

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENOSHA UNIFIED SCHOOL DISTRICT #1

Appearances:

FINDINGS OF FACT, CONCLUSIONS OF LAW,
CERTIFICATION OF RESULTS OF INVESTIGATION AND
ORDER INITIATING FACT FINDING AND APPOINTING FACT FINDER

FINDINGS OF FACT

No. 9306

4. That during the spring of 1968 teachers employed at Washington Junior High School, a secondary school within the District, worked out a written agreement with the principal of said school providing that the noon hour at said school would not be "closed" to the teachers, thus affording the teachers the opportunity to leave the school during their lunch hour; that such agreement was reached pursuant to a provision which the Board and the KEA had agreed upon during their negotiations leading up to a collective bargaining agreement which was executed by the Board and KEA on June 6, 1968, and which, by its terms, became effective July 1, 1968, and which continued in effect to June 30, 1969, covering salaries and working conditions of the certificated teachers in the employ of the District; and that the provisions of said agreement with respect to the "noon hour" matter were as follows:

"I. WORKING CONDITIONS

. . .

B. TEACHING HOURS AND LOAD

1. Teaching hours

. . .

- c. The minimum duty free lunch period for teachers will be thirty (30) minutes.
- d. All secondary schools will have a closed noon hour as soon as adequate lunch facilities can be made available. Noon hour schedules will be worked out by the staff of the school under the direction of the principal whenever changes from an open to a closed noon hour are contemplated. The only exception to this policy will occur in the case of the opening of a new building. Under such circumstances, teachers will know the type of noon hour to be in effect when they apply for transfer to the building."

5. That following the execution of said collective bargaining agreement, but prior to the start of the school year in the fall of 1968, the Board vetoed the open noon hour schedule which had been reached at the Washington School; and that pursuant to the grievance procedure in existence at that time, the KEA on September 6, 1968, filed a grievance with the principal of Washington School as follows:

"The Kenosha Education Association and the Washington Junior High staff maintain that the administration has unilaterally violated the Master Contract language, Section B. 1. 2., which specifically states that noon hour schedules will be worked out by the staff of the school under the direction of the principal whenever changes from an open to a closed noon hour are contemplated. The contract further states that the only exception to this policy will occur in

the case of the opening of a new building. Therefore, the Kenosha Education Association and the Washington Junior High School staff maintain that the above-mentioned contract violation constitutes a breach of the Master Contract and is a prohibitive practice.";

and that included in the form on which said grievance was filed was a statement of "relief" sought by the KEA as follows: A

"The schedule which was jointly worked out by the Washington staff and the Administration be adopted within a reasonable length of time not to exceed five school days or one calendar week."

6. That the principal of Washington School recommended that said grievance be brought to the attention of the Board, and subsequently and on September 12, 1968, at a Board executive meeting, representatives of the KEA and the Board resolved the grievance, in that the Board agreed that the teachers at Washington School were permitted to leave the school building during their lunch hour during the 1968-69 school year; that as part of the grievance settlement, it was agreed that a "Noon Hour Committee" would be established, consisting of representatives of the Board's administrative staff and representatives designated by the KEA, to "develop and recommend a uniform policy for all senior and junior high schools in the district for next year" on secondary schedules for teachers.

7. That following the appointments to said committee, and on September 13, 1968, the Superintendent of Schools, and Agent of the Board, sent the following memorandum to the Administration members of such committee as follows:

"One outcome of the grievance filed by the Washington School Faculty on the time and arrangement of the closed noon hour has been formation of a committee to study and report recommendations for secondary schedules which can be placed into operation next year.

The administrative members of the committee, appointed by the Superintendent of Schools, will consist of the six secondary school principals. The KEA will appoint six teacher members, one from each school.

We have asked that Mr. Martinez act as chairman for the administrative group, and that he make the necessary arrangements for the first meeting of the combined committee. A chairman for the combined committee can be elected at that time.

1. The committee is responsible for making recommendations on the structure and time of open and closed noon hours for the secondary schools in the district, and the estimated additional costs of these recommendations.
2. It is responsible for recommending teacher responsibility within the framework of a plan for noon hours.

3. It is responsible for studying the overall setup of the secondary school schedules related not only to noon hours but also to opening and closing of school and the length of school periods.
4. It is responsible to familiarize itself with all existing rules and regulations and develop patterns within the framework of these rules and regulations, making note of any exceptions which are recommended.
5. The committee, through its chairman, will forward its recommended report to the Superintendent of Schools upon completion of its assignment.

Since the length of school day, noon hour schedules, teaching schedules, etc., have become controversial, we suggest a careful study of all the implications and a recommendation as soon as the group is able to resolve the problem. We appreciate your cooperation."

8. That the Noon Hour Committee met on numerous occasions during the 1968-1969 school year, as did representatives of the KEA and the Board, the latter in negotiations with respect to salaries and conditions of employment for teachers for the 1969-1970 school year; that on April 2, 1969, prior to the submission of the report by the Noon Hour Committee, the KEA and the Board executed a Teacher Salary and Welfare Agreement, covering teacher salaries and their conditions of employment from July 1, 1969, to June 30, 1970; that the provisions contained in the 1968-1969 agreement with respect to lunch periods and noon hours were again repeated and contained in the same numbered provisions in the 1969-1970 agreement; and that the 1969-1970 Teacher Salary and Welfare Agreement also contained the following material provisions in Article XVIII entitled "Grievance Procedure":

"Any problem(s) involving teachers, or the Kenosha Education Association, concerning conditions of employment contained within the agreement shall be resolved in the following manner:

1. Level One

The teacher(s) involved shall, within five (5) school days of the grievance, go first to his immediate supervisor by himself, or with a representative of the PR & R Committee, in an attempt to resolve the grievance.

2. Level Two

- a. If the aggrieved person(s) is not satisfied with the disposition of his grievance at Level One, or if no decision has been rendered within five (5) school days after presentation of the grievance, he may file the grievance in writing with the Chairman of the Association's PR & R Committee within five (5) school days after the decision at Level One or ten (10) school days after the grievance was presented, whichever is sooner.

Within five (5) school days after receiving the written grievance, the Chairman of the PR & R Committee will refer it to the Superintendent of Schools.

- b. The Superintendent will represent the administration at this level of the grievance procedure. Within five (5) school days after receipt of the written grievance by the Superintendent, the Superintendent or his designee will meet with the aggrieved person and the Chairman of the PR & R Committee or his designee in an effort to resolve it.
- c. If a teacher does not file a grievance in writing with the Chairman of the PR & R Committee and the written grievance is not forwarded to the Superintendent within thirty (30) school days after the teacher knew or should have known of the act or condition on which the grievance is based, then the grievance will be considered as waived.

3. Level Three

- a. If the aggrieved person is not satisfied with the disposition of his grievance at Level Two, or if no decision has been rendered within five (5) school days after he has first met with the Superintendent or his designee, he may file the grievance in writing with the Chairman of the PR & R Committee within fifteen (15) school days after the grievance was submitted at Level Two. Within five (5) days after receiving the written grievance, the PR & R Committee will determine whether to refer the grievance to the Board of Education.
- b. The Board will meet in executive session at its next regularly scheduled meeting to consider all grievances which have been submitted to it since its last such meeting. Any party in interest shall have the right to appear before the Board and be heard."

9. That although the Noon Hour Committee's report was prepared and dated March 18, 1969, it was not submitted to the Administration until some time in May, 1969, after the execution of the Teacher Salary and Welfare Agreement for the 1969-1970 school year; and that the text of the report of the Noon Hour Committee was as follows:

"Our initial charge as a committee was centered around the problems inherent in developing an approximately equal day in schools with open and closed noon hours. The committee feels that it is not practical to establish the same schedule in all secondary schools because of the variation of facilities with the existing schools. It is this committee's recommendation that each secondary school appoint a committee consisting of four faculty members and the principal which will use the following criteria to establish a schedule which will work most effectively in their particular facility:

1. Working conditions shall be equivalent at schools with open and closed noon hours in terms of period length, class load, class size and extra responsibility.
2. The total school day shall be within the framework of the existing time allocations (425-530 minutes student day).
3. The class load for junior high school teachers will be the equivalency of five classes meeting five days per week.
4. All junior high school teachers will have the equivalency of one preparation period per day, five days per week.
5. All junior high school teachers shall have one duty free lunch period per day that is equivalent to a class period in length during which they may be free to leave the building.
6. All junior high school teachers shall have responsibility for an activity or study hall. During this period the teacher will be scheduled for professional use functions on a rotating basis with the above.

Example for a two week period:--

- | | | | | | | | | | | |
|----|----------|----------|----------|-----------|----------|----------|----------|----------|-----------|----------|
| | <u>M</u> | <u>T</u> | <u>W</u> | <u>Th</u> | <u>F</u> | <u>M</u> | <u>T</u> | <u>W</u> | <u>Th</u> | <u>F</u> |
| 1. | Act. | Pro. | Act. | Pro. | Act. | Pro. | Act. | Pro. | Act. | Pro. |
| 2. | Study | Study | Study | Study | Study | Pro. | Pro. | Pro. | | Pro. |
7. The maximum time required for the entire student body to be fed shall not exceed two hours in length.
 8. Junior and senior high schools will utilize para professionals at the ratio suggested by the Committee (approx. 28 hours/day per 1000 students).
 9. Because of additional clerical responsibilities, schools on a closed noon hour shall add an additional half day secretary to the present staff.
 10. We also recommend that all junior high schools open and close earlier than the opening and closing times of senior high schools.
 11. This recommendation must be endorsed by the entire committee, the secondary principals, the Kenosha Education Association, and the superintendent before going to the Board of Education.

We as a committee do not intend this report to be a restricting agent, but feel that there should be room for variation and imagination in developing schedules for various facilities. It is the Committee's recommendation that a standing committee be appointed to review and evaluate the variations of schedules developed within the system. The committee shall be composed of principals and staff members."

10. That on or about May 26, 1969, the Administration published a bulletin which set forth the "Hours of the School Day" which would be effective as of September 1, 1969, said bulletin indicated that the teachers at Washington Junior High School would have a closed noon hour, i.e., that the teachers and students would not be permitted to leave the school building during the noon hour lunch period; and that thereupon, the KEA, on May 26, 1969, filed the following grievance with the Washington Junior High School principal:

"Washington Junior High School staff maintains that the Administration has unilaterally violated the Master Contract language, Section B: 1, 2, specifically stating that the noon hour schedule will be worked out by the staff of the school under the direction of the Principal whenever changes from an open to a closed noon hour are contemplated. The contract further states that the only exception to this policy will occur in the case of the opening of a new building. Therefore, the Washington Junior High School staff maintains that the aforementioned contract violation constitutes a breach of contract and is a prohibitive practice.";

and that the relief sought by the KEA, as stated in the grievance, was as follows:

"That the Washington Junior High School staff maintain the 1968-1969 schedule until such time as an improved schedule can be developed and agreed upon mutually by the staff and the building principal.";

and that the disposition of the grievance by the Principal, dated May 28, 1969, was as follows:

"It would appear that this grievance involves a question in the area of negotiations. Having no role in negotiations, I can make no recommendation."

11. That the grievance was then submitted to the Superintendent who on June 2, 1969, answered the grievance as follows:

"Grievance No. 31 requests that the Washington Junior High School staff maintain the 1968-69 schedule until such time that an improved schedule can be developed and agreed upon mutually by the staff and the building principal."

This issue was raised with the Board last fall, following a similar disagreement with the Washington Staff, at which time the Board permitted the school to operate under a temporary schedule for one year pending solution of the problem. At that time a 'noon hour committee' was established, consisting of teachers and principals, to study the problem and submit the results to the administrative staff and the Kenosha Education Association before sending recommendations to the Board of Education.

The administrative staff received the report of the Committee in May and disagreed on the following points:

1. The Committee recommended that 'each secondary school appoint a committee, consisting of four faculty members and the principal, which will use the following criteria to establish a schedule which will work more effectively in their particular facility.' The administrative staff objects to this proposal in line with the objections which were raised last fall. The Board has the final authority to set schedules which have to be somewhat uniform within the district in order to solve many physical problems such as students going from one school to another, staffing, curriculum, activity program involvement, etc. The charge to the Committee was to develop a noon hour program within the existing policies and agreements, with any objections to be noted. The last Board adoption of a noon hour schedule was the approval of the Lance schedule which included the closed noon hour for both students and teachers. The current Teacher Salary and Welfare Agreement states:

I-B-1-d 'All secondary schools will have a closed noon hour as soon as adequate lunch facilities can be made available.' In negotiation discussions and the discussion with the Board and representatives of Washington Junior High School teachers last fall, the administrative staff pointed out that the faculty and the principal have the right to make recommendations but not to establish the program for all schools in the district.

2. Statement #2 in the Noon Hour Committee Report states: 'The total school day shall be within the framework of the existing time allocations (425-430 minutes student day).' The contract defines the total school working day and does not set minutes. This statement is at odds with the current Agreement.
3. The Noon Hour Committee states: 'The class load for junior high school teachers will be the equivalency of five classes meeting five days per week.' The contract identifies the normal class load for junior high school teachers in this manner. The statement is inaccurate and causes a conflict with the Teacher Salary and Welfare Agreement.
4. 'All junior high school teachers will have the equivalency of one preparation period per day, five days per week,' in the Noon Hour Committee Report, which is the equivalent to I-B-2-a (3) of the Teacher Salary and Welfare Agreement -- 'The normal teaching load shall include at least the equivalent of one preparation period per day. The statement is, therefore, unnecessary and should not be a part of the Noon Hour Committee Report.'

5. The Noon Hour Committee Report states that 'All junior high school teachers shall have one duty free lunch period per day that is equivalent to a class period in length during which they may be free to leave the building.' The Teacher Salary and Welfare Agreement states: I-B-1-c, 'The minimum duty free lunch period for teachers will be thirty (30) minutes.' At no point does the Agreement say that the teachers may leave the building.
6. The Noon Hour Committee report states: 'All junior high school teachers shall have the responsibility for an activity or study hall. During this period the teacher will be scheduled for professional use functions on a rotating basis with the above.' The Teacher Salary and Welfare Agreement I-B-2-a (4) states: 'The normal teaching load shall include five periods per week to be used for work in special assigned areas not involving the direct supervision of students.' The recommendation of the Committee specifically interferes with the scheduling of the school, placing the convenience of teachers above the welfare of students.
7. The Noon Hour Committee states: 'The maximum time required for the entire student body to be fed shall not exceed two hours in length.' This statement is not covered in the Teacher Salary and Welfare Agreement. Time requirements for noon hour schedules are subject to available facilities, type of noon hour programs and the number of and needs of students.
8. The Noon Hour Committee Report states that 'Junior and senior high schools will utilize para-professionals at the ratio suggested by the committee (approximately 28 hours per day per 1000 students).' In effect that statement sets for the Board a policy for the assignment of para-professionals which is not within the scope of the Committee, nor a part of the Teacher Salary and Welfare Agreement.
9. The Noon Hour Committee Report states that: 'Because of additional clerical responsibilities, schools on a closed noon hour shall add an additional half day secretary to the present staff.' This statement is not a part of any agreement and sets Board policy in hiring clerical personnel.
10. The Noon Hour Committee Report states: 'We also recommend that all junior high schools open and close earlier than the opening and closing times of senior high schools.' This statement is not part of any agreement and in effect eliminates the necessary flexibility to handle unique individual school problems, transportation, activity schedules, interscholastic programs, etc.

Due to the disagreement on each one of the points listed between the administrative staff and the Noon Hour Committee, the report was returned to the Committee for further study and revision. The Committee is meeting and attempting to resolve the problem.

The schedule temporarily approved for Washington Junior High School by the Board of Education for the 1968-69 school year changed the entire concept of the closed noon hour, added aides beyond the staffing of other junior high schools, did not close the noon hour as provided in the Teacher Salary and Welfare Agreement and did not meet the essential pattern of the Lance Junior High School program which represents the current official junior high school schedule. The administrative staff instructed Washington and Lincoln Junior High Schools to set up a program which conformed to the Lance pattern and was in accordance with present regulations. In both schools meetings were held with faculty members to provide such a schedule. An element in the Washington Junior High School faculty does not approve this type scheduling. The principal was requested to ask whether or not teachers could leave the building during their lunch period and whether or not the teachers could leave the building during the professional use period. If the Board were to approve these requests it would be possible for a teacher to have less than a 4-1/2 working hour day while being paid for a full day's work.

The working agreement clearly identifies the fact that schools will have closed noon hours as soon as adequate lunch facilities are available. Due to numerous student problems at both Lincoln Junior and Washington Junior High Schools, it is essential that noon hours be closed for the welfare of the student body. It is the position of the administrative staff that the welfare of students must be provided for before the convenience of teachers, and that a closed noon hour for both students and staff is essential to this welfare. The administrative staff therefore concludes that schedules have been discussed with the Washington Junior High School staff and that since the Agreement calls for a closed noon hour the administration would be violating the Agreement if they did not move to close the noon hour."

12. That the informal minutes of executive session of the Board's June 2, 1969 meeting contain the following statement of Board action denying the grievance:

"Mr. Turner moved and Dr. Capelli seconded that the Board institute Lance Junior High closed noon hour schedule at Washington Junior High, Lincoln Junior High, Bullen and at McKinley Junior High as soon as feasible, and that this whole matter be subject to negotiation for the 1970-71 year.... This motion related to Grievance No. 31 and the K.E.A. was to be so notified.";

and that in July 1969 the Deputy Superintendent issued a directive revising the hours of the school day to be effective September 1, 1969, but it, like the original directive from his office, indicated that the Washington Junior High School noon hour would be closed.

13. That on February 17, 1969 the KEA, on behalf of the teaching staff of Lance Junior High School and Lincoln Junior High School, filed a grievance in writing, pursuant to the contractual grievance procedure, alleging that 34 teachers (in excess of 50% of the staff) at Lance Junior High School, as well as 22 teachers (said number approaching 50% of the staff) at Lincoln Junior High School were teaching six of seven class periods per day of thirty teaching periods per week, in violation of the "Teaching Load" provisions of the 1968-1969 Teacher Salary and Welfare Agreement existing between the KEA and the District; that the provisions in said agreement material to the grievance are contained in Article I, Para. B. as follows:

"2. Teaching Load

a. Junior high school level

(1) The normal teaching load shall include the equivalent of twenty-five (25) teaching periods per week.

(2) The normal teaching load shall include no more than two (2) distinct teaching preparations. Distinct preparations shall be defined as preparations for classes of different grade levels, or very different ability levels, or different subject areas.

(3) The normal teaching load shall include at least the equivalent of one preparation period per day.

(4) The normal teaching load shall include five periods per week to be used for work in special assigned areas not involving the direct supervision of students. Special assigned areas may include:

- (a) Curriculum planning
- (b) Lab preparation
- (c) TV and special program preparation
- (d) Conferences
- (e) Committee assignments

(5) Through mutual agreement between a teacher and the building principal, the teaching load may consist of six teaching periods in lieu of the normal five teaching periods and one special assignment period.

(6) The normal teaching load shall include an activity or study hall assignment in schools where activities are scheduled during the school day.

(7) It will be normal to have a homeroom assignment in those schools operating on an open noon hour."

14. That on April 21, 1969, after the District and the KEA had executed the 1969-1970 agreement, which contained "teacher load" provisions identical to those contained in the 1968-1969 agreement, the Superintendent submitted his answer to the grievance as follows:

"I am aware of the fact that 34 teachers at Lance and 22 teachers at Lincoln are presently teaching 6 of 7 class periods per day. In the case of Lance Junior High, over 50% of the teachers are teaching 6 of 7 class periods per day, while the number of teachers with such schedules at Lincoln Junior High is approaching 50%.

These situations are partially the result of crowded conditions in junior high schools in the 1968-69 school year. The opening of Bullen Junior High School should alleviate some of this overcrowding.

Another reason that many teachers are teaching 6 rather than 5 classes per day is because staffing plans for the junior high schools assumed a 4% increase in enrollment in the 1968-69 year (172 students) whereas the district actually experienced nearly an 8% increase (339 students).

Ratios of students to professional staff in district junior high schools during the 1968-69 year varied from 20.0 to 21.1. Oddly enough, the junior high school with the best student/professional staff ratio in 1968-69 was Lance. This school also had the most teachers teaching 6 of 7 class periods per day and the lowest average class size among all district junior high schools. It would seem, therefore, that the schools exercised a choice between having large numbers of classes with 30 or more students or having smaller class sizes with a higher percentage of teachers teaching six periods per day rather than 5.

The Board of Education has authorized the employment of 43 additional junior high school staff members for the 1969-70 school year. Together with the 13 additional 7th and 8th grade positions being transferred from county elementary schools, this will give the district 262 junior high school teachers for the 1969-70 school year. On the basis of the 4,852 students presently enrolled in district junior high schools for the 1969-70 school year, the ratio of students to staff should be reduced from the present 20.6 to 18.5. This should enable the district to reduce the number of junior high school classes with 30 or more students and also reduce the number of teachers teaching 6 rather than 5 classes.

It should be emphasized, however, that it is impossible to guarantee that all junior high school academic classes will have a maximum limit of 29 students. It is equally impossible to guarantee that all junior high school teachers will be teaching only 5 periods per day. This is the reason the Teacher Salary and Welfare Agreement states that the normal teaching load will be 25 periods per week and that every reasonable effort will be made to maintain a maximum class size of 30.

By authorizing 43 additional junior high school staff members for the staff for the 1969-70 school year, I believe that the Board of Education of the Kenosha District has made plans to provide a normal teaching load of 25 teaching periods per week and every reasonable effort to provide a maximum of 30 students per class."

15. That the Superintendent's answer to the grievance was then appealed to the Board and on June 3, 1969, the Board in writing denied the grievance and stated as follows:

"It is the hope of the Board that most teachers at the junior high level will be teaching only five class periods per day for the 69-70 school year.

The employment of 43 additional junior high staff members for the 69-70 school year, together with the 13 positions being transferred from seventh and eighth grades in county elementary schools, will result in a reduction of the pupil-professional ratio in all junior highs in the coming year even if there were to be an 8 per cent increase in junior high school enrollments."

16. That Article VII of the Professional Negotiation Agreement existing between the KEA and the Board provides as follows:

"VII Amendment.

If either the Association or the Board desires change(s) in this agreement, the President of the group desiring change(s) shall notify the President of the other group in writing. If the other group agrees to the necessity of the change(s), the proposed amendment(s) shall become agenda items for negotiations and are final when ratified by the Board and the Association. By mutual consent the effective date of such amendments may be set prior to the completion of the current agreement year."

17. That the District has not established any fact finding procedures pursuant to Section 111.70(4)(m) of the Wisconsin Statutes; and that on July 7, 1969, the KEA filed a fact finding petition with the Wisconsin Employment Relations Commission initiating the instant proceeding.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

1. That, since the matter of open or closed noon hours for teachers in the employ of Kenosha Unified School District #1 involves a condition of employment, and since the Kenosha Education Association, as the certified collective bargaining representative of said teachers, has not waived, either in the collective bargaining agreement existing between it and Kenosha Unified School District #1, or otherwise, its right to negotiate thereon, and further since there was no condition precedent established herein which affects the right of the Kenosha Education Association to negotiate thereon the matter of open or closed noon hours for said teachers is subject to negotiations between the Kenosha Education Association and the Kenosha Unified School District #1, within the meaning of Section 111.70(4)(e), Wisconsin Statutes.

2. That Kenosha Unified School District #1, by unilaterally revising the noon hour conditions of employment at Washington Junior High School, in the manner set forth in the Findings of Fact, has failed and refused, and continues to fail and refuse, to meet and negotiate in good faith with the Kenosha Education Association in a bona fide effort to arrive at a settlement in negotiations, with respect to conditions of employment affecting its teachers, within the meaning of Section 111.70(4)(e), Wisconsin Statutes.

3. That Kenosha Unified School District #1, by requiring various teachers at Lance and Lincoln High Schools to teach six of seven class periods per day of thirty class periods per week, has at no time failed or refused to meet and negotiate in good faith with the Kenosha Education Association, in a bona fide effort to arrive at a settlement, with respect to class loads affecting its teachers, within the meaning of Section 111.70(4)(e), Wisconsin Statutes.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the following

CERTIFICATION AND ORDER

IT IS HEREBY CERTIFIED that the conditions precedent to the initiation of fact finding, as required in Section 111.70(4)(e), Wisconsin Statutes, with respect to the failure and refusal of Kenosha Unified School District #1 to meet and negotiate in good faith with the Kenosha Education Association in a bona fide effort to arrive at a settlement with respect to noon hour scheduling of teachers at Washington Junior High School, have been met.

NOW, THEREFORE, it is

ORDERED

1. That fact finding be initiated for the purpose of recommending a remedy and/or solution with respect to the open or closed noon hour schedule of teachers at the Washington Junior High School.

2. That Philip G. Marshall, Milwaukee, Wisconsin, is hereby appointed as fact finder to proceed forthwith in the matter pursuant to Section 111.70(4)(g) of the Wisconsin Statutes.

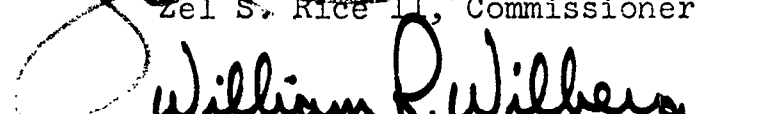
Given under our hands and seal at the
City of Madison, Wisconsin, this 26th
day of November, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slavney, Chairman


Zel S. Rice II, Commissioner


William R. Wilberg, Commissioner

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENOSHA UNIFIED SCHOOL DISTRICT #1

Decision No. 9306

ORDER INITIATING FACT FINDING AND APPOINTING FACT FINDER

The instant proceeding was initiated by a petition, filed by the Kenosha Education Association (KEA), as the certified collective bargaining representative of the teachers in the employ of the District, wherein the KEA requested the Commission to initiate fact finding, and in support thereof the KEA alleged that the District's Board of Education (1) failed to accept noon-hour schedules arrived at pursuant to certain provisions of the collective bargaining agreement existing between the parties and unilaterally established noon-hour schedules without negotiating same with the KEA, and (2) unilaterally established and maintained teaching loads of certain Junior High School teachers in violation of said collective bargaining agreement, and failed to negotiate such change with the KEA, and that thereby the Board failed to meet and negotiate in good faith at reasonable times in a bona fide effort to arrive at a settlement as contemplated by Section 111.70(4)(a) of the Wisconsin Statutes.

FACTS

The evidence adduced at the hearing indicates that prior to the commencement of the 1968-1969 school year, and after the Board and the KEA had executed an agreement for said school year, which agreement contained a provision to the effect that "noon hour schedules will be worked out by the staff of the school and under the direction of the principal whenever changes from an open to a closed noon hour are contemplated," the Board unilaterally vetoed the existing "open noon hour" schedule which had been reached at the Washington School. Such action was grieved by the KEA, which resulted in the establishment of a Noon Hour Study Committee to make

certain recommendations with respect to, among other things, open and closed noon hours for secondary schools, with the understanding that such report was to be considered for possible implementation during the 1969-1970 school year.

The Noon Hour Study Committee met on various occasions during the 1968-1969 school year, however, it did not complete its recommendations prior to April 2, 1969, the date on which the Board and the KEA executed a collective bargaining agreement covering the salaries and conditions of employment of the teachers for the 1969-1970 school year, which agreement became effective July 1, 1969. The latter agreement contained a provision, with respect to the establishment of noon hour schedules, identical to the provision contained in the 1968-1969 agreement between the parties. However, on May 26, 1969, following a unilateral determination by agents of the District, an announcement was made that effective September 1, 1969, there would be a closed noon hour at Washington School. Immediately after such announcement the KEA grieved such action as a violation of the collective bargaining agreement, specifically of that provision relating to the establishment of noon hour schedules to be worked out between the teaching staff and the principal of the school involved. The grievance was processed through the grievance procedure without resolution. The Board denied the grievance on June 2, 1969.

In February, 1969, the KEA filed a grievance alleging a violation of the 1968-1969 collective bargaining agreement in that certain teachers at Lance and Lincoln Schools were required to teach 6 of 7 class periods per day in violation of the "teaching load" provisions of the 1968-1969 agreement. On April 21, 1969, after the District and the KEA had executed the 1969-1970 agreement, which contained "teacher load" provisions identical to those contained in the previous agreement, the Superintendent denied the grievance, and on June 3, 1969, the Board also denied the grievance. The evidence discloses that the class loads of the teachers involved had been unilaterally established by agents of the District.

POSITION OF THE PARTIES

The KEA contends that the existence of the collective bargaining agreement between the parties does not relieve the District of its duty to bargain and that the District is under a continuing duty to negotiate with the KEA concerning modification, interpretation and administration of the existing agreement, as contemplated in Article VII of the Professional Negotiation Agreement existing between the parties as follows:

"VII Amendment.

If either the Association or the Board desires change(s) in this agreement, the President of the group desiring change(s) shall notify the President of the other group in writing. If the other group agrees to the necessity of the change(s), the proposed amendment(s) shall become agenda items for negotiations and are final when ratified by the Board and the Association. By mutual consent the effective date of such amendments may be set prior to the completion of the current agreement year."

The KEA argues that the District did not permit the staff and principal involved to work out noon hour schedules but unilaterally established closed noon hours for both students and teachers in all secondary schools for the 1969-1970 school year and thus unilaterally modified the terms of the agreement, without negotiating or bargaining such change. In addition, the KEA argues, the District's action, in unilaterally establishing teaching schedules at Lance and Lincoln which required teachers to teach six of the seven class periods per day, did in fact constitute modification of the agreement during its term without bargaining such changes or modifications with the KEA, and therefore constituted a failure to collectively bargain with the KEA.

The District contends that, since Section 120.13(8)^{1/} of the Wisconsin Statutes grants to school boards the unfettered authority to establish the "hours of each school day", the Board's determination with respect to closed noon hours is not a negotiable item and therefore not subject to a fact finding proceeding. In support of such contention the District cites the following language contained in the decision issued by the Wisconsin Supreme Court in Joint School District No. 8 vs WERB:^{2/}

"Many items and restrictions in a school calendar are established by statute. School year, term and session are defined in Section 40.01. In 40.45 the requirements for a school month are set forth and certain holidays are designed as non-teaching days and others as only special observance days. In Section 40.22(12) the school board is given power to fix the length of time school shall be taught and in Section 40.30(17m) the board may establish rules scheduling the hours of each school day. These items determined by the statute, of course, cannot be changed by negotiations."^{3/}

^{1/} "The school board of a common or union high school district may:
(8) School Hours
Establish rules scheduling the hours of each school day during which the school district may be in session.
The school board may differentiate between the various elementary and high grades in scheduling such school hours."

^{2/} 37 Wis. 2d 483 (1967)

^{3/} Despite the District's position on the negotiability of open or closed noon hours, a provision with respect thereto was included in the collective bargaining agreements negotiated between representatives of the District and the KEA.

Secondly, with respect to the "noon hour" issue the District contends that should said matter be considered a subject for collective bargaining, the parties have agreed upon their contractual grievance procedure as the sole method for resolving "problems" arising under their agreement, more specifically that portion of Article IX, Para. C as follows:

"Any problem(s) involving teachers or the Kenosha Education Association concerning conditions of employment contained within the agreement should be resolved in the following manner. . ."

The District argues that by the above provision the KEA has waived its right to negotiate regarding conditions of employment covered by the agreement, and in support of its argument the District cites the Commission's decision in City of Milwaukee (Building Inspectors),^{4/} in which the Commission determined that since the collective bargaining agreement involved permitted the city to unilaterally establish methods and processes by which work of the Building Inspectors is to be performed, the Union had waived its right to negotiate on such methods and processes.

The District, in addition, contends that, assuming it has a duty to negotiate the closed noon hour matter, the conditions precedent to negotiation had not been met since the report of the Noon Hour Committee provides that its recommendation did not receive the necessary endorsement by either the secondary principals nor the KEA and therefore no agreement was reached that could become a basis for negotiation with the Board.

With respect to the "teaching load" grievance the District reiterates its argument that the KEA waived its right to utilize fact finding by the nature of the grievance provision incorporated in the applicable collective bargaining agreement. It also contends that the language of the agreement supports the position of the District that the twenty-five hour teaching load is a norm and not an absolute standard and the said language does not guarantee that "no teacher will teach more than twenty-five hours", and in any event the issue between the parties is a matter of contractual interpretation.

In rebuttal, the KEA argues that while the Board, pursuant to Section 120.13(8) of the Wisconsin Statutes, may establish rules scheduling the hours of each school day, including noon hours, "that matter of the duties the teacher performs or does not perform during the noon hour is left and can be the subject of conferences and negotiations" and that in said regard "the question of whether

^{4/} Dec. No. 8505, 4/68

the teacher may leave the school building during his free lunch period is subject to conferences and negotiations" and further that the duties of teachers during a closed noon hour, is also negotiable, as are teaching loads, since such matters have a direct and intimate relationship with hours and conditions of employment.

With respect to the District's argument that the KEA, by the contractual grievance procedure, waived its right to negotiate conditions of employment covered in the agreement, the KEA contends that, since the contractual grievance procedure does not contain any provisions for final and binding arbitration, and since the agreement contained no express waiver with respect to the Board's obligation to negotiate on the matters involved herein, the Board's unilateral modification and application of the grievance procedures material herein constitutes a failure to bargain collectively as contemplated in Section 111.70.

DISCUSSION

While Section 120.13(8) grants school boards the authority to affix the hours of the school day, the specific hours of the school day in public school systems of the State are not determined by State statute nor are any "closed or open noon hours" thus established. Since a closed or open noon hour has a direct effect on conditions of teacher employment, they are, as contemplated in Section 111.70, subject to compulsory negotiation,^{5/} and thus, if the statutory conditions are met, they may be subject to fact finding proceedings.

With respect to the District's argument that the KEA, by entering into a contractual grievance procedure, waived its right to proceed to fact finding, it is to be noted that in Milwaukee County^{6/} previously quoted herein, the collective bargaining agreement specifically granted the County the right to unilaterally make certain determinations. In the memorandum accompanying that decision, we stated as follows:

"Section 111.70 contemplates fact finding as a method of resolving all disputes which are subject to collective bargaining pursuant to Section 111.70, Wisconsin Statutes, and that such disputes may arise not only during the negotiation of a collective bargaining agreement, but also during the period that an agreement is in effect where there has been a change in the terms and conditions of employment of the employees in the bargaining unit. The Municipal Employer cannot, absent such authority in the agreement, unilaterally establish or alter wages, hours and working conditions of employees in the bargaining unit."

^{5/} Joint School District No. 8 vs. WERB, Ibid.

^{6/} Dec. No. 8137-B, 12/67.

In City of Milwaukee (Building Inspectors), previously referred to herein, the Commission stated:

"We recognize and agree with the rule that a waiver of the right to bargain on a mandatory subject of bargaining will not be readily inferred, and that a waiver of such a statutory right, in order to be recognized, must be 'clear and unmistakable.' We conclude that the 'management rights' clause in question here specifically provides, 'clearly and unmistakably,' that the Municipal Employer has the authority, during the term of the agreement, to unilaterally make revisions in duties of employees in order to increase the efficiency of the particular operation involved. The parties agreed that the Municipal Employer has the prerogative to 'operate and manage its affairs,' and also to retain all powers and authority not abridged or modified by the agreement. The Municipal Employer further specifically retained the authority to revise the duties of employees to obtain a greater degree of efficiency by the clause which gives it the exclusive right 'to determine schedules of work and to establish the methods and processes by which such work is performed.'"

In the collective bargaining agreement involved herein, there was no express waiver provision. The District argues that such waiver is inferred as a result of entering into the grievance procedure. However, the three-step grievance procedure does not provide for a final and binding disposition of any grievance, and unless the grievance is resolved in the grievance procedure, the dispute continues. Therefore, the grievance procedure involved herein does not constitute a clear and unmistakable waiver of the KEA's right to proceed to fact finding, either on the noon hour or teaching load issues. In some instances, even where the contractual grievance procedure provides for a final and binding resolution of grievances, a refusal to negotiate within the meaning of Section 111.70(4)(e) may still exist.

Further, the argument that the conditions precedent to negotiating on the noon hour matter had not been met, since the report of the Noon Hour Committee did not receive the necessary endorsement by the principals or the KEA, and, therefore, no agreement could be reached thereon, is not convincing, since the agents of the District unilaterally determined that the noon hour would be closed at Washington Junior High School even though the collective bargaining agreement provided that noon hour scheduling was to be arrived at between the teachers and the principal involved.

contains the teaching load provision which was identical to that contained in the previous agreement under which the grievance originally arose.

Assuming that the District violated the teacher load provision, it does not necessarily follow that a violation of a contractual provision constitutes a failure and refusal to bargain in good faith. The provision here involved is not clear on its face, and therefore, subject to contractual interpretation. The fact that the District interprets the agreement in a manner other than contemplated by the KEA does not necessarily establish a refusal to bargain in good faith on the part of the District, and therefore, in the absence of any other circumstances, we have concluded that the District has not failed and refused to bargain collectively with the KEA within the meaning of Section 111.70(4)(e), with respect to the teacher loads.

Dated at Madison, Wisconsin, this 26th day of November, 1969.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II
Zel S. Rice II, Commissioner

William R. Wilberg
William R. Wilberg, Commissioner