STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

YVONNE KARNUTH, CAROL KOHLMEYER, MARY JO KRATOCHVIL AND 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 & VILLAGE OF HAUGEN, Respondents.	Case IX No. 19160 MP-466 Decision No. 13676-A

Appearances:

Mr. Robert E. West, Executive Director, NUE-WEAC-NEA Council 19, appearing on behalf of the Complainants.

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above named Complainants having, on May 14, 1975, filed a complaint with the Wisconsin Employment Relations Commission wherein they alleged that the above named Respondent had committed prohibited practices within the meaning of the Wisconsin Municipal Employment Relations Act; and the Commission having appointed Marvin L. Schurke, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter, as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Barron, Wisconsin, on July 24, 1975, before the Examiner; and the Examiner having considered the evidence and arguments 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 Northwest United Educators, hereinafter referred to as Complainant NUE, is a labor organization having its principal offices at 515 North Main Street, Rice Lake, Wisconsin 54868.

2. That Yvonne Karnuth, Carol Kohlmeyer and Mary Jo Kratochvil, hereinafter referred to as the individual Complainants or by their last names, are individuals residing at Rice Lake, Wisconsin; and that, at all times pertinent hereto, the individual Complainants were employed by the Respondent as elementary school teachers.

3. That 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, hereinafter referred to as the Respondent, is a municipal employer engaged in the operation of a public school system with offices at Rice Lake, Wisconsin 54868.

4. That, at all times pertinent hereto, the Respondent has recognized Complainant NUE as the exclusive collective bargaining representative in a bargaining unit consisting of all full-time and regular part-time employes of the Respondent engaged in teaching.

5. That Complainant NUE and the Respondent were parties to a 1973-74 collective bargaining agreement containing the following provision pertinent hereto:

"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.";

that, during the life of said agreement a grievance arose as to the proper interpretation and application of said provision; that such grievance was processed through the grievance procedure contained in said collective bargaining agreement without resolution thereof; that, subsequent thereto, Complainant NUE and the individual employe affected by that grievance filed a complaint with the Wisconsin Employment Relations Commission alleging that the Respondent herein violated said collective bargaining agreement in connection with the aforesaid grievance, and thereby violated Section 111.70(3)(a)(5) of the Municipal Employment Relations Act; that the Commission appointed Marshall L. Gratz, a member of its staff, as Examiner in the matter; that a hearing was held before Examiner Gratz on July 12, 1974; and that the Respondent herein there denied any violation of the statute or the collective bargaining agreement, claiming that the language set forth above was not intended to apply to the situation covered by the aforesaid grievance. 1/

6. That, during the course of collective bargaining between Complainant NUE and the Respondent for a 1974-75 collective bargaining agreement, Complainant NUE made a proposal, among numerous language proposals, relating to Article XI, Section F. of the previous agreement between the parties, as follows:

"Add: Teachers will also receive the same compensation as above if they are required to substitute for special teachers such as art, music, and/or physical education.";

that such proposal related specifically to regularly assigned classroom teachers at the elementary level; that such proposal was a subject of negotiations between those parties at a time when the aforementioned grievance was also pending between them; that, during the course of a negotiations session held on August 22, 1974, Complainant NUE offered to drop its proposal on substitute pay if the Board agreed to a mileage rate of 16¢ per mile; that thereafter, further offers and counter-offers were exchanged, culminating in an offer made on behalf of the Respondent which was termed to be the Respondent's final offer; that such final offer made provision for payment of mileage at the rate of 15¢ per mile, and further made provision that "aside from some technical changes in contract language, all language will

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1/ See: Darwin Destache and the Northwest United Educators vs. Joint School District No. 1, City of Rice Lake, et. al., docketed as Rice Lake Joint School Dist. No. 1, Case VII (12756-A) 12/74.

remain the same as in the 1973-74 contract"; that there was no meeting of the minds of the representatives of the parties regarding any change of the language or of the Respondent's interpretation of the language of Article XI, Section F of the 1973-74 collective bargaining agreement between the parties; that such final offer was embodied in a news release dated October 24, 1974 which was approved by a representative of Complainant NUE; and that such final offer became the basis for a 1974-75 collective bargaining agreement between the parties executed on November 18, 1974 and effective for the period from July 1, 1974 through June 30, 1975.

7. That the 1974-75 collective bargaining agreement between the parties contained the following provision pertinent hereto:

"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.";

that, during the life of said agreement and on February 24, 1975, a special teacher in music was absent from duty; that no regular substitute teacher was employed to perform the duties of the aforesaid special teacher in music during her absence from duty; that, on February 24, 1975, the individual Complainants herein were required to remain on duty in their regularly assigned elementary classrooms during the times when the special teacher in music would normally have assumed responsibility for instruction in those classrooms; that the individual Complainants herein made requests for payments of $2.50 each, representing a claim for compensation for one half of a "period taught" under Article XI, Section F of the collective bargaining agreement; and that such requests for compensation were refused by the Respondent.

8. That, following the Respondents' denials of their requests for compensation, the individual Complainants herein filed the processed grievances under the grievance procedure contained in the aforesaid 1974-75 collective bargaining agreement; that all of the steps of such grievance procedure were exhausted; and that such collective bargaining agreement makes no provision for the final and binding resolution of disputes arising as to its interpretation or application.

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

CONCLUSIONS OF LAW

1. That Article XI, Section F of the 1974-75 collective bargaining agreement between Complainant NUE and the Respondent does not extend to cover the situation of an elementary teacher required to teach his or her own class in the absence of a special teacher in music who had been scheduled to take over the class for a period of time.

2. That the Respondent, Joint School District No. 1, City of Rice Lake, et. al., by refusing the requests of Yvonne Karnuth, Carol Kohlmeyer and Mary Jo Kratochvil for compensation for February 24, 1975, has not violated, and is not violating, the 1974-75 collective bargaining agreement between said Respondent and Northwest United Educators and has not committed, and is not committing prohibited practices within the meaning of 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 the complaint filed to initiate the instant proceedings be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 24th day of March, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

PLEADINGS AND PROCEDURE:

The complaint was filed on May 14, 1975 seeking a determination on the merits of a violation of contract claim in the absence of final and binding arbitration provisions in the collective bargaining agreement. In its answer filed on July 8, 1975, the School District denies that any agreement was reached during 1974 changing the meaning of Article XI, Section F, and denies that it violated the agreement by refusing to pay the individual complainants the compensation they seek. The hearing was held on July 24, 1975 and the transcript of that hearing was made available on September 17, 1975. Briefs were filed, the last of which was received by the Examiner on October 20, 1975.

POSITION OF THE COMPLAINANTS:

The Complainants contend that NUE's proposal during bargaining for 1974-75 to "clarify" the language of Article XI, Section F was met with concurrence on the part of representatives of the School District. NUE contends that it thereafter dropped its demand for clarifying language on the basis of the discussions and assurances made and received at the bargaining table. The Complainants would distinguish the decision of the Commission and its Examiner in Case VII as relating to a different set of circumstances, and contend that the clear meaning of the language requires that the Complainants' position in this matter be sustained.

POSITION OF THE RESPONDENT:

The School District contends that the decision here should be strongly influenced, if not controlled, by the decision in Case VII, pointing particularly to findings made by Examiner Gratz in that case concerning the bargaining history of the provision in dispute. The consistent past practice of refusing payment for situations such as this is advanced as evidence of the intent of the parties, and the unsuccessful attempt to negotiate an amendment to specifically cover the situation at hand is said to bind NUE to the interpretation of the language made by Examiner Gratz. The School District contends that no new agreement was reached altering the meaning of the same language.

DISCUSSION:

Language of the type in dispute here has been a subject of litigation in other cases,2/ and that circumstance, in itself, gives rise to an inference that the language is not so clear as the Complainants here would have the Examiner find. Examiner Gratz made specific findings of fact concerning the bargaining history of Article XI, Section F, as follows:

> "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

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2/ In addition to Rice Lake Case VII, already referred to herein, see Kenosha Jt. School District XXXVII, MA-385, award issued 5/75, and Eagle River Jt. School District (13739-A) 2/76.

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." (Emphasis Added.)

Furthermore, even if the bargaining history had been otherwise or had been ambiguous on the point, the evidence before Examiner Gratz clearly established the practice of the parties in the implementation of Article XI, Section F, and Examiner Gratz made the following findings of fact with respect to that practice:

> "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 teach-teaching partner or a scheduled specialist, respectively."

There is now some suggestion that the findings relating to the situations other than as specifically raised by the Destache grievance went beyond the scope of the case before Examiner Gratz, but it is clear that the parties adduced considerable evidence concerning bargaining history during those proceedings and that the bargaining history findings are interrelated to one another. It is also noted that neither the individual Complainant therein nor Complainant NUE filed with the full Commission a petition for review of the findings, conclusions and order issued by Examiner Gratz to have any offensive dicta purged from the decision. The Commission proceeded to review the entire record and adopt the findings, conclusions and order of the Examiner as its own, and there is no question that the Complainants herein have been, and are, foreclosed from relitigating the interpretation of Article XI, Section F as it appeared in the 1973-74 collective bargaining agreement. The real question here is whether there has been a change of that interpretation through subsequent collective bargaining between the parties.

The negotiations during which Complainant NUE sought to amend Article XI, Section F were taking place during the same time period in which Case VII was heard and argued. It was clear that the School District was resisting, even to the point of formal litigation, the interpretation sought in the Destache grievance, and that evidence was adduced in the course of that litigation which would contraindicate the interpretation being sought by the Complainant NUE in those negotiations and in this proceeding. Put simply, the Complainants' assertion that agreement was reached on a different interpretation is lacking in credibility and persuasive force. At best, the witnesses called by the Complainants on the point indicated that some understanding was reached after discussions between unnamed participants. No specific trade-off or exchange was pointed out which established the alleged agreement on a change of interpretation and, on the contrary, it appears that the issue died on the vine as the parties came to grips with more important issues. There was clearly no written memorandum memorializing the alleged agreement, nor was there agreement to change the language on which the parties had already disagreed and on which the parties were then in litigation. Finally, it seems incongruous that a major change of interpretation would have been agreed to with no effect whatever on the pending litigation, yet there is no evidence whatever of any discussions pertaining to the settlement or withdrawal of the case before Examiner Gratz. Although it is clear that Complainant NUE was making an effort to obtain a more favorable interpretation of the same language or a modification of that language, the Examiner concludes that the Complainants herein have not sustained the burden of proving that there was a meeting of the minds of the representatives of the parties on such a change of either the language or the interpretation. Accordingly, the undersigned Examiner reverts back to the interpretation made by Examiner Gratz, and concludes that Article XI, Section F of the 1974-75 collective bargaining agreement was not intended to cover the situation of an elementary teacher 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. Accordingly, the complaint filed herein must be dismissed.

Dated at Madison, Wisconsin this 24th day of March, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner