STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant, vs. AMERY JOINT SCHOOL DISTRICT NO. 5, Respondent.	Case V No. 20678 MP-644 Decision No. 14802-A

Appearances:
Robert E. West, Executive Director, appearing on behalf of Complainant.
Novitzke, Byrnes, Gust and Williams, Attorneys at Law, by Don Paul Novitzke, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on July 22, 1976, alleging that Respondent had violated sec. 111.70(3)(a)5 of the Municipal Employment Relations Act. The Commission appointed Ellen J. Henningsen, a member of the staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in sec. 111.70(4) and 111.07, Stats. A hearing was held on August 19, 1976 at Balsam Lake, Wisconsin. The Examiner, having considered the evidence and arguments presented by the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Northwest United Educators is a labor organization and is the voluntarily recognized collective bargaining representative of certain professional employes of Respondent Amery Joint School District No. 5. The composition of the bargaining unit represented by Complainant was voluntarily agreed to by Complainant and Respondent.

2. Respondent Amery Joint School District No. 5 is a public school district and a municipal employer.

3. Complainant and Respondent were parties to a collective bargaining agreement effective July 1, 1975 through June 30, 1977 covering wages, hours and conditions of employment. That agreement contained a grievance procedure which did not culminate in final and binding arbitration. Relevant portions of that agreement are as follows:

"ARTICLE I

RECOGNITION

A. The Board recognizes the Association as the exclusive bargaining representative on wages, hours, and conditions of employment for all employees classified as classroom teachers but with the following personnel excluded:

1. Administrators.

2. Principals, Supervisors, coordinators or supervisors of instructional programs, and those department heads having evaluative responsibility over staff members.

3. Non-instructional personnel such as nurses, guidance counselors and social workers.

4. Office, clerical, maintenance and operating employees.

B. The purpose of this article is to recognize the right of the bargaining agent to represent employees in negotiations with the Board as provided in 111.70 of the statutes.

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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.

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

STEP I

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.

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ARTICLE VIII

FAIR SHARE AGREEMENT

NUE, as the exclusive representative of all the employees in the bargaining unit, will respresent [sic] all such employees, NUE and non-NUE, fairly and equally, and all employees in the unit will be required to pay, as provided in this article, their fair share of the costs of representation by the NUE. No employee shall be required to join the NUE, but membership in NUE shall be made available to all employees who apply consistent with the NUE

constitution and bylaws. No employee shall be denied NUE membership because of race, creed, color or sex.
The employer agrees that effective thirty (30) days after the date of initial employment or thirty (30) days after the opening of school it will deduct from the monthly earnings of all employees in the collective bargaining unit an amount of money equivalent to the monthly dues certified by NUE as the current dues uniformly required of all members, and pay said amount to the treasurer of NUE promptly. The employer will provide NUE with a list of employees from whom such deductions are made with each monthly remittance to NUE.

ARTICLE IX

SAVE HARMLESS CLAUSE

The NUE agrees that it will indemnify and save-harmless; [sic] the School District, the School Board, each individual School Board member, and all administrative personnel of the Amery School District against any and all claims, demands, costs, suits or other forms of liability, and all court or administrative agency costs that may arise out of or by any action taken for the purpose of complying with this article. In the event any action is brought by any party challenging the validity and/or legality of the provisions of this fair-share agreement or any earning deductions from earning pursuant to this agreement in which the employer is named as a defendant, the NUE agrees that it will indemnify the Amery School District in full for all fees including attorneys necessary to defend the interests of the Amery School District as a defendant in such action."

4. Melodie Greenquist was employed by Respondent in the position entitled learning disabilities coordinator for the 1975-1976 school year; the 1975-1976 school year was the first year such a position existed. The creation of the position was a response to the enactment by the state legislature of ch. 115, Stats., which requires school districts to provide educational programs for children with learning disabilities. Greenquist has a masters degree in learning disabilities with a speciality in reading. She is paid in accordance with the salary schedule included in the parties' collective bargaining agreement.

5. Greenquist serves on the multidisciplinary team of the school district which consists of the psychiatric social worker (who also serves as the director of the team), speech therapist, special education teachers, principal and, on occasion, the psychologist and nurse. A student who has a learning problem is referred to the team by a classroom teacher, parent, administrator or Greenquist. The specific disability is diagnosed by Greenquist in conjunction with the other team members. Approximately thirty to thirty-five of the 1800 students in the school district have been identified as having specific learning disabilities. After diagnosis occurs, Greenquist prescribes a program to correct the disability. The participating student remains in the regular classroom with non-participating students; usually, the particular program for the participating student which Greenquist has prescribed is carried out by the classroom teachers as part of that teacher's normal duties. On occasion, Greenquist instructs students who have severe disabilities.

6. Greenquist is responsible for determining a student's progress under the program that she has prescribed and, therefore, she frequently visits classrooms to observe both teacher and student. Teachers also seek her assistance with any questions or problems they might have about a program. She frequently discusses the performance of the teachers and students she observes with the school principal. If Greenquist observes that a teacher is not following the prescribed

program, she discusses the matter with the teacher. If the teacher does not thereafter follow the program, Greenquist approaches the school principal or the director of the multidisciplinary team and advises them of her problems with the teacher. On the two occasions when consideration was being given to removing the affected students from their teachers' classrooms because their teachers were not following the prescribed programs, the matter was resolved when the teachers agreed to follow the program after discussions with Greenquist and the school principal.

7. Greenquist has access to all records of all students and reviews them to determine which students have learning disabilities. A regular classroom teacher has access only to records of students assigned to his/her class and does not have access to all the records of her/his students; for instance, a classroom teacher does not have access to psychiatric reports, although Greenquist does.

8. During the 1975-1976 school year, Respondent did not deduct from Greenquist's salary an amount of money equivalent to the dues of Complainant.

9. Greenquist is a coordinator within the meaning of Article I of the parties' collective bargaining agreement and thus is excluded from the collective bargaining unit represented by Complainant.

10. Respondent has not filed a complaint of prohibited practices alleging that Complainant has violated Article IX of the collective bargaining agreement, thereby violating sec. 111.70(3)(b)4 of the Municipal Employment Relations Act.

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

CONCLUSIONS OF LAW

1. Respondent has not violated Article VIII of the collective bargaining agreement by failing to deduct from Melodie Greenquist's salary an amount equivalent to the dues of Complainant and thus has not committed a prohibited practice within the meaning of sec. 111.70(3)(a)5 of the Municipal Employment Relations Act.

2. The Examiner will not assert the Commission's jurisdiction to determine whether Complainant has violated Article IX of the collective bargaining agreement.

Based on the above Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

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

Dated at Madison, Wisconsin this 18th day of July, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Ellen J. Henningsen
Ellen J. Henningsen, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant filed the instant complaint alleging that Respondent had violated sec. 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA). 1/ Complainant alleges that Melodie Greenquist is a learning disabilities teacher and as such is a member of the collective bargaining unit it represents. Therefore, Complainant argues, Respondent violated the collective bargaining agreement by failing and refusing to deduct dues from Greenquist's salary as required by Article VIII, the fair-share clause. Complainant requests that Respondent be ordered to cease and desist from violating the agreement and to pay Complainant the amount of dues for the 1975-1976 school year.

Respondent admits that it failed to deduct dues from Greenquist's salary but denies that it violated Article VIII. Greenquist, Respondent argues, serves as a learning disabilities coordinator and therefore is excluded from the bargaining unit as a coordinator and supervisor of an instructional program. Thus, Respondnet is under no obligation to deduct dues from Greenquist's salary.

Respondent also argues that Article IX, the Save Harmless clause of the collective bargaining agreement, requires that Complainant pay the costs and attorney's fees incurred by Respondent in this action, regardless of the outcome of the case on the merits.

DISCUSSION

In order for the Examiner to determine whether Respondent has violated the collective bargaining agreement and, therefore, sec. 111.70(3)(a)5 of MERA, it must first be determined whether or not Complainant exhausted all steps of the contractual grievance procedure. 2/ Neither party mentioned at the hearing whether or not Complainant had exhausted the available grievance procedure prior to filing the instant complaint. An allegation of failure to exhaust is an affirmative defense to a complaint alleging a violation of a collective bargaining agreement which must be raised and proven by Respondent. 3/ Since Respondent did not argue nor prove that Complainant had failed to exhaust, the Examiner will assert the jurisdiction of the Commission to determine the merits of the alleged contractual violation. In addition, assuming that Complainant did not in fact exhaust the

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1/ Sec. 111.70(3)(a)5 provides that it is a prohibited practice for a municipal employer

> 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/ Lake Mills Jt. School Dist. No. 1 (11529-A, B) 8/73.

3/ City of Menasha (Police Department) (13283-A) 2/77; Mahnke v. WERC 66 Wis. 2d 524, 225 N.W. 2d 617 (1975).

entire grievance procedure, the Examiner views Respondent's complete silence on the matter as a waiver of its right to insist that all provisions of the grievance procedure be complied with.

Article VIII of the parties' collective bargaining agreement obligates Respondent to

> deduct from the monthly earnings of all employees in the collective bargaining unit an amount of money equivalent to the monthly dues certified by NUE as the current dues uniformly required of all members, and pay said amount to the treasurer of NUE promptly.

Respondent did not deduct the specified amount from Greenquist's salary. In order to decide whether Respondent's failure to make a fair-share deduction violated the collective bargaining agreement, it is necessary to decide whether Greenquist is an "employee in the collective bargaining unit." Article I specifies that "all employees classified as a classroom teachers" are members of the unit. "Coordinators or supervisors of instructional programs" are among those excluded from the bargaining unit. Respondent, contrary to Complainant, claims that Greenquist is a coordinator and supervisor of an instructional program and is thus excluded from the bargaining unit. In determining whether Greenquist is a member of the collective bargaining unit, the Examiner will look beyond the title of the position Greenquist holds and ascertain whether the duties she performs fall within the term "coordinators or supervisors of instructional programs." The resolution of this issue is a matter of contract interpretation and is not dependent on an analysis of whether or not Greenquist should be excluded from or included in the unit because she is or is not a managerial, confidential or supervisory employe within the meaning of sec. 111.70(1)(b) of MERA.

Greenquist's duties have been set forth in Findings of Fact 5, 6 and 7 and will not be repeated here. A description of her duties indicates that she does not function as a classroom teacher. She diagnoses learning disabilities, devises instructional methods and classroom techniques for use by teachers when teaching students with learning disabilities, instructs teachers on the proper use of those methods and techniques and oversees their implementation by observing teachers and students and correcting, if necessary, the teachers' conduct. Greenquist is responsible for developing and implementing the programs of participating students in all grades. The programs she prescribes apparently affect the entire classroom education of participating children, not just their instruction in one subject.

Complainant argues that coordinators were excluded from the bargaining unit because they exercise supervisory authority over teachers. Greenquist does not have supervisory authority, Complainant contends, and thus she is not a coordinator within the meaning of Article I. There is no evidence to support the contention that the parties excluded coordinators because of the supervisory nature of their duties. Indeed, the parties express language indicates that coordinators were excluded for some other reason than their supervisory status. Had coordinators been excluded because of their supervisory status, the parties would not have had to exclude "supervisors of instructional programs."

Based on Greenquist's duties, the Examiner concludes that Greenquist is a coordinator of an instructional program within the meaning of Article I and is therefore excluded from the bargaining unit pursuant to the parties' agreement. As Greenquist is a coordinator, the Examiner need not make a decision concerning Greenquist's alleged supervisory status.

Respondent has argued that Article IX, the Save Harmless clause of the collective bargaining agreement, entitles it to receive from

Complainant any costs and attorney's fees incurred in this action. Determining Complainant's obligations to Respondent under Article IX is irrelevant to a determination of Respondent's obligations to Complainant under Article VIII and thus Respondent's claim is an issue separate and distinct from the one raised by Complainant. The proper manner in which to raise its claim is for Respondent to utilize all available steps, if any, of the grievance procedure and, should no resolution occur, file a prohibited practice complaint alleging that Complainant has violated Article IX of the collective bargaining agreement by failing to indemnify or reimburse Respondent for costs and attorney's fees and thus has violated sec. 111.70(3)(b)4 of MERA. As Respondent has not filed a prohibited practice complaint, the issue it raises is not properly before the Examiner and thus the Examiner is without authority to rule on the merits.

Dated at Madison, Wisconsin this 18th day of July, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Ellen J. Henningsen
Ellen J. Henningsen, Examiner