not have a reasonable tendency to restrain, coerce, or interfere with Association members' in the exercise of their protected rights.

128. Eparvier's contacts with WEAC President Mary Bell and UNE President Mike Kaczmarzinski with concerns about Plaunt and Thiel Collar did not have a reasonable tendency to restrain, coerce, or interfere with Association members in the exercise of their protected rights.

129. Eparvier's criticisms of Plaunt to the School Board regarding the Title I document request, her failure to produce requested witnesses for the Title I hearing and her involvement in the Tavia Schoen discipline did not have a reasonable tendency to restrain, coerce, or interfere with Association members in the exercise of their protected rights.

130. Eparvier's response to Plaunt's document request in the Title I grievance in requiring her to come to Peshtigo to assist in gathering the documents did not have a reasonable tendency to restrain, coerce, or interfere with Association members in the exercise of their protected rights.

131. Eparvier's direction to Association member Betsy Bradley to assist him in the gathering of the documents requested by Plaunt during the work day had a reasonable tendency to restrain, coerce, or interfere with Association members in the exercise of their protected rights.

132. Eparvier's statements to Tavia Schoen wherein he criticized Plaunt and Smith and tried to enlist to her to become more active in the Association leadership interfered with the Association's right to bargain through representatives of its own choosing.

133. Eparvier's statements before and during the Title I grievance hearing, wherein he suggested that if the Association prevailed he could layoff teachers or reduce them to .85 FTE had a reasonable tendency to restrain, coerce, or interfere with Association members in the exercise of their protected rights.

134. The conduct of a search by Eparvier of the computers and e-mails of Schahczenski and Bradley prior to the Title I hearing and presentation of retrieved documents at the hearing had a reasonable tendency to restrain, coerce, or interfere with Association members in the exercise of their protected rights.

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

CONCLUSIONS OF LAW

1. The Complainant, Peshtigo Education Association, is a labor organization within the meaning of Section 111.70(1)(h), MERA.

2. The Respondent, Peshtigo School District, is a municipal employer within the meaning of Section 111.70(1)(j), MERA

3. The Respondent, Peshtigo Board of Education, is a municipal employer within the meaning of Section 111.70(1)(j), MERA

4. The Respondent, Kim Eparvier, is a municipal employer within the meaning of Section 111.70(1)(j), MERA

5. By the conduct described in Findings of Fact 14-31, the Respondents unilaterally changed the status quo with respect to wages, hours and working conditions of teachers and thereby violated Sec. 111.70(3)(a)4, Wis. Stats.

6. By the conduct described in Findings of Fact 32-47, the Respondents unilaterally changed the status quo with respect to wages, hours and working conditions of teachers and thereby violated Sec. 111.70(3)(a)4, Wis. Stats.

7. By the conduct described in Findings of Fact 48-55, the Respondents unilaterally changed the status quo with respect to wages, hours and working conditions of teachers and thereby violated Sec. 111.70(3)(a)4, Wis. Stats.

8. By the conduct described in Findings of Fact 56-73, the Respondents unilaterally changed the status quo with respect to wages, hours and working conditions of teachers and thereby violated Sec. 111.70(3)(a)4, Wis. Stats.

9. By the conduct described in Findings of Fact 47, 58, 71, 79, 85, 89, 91 the Respondents committed prohibited practices within the meaning of Sec. 111.70(3)(a)3, Wis. Stats.

10. By the conduct described in Findings of Fact 78, 81, 84, 88, 90, 95, 97 and 114 the Respondents did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)3, Wis. Stats.

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

ORDER

The Peshtigo School District, Peshtigo Board of Education and Kim Eparvier shall immediately take the following actions consistent with the Findings of Fact and Conclusions of Law set forth above:

1. Cease and Desist from unilaterally changing the *status quo ante* with respect to paying 5th and 6th Grade teachers extra compensation for teaching more than five contact periods per day.

2. Cease and Desist from unilaterally changing the *status quo ante* with respect to paying teachers extra compensation when assigned to take the classes of other teachers.

3. Cease and Desist from unilaterally changing the *status quo ante* with respect to paying Elementary teachers extra compensation for teaching assignments scheduled during their preparation periods.

4. Cease and Desist from unilaterally changing the *status quo ante* by issuing multiple disciplines to teachers for the same infractions.

5. Compensate teachers Kay Sodini, Cheryl Lange, Virginia Malmstadt and Patsy Moore for all time spent teaching Title I during the 2007-08 school year at their contract rate of pay at the time and according to the formula set forth in Article XX, Sec. F. of the collective bargaining agreement, plus statutory interest.

6. Compensate teacher Paula Fochesato for all time spent teaching Jerome Hurley's physical education classes during the 2007-08 school year at her contract rate of pay at the time and according to the formula set forth in Article XX, Sec. G. of the collective bargaining agreement, plus statutory interest.

7. Compensate teacher Jerome Hurley for all minutes spent teaching adaptive physical education during his planning period during the 2007-08 school year at his pro rated per diem contract rate of pay at the time, plus accrued statutory interest.

8. Expunge all references to the written reprimand and technology suspension from the personnel file of Miriam Schahczenski and place in her file a notice memorializing the oral reprimand issued by Lisa Peitersen on January 16, 2008.

9. Post the notice attached hereto as "Appendix A" in conspicuous places in the District's buildings where notices to employees represented by the Peshtigo Education Association are posted. The Notice shall be signed by a representative of the School Board and by Kim Eparvier and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.

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

Dated at Fond du Lac, Wisconsin, this 31st day of July, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

APPENDIX

NOTICE TO ALL EMPLOYEES REPRESENTED BY THE PESHTIGO EDUCATION 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 represented by The Peshtigo Education Association that:

WE WILL NOT violate Section 111.70(3)(a)1 & 4 of the Municipal Employment Relations Act by unilaterally changing the *status quo ante* as to the wages, hours and conditions of employment of its bargaining unit members.

WE WILL NOT violate Section 111.70(3)(a)1 & 3 of the Municipal Employment Relations Act by engaging in conduct that has a tendency to restrain, coerce, or interfere with bargaining unit members in their exercise of their protected rights under Section 111.70(2) MERA.

WE WILL NOT violate Section 111.70(3)(a)1 & 3 of the Municipal Employment Relations Act by engaging in conduct that interferes with the rights of bargaining unit members to select leadership of their own choosing.

Dated this ____ day of _____, 2009

_____ _____

Peshtigo Board of Education Superintendent of Schools

PESHTIGO SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

This case involves a series of incidents that occurred in the Peshtigo School District during the 2007-08 school year, several of which were grieved by the Association. Due to the fact that for most of the school year the parties were in a contract hiatus and were operating under an expired collective bargaining agreement, the grievances were processed through the contractual grievance procedure, but were not advanced to arbitration. In its complaint, the Association has alleged that the incidents giving rise to the grievances were violations of the *status quo* in place during the hiatus and, thus, constituted violations of Secs. 111.70(3)(a)1 and 4, Wis. Stats. The Association further alleged that several of the incidents, and several ancillary events, were retaliatory conduct by the District and specifically the Superintendent, Kim Eparvier as a result of animus toward the Association and its leadership due to their protected concerted activity and constituted violations of Secs. 111.70(3)(a) 1 and 3, Wis. Stats. The District, and Mr. Eparvier, assert that each of the several grievances should be denied on their merits and, further, that at no time did the District, or Eparvier, display anti-union animus or engage in retaliatory conduct toward the Association or its leaders. For purposes of clarity, each of the incidents will be addressed separately.

The Title I Grievance

Eparvier has been the Superintendent of the District since 1995. During most of his tenure, the Association was represented by UniServ Director Jim Blank of United Northeast Educators (UNE) and Association President Tavia Schoen. Prior to the 2007-2008 school year, however, the Association had undergone a turnover in leadership. In 2006-07, in anticipation of Blank's retirement, UniServ Director Kim Plaunt became the Association representative. She worked with Blank for the first half of the 2006-07 school year and then, upon Blank's retirement, became the sole representative. Before the 2007-08 school year, Schoen stepped down as Association President and was replaced by Danny Smith. The remainder of the Association Executive Committee in 2007-08 consisted of Vice-President Paula Fochesato, Treasurer Miriam Schahczenski and Terri Gaedke, Secretary.

At the end of the 2006-07 school year a 6th Grade teacher retired, creating a vacancy for 2007-08. In anticipation thereof, Eparvier posted a position for a long term substitute position for 6th grade, which did not provide fringe benefits under the contract, and so advised Smith. Smith, who had not previously been involved in Union leadership, consulted Plaunt and the Executive Committee about Eparvier's' action and reported back to Eparvier that the Association believed that a full-time teaching position should be posted for 6th Grade and that it would not support the hire of a long-term substitute. Ultimately, Patsy Moore, a Title I teacher in the District met with Eparvier and requested a voluntary transfer into the 6th Grade position, which was granted, leaving a vacancy for a Title I teacher for 2007-08.

At the outset of the 2007-08 school year the District utilized two teachers, Angie Flett and Jackie Shier, to provide title I services. Eventually, however, a decision was made by Eparvier and Elementary Principal Lisa Peitersen to have Title I reading and math instruction provided by the 5th and 6th Grade teachers, Kay Sodini, Cheryl Lange, Ginny Malmstadt and Moore, in addition to their regular teaching duties. The instruction was to occur at the end of the school day, during a time in which the teachers were not engaged in their regular teaching duties. For several years the last part of the school day has been a time that is denominated variously as A.R. E. (Application, Review and Enrichment) or Study Hall. The record reveals that during this time students in Band and Chorus are released for those activities and the remaining students are assigned to classrooms. During this time there is no delivery of instruction on new material *per se*, but the teachers are available to assist students with homework, or help them in areas with which they are having difficulty.

On August 30, 2007, Sodini, Lange, Malmstadt and Moore sent an e-mail to Eparvier informing him that if they were to be required to teach Title I they wanted to be paid for the extra duty according to Article XX, Sections F and G of the contract, which provides for extra compensation equivalent to 1/7 of 1/192 of their salary for teachers for every contact period beyond five during a school day or who take a class for another teacher. Study halls are, by contract, not considered contact periods. Eparvier did not respond, but on September 10 Peitersen directed Sodini to develop an evaluation instrument for determining which students were in need of Title I services and such an instrument was developed and employed. On October 11, Malmstadt e-mailed Peitersen to request a meeting between the four teachers and Peitersen to discuss the details and logistics of providing Title I services and also to determine whether the District intended to pay the teachers for the extra duty. No such meeting occurred, but Peitersen did inform Malmstadt and Sodini privately that there would be no extra compensation for providing Title I services, as Eparvier and Peitersen did not consider the referenced language of Article XX to be applicable to elementary teachers. Sodini, Lange, Malmstadt and Moore were directed to begin teaching Title I during the last period of the day on October 17, which they did until December 20, when the District's winter break commenced. After the winter break concluded, Jackie Shier was assigned to provide the Title I services previously provided by Sodini, Lange, Malmstadt and Moore. As had been indicated by Peitersen, the teachers were not compensated for their provision of Title I services.

On November 12, 2007, the Association filed a grievance on behalf of Sodini and Malmstadt over the District's requiring them to teach Title I without extra compensation. The grievance was denied at Steps 1 and 2 and was advanced to Step 3, which calls for a hearing before the School Board. In anticipation of the hearing, which was tentatively set for January 30, 2008, on January 8, 2008 Plaunt sent Eparvier a letter setting forth an extensive request for documents the Association wanted for the presentation of its case. Subsequently, Eparvier and Plaunt had conversations and exchanged correspondence about the request and hearing, during which Plaunt expanded her request and Eparvier requested that the Association make certain teachers available at the hearing to be questioned by the Administration and School Board. Plaunt responded that the Association would present the witnesses it felt necessary to its presentation and that the Administration would be responsible for arranging the

appearance of any additional witnesses it wanted present. Eparvier also asked Plaunt to come to Peshtigo on mutually agreed dates to assist in the search for the requested documents and Plaunt provided dates that she was available to work on the request. On January 14, Eparvier and Peitersen approached Betsy Bradley, who was the Elementary Library/Media Center Director, and also the Association's Grievance Chair, and directed her to assist them in gathering the documents listed in the Association's request. Bradley was concerned about the matter and contacted Wisconsin Education Association Council Attorney Melissa Thiel Collar. Thiel Collar subsequently called Eparvier and followed up with a letter in which she advised him that he had no authority to order Bradley to assist him and that Bradley would not, in fact, do so. Ultimately, the hearing was rescheduled to February 25, 2008 and Plaunt came to Peshtigo on January 31 and February 1 to work on the documents request.

On January 31 and February 1, 2008, Plaunt met with Eparvier, Peitersen and Information Technology Specialist Jim Meyer to assemble the requested documents. Plaunt was provided with information about where and from whom to obtain the requested documents and proceeded to do so. She was also instructed to use a copy machine in the District's Board Room, which she did, and she made copies of the desired documents for herself and Eparvier. While working with Peitersen on the document request, Eparvier appeared and requested to speak privately with Peitersen, whereupon he instructed her to be careful about speaking to Plaunt and then left. Peitersen related this conversation to Plaunt.

On February 25, 2008, the Board hearing on the Title I grievance was held. At the hearing Plaunt and Eparvier presented the positions of the Association and Administration respectively. Plaunt did not produce the witnesses that Eparvier had requested and both Eparvier and the School Board President expressed their disappointment that the teachers were not present. There is no evidence that Eparvier made any effort on his own behalf to have the teachers present. At the hearing, in response to the Association's presentation, Eparvier that if, in fact, the last period of the day was being used for study hall the District did not need teachers to monitor them and that he would be justified in either laying off teachers or reducing them to .85 FTE and using other staff as study hall monitors in order to cut costs. The Board ultimately denied the grievance and, due to the contract hiatus, the Association did not request arbitration.

The Fochesato Grievance

During the 2006-07 school year, the District had contracted privately with CESA 8 for the provision of adaptive physical education (A.P.E.) instruction for special needs students within the District. As a cost cutting measure, Eparvier decided not to contract with CESA 8 for 2007-08, but to have the instruction provided by Jerome Hurley, an Elementary Physical Education teacher within the District who was also certified to teach A.P.E. Prior to the 2007-08 school year, Eparvier met with Peitersen and Dr. Ronald Kapp, the District's Special Education Coordinator to discuss having Hurley teach A.P.E. Peitersen indicated a desire to revamp the elementary physical education schedule in order to take into account Hurley's new duties and Eparvier said she could do so as long as it did not result in extra cost to the District.

In September 2007, Kapp instructed Hurley to begin teaching A.P.E. at the high school. Because the times of the A.P. E. instruction conflicted with Hurley's elementary teaching schedule, Peitersen directed Paula Fochesato, another Elementary Physical Education teacher, to combine Hurley's 3rd and 5th Grade Phy. Ed. Classes with her own two days per week.

On a previous occasion in 2005-06, Fochesato had covered one of Hurley's classes and had been awarded extra duty compensation under Article XX, Sec. G. of the contract, which provides for extra duty compensation for teachers who substitute for other teachers in the amount of 1/7 of 1/192 of their contract salary, in lieu of hiring a substitute. Thus, prior to beginning the assignment Fochesato met with Peitersen and inquired whether she would receive extra duty pay for covering Hurley's classes. Peitersen responded that she would and instructed Fochesato to submit pay requests, along with her hours, to the school secretary. On that understanding, Fochesato began having Hurley's students combined with her classes as of October 16, 2007. During the time Fochesato taught Hurley's student's they remained assigned to Hurley and, thus, they remained in his grade book and he, in fact, did the grading for them. Fochesato continued instructing Hurley's students until early December, when she went on an extended sick leave, and during the periods when she was covering for Hurley her class sizes roughly doubled.

In early November 2007, Fochesato submitted pay requests for the October dates when she covered for Hurley and she received $168.36 in extra duty pay for those services in her November 9 paycheck. Fochesato subsequently submitted pay requests for the teaching of Hurley's classes in November and early December. After the issuance of the November 9 paychecks, Eparvier met with Peitersen and questioned the extra duty pay for Fochesato. Peitersen explained that Fochesato had claimed to be entitled to the pay under the contract. Eparvier disagreed and reminded Peitersen that the revised physical education schedule was not to cost the District more money. Peitersen agreed and thereafter denied Fochesato's pay requests for November and December. In addition, $168.36 was deducted form Fochesato's December 7 paycheck to reimburse the District for the November 9 payment.

On December 10, Fochesato, who was on sick leave, received her December 7 paycheck by mail, which did not include extra duty pay for November and which included the deduction. Also on December 10 Fochesato received an e-mail from Peitersen advising her that the requests for extra duty pay were henceforth denied. Fochesato consulted Betsy Bradley, the Association grievance Chair, about the matter and, on December 19, 2007, the Association filed a grievance on Fochesato's behalf for the extra duty pay. The grievance was processed through the steps of the contractual procedure and was denied at each level. Due to the contract hiatus, the Association did not request arbitration.

After the filing of the Fochesato grievance, Eparvier had a meeting with Peitersen. During the meeting, Eparvier brought up an informal practice that had grown up over the years wherein teachers would cover for other teachers who had to leave school before the end of the day, usually during the A.R.E./Study Hall time. The coverage was voluntary and at no time had a teacher requested compensation for this service. Nevertheless, there was a concern that if

the Fochesato grievance succeeded teachers would expect pay for this service in the future. Furthermore, Eparvier believed that teachers were abusing the privilege and were leaving school during instructional time, contrary to the contract. Consequently, on December 20, Eparvier, Peitersen and High School Principal Steve Motkowski sent an e-mail to the entire staff announcing that, due to the Association's position that teachers assigned to take other teachers' classes were entitled to be compensated, henceforth teachers were not permitted to cover for each other, but were expected to be on the premises throughout the workday. The administration also promulgated a new policy that any teacher desiring to leave before the end of the day had to file a formal request and would be subject to a *pro rata* salary deduction. The administration's actions regarding the leave policy were grieved by the Association, but the grievance was ultimately resolved in negotiations between the District and the Association.

On the morning of January 8, 2008, Eparvier came to the gymnasium to see Fochesato and told her he wanted to meet with her later in his office. She asked if she needed representation and he indicated that she did not, as the matter was not disciplinary, and that she should come alone. Fochesato later sent Eparvier an e-mail stating that she would only meet him with Association representatives present. Eparvier responded to the effect that the meeting involved scheduling and did not involve Fochesato's grievance, which he would discussion with the Association at another time. Later that day, Fochesato went to Eparvier's office with Art teacher Shelly Zander and Music teacher Marcia Thurow. Eparvier was angry that Fochesato had brought the others with her and instructed Zander and Thurow to leave. Zander and Thurow were unwilling to leave Fochesato alone with Eparvier and asked her to leave with them, which she did. As she was leaving, Eparvier expressed his disappointment that Fochesato would not meet with him and told her she would later receive something in writing. After the meeting, there were no follow-up communications from Eparvier to Fochesato.

The Hurley Grievance

As previously set forth, during the 2007-08 school year, Jerome Hurley was assigned to teach adaptive physical education in addition to elementary physical education. Prior to the District's winter break, this was accomplished by having Paula Fochesato cover some of Hurley's elementary phy. ed. classes. On January 3, 2008, Dr. Ronald Kapp informed Hurley that Fochesato would no longer be covering his classes, but that under a new schedule A.P.E. would be offered during time that Hurley had previously used for preparation. On January 8, 2008, Hurley sent an e-mail to Peitersen informing her that he wanted extra duty pay for teaching A.P.E. under the terms of Article XX of the contract. Peitersen subsequently met with Hurley and informed him that he would not receive compensation for teaching A.P.E. Between January and the end of the 2007-08 school year, Hurley taught A.P.E. as directed and submitted pay requests for extra compensation during that period totaling $528.21. The requests for compensation were denied.

On January 15, 2008, Hurley filed a grievance over the District's refusal to provide extra duty pay for teaching A.P.E. The grievance was processed through the steps of the contractual procedure and was denied at each level. Due to the contract hiatus, the Association did not request arbitration.

The Schahczenski Grievance

During the 2007-08 school year, 5th Grade teacher Miriam Schahsczenski served as Treasurer of the Association and was an *ex officio* member of its Executive Committee. On December 20, 2007, after receiving the e-mail from the administrators rescinding the practice of teachers covering for other teachers who leave at the end of the day, Schahczenski sent an e-mail on her school computer to all Association members criticizing the decision and referring to the "pettiness and foolishness" of the administration. Eparvier came into possession of the e-mail and on January 10, 2008, in company with Peitersen, hand delivered a notarized letter to Association President Danny Smith in his classroom in which he characterized Schahczenki's e-mail as personal harassment against him by Schahczenski and the Association leadership and "bullying in the workplace." He further indicated that the e-mail was a misuse of District technology resources to create dissension in the workplace. He ordered the Association to cease and desist from such behavior at the risk of legal action. Smith responded to the effect that he did not consider the e-mail to be harassment, but that he would take the matter up with the Association and, further, that he would work to prevent any future bullying by, or of, the Association members. In a private conversation with Eparvier, Smith indicated that he felt that Eparvier overreacted to the situation and that a person in his position should expect a certain amount of criticism from time to time.

After the exchange with Smith, Eparvier met with Peitersen to discuss the e-mail. Peitersen believed that the letter to Smith had dealt with the situation, but Eparvier indicated that he believed that Schahczenski had violated the District's Technology Policy and should be disciplined and directed Peitersen to see to it. Peitersen reviewed the e-mail, past similar incidents with other staff and Schahczenski's personnel file and determined that an oral reprimand was warranted. On January 16, 2008, Peitersen met with Schahczenski and Terri Gaedke and advised Schahczenski that she was issuing her an oral reprimand. The reprimand was not documented in Schaczenski's personnel file and Schahczenski did not grieve it. Eparvier subsequently told Peitersen that the reprimand should be documented in Schahczenski's personnel file, but Peitersen did not feel that was warranted.

After the meeting between Peitersen, Schahczenski and Gaedke, Eparvier sent Schahczenski an e-mail indicating he wanted to meet with her on January 25 to discuss a possible violation of the District's Technology Code. The meeting took place and those present included Eparvier, Peitersen, Schahczenski and Plaunt. Schahczenski was presented with three written questions, asking whether she had authored the December 20 e-mail, to whom it was sent and at what time it was written. Schahczenski responded orally that she had written the e-mail during her lunch period and sent it to the Association membership. Eparvier stated that he was considering discipline for a violation of the Technology Code, whereupon Peitersen indicated that she had already issued an oral reprimand. Eparvier stated that he did not believe that Peitersen's action constituted discipline and that he was investigating further.. Plaunt inquired as to where Eparvier had obtained the e-mail, to which he replied that it was none of Plaunt's business. Thereupon, the meeting concluded.

On January 28, 2008, Eparvier issued a written reprimand to Schahczenski for violating provisions of the Technology Code, specifically by wasting technology resources and using inappropriate language, as well as for conduct he considered to be bullying and harassment. In addition to the reprimand, he restricted Schahczenski's access to the District's computer system for 60 days. On February 1, 2008, Schahczenski filed a grievance over the issuance of the written reprimand and suspension of her technology privileges, alleging that she had been disciplined without just cause. The grievance was processed through the contractual grievance procedure in a timely manner and the grievance was denied at each step. Due the fact that the parties were in a contract hiatus, the Association did not request grievance arbitration.

Additional Circumstances

As set forth in the incidents described above, throughout the 2007-08 school year, the relationship between the District administration and the Association progressively deteriorated, particularly the relationship between Eparvier and Plaunt. This decline was evidenced in number of incidents wherein Eparvier expressed his dissatisfaction with the degree of involvement of Plaunt and WEAC in Association affairs. At one point in 2007-08, Eparvier met with Smith and expressed concerns that Smith was not in control of the Association and was receiving bad advice from Plaunt and the other members of the Executive Committee. Eparvier also indicated that he would prefer to resolve issues locally rather than relying on outside influences. Smith agreed that solving problems locally would be his preference, without either side needing professional representation. In October 2007, Eparvier approached Tavia Schoen, the former Association President, and asked her to become more involved in Association leadership. He told Schoen that he did not have as good a relationship with Plaunt as he had had with her predecessor, Jim Blank, and that the School Board laughed at her and had no respect for her. Schoen declined to get involved. In January 2008, after receiving the document request from Plaunt for the Title I grievance, Eparvier forwarded a copy of the request to the Board, long with a memo wherein he stated, "with all the copies requested, BPM may have to hire more people to fill paper orders, and the photocopiers may have a shorter life!"

In April, 2008, teacher Tavia Schoen received a written reprimand from Peitersen for, among other things, comments she made to Peitersen regarding recent School Board action concerning a softball coach, wherein Schoen allegedly stated that "Eparvier is going down." Previously, Eparvier had filed a personal complaint against Schoen for her comments under Board Policy #872, and sought a personal conference with her to discuss it. Believing that the complaint process could lead to discipline, Schoen indicated that she wanted Plaunt to represent her in any meetings concerning the complaint. Eparvier objected to Plaunt's participation and ultimately there was no meeting to discuss the complaint. Eparvier sent a letter to the School Board complaining about the tactics of the Association, specifically Plaunt and Thiel Collar, requesting Board action regarding his concerns and intimating that he might take legal action against Schoen for her threats against him. Later in April, Eparvier called WEAC President Mary Bell to complain about Plaunt and WEAC attorney Melissa Thiel Collar, and told Bell that he had more of a struggle with Plaunt that she had had with Blank

and that Plaunt was trying to circumvent the grievance process. At approximately the same time, he made another contact with UNE President Mike Kaczmarzinski to complain about Plaunt. Neither Bell nor Kaczmarzinski found any basis for the complaints about Plaunt or Thiel Collar.

Early in 2008, the Association conducted a Climate Survey of the Association membership to gauge the morale of the members and their impressions of the workplace environments and the relationships between the teachers and administrators of the District and the Elementary School, Middle School and High School. The Association intended to share the results with the administrators and the School Board with a view to addressing its concerns about the workplace environment. The survey indicated that staff morale was particularly low in the Elementary School and that there was a negative attitude among the Association members, particularly in the Elementary School, about the relationship between the teachers and the administration, particularly Eparvier. The survey was completed and the results were ready for dissemination by May 2008.

In April 2008, a Middle School Special Education teacher, Donna Biernasz, announced her retirement at the end of the school year. Thereafter, the other Middle School Special Education teacher, Donna Lauerman, requested a voluntary transfer into Biernasz's position for 2008-09, which was granted by Eparvier, leaving Lauerman's position unfilled. To fill Lauerman's position, Eparvier, Peitersen and Dr. Ronald Kapp, the District's Special Education Coordinator decided to involuntarily transfer 4th Grade teacher Rebecca Gensler, who was also certified to teach special education. Gensler was unhappy about the involuntary transfer and expressed as much in a meeting with Eparvier and Kapp.

On April 29, 2008, the Association held an event known as "Bump Night," wherein faculty members could request new assignments for the upcoming school year based on information provided by the administration concerning anticipated vacancies within the District. This had been an annual event for some time and was intended to implement a Memorandum of Understanding between the District and Association regarding filling vacancies. In practice, the Association members would meet to discuss projected vacancies and members were allowed to request assignments for the upcoming year, provided that they were qualified and the positions sought were open. The administration would review the requests and approve or deny them and the parties would meet thereafter to consult about requests that were denied. As a result of the April 29 meeting, the Association forwarded recommendations to the administration that included, among others, a request that Gensler be assigned for 2008-09 to the Middle School Special Education position previously held by Biernasz. The result would be that Lauerman would retain the position she had held in 2007-08. On May 7, the administration sent a memo to the Association Executive Committee denying the requested assignment for Gensler. On May 12, 2008, the Association resubmitted it recommendations regarding the open positions for 2008-09. The Association explained its rationale, which was that Gensler was senior to Lauerman, who had previously been granted a voluntary transfer into Biernasz's position, and therefore, inasmuch as she was also qualified for the position, she was entitled to her preference of positions. On May 14, Eparvier sent an e-mail to Smith

stating that the administration's position regarding Gensler was unchanged. Thereafter, a Kindergarten position opened for 2008-09 and the Executive Committee met with Peitersen to discuss the Bump Night proposal in the light of the new opening. The result of the meeting was a new proposal whereby the original Bump Night recommendation would be withdrawn and, among other things, Gensler would remain teaching 4th Grade in 2008-09 and the open Special Education position would be posted. This proposal was memorialized in a memorandum from Terri Gaedke to Peitersen dated May 27. Peitersen agreed to discuss the proposal with Eparvier that day, which she did. Eparvier stated he would consider the proposal if he received it separately in writing.

On May 28, Gaedke sent Eparvier the same memorandum she had previously given Peitersen. The same day, Smith sent Eparvier a copy of the Climate Survey results and requested an opportunity to meet with the School Board to discuss it. Eparvier forwarded the survey results, which he identified as being from the "union's anonymous school climate committee," to the Board in a packet for its upcoming meeting. The same day Eparvier met with Peitersen to discuss the new Bump Night proposal and they agreed that it would not be accepted. On May 29, Eparvier sent Gaedke an e-mail stating that he was rejecting the new Bump Night proposal on the basis that Bump Night was to be a one time event, that numerous parents had already made teacher assignment requests for their children for the coming year and that making significant staffing changes so late in the year would not be good for public relations. Gaedke responded later the same day and challenged his rationale in that parents requesting teacher assignments weren't aware of the original Bump Night recommendations and that the second proposal actually resulted in fewer new staff assignments than the original. Nevertheless, the matter was not grieved.

THE PARTIES' POSITIONS

Complainant

The Complainant asserts that the Examiner has jurisdiction to adjudicate the Title I, Fochesato, Hurley and Schahczenski grievances under Sec. 111.70(3)(a)1 and 4, Wis. Stats. During the time that the grievances were filed, the parties' contract had expired and they were in a contract hiatus while negotiating a successor agreement. Thus, while the grievances were advanced through the contractual steps, the Association was unable to compel the District to submit them to arbitration. The Commission has held that an employer violates Sec. 111.70(3)(a)4 by refusing to bargain when it takes unilateral action regarding a mandatory subject of bargaining during a contract hiatus inconsistent with its rights under the status quo. CITY OF EAU CLAIRE, DEC. NO. 29346-C (WERC, Dec. 2002) and other cases cited herein. Further, since arbitration is not available during a contract hiatus, when a union has exhausted the grievance procedure it is common for it to pursue its remedies under a prohibited practice complaint for a violation of the status quo and neither party can compel the other to arbitrate grievances that arise during a hiatus rather pursue a prohibited practice complaint. DODGELAND SCHOOL DISTRICT, DEC. NO. 31098-C (WERC, Feb. 2007), RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29203-B (WERC, Oct. 1998).

The Title I Grievance

The Association asserts that the District violated Secs. 111.70(3)(a)1 and 4 by assigning the 5th and 6th grade teachers to teach Title I without additional compensation. The language of Article XX, Sec. F. is clear and unambiguous and provides that a teacher who teaches an extra class, which is defined as any contact period in excess of five, is entitled to extra compensation in the amount of the equivalent of 1/7 of 192 days of the contract. Prior to being assigned to teach Title I, the teachers all taught 5 contact periods. Title I was an additional contact period, which had previously been taught by a full-time, fully compensated teacher. The contract does not make a distinction among teachers who teach different grade levels.

There is no question that the last period of the day was a study hall during which no organized instruction was taking place. Title I, by contrast, involves direct instruction of students. It is also clear that the Title I instruction is different than what the teachers were providing during the other periods. Under federal law, Title I is intended to supplement, not supplant, other instruction. To teach Title I as the District suggests would violate the Title I guidelines and jeopardize the District's funding. The record is clear that the teachers evaluated students for eligibility for Title I, prepared lesson plans and materials and delivered specific instruction, none of which would have occurred had they not been assigned to teach Title I. It is also undisputed that the 5th and 6th grades are departmentalized and are organized by periods. Middle School and High School teachers are compensated for contact periods in excess of five and the contract language makes no distinction for Elementary teachers.

Article XX, Sec. G. also provides for extra compensation when a teacher takes a class for another teacher. In 2006-07, Title I was taught by two other teachers who did not teach Title I in 2007-08. When the 5th and 6th grade teachers were assigned to teach Title I they took the assignments of the other teachers, entitling them to the extra compensation. In addition, after the grievance was filed, the Title I assignment was given to another regular, full-time teacher, who was compensated for the assignment.

The Fochesato Grievance

The Association asserts that the District violated Sec. 111.70(3)(a)1 and 4 when it required Paula Fochesato to teach two of Jerome Hurley's physical education classes without giving her extra compensation for the assignment. Article XX, Sec. G is clear and unambiguous. It provides that a teacher who takes another teacher's class is entitled to receive 1/7 of 1/192 of his or her basic contract pay for the assignment. Fochesato was assigned to take two gym classes for Hurley while he was teaching adaptive physical education. Had she not done so the District would have needed to hire a substitute. The District implies that all it did was increase the size of Fochesato's classes, but in reality she was teaching Hurley's classes, since the students remained on Hurley's class lists and attendance sheets and he graded them.

Initially, Fochesato was compensated for teaching Hurley's classes, but the payments ended when Superintendent Eparvier reminded Elementary Principal Peitersen that Hurley's A.P.E. assignment was not to cause the District additional money. Notably, Eparvier did not state that the contract did not provide for compensating Fochesato, only that he did not want the District to incur extra expense.

Past practice also supports the Association's position. In April 2006, Fochesato took classes for Hurley, resulting in double classes, just as in the case here. There is no dispute that she was compensated for the assignment according to Article XX, Sec. G. That establishes that it is understood by the District that teachers who are assigned to cover for other teachers are entitled to be compensated.

The Hurley Grievance

The Association asserts that the District violated Sec. 111.70(3)(a)1 and 4 when it required Jerome Hurley to teach adaptive physical education classes during his preparation period without giving him extra compensation. As noted in the Title I grievance, Article XX, Sec. F provides for extra compensation when a teacher teaches an extra class beyond five. There is no question that Hurley taught more than five periods, but the language provides a floor, not a ceiling. Further, there is no question that Hurley had a preparation period, which he lost when he was assigned to teach A.P.E. This constituted an extra class, entitling him to extra compensation.

Also, prior to Hurley A.P.E. had been taught by a teacher from CESA 8. Thus, by teaching A.P.E. Hurley was teaching a class previously taught by another teacher, entitling him to extra compensation under Article XX, Sec. G.

The Schahczenski Grievance

The Association asserts that the District violated Sec. 111.70(3)(a)1 and 4 when Eparvier issued a written reprimand to Mimi Schahczenski and a suspension of her computer privileges without just cause. The contract calls for progressive discipline, which typically increases incrementally. The contract also codifies a seven step test for the determination of just cause. The District has the burden to establish the existence of just cause.

The written reprimand and suspension constituted double jeopardy because Schahczenski had already received and accepted an oral reprimand from Peitersen for the same incident. Once discipline has been issued it cannot be increased for the same incident. The District attempts to argue that the reprimand issued by Peitersen was not discipline, however, Peitersen herself told Eparvier, Schahczenski and Kim Plaunt at the investigatory meeting that she had disciplined Schahczenski and her actions support her statement. She had authority to issue the discipline, undertook an investigation and acted in accordance with her findings. Further, the discipline issued by Eparvier was based on the same information relied upon by Peitersen. He was aware of the facts relied upon by Peitersen and no new facts came to light

afterward. Thus, the discipline amounted to double jeopardy and should be expunged from her record.

The District also violated the contractual requirements for a finding of just cause set forth in Article XII, Sec. C. Specifically, the Technology Code does not prohibit use of the District e-mail system for personal or Association purposes, nor does it define what constitutes politeness or appropriate language, so the Grievant could not have known that her e-mail potentially violated the Code. There was also no meaningful investigation by Eparvier into whether the Grievant violated the policy, specifically whether there was, in fact, a waste of technology resources, or whether her e-mail was considered by anyone other than Eparvier to be impolite, bullying, harassing, or an attempt to create dissension in the workplace. Thus, there was no finding of a violation of the Code. The Code has not been applied evenly among Association members, evidenced by the fact that another teacher, who used the e-mail system to shop online only received a verbal reprimand. Finally, the degree of discipline was disproportionate to the alleged offense. The Grievant had an unblemished 22-year career at Peshtigo and her actions did not rise to the level of a "serious" offense, so there was no basis for departing from the ordinary progression of discipline.

Retaliatory Conduct

The Association asserts that in addition to the conduct set forth above, the District, and specifically Eparvier, engaged in a course of unlawful intimidation, retaliation and interference with Association members for their engagement in protected concerted activity. A violation of Sec. 111.70(3)(a)3 is established where 1) a municipal employee engaged in lawful concerted activity, 2) the municipal employer was aware of such activity, 3) the municipal employer was hostile to the lawful concerted activity and 4) the municipal employer took action against the employee due to the lawful concerted activity. CLARK COUNTY, DEC. NO. 30361-B (WERC, Nov. 2003). Determining cause and effect is often a matter of drawing inferences based upon the circumstances. Where the foregoing elements are established, a violation occurs "…when employer conduct has a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their [protected] rights," even if there was no direct intention to interfere or the employees did not, in fact feel coerced or restrained. SCHOOL DISTRICT OF NEW BERLIN, DEC. NO. 31243-B (WERC, April, 2006).

Eparvier's antipathy toward the Association leadership went back several years according to former UniServ Director Jim Blank. Shortly after Danny Smith was elected Association President, Eparvier tried to distance him from fellow Executive Committee members and discourage him from relying on UniServ Director Kim Plaunt. As a result of Eparvier's aggressive attitude, more grievances were filed in 2007-08 than in the past 2-3 years together.

As a result of the Association's unwillingness to agree to the hire of a long-term substitute to teach 6th Grade, Eparvier engaged in a series of retaliatory acts. The record shows that Eparvier was aware of and hostile to the filing of the Title I grievance. Thereafter, he

began monitoring the hallways of the Elementary School at the end of the day and he directed the administrative team to observe the Elementary Study Halls. His explanation of the monitoring and observations was pretextual and goes to support the finding of hostile intent. He also directly complained about his frustration over the Title I grievance to Tavia Schoen. The teachers were concerned and anxious about Eparvier's actions and the observations and changed their behavior accordingly. Eparvier also threatened the Association before and during the Title I grievance hearing by stating he would 1) lay off teachers to .85 FTE, 2) lay off 9 teachers and 3) eliminate departmentalization in the 5th and 6th Grades without giving any legitimate justification.

Eparvier also retaliated against the Association for the filing of the Fochesato and Hurley grievances by monitoring of the gymnasiums while Fochesato and Hurley were teaching, engaging in intimidating behavior toward Fochesato and by eliminating the practice of teachers covering for one another at the end of the day. The monitoring of the gymnasiums began after the filing of Fochesato's grievance and was a concern because it had not happened before. Of greater concern was Eparvier's attempt to meet with Fochesato without Union representation. Commission case law is clear that employees are entitled to Union representation whenever the denial of representation could affect protected rights, such as in the adjustment of a grievance. WAUKESHA COUNTY, DEC. NO. 14662-A (WERC, Jan. 1978) and other cases cited herein. Fochesato had reason to believe that Eparvier's request to meet concerned her grievance and could result in discipline. His denial of her right to representation was a violation of Sec. 111.70(3)(a)1, Wis. Stats. Further, his behavior toward Fochesato and the other teachers in his office was an attempt to intimidate them and caused them to be upset and concerned. Further, the District's rescission of the contract language and past practice of teachers covering for each other was in retaliation for the Fochesato grievance. The rescission occurred one day after the filing of the grievance and the record makes it clear that the events were cause and effect. The District offered no valid business reason for the decision and , although Eparvier claimed he was addressing an abuse of the practice, there is no evidence that the practice was, in fact, abused or that Eparvier engaged in any investigation to determine whether abuse was occurring prior to rescinding the practice.

It is also clear that the discipline of Shahczenski was in retaliation for her protected concerted activity. Schahczenski sent an e-mail to the Association membership , on her free time and in her capacity as an Association officer, responding to the rescission of the practice mentioned above. This was protected concerted activity under VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, Nov. 2003). Eparvier's hostility is evidenced by his response, which included a notarized letter to Smith complaining about her "bullying" behavior, his pursuit of the matter even after Peitersen had issued discipline and his comments to smith and Peitersen throughout the school year criticizing Schahczenski and Gaedke and characterizing them as a "cancer." There was no basis for Eparvier's handling of the discipline under any just cause standard and it was clearly an attempt to retaliate for her protected concerted activity.

Eparvier also retaliated against the Association for its Climate Survey by refusing to accept the Association's recommendation regarding Becky Gensler's job assignment for 2008-

09. The Climate Survey was protected concerted activity by the Association intended to gather and express the concerns of the membership about the environment in the District. Eparvier had been provided a copy of the survey results by Smith and his hostility toward it was made clear by his comments to the Board and his testimony at hearing. His rejection of Gensler's assignment request came one day after receiving the survey results and his rationale for doing so was pretextual inasmuch as he did not review the parent assignment requests before making his decision. Further, his decision countermanded an agreement Peitersen had already made with the Association. Clearly, therefore, his decision regarding Gensler was based upon his hostility toward the Climate Survey.

Eparvier also engaged in retaliatory conduct by his efforts to undermine the Association leadership throughout the 2007-08 school year. Examples of this include his efforts to hinder the Association in its efforts to obtain documentation for the Title I grievance hearing, his attempt to for Betsy Bradley to assist in the document request and his searching of Schahczenski's and Bradley's e-mails after the document request without any justification. Eparvier also attempted to undermine Plaunt, Schahczenski and Gaedke in their representation of the Association. He encouraged Smith and Schoen to marginalize Plaunt's role with the Association and engaged in behavior toward Plaunt that was inconsistent with his dealings with prior UniServ Directors. This included requiring Plaunt to come to Peshtigo to fill her own document request for the Title I hearing, demanding that she provide witnesses for the District to examine at the hearing and contacting WEAC President Mary Bell and UNE President Mike Kaczmarzinski to complain about Plaunt. He also made inappropriate comments about Schahczenski and Gaedke to Smith and Peitersen and on one occasion Gaedke was warned by Peitersen that Eparvier was watching her. Eparvier told Peitersen that Schahczenski and Gaedke were a cancer in the District and deliberately snubbed Gaedke by refusing to acknowledge her receipt of a Teacher of the Year award. In total, Eparvier's activity throughout the year was intended to undermine and divide the Association leadership and was clearly in retaliation for the Association's various protected concerted activities.

The Respondent

The 6th Grade Teaching Position

The District asserts that it acted appropriately in filling the vacant 6th Grade position for 2007-08. The District initially sought to fill the position with a long-term substitute, which it had done in the past when Ms. Federico was elevated to the position of Elementary Principal in 2004-05 and Ms. Bari beau was hired to fill her open teaching position full-time without benefits. The District advertised the 6th Grade position and was unable to find an acceptable candidate. Then, Mr. Eparvier appropriately contacted Union President Danny Smith to discuss hiring a long-term substitute to fill the position, which was not a prohibited practice. Ultimately, Patsy Moore volunteered to teach 6th Grade, which resolved the issue. At no time did the District violate Sec. 111.70(3)(a) in handling this situation.

The Title I Grievance

Going into 2007-08, the District was in an extended period of declining enrollment. Eparvier reasonably was looking for ways to economize and 80-85% of the District's budget was comprised of labor costs, making that an appropriate area to look for savings. Eparvier believed that the 5th and 6th Grade Math and Reading teachers could provide Title I services at the end of the day when students had band and choir, giving the core subject teachers flexibility to provide Title I instruction at that time. The teachers eventually only taught Title I for a short time and were ultimately transferred to Mrs. Shier for the balance of the school year for Title I instruction.

The Association's argument that Eparvier's statements regarding reducing teachers to 85% was retaliatory has no merit. It is management's right to determine the District's staffing needs. The Association contended that the 5th and 6th Grade teachers were monitoring a study hall at the end of the day. Eparvier's response reflected a legitimate concern that, if so, the District was overstaffed. There is no requirement that study halls be monitored by certified teachers. Thus, considering using non-certified staff to perform this function was a legitimate cost-saving option. The District's position was that the end of the day was instructional time used for application, review and enrichment. If so, this time would have comported well with the addition of Title I instruction. It is also noteworthy that no reductions did, in fact, take place, which undercuts the Association's assertion of retaliation Further, Eparvier's increased presence in the hallways after the filing of the Title I grievance is not evidence of retaliation, but rather that he was engaged in legitimate investigation of what was actually happening at the end of the day in light of the Association's assertions.

The assignment of Title I duties at the end of the day also did not entitle the teachers to additional compensation. The record shows that the administration believed that instruction was occurring at the end of the day and that, in fact, it was. The administration had consistently resisted referring to the end of the day as "study hall." Further, the Title I instruction that did occur was not an additional class, but was just a time when additional help was given to certain students while enrichment was already being provided to others. While it is true that the teachers did develop curriculum for Title I, this is no different than Mr. Devine developing a health curriculum for presentation in his science class. It is also true that while Title I instruction was occurring the 5ht and 6th Grade teachers kept the rest of their students in their classrooms and continued to provide enrichment. Thus, since this was not an "additional" instruction period, Article XX, Sec. F, did not apply. In fact, the teachers did not consider seeking compensation for their Title I duties until after a group meeting where it was decided to do so.

Further, Article XX, Secs. F and G logically only apply to the Middle School and High School. There is no evidence of this language ever being applied to the Elementary School. This is shown by the fact that the Association sought to have the Elementary teacher schedules considered under Sec. F in negotiations and its proposal was rejected by the District. Thus it is clear that the Association understood that Secs. F and G only applied to Middle School and

High School. The Association's position rests on a proposition that the concept of contact periods has the same meaning in elementary school that it does in middle and high school. In fact, the elementary schedule has never been understood to be the same as the schedules in the middle and high schools. Thus the Association is attempting to obtain through litigation what it could not obtain through bargaining, a practice that has been consistently rejected in labor relations. The 5th and 6th grades do not operate on a set schedule based on fixed periods. The grievance, therefore, rests on two points of dispute: 1) that the Elementary School schedule is structured in the same way as the Middle School and High School and 2) that the time at the end of the school day was non-instructional. The record supports the District's position on both of these points and the grievance should be dismissed.

Management "intimidation"

The Association's assertion that management's supervision amounted to intimidation is absurd. It claims that management began sitting in on supervision periods and that Eparvier began walking the halls in the elementary school more frequently after the Title I grievance was filed as a means of intimidating the teachers. In fact, inasmuch as the grievance concerned what was occurring at the end of the day, management had a legitimate interest in assessing what was going on. That the teachers did not like it is immaterial. Management had the right to investigate the grievance and to determine the merits as it saw fit. An unreasonable belief by the teachers that they were being intimidated cannot form the basis of a prohibited practice. NORTHLAND PINES SCHOOL DISTRICT, DEC. NO. 29978-A (Jones, 5/02/01) To rule otherwise would inhibit the administration in the supervision of its staff. This is an example of the Association assigning anti-union sentiment to any management decision or action it disapproves of. The Association must prove the existence of anti-union sentiment and it has failed to do so. In fact, many of the Association's witnesses testified that they were unaware of any increased management presence or feelings of intimidation, which undercuts the Association's argument. Further, Eparvier was exercising his right to be in the hallways whenever he chose and it is not relevant that some of the teachers did not like it. It is also notable that Ms. Fochesato's and Mr. Hurley's written accounts of Eparvier's increased presence were almost identical. Eparvier has a history of being present in the District and there is no evidence of any stalking behavior or intent to intimidate.

The Fochesato Grievance

There is no contractual support for the Association's claim that Fochesato was entitled to additional compensation for having additional students added to her classes. Management exercised its rights in assigning her classes and including additional students during two weekly class periods. No additional classes were added to her schedule. The Association argues that the District must limit the number of students in a class and compensate teachers for additional students, but the contract does not support this claim. It is ironic that, while pressing Fochesato's claim the Association also complains about the District ending a practice of allowing teachers to cover classes for other teachers. It is clear that in doing so the administration was addressing exactly this situation – teachers expecting to be paid for covering the classes of other teachers.

The record shows that Fochesato did not require any additional preparation, but merely implemented her lesson plan with more students. Also, as previously noted, the Elementary schedule is not organized into periods and Article XX, Secs. F and G are not applicable to Elementary teachers. Association exhibits showing teacher contracts and sub reports as evidence of period structure do not apply to Elementary teachers.

Also, the evidence indicates that Eparvier was legitimately upset by Fochesato's refusal to meet with him to discuss scheduling. Before the meeting he told her that the meeting was not about the grievance and was not disciplinary. Thus, there was no reason or right for her to have Union representation. Further, the testimony of Fochesato and Zander is contradictory as to what happened at the meeting and Fochesato's explanation as to why she wanted the other teachers there is not credible. In addition, despite Fochesato's stated concerns, no discipline resulted from the meeting and in fact no further action was taken at all.

The Hurley Grievance

The District properly sought to generate savings in 2007-08 by ending its contract with CESA 8 and using Hurley's adaptive physical education certification to provide A.P.E. services. Determining workforce needs and assigning classes and class loads is a management right. As previously noted, the language of Article XX, Secs. F and G. does not apply to Elementary teachers. Thus, there is no right to extra compensation for an Elementary teacher based on being assigned more than five classes or being denied a preparation period. Here, again, the Association is attempting to obtain through litigation what it could not achieve in bargaining. Hurley clearly tried to have A.P.E. scheduled at a time other than his prep time. This resulted in his students being assigned to Fochesato, which, in turn, led to her grievance. Thereafter, Hurley's schedule was restructured to have him teach A.P.E. during his prep time. Because the contract does not guarantee prep time for an elementary teacher, however, the grievance should be dismissed.

The Sign Out Practice Grievance

The District responded to the Fochesato grievance by discontinuing a practice of teachers being able to cover for each other at the end of the school day. This was based on the Association's position that teachers who cover classes for other teachers are now entitled to additional compensation, which was the essence of Fochesato's grievance. The administration conducted an investigation to determine if the contractual language regarding leaving during the school day was being abused by teachers leaving during instructional time. Additionally, there was a concern that if Fochesato prevailed the District would now become liable to all teachers who covered for one another. There is no contractual right for teachers to leave when they choose and the potential for additional liability made it a sound decision to curtail the practice. This was done and ultimately the parties resolved the issue through negotiation.

There is no merit to the Association's position that the discontinuation of the practice was retaliatory for the Fochesato grievance. There was no animus toward concerted activity

and the fact that the decision was based on a concern for future claims or grievances does not make it retaliatory. The decision was based on sound administrative principles and the Association has failed to show that there was any anti-union sentiment or desire to retaliate for the Fochesato grievance underlying it.

The Schahczenski Grievance

The discipline of Mimi Schahczenski was appropriate due to her violation of the District's acceptable use policy by sending an e-mail that was clearly intended to harass the administration and subvert its authority. It is acknowledged that the District has the right to control and monitor the use of its e-mail system. Further, the issue is not Schahczenski's use of the e-mail system for personal or Association purposes, but rather her choice of language and the subversive purpose of the correspondence. It is hypocritical of the Association, given its complaints over the District's alleged intimidation, to at the same time complain about the District's response to this clearly harassing act. Had the administration sent out a similar e-mail characterizing the Association as "petty and foolish" there is no doubt another complaint would have been forthcoming. There is no question the e-mail was intended to incite the Association membership to engage in pushing back against the administration.

The discipline and circumstances were similar to discipline that was issued to Terri Gaedke in 2002. The conduct was similar and the cited policy violations were the same. Both received oral reprimands and restrictions on their computer use. In fact, Schahczenski's misconduct was more egregious than Gaedke's. Her e-mail was not only a personal attack on the Administrator, but was also solely intended to incite dissension and unrest. The e-mail, and its transmission to the membership clearly violated the Code of Conduct, as was the resulting discipline.

Schahczenski was not subject to multiple discipline. She only received a written reprimand. She did not receive an oral reprimand and there is no record of any such in her personnel file. In the past the Association has successfully argued that discipline that is not properly documented cannot be used for purposes of successive progressive discipline. The Association cannot now claim that a conversation between Peitersen and Schahczenski, which was never documented, constitutes discipline. The District had just cause for issuing the discipline and the degree of discipline was appropriate. The grievance should be dismissed.

The "Bump Night" Incident

The District and Association have a practice, memorialized in an MOU, whereby the Association meets in the spring and determines which open positions they want to fill in the coming year. Prior to the 2008 bump night, the District involuntarily transferred Becky Gensler to a Middle School Special Education position for 2008-09. Subsequently, a position opened for a Kindergarten teacher for 2008-09 and the Association sought to reconfigure the staffing and have a number of the assignments changed, including having Gensler transferred back to the Elementary School. Eparvier, based on sound educational principles, determined

that such would not be in the District's best interest. The Association maintains that Gensler should not have been transferred initially, but can cite no basis for its position. Ultimately, it is the District's prerogative to determine and fill its staffing needs, whether or not the Association agrees with the outcome. This does not give rise to a valid prohibited practice complaint.

The Association suggests that Eparvier's decision was in retaliation for the Association's climate survey, which occurred at the same time. The only evidence of this is the proximity in time of the events, which is insufficient. VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/2/03) There is no link between the events and the Association has been unable to establish otherwise. The administration had sound reasons for its decision to not reverse Gensler's involuntary transfer and acted within its management rights throughout the process.

Retaliatory Conduct

The Association's entire complaint is bases on its members' disagreement with decisions by the administration and not on any retaliatory conduct by management. In essence, the Association has engaged in a "kitchen sink" approach in the hopes that the Examiner will believe that there must have been some misconduct. The Examiner should not allow the Union to use the prohibited practice process as a means to dictate the District's exercise of its management rights.

Eparvier's statement that he would like issues to be resolved locally does not reflect anti-union sentiment. Ultimately, whether with the UniServ or the local, the issues are resolved properly through negotiation and collaboration. There is a history in the District of resolving issues locally and Union President Danny Smith also testified that he preferred local resolutions. There is nothing unusual or illegal about such a practice. Eparvier's cal to WEAC President Mary Bell is further evidence of his efforts. Bell testified that Eparvier wanted to discuss his concerns about the relationship between the Association and the District. He did not ask her to take any action, nor was any action taken based on his contact. The record shows that there were personality differences between Eparvier and the Union leadership, but in the past this had not hindered working together. The situation changed with the turnover in Association leadership in 2007. After Danny Smith and Kim Plaunt came on the scene the number of grievances increased dramatically. This was not the fault of the Administrator. Personality conflicts are common in labor relations and cannot provide a valid basis for complaints under Sec. 111.70(3)(a). It is restraint of protected activity that forms the basis for a complaint and there is no evidence that the administration in any way restrained the Association members in the exercise of their protected rights. Rather, it was Plaunt who sought to stir things up, suggesting job actions, refusing to work with the administration and ignoring or denying its reasonable requests. Eparvier engaged in no illegal conduct but only responded to the antagonistic behavior of Plaunt.

The complaint in this matter is merely an attempt by the Association to intimidate and impose its will on the administration. Smith told Eparvier he would not discuss resolution of

outstanding issues unless Eparvier apologized to Schahczenski. Throughout the year the Association continued to amend its complaint to add more spurious accusations and has used the complaint process in a wholly inappropriate manner. The record is clear that the Association's sole purpose is to paralyze the District in the lawful exercise of its management rights.

The Document Request

In preparation for the Title I grievance, the Association filed an extensive document request, the filling of which required great time and effort. Plaunt alone spent 9-11 hours filling the request. Also, given the amount of documents requested, it was conceivable the District could have missed something, giving rise to more accusations, so it was reasonable to place the onus of filling the request on Plaunt. Ultimately, Plaunt's participation saved time and resulted in the request being significantly narrowed in scope. Thus, by requesting her assistance in filling the request Eparvier acted reasonably and within his authority.

Complainant Reply

The Association asserts that the District and Eparvier falsely portrayed the District's financial position to justify their actions It is settled that the economic position of the employer is not grounds for violating a collective bargaining agreement. Also, the facts do not support the claim that the District was in financial difficulty. Eparvier admitted that when open enrollment numbers are figured in the District had increasing enrollment, for which it received $6000 per student, and actually had to turn students away. Further, the District's fund balanced has increased while Eparvier has been Administrator and is healthier that that of many area districts. In short, while pleading hardship, Eparvier offered no evidence to support the claim. Thus, the District's contention that its actions were justified by financial hardship cannot be sustained. Further, financial considerations do not permit retaliation under Sec. 111.70(3)(a)1 and 3, Stats. When Eparvier threatened to reduce teachers to 85% he offered no financial data to reveal any budgetary basis for his threat. He merely made a threat to attempt to intimidate the Association.

It is also disingenuous for the District to portray the Association's claims of retaliation and intimidation as "silly" or "amusing," or to characterize them as merely disagreements over the District's exercise of its management rights. Management rights do not justify an Administrator in referring to teachers as "cancers," berating a teacher for exercising her *Weingarten* rights, or threatening to lay off teachers for filing grievances. The reality is that Eparvier resented the teachers exercising their contractual rights and the Association's challenge to his iron-fisted control of the District and reacted accordingly. The District tries to create new case law by suggesting that threats alone are not unlawful or that retaliation and intimidation must generate a particular response. Case law makes it clear that conduct must only have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of protected rights to be unlawful.

There is no evidence that Eparvier's patrolling of the halls was for the purpose of gathering information, or that any information was so gathered or used. Further, it is unreasonable to assume that patrolling hallways, without actually observing activities in classrooms or talking to teachers is a reasonable observation technique. Further, his continued "monitoring," even after the grievances were denied at all levels reveals that it had no legitimate investigatory purpose. The Association has never contended that Eparvier cannot monitor his staff, just that he cannot do so as a retaliatory tactic.

The District mischaracterizes case law as to an employee's exercise of *Weingarten* rights. In requesting representation in her meeting with Eparvier, Fochesato was clearly within her protected rights. The District focuses on irrelevant differences in Fochesato's and Zander's accounts of the meeting and ignores the fact that both were consistent in relating his threatening words and conduct. Further, Eparvier gave no explanation for why he did not seek to meet with Fochesato before her grievance was filed, why he insisted on meeting her alone, or why he never followed up as he said he would.

The District also offers no proof from the evidence or the agreement to support its contention that the various grievances should be denied. Instead, it mischaracterizes evidence or even invents evidence in order to support its arguments. It argues that, except in the case of Schahczenski, it is permitted by economic considerations to violate the contract. The District mischaracterizes the situation with the Title I grievance by suggesting that the 5th and 6th Grade teachers were only temporarily assigned to teach Title I until the students could be assigned to Mrs. Shier. Actually, there was never a discussion with the teachers about the students eventually going to Mrs. Shier and the change was only made after the grievance was filed. The teachers took extensive measures to evaluate the students, to plan and prepare and to communicate with parents, which is not evidence of a temporary arrangement. The District minimizes what the teachers did to prepare for Title I and, on the other hand, overstates what was actually occurring during the end of the day study hall. The District's characterization of Title I as being in accord with the regular study hall activities misrepresents what Title I is and, if true, would violate the state guidelines for Title I instruction, which is to supplement, not supplant, regular instruction. The comparison to Mr. Devine's health unit in his science class is inapposite because health is part of the science curriculum.

The District asserts that the contract language regarding extra compensation for overloads does not apply to elementary teachers and cites Association bargaining proposals to support its claim. The testimony shows, however, that the Association never conceded that the existing language does not cover elementary teachers. The language does not distinguish between classes of teachers and the District should not be able to gain an interpretation through arbitration that it could not gain through bargaining. The District's implication that the teachers brought forth the grievance due to ulterior motives is offensive and should be rejected. This was a good faith grievance to assert a teacher's right to be compensated for an assignment to teach during a non-contact period and should be sustained.

The District's argument that the Fochesato grievance was over a teacher having more students added to her class is a red herring. Fochesato was assigned additional classes by the District. This scenario is clearly covered by Article XX, Sec. G and in the past Fochesato was compensated under the same circumstances. The language clearly applies when an elementary teacher is required to take a gym class for another elementary teacher in lieu of hiring a substitute. That is what happened here.

The District reiterate its position in the Fochesato grievance in addressing the Hurley grievance. Eparvier's testimony was self-serving and attempts to assert that Article XX, Sec. F does not apply to elementary teachers when it clearly does. Hurley was assigned the CESA 8 teacher's A.P.E. classes during his preparation time and is entitled to be compensated. It is also insulting for the District to argue that Hurley dragged his feet because he didn't want to teach A.P.E. The record does not support this, but clearly shows that Hurley tried to schedule A.P.E. during times that worked best for the students. In fact, by rescheduling A.P.E. during Hurley's prep time, the District upset one parent because it pulled the student out of a core class.

There is also no basis for the District's argument that Schahczenski's oral reprimand from Peitersen was not discipline. Schahczenski, Gaedke and Peitersen, herself, considered the reprimand to be discipline. The SCHNEIDER decision cited by the District is inapposite because it involved a complaint from a parent, not a reprimand, so the situation here was never presented to or addressed by Arbitrator Millet. There is no evidence, other than Eparvier's self-serving testimony, that Schahczenski's e-mail was subversive or destructive and it is hypocritical for the District to sound this note in this one instance while downplaying all evidence of Eparvier's multiple attempts to intimidate and retaliate against the staff. Eparvier also failed to give any evidence as to in what way the e-mail violated the technology code or what specific provision was violated.

The Association never argued that the District violated the contract in rescinding the teacher leave policy, but the District attempts to muddy the waters in order to avoid attention to the retaliatory basis for its actions. The Association dropped its claim over the practice when the parties agreed to a new MOU regarding the practice. The Association's claim is that the rescission was in retaliation for Fochesato's grievance. Further, Eparvier's claim that the rescission was justified ignores the fact that no investigation of the practice was ever conducted and no abuse of the practice was ever proved. Eparvier even attempted to shift responsibility to Peitersen by claiming that she originally raised the issue with him, which was clearly not the case.

The District and Eparvier have clearly adopted a "blame the victim" strategy whereby they claim that the Association was trying to throw in the "kitchen sink" in the hopes that something would stick. Eparvier chose to engage in multiple instances of retaliatory conduct and the Association cannot be blamed for challenging it. It is absurd for the District to argue that the Association should only be allowed to complain about conduct which occurs in isolation or that the Association is attempting to intimidate Eparvier by challenging his

conduct. The record shows that Eparvier continued his intimidating and retaliatory conduct even after the initial complaint was filed, which undercuts any claim that he was intimidated. Further, there is no support in the law for the proposition that an Association engages in intimidating and retaliatory conduct by seeking redress for wrongs committed by the District or Administrator.

Respondent Reply

The District reasserts that the Title I grievance rests on the propositions that 1) Article XX contemplates a period based school day for elementary teachers and 2) that the end of the school day was a non-contact period. It is undisputed that Title I is an instructional program requiring preparation of plans and materials. The record shows, however, that the end of the school day was contact time when instruction was already occurring and teaching activities were going on. This was admitted by Association witnesses. It is also true that the Elementary School schedule was not based on traditional periods in the same way as the Middle School and High School, so Article XX, Sec. F does not support the Association's position.

The testimony regarding bargaining history establishes that the parties had extensive discussions about the period-based system in the Middle School and High School, which shows that Article XX, Sec. F. applies to the Middle School and High School, but not the Elementary School. The Association advanced bargaining proposals attempting to gain the benefits of Article XX, Sec. F. for elementary teachers, which it would not have done had this language already applied. The Association also admits that some elementary teachers teach more than five contact classes per day without extra compensation, which further establishes that the traditional period concept does not apply in the elementary school. The Examiner should find that Article XX, Secs. F. and G. do not apply to elementary teachers and deny the grievance.

The Association further tortures Article XX, Sec. F. by asserting that Hurley's teaching of a class formerly taught by a CESA 8 teacher the previous year constitutes "taking another teacher's class." There is no dispute that Hurley was the only teacher who taught A.P.E. in 2007-08. Under this theory, any teacher who teaches a class taught by someone else the previous year is entitled to extra compensation. This makes no sense and is just an attempt to create a contractual obligation where none exists. There is also no support for the contention that Hurley should be compensated for teaching during his prep time, since the contract does not guarantee prep time for elementary teachers. It is conceded that specials teachers, including gym teachers, teach more than five classes per day, but the Association argues that the five periods per day rule is not a ceiling, but merely a floor, beyond which additional compensation may be paid, which is confusing. Thus, according to the Association, some teachers are entitled to extra compensation whenever they teach more than five periods per day, but others may teach more than five periods per day without extra compensation.

The Fochesato and Hurley grievances should be about what the contract requires, not what it does not prohibit, or what teachers would like to have. The grievances do not assert a

contract violation, but only that Fochesato and Hurley would like additional pay. The District was within its rights to deny the requests and did so. The record shows that "specials" teachers have not received extra compensation in the past when assigned more than five periods. The Association argues that Hurley should receive extra pay because either 1) the five class standard is modified by a particular teacher's class load or 2) any time a teacher is required to teach during previously unscheduled time extra compensation is due. As the Association argues elsewhere, the contract language is clear, and it does not support the first proposition. The second argument fails because there is no guaranteed prep time for elementary teachers.

The Schahczenski discipline must be upheld because personal attacks such as hers are not protected under the statute. CITY OF KENOSHA, DEC. NO. 25226-B (WERC, 2/89) Her comments served no legitimate purpose, but was merely intended to discredit the administration. She was disciplined for violating the District's computer use policy and the District has a legitimate interest in regulating this usage. The District does not forbid usage of District technology for protected activity, but requires that such activity adhere to the policy. The policy requires politeness and, in referring to the District as petty and foolish, her e-mail was not polite. Further, her discipline was handled in the same way as Terri Gaedke's for the same offense in the past. There is no reasonable comparison between Schahczenski's e-mail and Eparvier's previously telling Plaunt that a certain matter was none of her business or driving away from her in a parking lot. Nor is there a reasonable comparison between Schahczenski's case and the previous discipline of Angela Flett.

Fochesato's grievance should also be dismissed. She was not assigned extra classes. Rather, she had students added to classes she was already teaching. It is irrelevant that the students were still assigned to Hurley, or that he was still responsible for grading, testing, or other obligations in regard to them. The contract refers to classes as being discrete period of time. Fochesato required no additional increment of time to instruct the students, nor is there any contractual limit on class size. Had there simply been an assignment of the students to her initially, there would be no issue, yet she apparently feels entitled to extra pay, even though her responsibilities toward Hurley's students were less than those to her own.

The Association's complaint about retaliatory behavior has no merit. It is totally based on the feelings and beliefs of the teachers, even though subjective beliefs cannot form the basis for a complaint. While the Association states that its members were intimidated, there is no objective evidence of intimidation. Indeed, throughout the year the conduct of the Association members revel that, far from being intimidated, they grew more intransigent as the year progressed. Using a standard of reasonableness, it is fair to assess how a person would react in a given situation based on how they did react. The teachers did not act as if they were intimidated, nor did they testify that they were restrained. It also takes more than proximity in time to establish hostile intent. The Association must prove its claims by a clear and satisfactory preponderance of the evidence and has not done so. There is no doubt that the MOU regarding staffing permitted the District to reject the Association's assignment requests. The Association's only contention is that it occurred in proximity to the release of the climate survey, which falls far short of the standard of proof. Likewise, Eparvier's presence in the

hallways was clearly legal, yet the Association claims that it became illegal due to the existence of pending grievances. Likewise, Eparvier's contacts with the Association and WEAC leadership do not indicate any attempt to undermine or replace the Association leadership, but rather to address concerns about the relationship between the Association and the District. This does not constitute a prohibited practice. NEW BERLIN SCHOOL DISTRICT, DEC. NO. 31243-B (WERC, 2006). The record is replete with examples of Eparvier working through issues with the Association in the past, even during the 2007-08 school year. Eparvier took no steps to replace the Association leadership and engaged in no conduct that violated Sec. 111.70.

On the other hand, Fochesato's behavior when called to meet with Eparvier was clearly insubordinate. Fochesato was told the meeting was not disciplinary and did not involve her grievance. As such, she was not entitled to representation since she could have had no reasonable belief that discipline or adjustment of her grievance was involved. Eparvier did not bring up the grievance or discipline, nor was there any subsequent action taken after the meeting to suggest any improper purpose or motive.

There was also nothing remarkable in Eparvier's presence in the hallways. He testified that he tries to maintain a presence in the District and was frequently present in the hallways. His practice in this regard has been consistent over the years. He testified to legitimate purposes for walking the halls and it can be argued that the Association's complaint is based on a desire to direct Eparvier's administrative actions. The same is true of Eparvier's observations of the gymnasiums. He testified that his practice in 2007-08 was no different than in years past and his testimony was credible.

There is no evidence that Eparvier's decision regarding Becky Gensler's position was based on the Association's anonymous climate survey. There was nothing derogatory in his reference to the survey as anonymous, because it was anonymous. Eparvier testified that he had no use for anonymous surveys, but this does not rise to the level of animosity or retaliation, just his opinion that the reliability of such surveys is suspect. The Association equates his opinion with hostility and then assumes that any adverse action occurring in proximity to the survey was retaliatory. This does not meet the standard of proving retaliatory motive, which requires more than suspicion or speculation. The MOU does not restrict management's right to make teaching assignments and Eparvier explained the reasons for his action. There is no credible evidence of retaliation.

Likewise, Eparvier's statements regarding staffing options during the Title I proceeding were reasonable based on the positions taken by the Association. Reacting to the Association's assertion that the end of the day was a non-contact study hall, Eparvier merely pointed out that, if true, there was no need to have nine licensed teachers performing a task that could be done by non-licensed staff. Saving money is a legitimate business purpose and there is nothing wrong in considering such options in the face of the Association's argument. Ultimately, no such action was taken and yet the allegations persist. Further, assigning the 5th and 6th Grade teachers to provide Title I services at a time when they were already delivering instruction made good educational and fiscal sense, and, since elementary teachers are not guaranteed

additional compensation for more than a set amount of student contact, no extra compensation was warranted.

The Association complains about Eparvier's expectation that Plaunt or Bradley would assist with Plaunt's document request, and that he did not let Plaunt use the copy machine she preferred. It is established that there is no illegal act when there is a legitimate underlying business purpose. Eparvier testified that this was the largest document request he had ever received and would have required excessive District resources to fill. Plaunt was able to fill the request more quickly and efficiently herself and Eparvier provided her with workspace, staff and technology assistance and copying resources to facilitate the request.

Regardless of other considerations, the Association's request for attorney's fees should be denied. Such fees are warranted only when the response to the complaint is frivolous, in bad faith, or devoid of merit. Typically, each party is responsible for the costs of its own representation. The record shows that the defense of the allegations was not frivolous or in bad faith, therefore, the request for fees should be denied.

DISCUSSION

This case involves a series of grievances that were filed by the Complainant Association against the Respondent District throughout the 2007-08 school year at a time when the parties were in a contract hiatus and in an environment of deteriorating communication and relationships between the Association leadership and membership and the District and the Superintendent, Kim Eparvier. Thus, the complaint not only raises the legitimacy of the various grievances, but also the underlying atmosphere, in which, it is alleged, some of the actions resulting in the grievances, as well as certain ancillary events and actions, were the result of impermissible retaliation against the Association and its members by the District and Eparvier. Therefore, the grievances and the allegations of retaliatory conduct will be discussed in separate sections.

The Grievances

Legal Framework

As aforestated, the grievances occurred during a period of hiatus, when the parties existing collective bargaining agreement had expired and was not in force. In each case, the grievances were advanced through the contractual grievance process to the final step, but were not thereafter advanced to arbitration, although arbitration is the ultimate step to resolution set forth in the contract. The Association witnesses explained, and the Association argued in its brief, that the failure to do so was based on the Association's understanding that under prevailing law a union cannot compel an employer to submit to grievance arbitration during a hiatus. Therefore, the Association elected to seek redress for the grievances through a prohibited practice complaint.

The Commission has held that when a contract has expired, and before a new contract has been agreed upon, the parties are required to maintain the *status quo* as to all mandatory subjects of bargaining. DODGELAND SCHOOL DISTRICT, DEC. NO. 31098-C (WERC, 2/14/07). An employer that unilaterally changes or departs form the terms and conditions of the contract during a hiatus, therefore, is in violation of Sec. 111.70(3)(a)4, Stats., which provides:

> **(3)** PROHIBITED PRACTICES AND THEIR PREVENTION. (a) It is a prohibited practice for a municipal employer individually or in concert with others:
>
> . . .
>
> 4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit. Such refusal shall include action by the employer to issue or seek to obtain contracts, including those provided for by statute, with individuals in the collective bargaining unit while collective bargaining, mediation, or fact-finding concerning the terms and conditions of a new collective bargaining agreement is in progress, unless such individual contracts contain express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement.

DODGELAND SCHOOL DISTRICT, ID.

Typically, grievances are processed through the contractual grievance procedure and, unless resolved and if the contract so provides, are then advanced to arbitration for resolution. Indeed, where a contractual grievance procedure provides for binding arbitration, the Commission prefers to defer prohibited practice complaints which raise arbitrable issues to arbitration rather than resolve them through a prohibited practice complaint. The Commission has held, however, that the duty to arbitrate is a creature of contract and, therefore, when a contract expires the duty to arbitrate disappears. SCHOOL DIST. NO. 6, CITY OF GREENFIELD, DEC. NO. 14026-B (WERC, 11/77). As a result, therefore, during a hiatus, neither party can compel the other to submit to grievance arbitration. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29203-B (WERC, 10/98) Where the Association has exhausted the grievance procedure, therefore, it may file a prohibited practice complaint alleging a violation of Sec. 111.70(3)(a)4 without first requesting arbitration. RACINE UNIFIED SCHOOL DISTRICT, ID. The record reveals that the underlying grievances that have been included in the complaint herein were processed through the steps of the contractual grievance procedure and so are properly raised in this proceeding.

The Title I Grievance

The essence of the Title I grievance is a claim by the 5th and 6th Grade math and reading teachers – Kay Sodini, Cheryl Lange, Ginny Malmstadt and Patsy Moore – that they were

contractually entitled to extra-duty compensation as a result of being assigned to teach Title I at the end of the school day. As with all the grievances raised herein, the Title I grievance is intermeshed with the Association's allegations regarding intimidation and retaliation by the District and Superintendent, but these will be addressed separately later in the discussion and only the merits of the particular grievance will be dealt with here.

The particular contract language in issue is Article XX, Section F., which provides:

> "Classroom Driver Education, Homebound Instruction and Extra class rate pro-rated: 1/7 of 192 days of contract. Extra class shall be defined to mean any contact period in excess of five, however, preparation periods and study halls do not constitute contact with students. Furthermore, the District shall only be obliged to pay the 1/7 extra compensation if it assigns the extra class."

It is the contention of the Grievants that under the departmentalized model of class structure in the 5th and 6th Grades they were each assigned five contact periods per day and that the period at the end of the day, when Title I was to be taught, was a non-contact study hall for students who were not involved in Band or Chorus. Under Article XX, Sec. F., therefore, the Title I assignment constituted an extra class entitling them to additional compensation computed according to the formula set forth in the provision. It is not disputed that the teachers pre-evaluated students, developed lesson plans and materials and provided direct instruction to the Title I students, as set forth in the guidelines promulgated by the Wisconsin Department of Public Instruction.

The District's argument in opposition to the grievance is based on two propositions. First, it is the District's position that the time at the end of the day was, in fact, a contact period wherein teachers were expected to engage in application, review and enrichment activities with students, although it appears that no lesson plans were prepared for this time nor did formal instruction take place. Thus, this was not an extra period, but one in which they were already teaching. Second, the District asserts that the Elementary School does not operate on a set period schedule, as the Middle School and High School do, and so Elementary teachers' workdays are not broken down into contact period segments. It maintains, therefore, that the language of Article XX, Sec. F. does not apply to Elementary teachers.

The initial question is whether the language of Article XX, Sec. F is applicable to the 5th and 6th Grade teachers. I find that it is. In the first place, despite the protestations of the District to the contrary, the language itself is not restricted to the Middle School and High School, but appears to apply to any teacher in the District to whom the described circumstances apply; that is, any teacher who is required to teach more than five periods. The District argues that, by definition, Elementary teachers are excluded because the Elementary School schedule is not based on periods. The record indicates, however, that, at least with respect to the 5th and 6th Grades, that is not the case. According to 6th Grade teacher Patsy Moore, for at least ten years the 5th and 6th Grades have been departmentalized. This means that each teacher teaches his or her own subject and the students move from classroom to

classroom throughout the day, similar to Middle School and High School. Indeed, the testimony reveals that the point of departmentalization was to prepare the students for the type of class schedule they would encounter in Middle School. The schedules of the teachers, set forth in Association Exhibits 35, 39, 44, 46, 51, 59 and 76 and District Exhibits 1 and 2 reveal that the teachers each meet particular classes of students during particular periods of the day and in many of the schedules the contact periods are enumerated. The schedules are prepared by the teachers at the beginning of the year and are turned in to the administration. The teachers testified that in the past they have not had to teach more than five contact periods per day and the schedules bear this out. In some instances, teachers are assigned five sections of their subject during the day. In other instances, teachers are assigned four sections of their subject and then team teach a language arts module. The other periods of the day are designated as Homeroom, Specials/Preparation, Lunch/Recess and the period at the end of the day, which has been characterized variously as Study Hall, A.R.E., Enrichment and Remediation. The structure of the daily schedule, combined with the testimony of the teachers, makes it clear that 5th and 6th Grades are by design intended to model the patterns of the Middle School and High School.

The District persuasively argues that the bargaining history supports the notion that Section F. does not apply to Elementary teachers. In particular it notes that in the negotiations over past contracts, and in contemporary negotiations over the 2007-09 agreement, the Association sought language specifically providing extra duty compensation for departmentalized 5th and 6th Grade teachers who are assigned more than five contact periods. It asserts that this is evidence that the Association recognized that such an entitlement did not exist under current language. The Association's position, however, is that the language was silent on the point and the proposal was intended to clarify the *status quo* rather than add a new benefit. Thus, the amendment to the language would clarify that extra compensation for more than five periods would apply to all teachers operating in a period based system, including the 5th and 6th Grade teachers. In my view, the Association's position is the stronger one inasmuch as the reality was that the 5th and 6th Grade teachers were actually teaching in a period based system and had been since departmentalization was introduced several years before. The language as currently worded applies to all teachers in a period based system. Given the structure of the daily schedule, therefore, along with the fact that the contract language itself is not limited to the Middle School and High School, I find that Article XX. Sec. F. does apply to the 5th and 6th Grade teachers.

As to whether the last period of the school day constitutes a contact period, as that term is used in Article XX, Sec. F., I find that it does not. First of all, the provision itself specifically states that a study hall is not a contact period. This then centers the analysis on what exactly the last period of the day is. The District asserts emphatically that it is not a study hall, but a contact period during which teachers are to be providing assistance to students. The District even went so far at one point as to insist that the teachers not refer to the last period as study hall, but call it A.R.E. instead, which stands for application, remediation and enrichment. The point here being that the District intended for the teachers to be actively working with students at this time, not just monitoring them. Indeed, at the Title I hearing

before the School Board Eparvier suggested that if, in fact, the end of the day was a study hall then he didn't need certified teachers to be monitoring those students, but could use less expensive non-certified staff instead. Notwithstanding the foregoing, it is also true that the teachers do not prepare lesson plans or materials for the period at the end of the day. Thus, they do not deliver formal instruction, which would be difficult because many of the students are not present, but are in Band or Chorus during that period. The students are not tested, nor are they graded or otherwise evaluated, for that period. The teachers do help students during this period and engage in educational activities, such as reteaching concepts, but this falls short to my mind of what occurs during an ordinary contact period.

When Peitersen assigned the four 5th and 6th Grade Math and Reading teachers to teach Title I at the end of the day, they were required to evaluate students for eligibility to participate in the program, prepare lesson plans and materials, deliver instruction and evaluate the students' progress. These are all teaching activities consistent with what may be expected to occur during a "contact" period. This was different than what they had been doing during the period at the end of the day in the past. After the Title I grievance was filed, the Title I assignment was withdrawn from the Grievants and was given to another teacher, who was compensated for it. Inasmuch as the Title I assignment was a contact period, it brought the Grievants to six contact periods per day where in the past they had only had five. The contract language is clear in requiring that teachers assigned to more that five contact periods be given extra compensation according to the formula set forth therein. This was not done and by failing to compensate the teachers according to Article XX, Sec. F., the District unilaterally modified the contract during the hiatus and, thereby, violated Sec. 111.70(3)(a)4, Wis. Stats.

The Fochesato Grievance

The Fochesato grievance arises out of a circumstance where during October through early December, Elementary Physical Education teacher Paula Fochesato was required to teach two Physical Education classes for another Phy. Ed. teacher, Jerome Hurley, while Hurley was assigned to teach Adaptive Physical Education to special needs students in the Middle School and High School. The Association maintains that Fochesato was entitled to extra compensation for the teaching assignment according to Article XX, Section G. of the contract which provides:

> "A teacher taking another teacher's class shall be paid 1/7 of 1/192 of the substituting teacher's basic contract pay (excluding extra-curriculars). This includes elementary teachers who are required to take gym, music and/or art classes when substitute teachers are not hired. A teacher who substitutes for another teacher in lieu of a regularly assigned class shall receive no extra pay."

It is the Association's position that by virtue of the fact that she was required to take two of Hurley's classes, and based upon the cited provision, Fochesato should have been compensated accordingly.

The District asserts to the contrary that Fochesato was not required to take Hurley's classes, but merely had Hurley's students combined with her own during periods she was already teaching. Thus, she did not have additional classes, but only additional students. There is no contractual limitation on management's right to determine class size, so Fochesato has no legitimate claim to extra compensation merely because her class sizes were increased. I cannot agree.

The record establishes that Eparvier's decision to eliminate the contract with CESA 8 and provide the Adaptive Physical Education instruction in house was intended to be a cost saving move. In September 2007 Hurley was directed to begin teaching Adaptive Physical Education by Dr. Ronald Kapp, the District's Special Education Coordinator. Hurley began trying to develop a schedule for the A.P.E. students, but it was Eparvier's impression that he was deliberately trying to undermine the A.P.E. program at the urging of the Association, and with the connivance of Fochesato. The record fails to provide any objective basis for his belief, but ultimately a schedule for providing A.P.E. instruction was created which conflicted with two of his own Elementary Physical Education classes. Eparvier instructed Peitersen that providing coverage for Hurley's classes needed to be cost-neutral. Peitersen approached Fochesato and told her she would be covering Hurley's classes two days per week by combining them with her own, but that the classes would technically remain Hurley's. The students would remain assigned to him, and, although Fochesato would provide the direct instruction, he would be responsible for evaluating the students and grading them. Prior to beginning the assignment, Fochesato told Peitersen that she expected to be paid for the extra duty under Article XX. Sec. G., and would be submitting pay vouchers accordingly. Peitersen agreed. Fochesato taught Hurley's classes in October 2007, submitted extra duty vouchers, which were approved by Peitersen, and was compensated for the extra classes. Fochesato continued to teach Hurley's classes until early December, when she went on sick leave. She submitted extra duty vouchers for those classes, as well, which came to Eparvier's attention. Eparvier asked Peitersen for an explanation and Peitersen told him Fochesato told her she had to. Eparvier told Peitersen that their understanding was that the provision of A.P. E. services was not to cost the District more money and that the pay requests should be denied. When Fochesato received her December 7 paycheck she discovered that not only did she not receive extra duty pay for November and December, but the pay she had received for October was deducted from her check. On December 10, Peitersen sent Fochesato an e-mail confirming that her request for extra duty compensation was henceforth denied.

The contract language states that a teacher will be paid extra compensation "for taking another teacher's class." Although this would likely typically occur at a time when the substituting teacher is otherwise unengaged, it does not state that this must be so. In practical effect, the District is correct that Fochesato's pre-existing classes merely became larger, but the reality is that the classes remained Hurley's and he was ultimately responsible for them. Thus, while Fochesato was providing the direct instruction, it would no doubt have been necessary for Fochesato to do extra work to become familiar with the students and their levels of ability, provide them with instruction and then communicate with Hurley in order for him to do the necessary evaluation and grading. Applying the language on its face, therefore,

Fochesato did take Hurley's classes and was entitled to the extra compensation. Further support for this interpretation is found in the fact that Fochesato had previously taken one of Hurley's classes in 2006 and was compensated accordingly based on Article XX, Sec. G. Also, Peitersen initially agreed with Fochesato's request and signed off on her extra pay vouchers. This only changed when Eparvier instructed Peitersen to deny the requests and, notably, his direction was not apparently based on interpretation of the contract language, but merely on his desire that the District not incur any additional cost due to Hurley's assignment to teach A.P.E. It is well settled that a desire to save money does not justify the violation of a collective bargaining agreement. Therefore, in denying Fochesato's pay request the District unilaterally modified the contract during the hiatus and, thereby, violated Sec. 111.70(3)(a)4, Wis. Stats.

The Hurley Grievance

The Hurley grievance arose out of the Fochesato grievance. When Paula Fochesato grieved the fact that she was assigned to teach two of Jerome Hurley's Phy. Ed. classes without extra compensation, the District decided to withdraw the assignment. This meant that Hurley had to resume teaching the classes that had been assigned to Fochesato and could no longer teach Adaptive Physical Education during those periods. This required the District to either cancel A.P.E., hire another teacher to teach it, or rework Hurley's schedule. Given that choice of alternatives, the District elected to have Hurley teach A.P.E. three days per week during the period between 11:10-11:55 a.m., which until then had been his preparation period. He was notified of this in an e-mail from Kapp and Peitersen on January 3, 2008. On January 7, Hurley e-mailed Peitersen to inquire about extra compensation for the loss of his prep time and his request was denied.

The grievance was predicated on Hurley's contention that the assignment entitled him to extra compensation under Article XX of the contract. The Association argues that he was entitled to be paid under Article XX, Sec. F., because he was assigned to teach more than five classes and under Sec. G., because he was assigned to teach a class during his prep time, i.e. A.P.E., previously taught by a CESA 8 teacher. The District argues that there is no guaranteed prep time for Elementary teachers, that the five class limit does not apply to Elementary teachers and that Sec. G. is inapplicable.

The schedule for the Elementary Physical Education teachers is broken down into seven forty minute contact periods, plus a 30 minute lunch period, a thirty minute prep period and 15 minutes at the beginning and end of the day to set up and take down gym equipment. This is problematic from the standpoint of Article XX, Sec. F because the Phy. Ed. teachers teach more than five contact periods per day and yet the evidence is clear that historically they have not received extra compensation for doing so. The Association argues that Sec. F. creates a floor, or minimum number of periods, beyond which extra compensation must be paid, but that is not what it says. The language states, "Extra class shall be defined to mean any contact period in excess of five..." This is clear and unambiguous language that makes it clear that extra compensation is due whenever a teacher is assigned to a class period beyond five. And yet, the specials teachers In the Elementary School, including Phy. Ed., Art and Music

teachers, have typically had more than five contact periods per day and have not received extra compensation. In my view, this reflects the fact that it has been generally understood that Sec. F. does not apply to Elementary teachers other than those who are departmentalized.

Article XX, Sec. G. is also inapplicable. It specifies that extra compensation is due when a teacher takes another teacher's class. The Association's argument in this regard is that in 2006-07 A.P.E. was taught by a CESA 8 teacher and this assignment was passed to Hurley in 2007-08. As the District points out, however, if Sec. G. applies to this situation, then any teacher who teaches a class that was taught by another teacher the previous year is entitled to extra compensation. The most reasonable reading of the language, however, is that it applies to situations where a teacher takes a class that is presently assigned to another teacher in lieu of hiring a substitute. In the case of A.P.E., Hurley was not taking a class assigned to another teacher, A.P.E. was assigned to him.

On the other hand, after the Fochesato grievance was filed, Hurley's classes were rescheduled so that A.P.E. instruction would be delivered during what had previously been his prep time. The District argues that Elementary teachers are not guaranteed prep time and so the assignment was within its management rights. In my view, the record does not support this contention. Prep time is referenced in the contract in Article XIII, Sec. B. and Article XX, Sec. F. It is by definition time the teacher can use to prepare lesson plans and class materials, or to do other school work, and it is expressly non-contact time. Nowhere does the contract limit it to only to Middle School and High School teachers. It is true the contract does not guarantee prep time, or any particular amount of it, but in practice all teachers receive it. This is reflected in the schedules of the various teachers that have been entered as exhibits. The 5th and 6th Grade teachers have a prep period, the Art, Music and Phy. Ed. teachers have blocked out planning time and the teachers in the lower elementary grades have non-contact time when their students are in Art, Music or Phy. Ed. For non-departmentalized teachers the planning time is dependent on the elementary schedule, but once the yearly schedule is developed the planning time is part of the schedule. By requiring Hurley to teach during his planning time, therefore, the District violated a binding practice. The District did not rescind the practice and thus unilaterally modified the contract during the hiatus and, thereby, violated Sec. 111.70(3)(a)4, Wis. Stats.

The Schahczenski Grievance

Miriam Schahczenski was disciplined for sending an e-mail on the District's network to the Association membership in which she characterized the behavior of the administration as "petty and foolish" in its act of rescinding a practice regarding teachers covering for one another at the end of the school day. The e-mail was deemed to be a violation of the District's Technology Code, which prohibits impolite language and also improper use of District technology resources. The parties disagree over whether the conduct warranted discipline. The Association asserts that Schahczenski's e-mail was sent in her capacity as a Union officer and was protected. Moreover, it is argued that the communication did not violate the Technology Code on its face. The District asserts that the e-mail was deliberately inflammatory and was

intended to create dissension among the staff. It further maintains that even if a communication is for Association purposes it must still comport with the Technology Code. Beyond that, however, the parties also disagree about how the discipline was administered. The Association contends that the District disciplined Schahczenski twice for the same offense – once when Peitersen gave her a oral reprimand and again when Eparvier issued a written reprimand and suspension of her technology privileges. The District maintains that Schahczenski was not disciplined by Peitersen and that the discipline imposed by Eparvier was appropriate to the offense.

There is no dispute that Schahczenski sent the e-mail and that she used District technology resources to do so. It is not disputed that the Technology Code prohibits improper use of the District's e-mail system and that misuse can lead to disciplinary action. In 2002, teacher Terri Gaedke received a written reprimand for sending an e-mail on the District's network, also in her capacity as an Association officer, that was very similar in tone to Schahczenski's e-mail. The reprimand was not grieved. Prior to meeting with Schahczenski, Peitersen investigated the matter, as well as reviewing Schahczenski's personnel file and researching how similar acts had been dealt with in the past. It is also notable that after Peitersen met with Schahczenski and Gaedke, Schahczenski did not grieve the issuance of the oral reprimand. I view this acquiescence by Schahczenski as a waiver of the argument that the District did not have a valid basis for the issuance of discipline. In sum, therefore, given the Gaedke precedent and the fact that Schahczenski herself did not initially challenge the action, I conclude that the District did not violate Sec. 111.70(3)(a)4 in concluding that Schahczenski's actions warranted discipline.

That does not, however, conclude the analysis. It remains to be determined whether the District, in effect, exposed Schahczenski to double jeopardy by disciplining her twice for the same act. I find that it did. Double jeopardy is a circumstance that arises when an employee is subjected to discipline more than once for the same offense. It is generally accepted that once a penalty is imposed it cannot later be increased for the same offense. CITY OF KENOSHA, 76 LA 758 (McCrary, 1981). This is a principle that is grounded in the concepts of good faith and fundamental fairness that undergird the collective bargaining process.

The testimony of Lisa Peitersen reveals that Eparvier brought the e-mail to her attention and directed her to discipline Schahczenski, but did not specify what the discipline should be. In essence, he told Peitersen that he felt discipline was warranted and that she should see to it. Peitersen was surprised by Eparvier's instruction because she felt he had dealt with the situation in the January 10, 2008 letter he gave to Union president Smith. Nevertheless, Peitersen conducted her investigation and concluded that at most an oral reprimand was justified. She explained this to Schahczenski and Gaedke at their meeting and all three understood that an oral reprimand had been given, but Peitersen chose not to document the reprimand in Schahczenski's personnel file. When Eparvier called an additional meeting with Schahczenski, Peitersen and UniServ Director Kim Plaunt, Peitersen explained that she had already given an oral reprimand, but Eparvier disagreed because she had not documented it. He then subsequently issued a written reprimand and a 60 day suspension of technology privileges.

In my mind there is no question that Peitersen's action at the meeting with Schahczenski and Gaedke on January 16, 2008 was an imposition of discipline. The only person involved who apparently felt otherwise was Eparvier. It is not clear from the record whether his impression was based on the fact that Peitersen did not document the oral reprimand, or because the felt an oral reprimand was insufficient. To be sure, it is common when issuing an oral reprimand to document it in the employee's personnel file in order to preserve a record in the event of future discipline, but it is not required. WOOD COUNTY, WERC CASE NO. 164, NO. 63668, MA-12665 (Emery, 3/3/05). If it was felt that documentation was necessary, however, all that needed to occur was for Peitersen to place a memorandum in Schahczenski's file memorializing the action taken on January 16, which Eparvier could have directed her to do. Instead, Eparvier called a second meeting on January 25 where he questioned Schahczenski about the incident and then followed up the meeting with a written reprimand and suspension of her technology privileges on January 28. The interview revealed only that Schahczenski wrote the e-mail at school on her lunch hour and sent it to the Association membership. All these facts were known at the time that Peitersen issued the oral reprimand on January 16, so there was no basis for increasing the level of discipline. Once discipline had been issued by Peitersen, further imposition of increased discipline for the same incident constituted double jeopardy and violated Schahczenski's rights under Article XII of the contract. In so doing, the District unilaterally modified the contract during the hiatus and, thereby, violated Sec. 111.70(3)(a)4, Wis. Stats.

Intimidating and/or Retaliatory Conduct

The record in this case reveals that the relationship between the Association leadership and the District administration began to disintegrate before the 2007-08 school year began and continued to worsen throughout the year. The Association believes this initially arose from Superintendent Kim Eparvier's dislike of the new Association leadership, which took over in the 2006-07 school year with the succession of Jim Blank by Kim Plaunt as UniServ Director and the election of Danny Smith as Association President. Thereafter, the Association allegedly adopted a more assertive attitude in dealing with the administration than had previously been the case. In the Association's view, the precipitating event was its opposition to Eparvier's desire to hire a long-term substitute without benefits to teach 6th Grade Reading in 2007-08. It would not agree and, although the matter was resolved when Patsy Moore volunteered to teach 6th Grade Reading, the event is alleged to have had a snowball effect which ultimately led to the incidents underlying all the grievances raised herein, which are all alleged to have been forms of retaliation against the Association membership. In addition, several other occurrences during the year, some connected to the grievances and some not, are likewise felt to have been attempts to retaliate against or otherwise intimidate the Association members. It is the Association's contention that, in one way or another, each of these events had a reasonable tendency to impermissibly interfere with, coerce, or restrain Association members in the conduct of concerted activity protected under Sec. 111.70(2).

Under Sec. 111.70(3)(a)1, it is a prohibited practice for a municipal employer "(t)o interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed

in sub. (2). Referring back to that statute, the operative language provides to municipal employees "…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…" It has been held that "(i)n order to prevail upon the allegation that an employer has violated Sec. 111.70(3)(a)1, Stats., the complaining party must demonstrate, by a clear and satisfactory preponderance of the evidence, that an employer has engaged in conduct which has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. A violation may be found where the employer did not intend to interfere and an employe did not feel coerced or was not, in fact, deterred from exercising Sec. 111.70(2) rights. A finding of anti-union animus or motivation is not necessary to establish a violation of Sec. 111.70(3)(a)1." ST. CROIX FALLS SCHOOL DISTRICT, DEC. NO. 27215-B (Burns, 1/93), citing CITY OF EVANSVILLE, DEC. NO. 9440-C (WERC, 3/71); BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC. NO. 12593-B (WERC, 1/77).

It should also be noted that the WERC has also held that "(a)n employer's legitimate business interests can sometimes justify rules that have a limiting effect on protected activity." SCHOOL DISTRICT OF NEW BERLIN, DEC. NO. 31243-B (WERC, 4/06) Determining whether such an interest exists and the degree to which it is protected involves a two-part analysis. The first step in the analysis is to determine whether the employee activity is protected under Sec.111.70(2). If it is, then the inquiry turns to whether the County had a legitimate business interest in restricting the activity and, if so, whether the restraints it imposed were no greater than necessary to protect its interest. STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, DEC. NO. 30340-B (WERC, 7/04)

The District asserts that in no case were its actions the result of anti-union animus. It maintains that in many of the circumstances it acted out of legitimate business interests and in accordance with its management rights. It further asserts that in many cases it was the Association or its leaders that engaged in provocative conduct and that many of its charges are premised on baseless assumptions about the motivations underlying the District's actions.

There is no question in my mind that Eparvier wanted the Association's support for his plan to hire a long-term substitute to teach 6th Grade Reading for 2007-08. He admitted as much and the record indicates that a similar situation may have occurred in the hire of Melissa Baribeau as a long-term substitute in the recent past, wherein the Association did not oppose the action. Eparvier explained his action as a cost-saving measure motivated by his concerns over the District's fiscal health, which concerned him because of the District's declining enrollment. While the record is not clear on whether the District's finances were as dire as portrayed, given the number of open enrollments it received and the state of its fund balance, I am satisfied that Eparvier's motivation was as he stated.

The agreement by Moore to teach 6th Grade Reading, in turn, led to an opening for a Title I position for 2007-08, which Moore had previously held. This, therefore, presented the District with the need to fill that position, which it could do by hiring another teacher or by reorganizing its existing staff. Given his concerns over finances and desire to cut costs, Eparvier, elected to have the Title I instruction offered by 5th and 6th Grade teachers Kay Sodini, Cheryl Lange, Ginny Malmstadt and Patsy Moore, who were all qualified to teach Title I, during a period at the end of the day when they were not otherwise providing instruction. Eparvier determined that under the expired collective bargaining agreement the teachers were not eligible for extra compensation for the Title I Assignment and so none was given, which led to the Title I grievance discussed above. The record does not reflect that Eparvier's actions in staffing the Title I position were motivated by any desire to intimidate, coerce, or restrain the Association members, but were purely economic in nature. Further, I find no evidence that the Association members were or would have been intimidated, coerced, or restrained in the exercise of their protected rights by Eparvier's action. Thus, I find no basis for a violation of Sec. 111.70(3)(a)3 and 1 in the assignment of Title I duties to the 5th and 6th Grade teachers.

During the same period early in the 2007-08 school year, the District, due to its having elected not to contract with CESA 8 for provision of Adaptive Physical Education, again a cost-saving move, was in need of filling this position. Eparvier reasoned that these duties could also be provided in-house inasmuch as Elementary Physical Education teacher Jerome Hurley was certified to teach A.P.E. He therefore instructed District Special Education Coordinator Ronald Kapp and Elementary Principal Lisa Peitersen to work with Hurley to bring this about. This process took some time as, in Eparvier's opinion, Hurley and the Association leadership opposed the idea and were deliberately trying to sabotage it by raising obstacles to its implementation. The record, however, does not support Eparvier's view. There is no evidence that Hurley was actively trying to avoid teaching A.P.E. or that the Association was in any way involved in the process. Nevertheless, a schedule was worked out by October whereby Hurley would be released from two of his Elementary Phy. Ed. classes during the school day in order to teach A.P.E. Hurley's classes were to be covered by the other Elementary Phy. Ed. teacher, Paula Fochesato. Consonant with his cost-saving philosophy, Eparvier instructed Peitersen that the rescheduling should be cost neutral to the District. Thus, although Peitersen initially approved Fochesato's requests for extra compensation, when Eparvier learned of it he directed Peitersen to cease the payments and recoup the monies already paid out. This action led to the filing of the Fochesato grievance discussed above.

As with the Title I issue, it appears that Eparvier's, and the District's, motivation for denying Fochesato the extra compensation was based on financial considerations and the District's belief that the contract language on which the claim for extra compensation was based did not apply. I find nothing in the record to suggest that there was any improper motive to inhibit protected concerted activity behind the decision, nor does it appear that the decision to deny payment would likely have any such effect. Therefore, the decision to deny Fochesato's claim for extra compensation was not a violation of Sec. 111.70(3)(a)3 and 1.

Of greater concern was Eparvier's reaction to the filing of the Fochesato grievance. Fochesato filed her grievance on December 19, 2007. The next day Eparvier, along with Peitersen and High School Principal Steve Motkowski, sent an e-mail to all District staff announcing that the District was immediately rescinding a long standing practice of teachers voluntarily covering for one another at the end of the school day, or during other non-contact periods, in order to facilitate attendance at medical appointments and other off-site commitments. The e-mail made it clear that the decision was directly based on the Association's position, articulated in the Fochesato grievance, that teachers who are assigned to cover classes of other teachers are entitled to be paid. At hearing, Eparvier testified that the decision was based on his impression that teachers were abusing the practice by leaving during contact periods and, thus, the decision to end the practice was intended to stem the abuse, but the record indicates that such rationale was pretextual.

In the first place, the e-mail makes no reference to any allegations or evidence of abuse of the practice. On its face, therefore, the communication undercuts Eparvier's stated basis for the decision and would not have enlightened the Association members if that was his true motivation. The e-mail only refers to the issue of extra compensation as the basis for the decision. Second, while Eparvier testified that he was concerned about abuse of the early leave practice the evidence does not support a finding that he undertook any serious investigation to determine whether, or to what degree, the practice was in fact being abused before rescinding the practice. Further, Eparvier's and Peitersen's testimony make it clear that the administration believed that the Association was behind the difficulty in scheduling Hurley's A.P.E. classes and Fochesato's request for extra compensation. To wit:

> A: It's my opinion that at no time did Paula Fochesato and Jerome Hurley ever want to make this work after being approached by the PEA executive committee regarding their concern on this matter.
>
> Q: Well, now I'm a little confused, because it doesn't appear that the PEA executive committee was even aware that Mr. Hurley had been asked to teach adaptive P.E. as of September.
>
> A: I believe that is not the case.
>
> Q: Well, what is that belief based on?
>
> A: I believe that Paula Fochesato and Jerome Hurley informed members of the executive committee about their assignments going back to last spring.
>
> TR at 1209-10
>
> Q: Do you recall a conversation with Ms. Fochesato where you said to her that you would pay her because if she wouldn't take the classes, you'd have to hire a sub?

A: Yes. Yes. That's when what she said made sense to me. Yes.

Q: And when you said that you had taken the association's word – or taken Ms. Fochesato's word that she needed to be paid for this, you don't believe she was misrepresenting anything do you?

A: I believe she did what she was told to do by the association.

TR at 1513

Finally, the timing of the e-mail, coming as it did one day after the filing of the Fochesato grievance, is highly suspect. The Commission has held that timing is one factor that, in concert with others, can influence a finding of improper motive. VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/28/03) Here, the fact that Eparvier's stated reason for the action does not track with the events, combined with his belief in the Association's influence in pursuing the Fochesato grievance and the proximity in time between the grievance and the e-mail, suggests strongly that his motivation in rescinding the practice was to strike back at the Association for its involvement in the Fochesato and Hurley, and perhaps the Title I, matters. The message conveyed was that continued efforts to undercut the District's cost saving strategies by pressing for additional pay for the teachers involved would have negative consequences for the Association members. There is no question that such a message would have a tendency to intimidate, coerce, or restrain Association members in their exercise of their protected rights. The rescission of the early leave practice, therefore, even though the grievance filed in response was resolved, constituted a violation of Sec. 111.70(3)(a)3 and 1.

After the filing of the Fochesato grievance, Eparvier approached Fochesato in the gymnasium on January 8, 2008 and told her he wanted to meet with her in his office later. Although he stated the meeting was not disciplinary and followed it up with an e-mail explaining that the meeting was about scheduling, not her grievance, Fochesato refused to meet without Association representation. She met Eparvier in his office later that day, in the company of two other teachers, Shelly Zander and Marcia Thurow. Upon their arrival, Eparvier appeared angry and ordered Zander and Thurow to leave. They refused to leave Fochesato alone with Eparvier and asked her to accompany them, which she did. As she was leaving, Eparvier expressed his disappointment at her refusal to meet with him alone and said she would "get it in writing." There was no follow meeting or communication between Eparvier and Fochesato about this matter thereafter. The Association believes Eparvier's behavior to be a violation of Fochesato's right to representation in any meeting involving potential discipline or where other protected interests might be affected. The District asserts that the meeting was about scheduling, that Fochesato had no protected interests at stake and, therefore, she had no right to representation. It characterizes Eparvier at being justifiably upset at her unwillingness to meet him alone and her insubordinate behavior.

In NLRB V. WEINGARTEN, 420 U.S., 251 (1975), the U.S. Supreme Court ruled that employees have a right to union representation in investigatory meetings which may result in

discipline. The WERC has extended the WEINGARTEN ruling to public sector employees and has held that these rights apply to any meeting where protected interests may be at stake, including the adjustment of grievances. WAUKESHA COUNTY, DEC. NO. 14662-A (WERC, 1/78); BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). The employee's belief that protected interests are at stake, however, must be reasonable. MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 32065-A (JONES, 11/29/07).

Fochesato testified that she was concerned that Eparvier wanted to discuss her grievance, which he denied. His e-mail indicated he wanted to discuss phy. ed. scheduling and his testimony was to the effect that he wanted Fochesato's insights into the scheduling of phy. ed., particularly with respect to the doubling up of classes. He further testified that he fully discussed the purpose of the meeting with her when he met her in the gymnasium, so presumably he told her that then, as well.

The Fochesato grievance was exactly about the scheduling of phy. ed. and the doubling up of phy. ed. classes. Eparvier's antagonism toward the Association, of which Fochesato was an officer, for the grievance had already been shown in his action in rescinding the early leave practice. It seems reasonable, therefore, for her to have had concerns about the purpose of the meeting, notwithstanding Eparvier's assurances. Be that as it may, however, Eparvier's reaction to the appearance of the other teachers seems to have been disproportionate to the provocation. The District explains Eparvier's reaction by characterizing the conduct of the teachers as insubordinate, but I disagree. Having determined that Fochesato's concerns about meeting Eparvier alone were not baseless, it was within her protected rights to insist on union representation. By reacting as he did, Eparvier lent credibility to their fears and his demeanor towards them could have had a reasonable tendency to intimidate, coerce or restrain them in the exercise of their protected rights and, thus, constituted a violation of Sec. 111.70(3)(a)3 and 1.

After the Fochesato grievance was filed, and the administration had rescinded the early leave policy, Miriam Schahczenski issued the e-mail for which she was reprimanded, as noted above. The Association argues that the discipline was as much retaliation for her protected concerted activity as it was for a violation of the Technology Code. The District asserts that it was proper discipline for the level of the misconduct. As noted above, the record supports a finding that Schahczenski's e-mail did arguably violate the Technology Code such that the District was warranted in seeking to impose some low level of discipline. Further, even though Schahczenski was engaged in protected concerted activity, she was still subject to the provisions of the Technology Code while using the District's computer resources. Indeed, as previously noted, Terri Gaedke was reprimanded for a similar e-mail written in her capacity as an Association officer and did not see fit to grieve it. Disciplining Schahczenski for her choice of language in the e-mail criticizing the administration, therefore, was not a *per se* violation of the statute.

As also noted, however, the discipline became inappropriate at the point it became enhanced. Further, it seems clear that Eparvier's decision to increase the discipline was largely driven by his personal feelings about what he perceived to be a direct attack on him. This is evident from the level of his reaction. So far as the record reveals Schahczenski's e-mail was not part of a larger response to the rescission of the leave policy, but an individual communication to the Association membership. In response, however, Eparvier first gave a notarized letter to Smith complaining of Schahczenski's harassing and bullying behavior, which he described as a personal attack on him, then ordered Peitersen to discipline her, then increased the discipline himself when her perceived that Peitersen had not done enough. Further his letter of reprimand to Schahczenski also refers to harassment and bullying. Throughout the chain of events it was clear that Eparvier took Schahczenski's comments personally and responded accordingly. In effect, not satisfied with Peitersen's action, he inserted himself personally into the process and used his power as Administrator to retaliate against Schahczenski, an Association officer, for publicly criticizing an administration action against the Association members. In so doing, he revealed antagonism toward protected concerted activity that challenged the policies and practices of the administration and engaged in conduct designed to prevent it in the future. The intent was clearly to intimidate the Association leadership and to restrain them from engaging in similar protected concerted activity in the future. The action thus violated Sec. 111.70(3)(a)3 and 1.

During the tendency of the Title I grievance, and for the remainder of the school year, the teachers in the Elementary School noted an increased presence by Eparvier in the hallways, particularly during the last period of the school day, when the 5th and 6th Grade teachers were overseeing Study Hall/A.R.E. Likewise, after the filing of their grievances, Fochesato and Hurley both testified that Eparvier would come down to the gym more frequently and they documents the occurrences. Eparvier also directed various District administrators to sit in and evaluate the Study Hall/A.R.E. periods to determine what was occurring in them. The Association describes this as a pattern of conduct which was intended to intimidate the teachers after they filed their grievances. The District asserts that Eparvier's presence in the halls and throughout the building was a legitimate exercise of his management rights and the observations of the teachers was an appropriate investigative tool to find out what actually occurred at the end the day in evaluating the Title I grievance.

Here, the Association appears to argue from the negative. The testimony of the teachers was that Eparvier would walk the halls, but would not go into the classrooms or talk to the teachers. Likewise, with Fochesato and Hurley he would go into the gyms during classes, but would not interact with the teachers or students. The administrators observed the Study Hall/A.R.E. sessions, but apparently prepared no reports, nor were they referenced in the Title I grievance hearing. From this, the Association infers that the administration had no legitimate purpose for these actions, so must have had an illegitimate one. I disagree.

The District's point is well taken that Superintendent has inherent authority to oversee the District's staff and its operations. To perform those functions, he must have the ability to go as he will throughout the campus and to observe the staff and students throughout the day.

It may be that Eparvier was more present in the hallways after the Title I grievance was filed, and it may be that the teachers disagree that walking the hallways is an effective means of gathering information, but that doesn't necessarily mean that Eparvier had an improper motive or that he exceeded his authority. Indeed, in his testimony, Union President Smith conceded as much. Likewise with the observations of the Study Halls, it may be that the teachers were disconcerted by those visits, but that does not perforce make them inappropriate and there is no evidence in the record that any of the observers engaged in conduct that was in any way inappropriate or intimidating. Rather, in my view this particular aspect of the case is a good example of how badly the relationship between the teachers and the administration had degenerated during the year. The atmosphere had reached a point where if teachers saw the Superintendent coming they would assume the worst and close their doors. Eparvier, for his part, wanted to know what was going on in the Elementary School, but did not want to engage the teachers directly. This does not mean that he had some improper motive for his actions and the record is silent as to any act of intimidation or retaliation arising from Eparvier's walking the hallways, other than the fact that the teachers were made uncomfortable merely by his presence. To support this claim, more is needed than an allegation that the Superintendent was engaged in his authorized and permissible duties at times and in ways that the teachers did not appreciate. This does not rise to the level of illegal conduct and to find otherwise would, in effect, make the Superintendent a hostage in his office lest he be accused of trying to intimidate the staff. Such is not the purpose or the effect of the statute.

In April 2008, the Association held its annual Bump Night, an event intended to effectuate an MOU with the District whereby the District would provide a list of available teaching openings for the coming year and the Association would consult and then propose the names of teachers within the Association who were seeking to move into the available positions, subject to administration approval. Prior to Bump Night, 4th Grade teacher Becky Gensler was informed she was being involuntarily transferred into a Middle School Special Education position for 2008-09, a position she did not want. As a result of the Bump Night, the Association proposed that Gensler be permitted to fill a different Special Ed. position, which request the District denied. Subsequently, the administration announced an opening for a Kindergarten position for 2008-09, which led Smith to meet with Peitersen to, in effect, redo the Bump Night proposal. The result was a proposal drafted May 27 whereby Gensler would be allowed to retain her 4th Grade position. Peitersen agreed to discuss the proposal with Eparvier.

The proposal to rework the Bump Night was forwarded to Eparvier on May 28, which was the same day he received a copy of the results of a Climate Survey done by the Association earlier in the spring, which Smith wanted to discuss with Eparvier and the Board. The survey painted an unflattering picture of the atmosphere in the District, and particularly the Elementary School. It also pointed out a negative attitude among the teachers toward the administration and particularly Eparvier.

On May 28, Eparvier met with Peitersen to discuss the new Bump Night proposal and they agreed to reject it. This was conveyed the next day by Eparvier in an e-mail to Terri

Gaedke wherein he cited concerns about making numerous changes so late in the year and the fact that many parents had already requested teacher assignments for their children for the following year. The Association asserts that the rejection of the proposal was pretextual and was actually retaliation against the Association for the Climate Survey. The District argues that the decision was within management's rights under the contract, was based on sound educational reasons and was in no way connected to the survey results.

Here, as with the decision regarding the early release practice, a key to the Association's position is the proximity in time to the receipt of the Climate Survey results and the adverse decision regarding the Gensler proposal. It argues that the events were cause and effect. In this regard, the Association has failed to satisfactorily make its case.

In the first place, the administration had determined in early April that it wanted Gensler to teach Special Ed. in 2008-09 and had involuntarily transferred her. This was well in advance of the receipt of the Climate Survey results. Further, there were exchanges of e-mails between Eparvier and Gaedke throughout early May about the Bump night request in which Eparvier remained adamant in his position that Gensler would remain as a Special Ed. teacher. These also preceded the issuance of the survey results. Thus, it is clear that the administration's preliminary decision about Gensler's placement was made well in advance of Eparvier's receipt of the survey results. It is also notable that the District did not reject the Association's recommendations in total, but approved most of them, which militates against a finding that the District, or Eparvier, had a retaliatory motive with respect to the Bump Night decision, especially since the record does not reflect that Gensler was in any way uniquely associated with the Climate Survey or involved in the Association leadership. Finally, other than timing, there is no evidence that Eparvier's response to the May 28 memorandum was in any way connected to the survey results or that he even read the results before making his decision.

The determination of whether or not to accept the Association's Bump Night recommendations was firmly within the purview of management under the MOU. Eparvier articulated his reasons for his decision in his e-mails to Gaedke and the fact that the Association did not agree with them does not make them wrong or pretextual *per se*. At hearing, both Eparvier and Peitersen cited concerns about the Association's choice to fill the open Kindergarten position set forth in the May 28 memo, which was also a staffing determination within management's control. The record, therefore, does not support a finding that Eparvier's decision regarding Gensler's placement in 2008-09 was retaliatory or otherwise a violation of statute.

The Association's final contention in that throughout 2007-08 Eparvier engaged in a pattern of conduct designed to marginalize, undercut, or otherwise interfere with the Association leadership, thereby interfering with the Association's right to determine its own leadership and manage its own affairs. Specific allegations of such behavior include:

- Attempting to undermine the role of Kim Plaunt as Unicorn Director by making disparaging remarks about her to Association members and the Board and complaining about her, as well as WEAC attorney Melissa Thiel Collar, to WEAC and NUE leadership.

- Attempting to dissuade the Association leadership from involving Plaunt in resolving issues with the District.

- Hindering Plaunt in the fulfillment of a document request regarding the Title I grievance, demanding that she produce certain witnesses for the grievance hearing and berating her at the hearing for not doing so, in ways that were a departure from Eparvier's conduct toward prior UniServ Director Jim Blank.

- Attempting to compel Association member Betsy Bradley to assist in the fulfillment of Plaunt's document request.

- Threatening the Association with teacher layoffs or reductions if it prevailed in the Title I grievance.

- Making disparaging comments about Miriam Schahczenski and Terri Gaedke to Elementary Principal Lisa Peitersen.

- Monitoring the e-mails of Association leaders.

There is no question that the relationship between Eparvier and Plaunt, as well as the Association leadership deteriorated throughout 2008-09. However, there is no statutory requirement that relationships between management and labor be amicable and, indeed it is part and parcel of labor-management relations that their interactions are often adversarial. The types of verbal sparring that go on in labor relations are commonplace and do not rise to the level of interference unless they cross the line into the realm of trying to influence the other party's choice of representation or leadership. Thus, even complaints about the conduct of the other party's leadership in certain respects may not rise to the level of illegal conduct. NEW BERLIN SCHOOL DISTRICT, DEC. NO. 31243-B (WERC, 4/21/06).

In regard to the foregoing, much of the interaction between Eparvier and the Association representatives falls into the category of adversarial discourse, but does not rise to the level of interference. Into this category, I place the comments by Eparvier to Smith about trying to resolve issues locally without outside influence, his comments to Peitersen about the conduct of Schahczenski and Gaedke being "cancerous" and his calls to WEAC President Mary Bell and UNE President Mike Kaczmarzinski raising concerns about the conduct of Plaunt and Thiel Collar. Eparvier did not suggest that Smith attempt to replace Plaunt or NUE as the Association's representative, or suggest that the District would not work with the UNE representative, but merely expressed his view that issues might be resolved more easily if they

were handled locally. Smith even testified that he agreed in principle with Eparvier's views on this point. His comments regarding Schahczenski and Gaedke were made to Peitersen, another member of the Association, and Peitersen chose to share them with Schahczenski and Gaedke. Again, while certainly provocative, the statements were not made to Association members and were not coupled with any explicit or implicit threat of action or suggestion that the District would reward the Association for their replacement. Thus, while Eparvier's previous discipline of Schahczenski was improper, I do not take the same view of his statements to Peitersen. As to the calls to Bell and Kaczmarzinski, the record certainly reflects concern on Eparvier's part over the actions of Plaunt and Thiel Collar with respect to the Association, and in particular with regard to the Title I grievance, but he did not apparently make any particular complaint of misconduct against them nor ask that any particular action be taken in regard to them. The record reveals that neither Bell nor Kaczmarzinski took any action as a result of Eparvier's contacts. Here again, while suggestive of a poor relationship, Eparvier's contacts with WEAC and UNE do not, in my view, constitute impermissible interference. Likewise, in the Title I grievance process Eparvier criticized Plaunt for the filing of what he perceived as an overbroad and burdensome document request and for not providing the witnesses he requested at the Board hearing on the matter. His complaints to the Board about Plaunt's involvement in the Schoen discipline also fall into this category. This is the type of verbal sparring that the Commission has traditionally been reluctant to referee. NEW BERLIN, *supra*.

In his dealings with Plaunt over the Title I document request, it is clear that Eparvier was not favorably disposed toward the request and was not overly cooperative in honoring it. The record reveals that he required Plaunt to come to Peshtigo to retrieve the documents herself, a stance he had not taken in handling previous document requests from Blank. He also took the unusual step of requesting that Plaunt provide witnesses at the Board hearing on the grievance, did not seek to secure the presence of the witnesses himself after she refused and criticized her at the hearing when they were not provided. The exchange over the witnesses is the type of gamesmanship that frequently occurs in litigation and, while unpleasant, is not impermissible. As to the document request, Eparvier did not gather and provide the documents himself, citing the volume of the request as making it unduly burdensome, but did permit Plaunt to come to the District offices, search for and obtain any needed documents herself. He also made District personnel and technology resources available to her in her search. Whether or not Eparvier could have been more accommodating, there is no evidence that he tried to prevent the documents from being obtained or unduly hindered Plaunt in her efforts to obtain them. The fact that he did not extend to Plaunt the same courtesies that he had previously extended to Blank do not rise to the level of impermissible conduct. On the other hand, Eparvier also attempted to require Association member Betsy Bradley to fill Plaunt's request by ordering her during a work day to cease other activities and assist in gathering the documents. The circumstances under which the directive was given caused Bradley concern that if she refused she could be subject to discipline for insubordination. Bradley was only relieved from the order after the intervention of Thiel Collar. Here, Eparvier impermissibly interfered with the Association by attempting to direct when, how and by whom the document request would be filled. It was one thing for Eparvier to demur from filling the request himself. It was another for him to personally select and direct an Association member to gather

the documents during work time and to supervise her in doing so. In this way he inserted himself into the operations of the Association instead of going through the Association leadership, in violation of Sec. 111.70(3)(a)3

The comments Eparvier made to Tavia Schoen were also problematic. In this instance, in the midst of the Title I dispute, Eparvier approached Schoen, the former Association President, to complain about the worsening relationship between the Association and the administration since Plaunt and Smith had assumed positions of leadership and contracted it with what he perceived as having been a better relationship under Schoen and former UniServ Director Blank. He then attempted to enlist Schoen's support by suggesting that she take a greater role in the Association leadership, presumably to counterbalance or offset what he perceived as the negative influence of Plaunt and Smith. In this instance, Eparvier's statements, combined with his attempt to influence the internal leadership structure of the Association to his advantage, crossed the line into the realm of interference, in violation of Sec. 111.70(3)(a)3.

Finally, prior to and at the Title I hearing Eparvier made statements to the effect that should the Association pursue the grievance and prevail he might layoff teachers or reduce teachers to .85 FTE. Eparvier testified that the comments reflected his opinion regarding the lack of need for teachers to monitor study halls, in response to the position the Association took in the grievance that the period at the end of the day was not a contact period and that, if true, using non-certified staff to monitor those periods would be a potential const-saving move. The Association regarded the statements as threats of retaliation against the Association for bringing the grievance. The record reflects that when the comments were made there was no supporting data given regarding any financial difficulties the District was having, or any projected savings that would be realized from such actions. The context is also important. The Title I hearing took place in February 2008, after many a heated confrontation between Eparvier and the Association over the Fochesato, Hurley, early leave time and Schahczenski grievances and the drawn out battle over the Title I grievance. Given that backdrop it is not surprising that the Association would interpret Eparvier's statements as threats of retaliation. As previously noted, an employer can sometimes engage in conduct which has a limiting effect on protected concerted activity if there is a legitimate business interest in doing so. NEW BERLIN, SUPRA. In such a case, however, it is incumbent upon the employer to establish that such an interest exists. It is insufficient in this regard to say that reducing staff would save money. More is needed. Here no attempt was made to show that the District had insufficient resources to maintain current staffing levels and that economies were necessary. Instead, Eparvier merely stated that if the Association's position prevailed he might consider reducing staff because they would not be necessary. In this context, Eparvier's comments could have had a reasonable tendency to restrain, coerce, or interfere with the Association members in their exercise of protected rights and was impermissible under Sec. 111.70(3)(a)3 and 1.

In the same hearing, Eparvier produced copies of e-mails he had downloaded from the computers of Bradley and Schahczenski, ostensibly to show that Association members had sufficient time during the day to send e-mails for personal and Association business. In effect,

to show that they had too much time on their hands. The Association argues that this was impermissible activity in that Eparvier was targeting and monitoring the e-mails of Association leaders due to his hostility toward the Association. The District Technology Code specifies, however, that all files stored on District computers are property of the District and that users have no reasonable expectation of privacy in their e-mail communications. Here, again, however, the District's legitimate interest in preventing misuse of its computer and e-mail systems must be balanced against the rights of the Association members to engage in protected concerted activity without undue interference. The District's explanation for searching the computers was to obtain documents pursuant to Plaunt's request. Nevertheless, there is no evidence that Schahczenski or Bradley were involved in the Title I grievance, beyond being members of the Association leadership, and there was no evidence that any search was made of the computers of the actual Title I teachers. Further, no documents relevant to the request were discovered on the computers and the documents presented at the hearing were not apparently offered for any purpose relevant to the Title I proceeding. The impression that is left, therefore, is that the search was a fishing expedition under guise of working on the document request to see if anything damaging to the Association's position could be found. In my view, this was an abuse of the District's authority under the Technology Code. This was a targeted search to obtain information to be used in an adversarial proceeding. Thus, where there was no suggestion of improper conduct use by Schahczenski or Bradley, the potential for restraint in the exercise of protected rights outweighed any legitimate business interest of the District in overseeing the use of its technology resources. In this situation, therefore, the District's actions violated Sec. 111.70(3)(a)3 and 1.

Dated at Fond du Lac, Wisconsin, this 31st day of July, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Examiner

JRE/gjc
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