

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS,

Complainant,

vs.

AMERY JOINT SCHOOL DISTRICT NO. 5,

Respondent.

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: Case II
: No. 19803 MP-543
: Decision No. 14140-A
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Appearances:

Mr. James Guckenberg, Executive Director, Northwest United Educators,
appearing on behalf of the Complainant.

Novitzke, Burns & Gust, Attorneys at Law, by Mr. Don Paul Novitzke,
appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter; and the Commission having appointed Thomas L. Yaeger, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.70(5) of the Wisconsin Statutes and hearing on said complaint having been held at Balsam Lake, Wisconsin on February 11, 1976, 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, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Northwest United Educators, herein Complainant, is a Labor Organization and the exclusive collective bargaining representative of certain teachers employed by Amery Joint School District No. 5.

2. That Amery Joint School District No. 5, herein the District or Respondent, is a Municipal Employer within the meaning of Section 111.70 (1)(a) of the Municipal Employment Relations Act.

3. That at all times material hereto the Complainant and Respondent were parties to a collective bargaining agreement, which among its several provisions, contained the following which are material herein:

"ARTICLE V

GRIEVANCE PROCEDURE

- A. Purpose -- The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this Agreement. A determined effort shall be made to settle any such differences through the use of the grievance procedure, and there shall be no suspension of work or interference with the operation of the school during the term of the Agreement.
- B. Definition -- For the purpose of this Agreement a grievance is defined as any complaint regarding the interpretation or application of a specific provision of this Agreement.

No. 14140-A

- C. Grievances shall be processed in accordance with the following procedure:

STEP 1

- a. An earnest effort shall first be made to settle the matter informally between the teacher and his principal.
- b. If the matter is not resolved, the grievance shall be presented in writing by the teacher to his principal within five days after the facts upon which the grievance is based first occur or first become known. The principal shall give his written answer within five days of the time the grievance was presented to him in writing.

STEP 2

If not settled in Step 1, the grievance may within five days be appealed to the Superintendent of Schools. The Superintendent shall give a written answer no later than ten days after receipt of the appeal.

STEP 3

If not settled in Step 2, the grievance may within ten days be appealed to the Board of Education. The Board shall give a written answer within thirty days after receipt of the appeal.

ARTICLE VI

ADVISORY ARBITRATION

- A. In order to process a grievance to Advisory Arbitration, the following must be complied with:
 1. Written notice of a request for such arbitration shall be given to the Board within ten days of receipt of the Board's last answer.
 2. The matter must have been processed through the grievance procedure within the prescribed time limits.
 3. The issue must involve the interpretation or application of a specific provision of the Agreement.
- B. Grievances involving the same act or same issue may be consolidated in one proceeding provided the grievances have been processed through the grievance procedure by the time the parties meet to select an impartial third party.
- C. When a request has been made for advisory arbitration, a three-member board shall be established in the following manner: The employer and the employee representative shall each appoint a member of the Board and shall notify the other of the name of its appointee to the Board within five days of receipt of the written appeal. These representatives shall meet in an attempt to select an impartial third party to act as Chairman of the advisory board. Failing to do so, they shall, within fifteen days of the appeal, request the Wisconsin Employment Relations Commission to submit a list of five names for their consideration. The employer and the employee representative shall determine by lot the order of elimination and thereafter each shall, in that order, alternately strike a name from the list, and the fifth and remaining name shall act as Chairman of the advisory board.

- D. The advisory board shall meet with the representative of both parties, hear evidence and give an opinion within thirty days of the close of the hearing.
- E. It is understood that the function of this board shall be to provide an advisory opinion as to the interpretation and application of specific terms of this Agreement. This board shall not have power, without specific written consent of the parties, to either advise on salary adjustments, except the improper application thereof, or to issue any opinions that would have the parties add to, subtract from, modify or amend any terms of this Agreement.
- F. Each party shall bear the expenses of its representatives and witnesses in this hearing. The fees and expenses of the Chairman of the advisory board shall be shared equally by the parties.

ARTICLE VII

PLACEMENT

- A. The Board retains the right to determine grade, subject and activity assignments and to make transfers between schools as necessary in the best interest of the district.
- B. Assignments and transfers will take into consideration employee professional training, experience, specific achievements, and service in the district.
- C. Any teacher wishing another assignment or transfer to another school shall make his wishes known by February 1 in order to be given consideration for the following school year. Applications must be renewed annually to remain valid.
- D. In making involuntary assignments and transfers, the convenience, wishes, and seniority of the individual teacher will be honored to the extent they do not conflict with the instructional requirements and best interests of the school system and the pupils. Permanent assignments or transfers will not be made without prior agreement with the teacher.

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ARTICLE X

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E. Contracts

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- 5. No teacher shall be discharged, nonrenewed, suspended or reduced in compensation without cause.

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F. Work Schedules

- 1. It is recognized that hours of work, including the school day and school calendar, are based on educational requirements and subject to change as educational methods, needs, and techniques change.
- 2. The Board retains the right to establish hours for the school day. However, the Association shall be notified in

advance of any changes in schedule that have a substantial impact on employees in the bargaining unit, and shall be given an opportunity to discuss the matter and make recommendations for improving the schedule.

3. Schedules for the school year shall be established prior to August 15 each year.
4. It is recognized that employees in the bargaining unit assume an obligation for all teaching functions related to a quality educational program including:
 - a. Daily preparation
 - b. Supervision of extra-curricular and co-curricular activities
 - c. Attendance at staff and in-service training meetings
 - d. Participation in meetings with parents
5. The Board shall endeavor to distribute the workload relatively equally over the school year among qualified employees."

4. That Kathleen Krogh is presently employed on a part-time basis by Respondent to teach junior high school home economics; that Krogh began her employment with Respondent during the 1971-72 school year; and that Krogh taught all but the first two weeks of the 1971-72 school year but was not issued an individual teaching contract for said school year.

5. That Krogh was retained by the District for the 1972-73 school year and was tendered an individual teaching contract for said school year; that said teaching contract provided that Krogh was to teach home economics for 180 days and participate in in-service training for 5 additional days and that she was to be paid \$3,048 or \$8.24 per hour; that Krogh taught two periods of home economics per day in a seven period day; that during the 1972-73 school year Krogh received an upward adjustment in her compensation which reflected compensation for one hour of preparation time per day; and that said salary adjustment was authorized by the principal of the school where Krogh taught.

6. That Respondent tendered Krogh a teaching contract for the 1973-74 school year; that said contract provided that Krogh was to teach two periods of home economics and receive an additional 1/2 period of preparation time; that Krogh taught home economics in the junior high school during said school year and that the junior high school was operating on a seven period per day schedule; that for said services Krogh was to be paid \$2,959; that said salary, rather than representing an hourly rate was computed by placing Krogh on the appropriate salary step of the parties' negotiated salary schedule and multiply said salary step by 2.5 periods/7 periods; that this was the first time Krogh's salary had been computed from the parties' negotiated salary schedule; and that said salary was increased during the school year to \$3,107 to reflect the increases in the salary schedule negotiated by the parties subsequent to the issuance of the aforesaid individual teaching contract.

7. That in the Spring of 1974, prior to the conclusion of negotiations on the parties' 1974-75 collective bargaining agreement, Respondent tendered Krogh an individual teaching contract for the 1974-75 school year; that said teaching contract called for Krogh to teach two periods of home economics and receive 1/2 period of preparation time; that Krogh was to be paid \$3,107 for her services; and that the salary appearing on said teaching contract was calculated in the same manner as the 1973-74 teaching contract, i.e. multiplying the appropriate

step on the parties' negotiated salary schedule 1/ by 2.5 periods/7 periods.

8. That during the Summer of 1974, the District, in an attempt to schedule more classes within a given time in an "outmoded facility", changed from the previous seven period day to an eight period day for both junior and senior high schools; that said change had the effect of reducing each class period from approximately 55 minutes to 46 minutes; that as a consequence of said change in the number of periods per day Respondent recalculated Krogh's compensation provided for in her 1974-75 teaching contract by modifying the formula appearing at finding No. 7 herein as follows:

$$\frac{2.5 \text{ periods}}{8 \text{ periods}} \times \text{appropriate step on the salary schedule; and}$$

that said modification had the effect of reducing her compensation to \$2,936.

9. That Krogh, upon being informed her salary was being reduced, grieved, and proceeded in accordance with the procedures appearing at Article V of the parties' collective bargaining agreement; that Alan Stoddard, Principal, answered the grievance on September 20, 1974:

"Dear Mrs. Krogh:

In response to your grievance submitted September 20 and our conference held September 23, the following decisions have been made.

Concerning Article XI Section D-Placement- it is my understanding that a year ago you negotiated with Dr. Froehlich your experience for placement on the salary schedule. At that time all of your public school experience was accepted. That places you, this year, on the 5th step BA column at \$9,396, and your pay is 2.5/8 of that figure, or \$2,936.25. As you negotiated your experience last year and were satisfied with it, it appears the placement issue is closed.

Concerning Article XI Section E-Benefits, your situation is the same as other part time teachers, that is, no fringe benefits are provided for less than [sic] 1/2 time teachers. You are, however, covered by the Boards [sic] liability policy.";

that thereafter the grievance was processed to the next step of the grievance procedure and answered by Robert B. Froehlich, Superintendent of Schools:

"Dear Mrs. Krogh:

In accordance with the Master Agreement between Joint School District No. 5, Amery and Northwest United Educators - Amery, the following reactions are filed relative to the grievance filed on September 20 with Mr. Stoddard.

- your placement on the salary schedule was based upon experience and training applicable to your position as junior high school instructor in home economics.

1/ The salary schedule in the 1973-74 bargaining agreement was used in the calculation inasmuch as negotiations on the subsequent year's salaries had not been completed.

- fringe benefits and teachers retirement are not paid to instructors employed on less than a half-time basis.

The transition of the school day from seven and one half periods to eight periods has been applied on the same basis for all part-time staff members. Therefore your request for an increased income would be dependent upon your willingness to accept a contract with additional time or duties. Should you decide that the suggestion of additional time would satisfy the grievance submitted on September 20, please inform me within the next ten days.";

that as a consequence of Froehlich's answer to the grievance, Krogh's teaching time was increased by 1/2 period to allow her to give individualized instruction as may be required by the principal; that Krogh's salary was increased to \$3,523.50 to reflect a change in her teaching time and the formula used to calculate the new salary was 3.0 periods/8 periods x appropriate step on salary schedule; that the aforesaid grievance was settled on the foregoing basis; and that Krogh was never asked to teach the additional 1/2 period at any time during the 1974-75 school year.

10. That, in the Spring of 1975, Krogh was tendered a teaching contract for the 1975-76 school year that called for her to teach two periods of home economics with an additional 1/2 period for preparation while receiving a salary of \$2,936 calculated in the following manner 2.5 periods/8 periods x appropriate step on salary schedule; that the District reasoned the 1/2 period drop from the previous year's 3.0 periods because there was not a demonstrated need for the 1/2 period of individualized instruction as evidenced by Krogh never having been used in that capacity the prior year; that for the 1975-76 school year the District went from the 1974-75 uniform eight period day in both the high school and junior high school to an eight period day in the high school and a mixed seven and eight period day in the junior high school where Krogh taught; that said junior high school schedule called for the first five periods in the day to run for 55 minutes or the equivalent of a seven period day, whereas, the last two periods (6th & 7th) were to run for only 46 minutes or the equivalent of an eight period day; that said change was motivated by scheduling considerations in that both junior and senior high school classes were being offered in the same building and, said change provided greater flexibility by permitting the use of senior high school teachers in the junior high school in meeting the needs of the junior high school; that the junior high school class schedule for the 1975-76 school year called for Krogh's home economic courses to be taught during the 6th and 7th periods (46 minute periods); and that this is why the denominator of the fraction set out above, eight was used in computing Krogh's 1975-76 salary.

11. That all other part-time teachers have their salaries calculated on the basis of an eight period day; that all part-time teachers are either teaching in the high school which is on an eight period day (46 minute periods) or in the junior high school where the classes they teach are offered during the 6th and 7th periods (46 minute periods); and that the District has no policy concerning the amount of material to be covered by the teacher whether his/her class be offered during a 55 or 46 minute period.

12. That after receiving her 1975-76 teaching contract in the Spring of 1975, Krogh grieved the reduction in compensation; that said grievance was processed through the grievance procedure; and, that the parties herein waived Article VI of the instant collective bargaining agreement providing for advisory arbitration.

13. That the District's action in only offering Krogh a contract to teach 2 periods per day for the 1975-76 school year, scheduling her junior high school home economics courses during the 6th and 7th periods

and, calculating her compensation on the basis of an eight period day was for cause; and that the resultant reduction in compensation did not violate the collective bargaining agreement.

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

CONCLUSION OF LAW

That Amery Joint School District No. 5, by reducing Krogh's compensation for the 1975-76 school year from that received the previous school year for cause, did not violate the terms and conditions of the collective bargaining agreement subsisting between it and the Northwest United Educators and, therefore, has not committed and is not committing a prohibited practice 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 Conclusion of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the complaint in the instant matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this *31st* day of August, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Thomas L. Yaeger*
Thomas L. Yaeger, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF
FACT, CONCLUSION OF LAW AND ORDER

The instant complaint was filed on November 14, 1975 and hearing thereon was held on February 11, 1976. The transcript was mailed to the parties on April 19, 1976, and they were to file their briefs by May 3, 1976, but, requested an extension to May 19, 1976. By June 14, 1976, the Examiner had not received either party's brief and no additional extensions had been requested. The record was thus closed on June 14, 1976.

In its complaint, Complainant charges that Respondent reduced Krogh's compensation without cause for the 1975-76 school year from what she previously received for the 1974-75 school year. Respondent's answer denied it violated the collective bargaining agreement and denied the existence of such an agreement for the 1975-76 school year. 2/ Respondent further averred that Krogh was not issued a teaching contract for 1975-76 requiring her to perform individualized instruction inasmuch as the need for same had been eliminated. Lastly, Respondent argued that Krogh had her compensation adjusted in accordance with the District's long standing method of computing part-time salaries and that the formula used in calculating her salary was the same as applied to other part-time teachers in the District.

Reduction in Compensation:

On the basis of the individual teaching contract tendered Krogh for the 1975-76 school year, it is clear that her compensation was reduced from that received the prior year. The question presented is whether Respondent had "cause" to initiate the changes that ultimately caused Krogh's compensation to diminish in 1975-76 vis-a-vis her 1974-75 compensation. The changes in conditions that impacted Krogh's compensation were: (1) the Respondent's decision that Krogh's services for individualized instruction 1/2 period per day were not needed in 1975-76 thus, causing her hours devoted to teaching per day to drop from three to two and one-half; and, (2) the Respondent's decision to schedule classes in the junior high school on the basis of a mixed seven and eight period day and scheduling junior high school home economics during the sixth and seventh periods.

In Article VII of the applicable contract 3/ Respondent reserves unto itself the "right to determine grade, subject, and activity assignment" Further, in Article X(F) (2) Respondent retains the "right to establish hours for the school day". However, notwithstanding the foregoing as well as the absence of any specific restrictions upon Respondent's ability to determine the teaching load for part-time teacher Article X(E) (5) may preclude the exercise of these vested rights in making operational decisions if said decisions have the ultimate effect of reducing a teacher in compensation. In such event, Respondent, if challenged, must establish it had "cause" to exercise said rights in the manner it chose.

2/ While this defense was raised in its answer it was later abandoned

The standard set forth in the parties' agreement that is to be applied by the Examiner in reviewing Respondent's action herein is "cause". What is cause? Arbitrator McGoldrick said in discussing the standards of "cause" and "just cause", 4/ "These [cause and just cause] exclude discharge for mere whim or caprice." Therefore, by analogy, in the instant case the Examiner will be reviewing Respondent's conduct to determine if same was motivated by whim or caprice or whether Respondent's decisions were motivated by legitimate interests in managing the District's affairs.

One factor causing Krogh's compensation to be reduced for the 1975-76 school year was Respondent's decision that Krogh would not be needed for individualized instruction during said school year. The previous school year, as a consequence of a grievance filed by Krogh contesting a reduction in her compensation for said school year, Respondent, in settlement of said grievance, increased, Krogh's hours taught by 1/2 period. This additional 1/2 period represented additional time that was allocated for individualized instruction. The original teaching contract issued Krogh for the 1974-75 school year provided for only two periods of teaching and the subsequent addition of 1/2 period to her teaching duties was offered by Respondent and accepted by Complainant and Krogh as a compromise of said grievance.

In the instant case although not explicitly so stating, Respondent's position implies that said settlement is binding upon Respondent for the 1975-76 school year and, therefore, Respondent was obliged to contract with Krogh for 1/2 period of individualized instruction. The Examiner appreciates the need to give binding effect to the mutual settlement of grievances, however, this approach much necessarily give way in the face of changed conditions as exists herein. Further, while the aforesaid grievance settlement was a means to resolve the dispute short of arbitration there is no evidence upon which to conclude that Respondent was obligated evermore thereafter to engage Krogh's services on said basis.

As testified to by Respondent's Superintendent of Schools, Krogh was not needed for individualized instruction during the 1975-76 school year. Indeed, she was never used in said capacity during 1974-75 school year, although admittedly being paid to be available for said work. Thus, in view of this evidence the Examiner is not persuaded that said grievance settlement should be viewed as establishing any binding precedent but, rather, was nothing more than an expedient means to increase Krogh's compensation in order to dispose of her grievance. Given these facts the Examiner is convinced that the Respondent's decision to provide Krogh with a 2.5 hour teaching load was not motivated by mere whim and caprice but, rather, an honest appraisal of the extent to which Krogh's services would be required for the 1975-76 school year. Thus, Respondent had cause to reduce Krogh's teaching load from 3.0 periods in 1974-1975 to 2.5 periods in 1975-1976.

The final factors affecting Krogh's diminished compensation are the Respondent's decision to follow a mixed seven and eight period day schedule in the junior high school and the scheduling of home economics during the sixth and seventh periods. Respondent attributes the change to mixed periods from the previous school year's uniform eight period day, to a need for flexibility in using senior high teachers in the junior high as well as the ability to schedule more classes in a given time in order to meet the needs of the junior high school. Admittedly, this

4/ Washington Corp. 24 LA 1 (1967).

may be a very superficial explanation, however, it is enough, absent evidence to the contrary, to establish prima facie that Respondent's actions were not motivated by mere whim and caprice and were for cause.

The only remaining consideration is Respondent's decision to schedule junior high home economics during the sixth and seventh periods. The reason proffered by the District for said change was its desire to schedule that type of course along with shop courses for the 46 minute periods in order to facilitate the use of high school staff who were teaching on a uniform eight period day schedule. Complainant did not challenge this explanation nor adduce any evidence upon which to conclude that the explanation was pretextual. Therefore, the conclusion to be drawn from the evidence is that Respondent had cause to schedule Krogh's home economics classes during the sixth and seventh periods.

Herein, Complainant carries the burden of establishing by a clear and satisfactory preponderance of the evidence 5/ that Respondent violated the collective bargaining agreement. In this regard, Complainant has failed to meet its burden inasmuch as Complainant did not overcome Respondent's prima facie showing of cause for the reduction in Krogh's compensation.

Dated at Madison, Wisconsin this 31st day of August, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger
Thomas L. Yaeger, Examiner

5/ Section 111.07(3), Wis. Stats.