

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between

**WAUSAUKEE EDUCATION ASSOCIATION**

and

**SCHOOL DISTRICT OF WAUSAUKEE**

Case 51  
No. 65366  
MA-13202

(Kostelecky Grievance)

---

**Appearances:**

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

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

**ARBITRATION AWARD**

Wausaukee Education Association, hereinafter "Association," and School District of Wausaukee, hereinafter "District," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators to the parties in order to select an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on February 28, 2006, in Wausaukee, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs, the last of which was received on May 2, 2006, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

**ISSUES**

The parties stipulated that there were no procedural issues in dispute and framed the substantive issues as:

1. Whether the School District had just cause to issue a six-week unpaid suspension to Mr. Kostelecky for changing computer software on the district computer?
2. If not, what is the appropriate remedy?

### **RELEVANT CONTRACT LANGUAGE**

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

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

B. No teacher shall be required to appear before the Board or its agents concerning any matter which could adversely affect the continuation of that teacher in his/her office, position, employment or the salary or any other increments pertaining thereto, unless s/he has been given prior written notice of the reason for such meeting or interview and shall be entitled to have a representative of the Association present to advise him/her and represent him/her in such interview.

C. A teacher shall have the right, upon request, to review the contents of his/her personal file and to receive copies at own expense of any documents contained therein. A teacher shall be entitled to have a representative of the Association accompany him/her during such review. At least once every two (2) years a teacher shall have the right to indicate those documents and/or other materials in his/her file which s/he believes to be obsolete or otherwise inappropriate to retain, they shall be destroyed. The District Administrator or his designee shall have the right to retain any document and shall give the teacher a written explanation for said retention.

### **BACKGROUND AND FACTS**

A complete recitation of the facts are contained in WAUSAUKEE SCHOOL DISTRICT, DEC. NO. 31621-A, (Millot, 7/06).

Kurt Kostelecky has been employed by the District for eight years in the capacity of full-time technology education with no prior disciplinary record. He was laid off in 2004-2005 for the 2005-2006 school-year. He was recalled to 50% employment two weeks prior to the beginning of the 2005-2006 school-year and following a successful grievance hearing before the Board of Education challenging the District's failure to recall him to 100% employment, he returned to the classroom full-time effective Monday, October 20, 2005.

On Wednesday, October 23, 2005, High School Principal Pamela Beach was taking a student to a classroom and observed Kostelecky's classroom from the hallway noting that the classroom was unattended. Beach entered the classroom and heard music playing from Kostelecky's district-provided computer. Beach was concerned that Kostelecky had downloaded the music from the internet, which she believed to be a violation of the District's computer use expectations. The Guidelines for Computer Resource Use as approved by the Board of Education the preceding Summer read as follows:

### **Purpose and Scope**

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

### **Computer Use**

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

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

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

## **Electronic Communications and Internet Use**

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

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

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

## **Prohibited Activities**

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

- Engaging in illegal, fraudulent or malicious activities
- Illegal distribution of copyrighted materials (see below)
- Viewing, sending, or storing material that could be considered offensive, obscene, harassing, or defamatory.
- Annoying or harassing other individuals.
- Sending uninvited email of a personal nature.
- Using another individual's account.
- Attempting to test, circumvent, or defeat security systems.
- Permitting any unauthorized individual to access the Districts (sic) system.

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

### **Copyright**

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

### **Software use**

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

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

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

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

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

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

### **Monitoring**

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

### **Obscenity and Harassment**

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

### **Violations**

Violators of this policy are subject to progressive disciplinary measures

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

\_\_\_\_\_  
Staff Member Signature

\_\_\_\_\_  
Date

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

Additional facts, as relevant, are contained in the **DISCUSSION** section below.

### **DISCUSSION**

The Association challenges the Grievant's discipline on the basis that the Grievant did not know that making modifications to his district-provided computer would subject him to discipline. The Association further asserts that the level of discipline imposed, a six-week unpaid suspension, is too severe a penalty.

The methodology of a just cause analysis looks first to whether the employee engaged in the behavior for which he was disciplined and second, whether the discipline imposed reasonably reflects the employer's proven disciplinary interest.

The Grievant was disciplined for making changes to his district-issued computer. Kostelecky admitted that he changed the operating system on the computer and that he had removed the anti-virus software. Moreover, this was not the first time that the Grievant had modified his district-issued computer. During the 2004-2005 school-year, District Network Administrator Scott McClelland, spoke to the Grievant on more than one occasion regarding his computer habits and subsequent to the District's hacking incident of January 2004, McClelland found two additional software programs on Kostelecky's computer and removed them.

The fact that the Grievant modified his computer and admits such a modification requires further inquiry. Beach was aware that Kostelecky was modifying his computer, but she did not discuss with him the fact that he was subjecting himself to potential discipline. Similarly, McClelland did not inform the Grievant that modifying his computer would subject him to discipline although they spoke on the issue on multiple occasions.

It is clear from this record that making modifications to district-issued computers was not viewed or enforced as a disciplinable offense. Providing greater credence to this conclusion was the District's laissez-faire response when it learned that some staff members had installed and were participating in chat rooms on the Internet. Rather than attempt to determine which staff members were involved and hold them accountable for their behavior, the District chose to distribute an email telling staff to terminate their use of the programs and web locations. Again, a reasonable person would not conclude that he or she was subjecting themselves to discipline should they modify their computer.

The District posits that the Grievant need not have been told that his actions would subject him to discipline since his behavior deviated from the generally accepted norms of conduct to which another teacher, Donna Pintarelli testified. While it is true that Pintarelli inherently understood that making modifications to her district-provided computer, and specifically removing the anti-virus program, would subject her to discipline, she also had made modifications to her computer. It was only after she learned of the sanctions imposed on the Grievant that she removed those programs. Her actions do not justify the Grievant's behavior, but provide insight into whether the staff understood that modifications would subject them to discipline and challenge the District's assertion that its annual summer review of all District computers accurately accesses whether the machines have been modified.

Moving to the level of discipline imposed, Beach recommended the Grievant's discharge. The Board did not accept that recommendation and reduced the punishment to a six-week suspension. Beach testified that she based her recommendation for termination on the gravity of the situation since it placed the District's computer system in a vulnerable position and the fact that she believed this to be a continuing violation since McClelland has spoken to Kostelecky in the past regarding modifications to his computer. The evidence does not support either basis.

WEAC's Computer Director of Technology and Design Print and Mail Service, Nathan Harper, testified that even if Kostecky's computer was the recipient of a virus from an Internet site, that virus would likely be contained by the District's firewall and therefore the virus would not spread to other District computers or the servers. This same scenario occurs when staff log into the District's system from a remote location if they do not have anti-virus programs enabled in their computer. McClelland, as Network Administrator, should have understood this configuration and would have been able to dispel Beach's fears for the District's computer system.

Beach also premised her recommended severe level of discipline on the fact that she knew that McClelland had spoken to the Grievant in the past regarding his computer. These discussions were not disciplinary nor was the Grievant informed or warned that his behavior would subject himself to future disciplinary action. The discussions likely communicated the opposite. The Grievant walked away from those meetings with the understanding that changing his computer was not a punishable offense because he had done it on more than one occasion, and likely multiple occasions, and no discipline resulted.

The Association challenges the discipline on the basis that McClelland is not the Grievant's direct supervisor. While it is true that McClelland is not Kostecky's supervisor and therefore would not have the authority to impose the discipline on Kostecky, it is also true that McClelland is the District's designated administrator of the network and therefore is the authority figure on all issues related to the network. The Grievant testified that he would not have made the changes to his computer if he had known that his job would be in danger. I find the Grievant's comments to be disingenuous. The Grievant knew that McClelland was the Network Administrator and he knew that McClelland had denied his requests to upgrade his operating system and yet, he still modified his computer.

### **AWARD**

1. No, the School District did not have just cause to issue a six-week unpaid suspension to Mr. Kostecky for changing computer software on the district computer.

2. The appropriate remedy for the violation found in item one above is as follows: the School District shall immediately expunge all references to Kostecky's suspension from its personnel files and it shall make him whole without interest for all money and benefit that he otherwise would have earned but for his suspension, lest any monies he would not have received but for his suspension.



3. I will retain jurisdiction for a period of thirty (60) days for the purpose of assisting the parties in the administration of this award.

Dated at Rhinelander, Wisconsin, this 18<sup>th</sup> day of July, 2006.

Lauri Millot /s/

---

Lauri Millot, Arbitrator

