STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DARWIN DESTACHE AND THE NORTHWEST UNITED EDUCATORS, Complainants, vs. JOINT SCHOOL DISTRICT NO. 1, CITY OF RICE LAKE AND TOWNS OF BARRON, BEAR LAKE, BIRCHWOOD, CEDAR LAKE DOYLE, LONG LAKE, OAK GROVE, RICE LAKE, SARONA, STANFOLD, STANLEY, SUMNER, WILKINSON, WILSON, AND VILLAGE OF HAUGEN, Respondent.	Case VII No. 17998 MP-368 Decision No. 12756-A

Appearances:

Mr. Frank Burdick, Staff Representative, Wisconsin Education Association Council, appearing on behalf of the Complainants.

Losby, Howard, Riley & Farr, S.C., Attorneys at Law, by Mr. Stevens L. Riley, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainants having filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondent committed a prohibited practice within the meaning of Section 111.70 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Marshall L. Gratz, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders in the matter as provided in Section 111.07 of the Wisconsin Employment Peace Act as made applicable to municipal Employment by Section 111.70(4)(a) of MERA; and hearing having been held in the matter on July 12, 1974, at Barron, Wisconsin; and the Examiner having considered the evidence, arguments and briefs of Counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Complainant Darwin Destache, referred to herein as Destache, is an individual whose address is 707 West Stout Street, Rice Lake, Wisconsin 54868.

2. That Complainant Northwest United Educators, referred to herein as NUE, is a labor organization with offices located at 515 North Main, Rice Lake, Wisconsin 54868.

3. That the above-named Respondent is a municipal employer, referred to herein as the District; and that the president of the District's Board of Education is Edward Coe, whose address is 812 Colon Boulevard, Rice Lake, Wisconsin 54868.

4. That at all times material hereto, NUE has been the exclusive collective bargaining representative of all full-time and regular part-time employes of the District engaged in teaching.

5. That at all times material hereto, Destache has been employed by the District as a physical education teacher and football coach; and that Destache has therefore been represented at all material times by NUE.

6. That the District and NUE are bound to a 1973-74 collective bargaining agreement referred to herein as the Agreement, covering the wages, hours and working conditions of the District's full-time and regular part-time employes engaged in teaching; that the Agreement contains a grievance procedure but no final and binding means of grievance resolution; and that the Agreement further provides as follows:

"ARTICLE XI

Compensation

. . .

F. If a teacher is required by the administration to act in the capacity of a substitute teacher, that teacher will receive compensation of $5.00 for each period taught in addition to the teacher's regularly assigned duties."

7. That throughout the 1973-74 school year, Destache and James Sevals shared team-teaching responsibilities with respect to several physical education classes; that their typical teaching method involved splitting each class into two groups with each teacher teaching a given activity to each of the groups, for one-half the period each; that frequently, e. g., once per week, Sevals and Destach would cover for one another such that one of them would supervise both of the activities and both of the groups at the same time so as to permit the other to take a coffee break, run an errand or otherwise absent himself for a period ranging from a few minutes to several hours; until the March 14-15 incident described below, neither Sevals nor Destache had ever requested payment of Art. VI F compensation for the periods of time during which they covered in each other's absence.

8. Early in March, 1974, Destache, upon learning that Sevals would be absent on March 14-15, requested of the District that a substitute be hired to replace Sevals on those two days; District officials denied that request stating that it was neither necessary nor the District's practice to hire a substitute when one of two team teachers was absent.

9. Sevals was absent on March 14 and 15; as a result of his absence and the District's refusal to assign a substitute to replace him, the District effectively required Destache to: (1) move a large mat upstairs at the beginning of the March 14 school day (which mat would not have been moved at all had Sevals or a substitute been present), (2) take attendance in the six classes in which Sevals would normally have taken it, and (3) supervise, throughout ten periods, Sevals' volleyball groups while continuing to conduct his own tumbling activity in the same gymnasium, thereby supervising twice as may students as he would have supervised in Sevals' presence; but that Destache was not required on those days to teach classes during any periods of time in addition to his regularly assigned class periods.

10. That Destache requested of the District that he be paid $5.00 for each of the ten periods during which he was required to cover for

Sevals on March 14-15; that the District denied said request; that Destache and NUE filed a timely grievance claiming that such denial violated Art. XI F of the Agreement; that Destache and NUE exhausted the Agreement grievance procedure as to said grievance and filed the instant complaint with respect thereto on May 30, 1974.

11. That the language of Art. XI F of the Agreement originated in the parties 1969-70 agreement after lengthy negotiations pursuant to the employe representatives' initial proposal that employes be paid $5.00 for each period in which they served as a substitute teacher; that during said negotiations the employe representatives stated that said proposal was a reaction to the District's occasional practice of covering an absent teacher's classes with a number of regular employes rather than with one outside substitute such that, occasionally, classroom teachers were required to teach an additional class during their (otherwise free) preparation period and librarians and guidance counselors were required to take the time to teach one or more classes without any reduction in their regularly assigned library or guidance counseling workload, all without additional compensation to such regular employes that the District responded that any such compensation should be payable only if the District administration assigned such substitute work to a regular employe and should not be payable where the absentee has arranged on his own with a fellow regular employe who agrees to cover the class voluntarily; that the agreed upon language therefore included the terms ". . . is required by the administration to act . . ."; that at no time during said negotiations were any of the following scenarios discussed either in general or with particular regard to the applicability of Art. XI F thereto: (1) teacher is required to teach the same subject to two classes at the same time in the absence of the other teacher of such subject; (2) one of two team-teachers, in the absence of the other team-teacher, is required to teach both halves of an often separated team-taught class; (3) elementary teacher is required to teach his or her own class in the absence of a specialist (e.g. in art or music) who had been scheduled to take over the class for a period of time.

12. That twenty-eight payments have been made to employes pursuant to Art. XI F since the beginning of school year 1970-71 when records of same were first kept; that each of those twenty-eight payments was to an employe who taught a class period in excess of the number of class periods he or she was regularly assigned to teach on the day in question; and that apparently at no time since the effective date of the 1969-70 agreement has any request (except that of Destache noted above) been submitted for Art. XI F payments with respect to any of the numerous occurrences during that period in which classroom teachers covered double classes or both halves of a team-taught class or their elementary school class during the absence of another teacher, the team-teaching partner or a scheduled specialist, respectively.

13. That based upon the language of Article XI F of the Agreement, read in the context of the foregoing bargaining history, a bargaining unit employe will be eligible for Art. XI F compensation only for such periods of time-in excess of the number of periods regularly assigned to such employe on the day in question-during which such employe is required by the administration to act in the capacity of a substitute teacher.

14. That Destache was not required to act in the capacity of a substitute teacher for any periods of time in addition to the number of periods regularly assigned to him on either March 14 or March 15;

that therefore Destache is not entitled to any Art. XI F compensation for either of those days; and that, therefore, by refusing to pay Destache any such compensation with respect to said days, the District did not violate Art. XI F of the Agreement

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

CONCLUSION OF LAW

1. That by refusing to pay Complainant Darwin Destache any Art. XI F compensation as regards March 14 and 15, Respondent District did not violate either Art. XI F of the collective bargaining agreement between Respondent District and Complainant Northwest United Educators or, therefore, Sec. 111.70(3)(a)5 of MERA.

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

ORDER

1. That the complaint in the above-entitled matter be, and the same hereby is, dismissed.

2. That Complainants' and Respondents' requests that costs and attorney's fees be assessed against their adversary shall be, and hereby are, both denied.

Dated at Milwaukee, Wisconsin, this 9th day of December, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complainants, in their complaint, allege that Respondent's failure to compensate Destache for ten ". . . extra periods taught in addition to his regular teaching duties . . ." constituted a violation of Art. XI F of the parties' 1973-74 agreement, therefore, a prohibited practice in violation of Section 111.70(3)(a)5. 1/ In their answer, stated on the record at the hearing, Respondents deny committing any such violation, admit that Respondent taught Sevals' groups as well as his own during Sevals' March 14-15 absence, but assert that the parties' bargaining history and history of administration regarding Article XI F show that such language was not intended to apply to the instant situation.

The language of Art. XI F, on its face, indicates that the parties intended that it provide compensation only to personnel who teach periods of time in excess of the periods of time they perform regularly assigned classroom teaching, and then, only if they were required to do so by the administration. The use of the terms " . . . in addition to the teachers' regularly assigned duties", considered alone, gives the illusion that the instant facts fall within the purview of the section since Destache was required to perform at least some duties that he would not have performed in Sevals' presence. But Art. XI F compensation is expressly provided only for periods taught in addition to regularly assigned duties, not merely for additional duties performed during an employe's regularly assigned schedule of classroom teaching.

Moreover, any abmiguity arising by reason of the parties' use of the term ". . . in addition to the teacher's regularly assigned duties" is resolved by reference to the parties' discussion of the instant section when it was first negotiated into their 1969-70 agreement. 2/ Complainant's witness Ptacek, testified on direct examination as follows:

"Q: Now, the language says ' . . . in addition to the teacher's regularly assigned duties.' Can you give us any further background as to whether--as to what was meant when you agreed that it was in addition to regular assigned duties?

A: I think what the intent was here was that if somebody was normally a librarian and was asked to be used as a sub, they would be paid--if I was normally a teacher who taught six classes a day and I was asked, during my preparation period, to be used as a sub, I would be paid, if I was noramlly a

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1/ That section provides as follows:

"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."

2/ See Finding No. 11

guidance counselor and I was asked to substitute in one class or two classes, that I would be paid." 3/

That testimony supports the conclusion that Art. XI F was intended by the parties to compensate employes only for periods of classroom teaching in excess of those regularly assigned to the employe. 4/ The significance of that bargaining history is not negated by the fact that the bargaining teams did not discuss the double class, or absent elementary specialist or absent team-teacher situations. On the contrary, that the parties did not discuss such situations is not inconsistent with the District's assertion that Art. XI F was not intended to apply thereto.

The evidence concerning the parties' history of administration 5/ of Art. XI F, while not conclusive, is nontheless fully consistent with the District's proposed interpretation of that provision.

In its answer, Respondent requested that the Examiner order Complainants to reimburse Respondents for all costs occasioned by Complainants' filing of the instant complaint. The complaint contained a request that Respondent be so assessed in favor of Complainants.

It has never been the Commission's policy to order a party (prevailing or nonprevailing) to pay any such costs or fees except where the parties have agreed in advance that such remedy is appropriate. 6/ The Examiner finds nothing in the instant case warranting an exception to or modification of that approach. Therefore, the parties' requests for costs and attorney's fees have both been denied.

Dated at Milwaukee, Wisconsin, this 9th day of December, 1974.

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By Marshall L. Gratz
Marshall L. Gratz, Examiner

3/ Tr. 20

4/ Of course, librarians or guidance counselors might have few, if any, regularly assigned classes.

5/ See Findings No. 7 and 12.

6/ See, e. g., Monona Grove Joint School District No. 4, Dec. No. 11614-A,B (7/73), United Contractors, Inc., Dec. No. 12053-A,B (12/73)