STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DODGELAND EDUCATION ASSOCIATION, Complainant, vs. BOARD OF EDUCATION, JOINT COMMON SCHOOL DISTRICT NO. 11, Respondent.	Case II No. 16807 MP-241 Decision No. 11882-B

Appearances:

Mr. Edward Hogenson, Staff Member WEA Council, appearing on behalf of the Complainant.

Mr. Ralph E. Sharp, Jr., Member, Board of Education and Chairman of the Negotiation Committee, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Dodgeland Education Association having filed a complaint with the Wisconsin Employment Relations Commission, alleging that the Board of Education, Joint Common School District No. 11 has committed prohibited practices within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act; and the Commission having appointed Sherwood Malamud, a member of its staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held at Juneau, Wisconsin on June 8, 1973, before the Examiner, and the Examiner having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant, Dodgeland Education Association, hereinafter referred to as the Complainant Association, is a labor organization, which has been at all times material herein, the exclusive bargaining representative of teachers employed by Joint Common School District No. 11.

2. That Respondent Dodgeland Joint Common School District No. 11, hereinafter referred to as Respondent, is a public school district organized under the laws of the State of Wisconsin and a public body charged under the laws of Wisconsin with the management, supervision, and control of the Respondent District and its affairs.

3. That at all times herein Complainant and Respondent were signators to a collective bargaining agreement effective from July 1, 1972 through June 30, 1974 covering wages, hours, and other conditions of employment of teachers in the employ of the Respondent and that said agreement contains the following provisions relevant hereto:

X. Grievance Procedure

(A) Defined
A claim by a teacher, the Association or the Board of Education that there has been a violation, misinterpretation or misapplication of any provision of this agreement.

(B) All grievances or disputes, either individual teacher or group arising under this agreement shall first be submitted in writing within 15 days of the occurrence of the event giving rise to the alleged grievance, to the building principal or immediate superior. If, after five days, satisfaction is not received, then the grievance shall be submitted in writing to the Superintendent of Schools. If, after another ten days, satisfaction is not received, such grievance shall be taken before the Board of Education. On failure to reach a satisfactory agreement in ten days with the Board of Education, an arbitration board shall be formed consisting of two appointees by the Board of Education and two members of the D.E.A. This Board of Arbitration is to reach an agreement or final decision within ten days after their appointment. These four members may mutually select a fifth impartial member. Said decision to be advisory.

(C) When the Board of Education is the aggrieved party the D.E.A. representatives agree to meet with the Board or its representatives in order to reach a satisfactory agreement. On failure to reach a satisfactory agreement in ten days with the D.E.A., an arbitration board shall be formed consisting of two appointees by the Board of Education, two appointees by the D.E.A. This Board of Arbitration is to reach an agreement or final decision within ten days after their appointment. These four members may mutually select a fifth impartial member. Said decision to be advisory.

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Appendix B

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C. Extra-Duty Activities

Bus Chaperones	\$6.00 per event \$9.75 over 30 miles
Dance Chaperones	\$6.00 per event
Ticket Takers	\$6.00 per event
Scorekeepers & Timers	\$6.00 per event
Lunch Duty	\$3.00 per hour
Substitute Pay	\$5.25 (High School only, except as stated and applied to elementary teachers in Section III, subsection 8.)
Drivers Education	\$5.00 per hour" (Emphasis added)

4. Prior to the commencement of the 1972-73 school year, Respondent decided to increase the number of periods in the high school day from seven to eight periods. In order to avoid the lengthening of the school day and thus increasing the work load of the teachers, each period was reduced from 51 to 45 minutes. As a result of this change in schedule, most teachers had at least two preparation periods and there were three 30-minute periods during which lunch was served. Prior to this schedule change most teachers had only one preparation period, and there was only one period during which lunch was served.

5. On August 24, 1972, at an in-service meeting for teachers, the Respondent outlined the scheduled changes and delineated their effect on individual teacher schedules in a mimeograph multi-page handout. One page of this handout contained a summary of the classes, preparation periods, hall supervisions, and extra duties to be performed by each high school teacher. In one column of this page of the handout bearing the heading "Duty Hours/Year", a teacher was advised whether he had any duty hours, whether it was A.M. (morning) supervision of the halls, P.M. (afternoon) supervision of the halls, or noon supervision of the lunchroom and hall. In the last column on this same sheet there appeared the extra curricular duties, which was headed "Other", where many of the duties listed such as Athletics, contained an asterisk. The asterisk indicated that the teacher supervising that activity would receive extra-duty pay. No asterisks appeared in the column where the A.M., P.M. or noon supervision were listed.

6. On October 24, 1972, Ms. Neumann asked the school Principal, Mr. Brenegan, to arrange for an aide to take her noon supervision of the cafeteria. Mr. Brenegan advised her that she would not receive any extra-duty pay for noon supervision; and therefore, the School District would not employ an aide to perform that duty for her. On October 30, 1972, Robert H. Willett, member of the Association, Contract Interpretation and Enforcement Committee and Robert Wineke, President of Complainant Association filed a grievance, on behalf of all teachers with noon supervision responsibilities, protesting Respondent's decision to refrain from paying teachers for lunch duty. The teachers of Respondent School District receive their extra-duty pay (had they been paid, their pay would have been considered extra-duty pay) semi-annually in December and June of the school year.

7. On November 3, 1972 the Principal delivered his response to the grievance; on November 8, 1972 Complainant appealed Mr. Brenegan's reply to the grievance to Mr. Hauer, the Superintendent of Respondent's School District. On November 16, 1972 the Superintendent replied to the Complainant's appeal by affirming the position taken by the Principal Mr. Brenegan, by denying the grievance. On November 21, 1972 the Board of Education affirmed the action of its administrative personnel and denied the grievance. On December 8, 1972 Complainant requested that a Board of Arbitration be established, and with said request Complainant submitted the names of its two appointees to the Board of Arbitration. On January 9, 1973 Respondent appointed its two members to the arbitration panel. On January 24, 1973, Mr. Hauer advised Complainant that on January 23, 1973, the two Board members to the Arbitration Panel reported to the Board of Education at its meeting; that the Board of Education voted to reaffirm its position denying Complainant's grievance.

8. That the parties did not negotiate nor reach an agreement to change the contractual language pertaining to lunch duty to accomodate the schedule changes effectuated by the School District at the commencement of the 1972-73 school year.

9. That, the collective bargaining agreement in existence between the parties, establishes a grievance procedure, its final step is advisory arbitration which is not binding on the parties; that each party to

the agreement appoints two members to an arbitration panel; that these arbitration panel members appoint, if they wish, an impartial fifth party; that the appointment of a fifth impartial member to the arbitration panel is an optional provision of the final step of the grievance procedure; that the final step of the grievance procedure is the convening of the four-member arbitration panel.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Complainant exhausted the grievance procedure established by the collective bargaining agreement in convening the arbitration panel, the final step of the grievance procedure.

2. That a violation of the collective bargaining agreement occurred when the teachers with lunch duty did not recieve their extra-duty pay in December and June of the 1972-73 school year; on October 30, 1972 Complainant properly anticipated Respondent's stated intention to violate the collective bargaining agreement, therefore, the grievance filed on October 30, 1972 was timely.

3. That Respondent, by violating the collective bargaining agreement, has and continues to violate Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that Respondent, Board of Education, Joint Common School District No. 11, its officers and agents shall immediately:

1. Cease and desist from refusing to adhere to the terms of the collective bargaining agreement between the parties effective from July 1, 1972 through June 30, 1974.

2. Take the following affirmative action which the undersigned finds will effectuate the purposes of the Municipal Employment Relations Act:

   (a) Reimburse all employes who were assigned to lunch duty without compensation in violation of the collective bargaining agreement, since July, 1972 for the hours which they were engaged in noon supervision - lunch duty 1/ at the contract rate of $3.00 per hour.

   (b) Notify the Wisconsin Employment Relations Commission within 20 days following the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 23rd day of July, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By
Sherwood Malamud, Examiner

1/ The Examiner concludes that there is no material difference between the duties denoted by the term "lunch duty" and those denoted by "noon supervision".

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint filed herein, alleged that Respondent violated a provision of the collective bargaining agreement. Respondent answered denying it violated the agreement and also asserted that the grievance was not timely filed. At the hearing, Respondent claimed that the Wisconsin Employment Relations Commission was without jurisdiction because Complainant failed to exhaust the provision of the agreement established for the resolution of grievances.

Exhaustion of Grievance Procedure

The question of whether the Dodgeland Education Association, Complainant herein, exhausted all steps of the grievance procedure must first be determined, for if it is decided that Complainant failed to exhaust all steps of the grievance procedure the Commission would refuse to assert its jurisdiction. 2/ The Commission has held that even in cases of advisory arbitration a party seeking relief under 111.70 must first exhaust the contractual remedies afforded by the collective bargaining agreement. 3/ The Commission has established an administrative policy in advisory arbitration cases where the advisory arbitrator established by the agreement is a Commissioner or a member of the Commission's staff, the Commission will refrain from assigning advisory arbitrators. 4/ Under this agreement, however, the Commission is not named as the advisory arbitrator. Therefore, the Examiner need only determine if Complainant exhausted the grievance procedure outlined in the agreement.

2/ Lake Mills Joint School District No. 1 (11529-A), 7/73; Oostburg Joint School District No. 1 (11196-A), 11/72.

3/ Lake Mills Joint School District No. 1, supra.

4/ In Superior Board of Education (11286-A) 10/72, The Commission set aside its appointment of a staff member as an advisory arbitrator. The Commission stated "it would be an abuse of the Commission's procedures to have one of its staff members issue an advisory award, and if not implemented by the parties, to be required to proceed in a prohibited practice complaint on the same issue involved in the advisory arbitration."

In Melrose-Mindoro Joint School District No. 1 (11627) 2/73, the Complainant sought and received an order from the Commission directing Respondent to proceed to advisory arbitration. In so doing, the Commission restated its position announced in Superior Board of Education, supra, that the Commission would not exercise its jurisdiction to direct an advisory arbitration where the neutral arbitrator is a Commissioner or a member of the Commission's staff. In Melrose-Mindoro, the Commission directed the parties to advisory arbitration, where the Commission was named as an advisory arbitrator, because the hearing in that case was held prior to the Commission's decision in Superior Board of Education.

In Alma Center United School District No. 3 (11628) 2/73, the Commission directed the parties to proceed to advisory arbitration. In the event they could not agree on an arbitrator, the Commission directed the parties to request the Commission to appoint an arbitrator from outside its staff. In this case, the grievance procedure did not specifically provide that the neutral arbitrator be a Commissioner or a member of the Commission's staff.

The Examiner finds that Complainant exhausted the remedies afforded by the agreement and that the Commission has jurisdiction in this matter because of the peculiarity of the advisory arbitration provision contained in this agreement. The pertinent part of the agreement reads as follows:

> "On failure to reach a satisfactory agreement in ten days with the Board of Education, an arbitration board shall be formed consisting of two appointees by the Board of Education and two members of the D.E.A. This Board of Arbitration is to reach an agreement or final decision within ten days after their appointment. These four members may mutually select a fifth impartial member. Said decision to be advisory."

This paragraph delineates the procedures and time limitations which the teachers must follow to process a grievance. The portion quoted above requires interpretation. If the Respondent and Complainant cannot settle the grievance, then each side appoints two members to a board of arbitration. The grievance procedure then provides that this board of arbitration must reach a final decision within ten days. This procedure requires that the individuals on the board of arbitration may mutually appoint a fifth impartial member to the board. Respondent has assumed that the appointment of a fifth member occurs <u>after</u> the board of arbitration deliberates, and thus constitutes a separate step of the grievance procedure. Yet, the language of the agreement is quite clear. The decision of the board of arbitration is "final", in other words, it is the last step of the grievance procedure. The agreement provides that this "final decision" or last step of the grievance procedure is advisory and not binding on the parties. If the agreement contemplated the appointment of an impartial fifth party after the deliberation of the board of arbitration, the agreement would not state that the decision of the board is "final", i.e., the last step. Therefore, the only reasonable interpretation which maintains the "finality" of the decision of the board of arbitration is one which establishes that the board of arbitration may appoint the fifth member before it deliberates or at least before it reaches its decision. The board of arbitration presumably would take advantage of this opportunity, if for one reason or another, it believed the unbiased insights of an impartial individual would help in resolving the grievance. What is most important, is that under this agreement it is not the parties who appoint the fifth arbitrator, but the appointees to the board of arbitration who must select the neutral arbitrator. This interpretation is further buttressed by the fact that the agreement does not provide for a procedure of selecting the fifth impartial arbitrator should the parties be unable to agree on a neutral by themselves.

However, if the board of arbitration fails to appoint a neutral fifth member and were not able to resolve the grievance to the satisfaction of all concerned, the failure to resolve the question would thus constitute a "final decision" in other words, the last step of the grievance procedure. The conclusion that the board of arbitration's failure to resolve the grievance constituted a final decision of the board is further buttressed by the fact that the Board of Education, by resolution, reaffirmed its position after its appointee to the board of arbitration reported on its deliberations.

No one argues that the Commission should accord an advisory arbitration opinion the same legal affect as a final and binding

decision of an arbitrator. 7/ Thus, in this case, if the board had appointed a fifth arbitrator, and one party or the other refused to accept the decision of the board, neither Complainant nor Respondent argued that any party would be precluded from enforcing the agreement (not the advisory opinion) via the prohibited practice route.

It is on the basis of the above analysis that the Examiner concluded that Complainant had fully complied with the grievance procedure contained in the collective bargaining agreement. Having so concluded, the Examiner must now consider the procedural and substantive issues raised by the parties to determine if Respondent violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

Procedural Issue

Respondent asserts that on August 24, 1972 at the in-service teacher meeting Complainant knew or should have known of Respondent's intention to refrain from paying teachers for noon supervision duties. Therefore, Respondent argues, in order for the grievance to be timely, it should have been filed within 15 days of the August 24th in-service meeting. Respondent's timeliness defense is without merit. Respondent makes its extra duty payroll twice per year, once in December and once in June. Although Respondent's intentions were made known in August, 1972, the consummation of those intentions could not occur until December, 1972 and June, 1973 respectively. Thus, Complainant, by filing its grievance on October 30, 1972, properly anticipated Respondent's intention to refrain from reimbursing teachers for noon supervision duties.

Substantive Issue

When the Employer instituted an eight-period high school day instead of seven-period day, it reduced the length of each period from 51 to 45 minutes. The additional period each day resulted in teachers having two

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7/ Section 111.70(3)(a)5 provides as follows:

"It is a prohibited practice for a municipal employer individually or in concert with others:

. . .

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them."

In fact, the Commission in Superior Board of Education (11286-A) 10/72 at page two stated the legal affects of advisory arbitration:

> "Should the arbitrator issue an advisory award which is not acceptable to the Union, there would be nothing to prevent it from filing a complaint alleging a violation of the agreement. If the advisory award were acceptable to the Union but not to the employer, under such circumstances the Union could file a complaint alleging that the employer has violated the agreement, and thus committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the Municipal Employment Relations Act."

preparation periods instead of the one preparation period they have had in prior years. Under the new schedule, if a teacher had cafeteria supervision duties over the noon hour, he could still eat his lunch during his other preparation period; the teacher would thereby have a duty-free lunch. The School District argues that it was the intention of the parties to pay for cafeteria supervision because that supervision in the past required teachers to relinquish their duty-free lunch.

In addition, Respondent claims it changed the nature of the "lunch duty" to include supervision of the hall when the students began to leave the cafeteria after the lunch period. The School District called this new supervision duty "noon supervision" as opposed to "lunch duty". Just as the School District did not reimburse teachers for morning or afternoon supervision of the halls, in a like manner it did not reimburse teachers for supervision of the cafeteria and halls.

Respondent's first argument, i.e., the reasons for paying teachers an hourly rate of $3.00 for the lunch duty supervision disappeared when the School District increased the number of periods in a school day from seven to eight, does not free Respondent from contractual duties under the agreement. In the absence of a negotiated change in the collective bargaining agreement, Respondent's duty to pay $3.00 per hour for lunch duty was not obviated.

Respondent's second argument, i.e., additional duties were included in "noon supervision" which were not present in lunch duty changed the nature of the function to be performed, is without merit. The evidence does not support Respondent's contention that the lunch duty responsibilities were materially changed by the addition of hall supervision responsibilities at the conclusion of the period. The hall supervision takes only five to seven minutes of the period; whereas, the teacher spends the balance of the period supervising the students in the cafeteria. 8/ Therefore, the Examiner is not convinced that the new name, "noon supervision" transformed the lunch duty supervision of students in the cafeteria into a nonpaid extra-duty under the collective bargaining agreement.

Furthermore, under the agreement, payment for lunch duty is not made dependent on any factor other than performance of supervision of students in the cafeteria over the lunch hour. Therefore, it follows that Respondent by its failure to pay for lunch duty violated the 1972-74 collective bargaining agreement and thereby has committed a prohibited practice in violation of Section 111.70(3)(a)5 of the Municipal Employment Relations Act.

Dated at Madison, Wisconsin this 23rd day of July, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud

Sherwood Malamud, Examiner

8/ The teachers introduced testimony indicating that in prior years teachers supervised the halls at the conclusion of the lunch duty. The Examiner's analysis is based upon his viewing the testimony in a light most favorable to Respondent.