STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| NORTHWEST UNITED EDUCATORS,<br><br>Complainant,<br><br>vs.<br><br>AMERY SCHOOL DISTRICT,<br><br>Respondent. | Case XII<br>No. 26054 MP-1102<br>Decision No. 17797-A |

Appearances:
Alan D. Manson, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of the Complainant.
Kenneth Cole, Wisconsin Association of School Boards, Inc., 122 West Washington Avenue, Room 700, Madison, Wisconsin 53703, appearing on behalf of the Respondent.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On April 27, 1980, Northwest United Educators, hereinafter referred to as the Complainant, filed with the Wisconsin Employment Relations Commission, a complaint of prohibited practices against Amery School District, hereinafter referred to as the Respondent. The Commission, thereupon, issued an order pursuant to Sections 111.70(4)(a) and 111.07 of the Wisconsin Statutes appointing Timothy E. Hawks, a member of its staff, as Examiner to conduct a hearing and issue Findings of Fact, Conclusions of Law and Order.

A hearing was held on June 5, 1980 at Balsam Lake, Wisconsin. Post-hearing briefs were received by August 20, 1980.

The Examiner, having considered the evidence, arguments and briefs, and being fully advised in the premises, makes and issues the following Finsings of Fact, Conclusions of Law and Order.

## FINDINGS OF FACT

1. Northwest United Educators is a "labor organization" within the meaning of Section 111.70(1)(j) of the Municipal Employment Relations Act (MERA) with its principal offices at 16 West John Street, Rice Lake, Wisconsin 54868.

2. The Amery School District is a "municipal employer" within the meaning of Section 111.70(1)(o) MERA with its offices at 115 Dickey Street North, Amery, Wisconsin 54001.

3. The Complainant is the exclusive bargaining representative for all teachers, guidance counselors, nurse, learning disabilities coordinator, psychologists, and non-supervisory social workers employed by the Respondent.

4. The Complainant and Respondent were parties to a collective bargaining agreement effective between July 1, 1978 and June 30, 1980.

Article VIII, Part C of said agreement provides:

LEAVES OF ABSENCE

. . .

C. Personal Leave - Professional personnel of the school district shall be allowed two (2) days of personal leave on a non-cumulative basis. The employee taking personal leave time will pay the substitute teacher's salary required to cover the assignment of the absent instructor. Not more than five (5) teachers shall take personal leave on any one (1) day. In the event that more than five (5) teachers wish personal leave on the same day, it shall be permitted on a seniority basis.

5. Respondent and Complainant were parties to a collective bargaining agreement effective on July 1, 1975 through June 30, 1977, which agreement provided at Article IX, Section 3:

> Personal Leave - Professional personnel of the school district shall be allowed two (2) days of personal leave each year on a non-cumulative basis. The employee taking personal leave time will pay the substitute teacher's salary required to cover the assignment of the absent instructor. Not more than five (5) teachers shall take personal leave on any one (1) day. In the event that more than five (5) teachers wish personal leave on the same day, it shall be permitted on a seniority basis.

6. Respondent and Complainant were parties to collective bargaining agreement effective July 1, 1974 through June 30, 1975 which provided at Article IX, 3:

> Personal Leave - Professional personnel of the school district shall be allowed one (1) day for personal leave with the employee paying the substitute teacher's salary who covers the assignment of the teacher taking personal leave.

7. The collective bargaining agreement at issue herein makes no provision for binding arbitration of disputes regarding the interpretation or application of its provisions.

8. The Respondent has, since October of 1976, required all employes represented by Complainant, who have taken one day of personal leave, to reimburse the District in the amount of the cost of a substitute teacher, whether or not the Respondent did hire such a substitute. During the 1976-77 school year the District incurred 43 days of personal leave, 8 days of which the District hired no substitute but nevertheless deducted an amount equal to the cost of a substitute from the absent employe's pay. During the 1977-78 school year the District incurred 56 days of personal leave, 11 days of which no substitute was hired, yet pay for the same was deducted. During the 1978-79 school year the District incurred 61 days of personal leave, 11 of which the District hired no substitutes, yet pay for same was deducted. During the 1979-80 school year the District incurred 66 days of personal leave, 13 of which no substitute was hired, and pay was deducted.

9. Among those employes who took personal leave during the period 1976 through 1980, and whose absence were not covered by a substitute teacher, but whose pay was nevertheless reduced by the amount of the cost of a substitute teacher, were a number who at the time of the deduction or at some later point in time representatives of the Association for the purpose of initiating claims of breach of contract or for the purpose of negotiations with the Respondent regarding successor agreements.

10. The practice of the Respondent as regards the deduction of an amount equal to the cost of substitute whether or not one was in fact hired has been continuous since 1975, and has been applied to all employes taking personal leave.

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

## CONCLUSION OF LAW

The Amery School District has not violated Section 111.70(3)(a)5 of the Municipal Employment Relations Act by deducting an amount equal to the cost of a substitute teacher whether or not one was in fact utilized by the District during the time an employe was on personal leave where such procedure was governed by the following collective bargaining provision:

> "Personal Leave - Professional personnel of the school district shall be allowed two (2) days of personal leave on a non-cumulative basis. The employee taking personal leave time will pay the substitute teacher's salary required to cover the assignment of the absent instructor. Not more than five (5) teachers shall take personal leave on any one (1) day. In the event that more than five (5) teachers wish personal leave on the same day, it shall be permitted on a seniority basis."

On the basis of the above and foregoing Findings of Fact and Conclusion of Law the Examiner makes and issues the following

## ORDER

That the instant complaint be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin this 29th day of January, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Timothy E. Hawks
Timothy E. Hawks, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Respondent has violated the collective bargaining agreement in effect from July 1, 1975 through June 30, 1980, thus committing a prohibited practice as set forth in Section 111.70 (3)(a)5, MERA. In particular, the Complaint focuses upon the admitted practice of the District to deduct from an employe's pay when such employe takes a day of personal leave an amount equal to the cost of substitute teacher's pay whether or not a substitute is in fact employed by the Respondent.

The analysis which determines an allegation of prohibited practice as set forth at Section 111.70(3)(a)5 (MERA), is as follows. 1/ Said section provides:

> "It is a prohibited practice for a municipal employer . . . [t]o violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes."

The language of the collective bargaining agreement to which the parties agreed and which is to govern their behavior, is examined so as to determine whether it is clear and unambiguous on its face. If it is, the language is applied to the facts without further regard to the practice or evidence offered by the parties regarding its intent. If it is not, then the practice of the parties when implementing the disputed provision together with evidence regarding the intent of the parties at the time the disputed provision was negotiated are considered in an effort to fairly construct the language.

The operative language of Article VIII, Section C, is the following:

> "The employee taking personal leave time will pay the substitute teacher's salary required to cover the assignment of the absent instructor."

The phrase, "the substitute teacher's salary required to cover the assignment of the absent instructor" might establish, as the District contends, only the amount that the "employee taking personal leave time will pay", i.e., the prevailing rate for the cost of a substitute's services. Accordingly, as the rates for employing a substitute rose, so also would the cost of taking a day's personal leave. In the alternative the same phrase might be construed to determine, as the Complainant argues, when the cost of the substitute is to be charged the employe on leave. The Complainant would stress the import of the word "required" so as to conclude that pay would be deducted only when a substitute actually covered the absent teacher's assignments. Presumably the Complainant would use the fact of actual coverage to determine when a substitute was required. The possibility would exist under this proposed interpretation, however, that the Respondent would hire a substitute and the Complainant could assert that one was not "required".

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1/ The collective bargaining agreement in effect between the parties does not provide for grievance arbitration, therefore, exhaustion of such a remedial process is not at issue.

The language, on its face, does not clearly and unambiguously determine which of the two constructions proposed above is to be applied to the instant dispute. Accordingly, it is proper to consider the past practice of the District as it has implemented this provision. In order to be binding upon the parties to a collective bargaining agreement a practice must be of long standing, continuous or uninterrupted and acknowledged by the parties to be binding upon themselves by express approval or through tacit acceptance in circumstance evincing knowledge of the practice.

The practice at issue herein has been administered by the Respondent since the first semester of the 1976-77 school year. The unrebutted testimony of Respondents' witnesses established that during the last five years the practice has been applied to all employes without exception. 2/ In short the practice is of long-standing and has been continuously applied.

The Complainant protests that its representatives were unaware of this practice until the 1979-80 school year when several teachers first brought it to their attention. The record contradicts this assertion. A number of teachers who had deducted from their pay the amount of a substitute's wages when no substitute was utilized by the Respondent, were at some time serving as representatives of the Complainant. The most notable example would be that of Eugene Collier who is a physical education instructor employed by the Respondent. Collier took personal leave on April 25, 1978, and on March 16, 1979, and was docked pay in the amount of a substitute even though no substitute was in fact used. During the 1976 through 1978 school years Collier served as a committee member on "committee for local teacher defense" which was responsible for initiating grievances. 3/ Among these employes who took personal leave without substitutes covering for them during the 1976-77, 1977-78 and 1978-79 school years, seven had served in a local representative capacity for the Complainant either prior to, during or after the time they took their personal leave.

In such circumstances, it is reasonable to conclude the Complainant either knew or should reasonably be expected to have known of the practice. The Complainant nevertheless failed to file its complaint in the instant matter until April 2, 1980. Between September 1976 and April, 1980, two successor contracts were negotiated in which personal leave was an issue but not the District's practice in implementing same. Accordingly, the undersigned concludes that the Complainant had sufficient knowledge of the practice yet, acquiesced in its continued application.

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2/ Only one exception was illustrated by Complainant and in that case the substitute was the spouse of the absent teacher and District did not deduct the cost of the substitute from the teacher's pay, nor did it pay the substitute.

3/ During those years, unlike the present, the collective bargaining agreement included a grievance arbitration procedure.

Accordingly, the practice of the District stands as persuasive evidence of the parties construction of Article VIII, Part C of the contract. The Respondent has not violated the collective bargaining agreement by continuing such practice. There being no contractual breach there is also no violation of Section 111.70(3)(a)5.

Dated at Milwaukee, Wisconsin this 29th day of January, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Timothy E. Hawks, Examiner