STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BANGOR EDUCATION ASSOCIATION, Complainant, vs. SCHOOL DISTRICT OF BANGOR, Respondent.	:	Case IX No. 31756 MP-1488 Decision No. 20831-A

Appearances:

Mr. Gerald Roethel, Executive Director, Coulee Region United Educators, 4329 Mormon Coulee Road, P.O. Box 684, La Crosse, WI 54601, appearing on behalf of the Complainant.

Bosshard, Sundet & Associates, Attorneys at Law, by Mr. John Bosshard, Allen Building, Suite 500, P.O. Box 966, La Crosse, WI 54601-0091, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Bangor Education Association having, on June 20, 1983, filed a complaint with the Wisconsin Employment Relations Commission alleging that the School District of Bangor has committed prohibited practices in violation of Sec. 111.70(3)(a)1, 3, and 5 of the Municipal Employment Relations Act (MERA); and the Commission having appointed Mary Jo Schiavoni, 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 Sec. 111.07(5), Wis. Stats.; and a hearing on said complaint having been held on August 4, 1983, at Bangor, Wisconsin; and the parties having filed post-hearing briefs on September 9 and 13, 1983, and reply briefs on September 26 and 27, 1983; and the Examiner, having considered the evidence and arguments contained in the briefs and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Bangor Education Association, hereinafter referred to as Complainant, is a labor organization with its principal offices located c/o David Lund, Route 1, Box 348, Galesville, WI 54630.

2. That the School District of Bangor, hereinafter referred to as the Respondent, is a municipal employer which operates a public school system in Bangor, Wisconsin; that its principal offices are located at Bangor, WI 54614; and that Neil Winchell is the District Administrator and Elementary Principal for the District and has functioned as an agent for Respondent at all times material herein.

3. That at all times material hereto, Complainant has been the exclusive collective bargaining representative for certain of Respondent's employes in a unit consisting of "all contracted and certified teachers of the District, librarians, guidance, counselors, nurses, but excluding principals and assistant principals, administrators, coordinators, business manager, superintendent, paraprofessionals, clerical aides, office, clerical, maintenance, and operating personnel and social workers."

4. That Complainant and Respondent are, for the period August 1, 1982, through July 31, 1984, parties to a collective bargaining agreement governing wages, hours, and conditions of employment for employes described in Findings of Fact 3 above; and that said labor agreement contained the following provisions:

ARTICLE I

A. RECOGNITION

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2. The Board recognizes the BEA as the exclusive bargaining representative on wages, hours, and conditions of employment for all contracted and certified teachers of the District, librarians, guidance, counselors, nurses, but excluding principals and assistant principals, administrators, coordinators, business manager, superintendent, paraprofessionals, clerical aides, office, clerical, maintenance, and operating personnel and social workers.

3. 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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G. MANAGEMENT RIGHTS

The Board on its own behalf and on behalf of the electors of the district hereby retains and preserves unto itself, without limitation, all powers, rights, authority, duties and responsibility conferred upon and vested in it by the laws and Constitution of the State of Wisconsin and the United States, including, but without limiting the generality of the foregoing rights:

1. To the executive management and administrative control of the school system and its properties and facilities, and the assumed or contracted assigned school activities of its employees.

2. To hire all teachers and, subject to the provisions of law and this contract, to determine their qualifications and conditions for their continued employment or dismissal or demotion and to promote and transfer all such teachers.

3. To establish classes and courses of instruction, including special programs, and to provide athletic, recreational, and social events for students, all as deemed necessary or advisable by the Board.

4. To decide the means and methods of instruction, the selection of textbooks, and other teaching materials, and the uses of teaching aids of every kind.

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ARTICLE V CONTRACTS

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D. DISMISSAL

1. All teachers shall be on probationary status the first two years of employment with the District, beginning with the 1982-83 school year.

2. After completing the probationary period, the parties recognize the authority of the Board to suspend without pay, discipline, discharge or non-renew teachers but only for just cause.

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F. LAYOFF PROCEDURES

When it becomes necessary to reduce the number of staff members, the Board shall determine the teacher(s) to be laid off in accordance with the following procedures:

1. A point system for the purpose of determining order of layoff shall be established. The teacher(s) with the lowest points shall be laid off. In the event the point totals are equal, length of service in the District shall prevail.

2. Point System Criteria and Allocation

   (a) Length of teaching based on years of service in the District: 1 point for each year.

   (b) Academic Training: BS or BA = 1 point; BS+8 = 2 points; BS+15 = 3 points; BS+23 = 4 points; MA or MS = 5 points; MA or MS+12 = 6 points.

   (c) Ability and performance as a teacher in the District as evaluated by Principal and Superintendent (evaluations for the year in which the layoff is being considered shall not be used) 0-4 points per year for the last four (4) years. Evaluation Points/Year - (4 year maximum), 0-poor; 1-fair; 2-average; 3-good; 4-excellent.

   (d) Performance of extra duties listed on Appendix C - - 1-5 points for the last year only.

3. The total accumulation of points under Section 2 of this provision will now be applied to those teachers who have the certification for the position to be eliminated. All those teachers who have the appropriate certification will have removed from their number any teacher whose certification is required in some other capacity by the District. From the remaining teachers in the layoff pool, the teacher with the lowerst accumulation of points will be laid off.

4. No member of the bargaining unit may be prevented from securing other employment during this period of layoff, providing said teacher(s) is certified or has the necessary qualifications for certification in the duties of the available position. Eligibility for reinstatement shall be for up to two (2) school years following such layoff. Such reinstatement shall not result in loss of credit for previous years of service. No appointment of new or substitute employees shall be made in those positions where teachers certified or possessing qualifications for certification are on layoff. Failure of a teacher on layoff to accept reinstatement within fifteen (15) days of their receipt of notification of reemployment shall constitute a waiver of further employment rights under this provision.

5. Any layoff, recall or failure to recall pursuant to this article shall not be subject to the grievance procedure, except that an allegation that the Administrator or the Board acted in bad faith in utilizing and/or applying the procedure in this article is grievable.

ARTICLE VI COMPENSATION

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E. HEALTH INSURANCE

1. The District shall pay monthly the jointly approved hospital, medical, surgical plan at the following rates:

(a) Married teachers - District pays $104.14 of current family premium

(b) Single - District pays $41.30 of current single coverage

(c) The District's insurance payment to husband and wife teacher teams shall be limited to $104.14.

2. District payment begins on the first contract day or as soon as the carrier enrolls teachers new to Bangor and continues till end of contract.

F. DENTAL INSURANCE

1. The District shall pay monthly toward the jointly approved dental plan at the following rates:

(a) Married teachers - District pays $17.43 of current family premium

(b) Single - District pays $3.63 of current single coverage

(c) The District's insurance payment to husband and wife teacher teams shall be limited to $17.43.

G. DISABILITY INSURANCE

1. The District shall pay monthly toward the jointly approved disability plan at the rate of $4.60 per employee.

H. TERM LIFE INSURANCE

1. The District shall pay in full annually toward the jointly approved $15,000. extended life insurance policy.

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J. TEACHER SUBSTITUTES

1. Teachers employed for substitute teaching during their preparation period will be paid at the rate of seven dollars and fifty cents ($7.50) per full class hour. The first three class hours, per teacher, per year, will be without compensation.

2. Substitute teachers will be paid $30.00 per day for the first thirty (30) days and then go on the salary schedule.

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ARTICLE VII WORKING CONDITIONS

A. INSTRUCTIONAL LOAD

1. . . .

(b) At the elementary level, two and one-third (2 1/3) = (3 hours and 30 minutes) blocks per week will be allowed for each teacher or they will be compensated at the rate of $7.50 per forty-five (45) minutes.

B. TEACHING DAY

1. All teachers will be in the school at 8:00 a.m. or twenty minutes before starting time or whichever is later to receive students. Teachers are not to leave the building

in the afternoon before 3:30 p.m. after dismissal time without permission. On Friday and days before a vacation teachers may leave as soon as the buses have departed.

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F. LUNCH DUTY

1. All teachers shall be provided with a daily minimum of thirty continuous minutes of duty-free lunch period.

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ARTICLE XI MISCELLANEOUS

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D. OMISSIONS

1. All terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's direction and control.

and that the agreement does not contain any provision relating to the final and binding resolution of disputes concerning the agreement's interpretation, nor does it contain any provision relating to the maintenance of standards existing previous to said agreement.

5. That Jeanette Schaller, hereinafter referred to as Schaller, has been an employe of Respondent since 1963, with the exception of a three-year period from 1965 - 1968; that Schaller from 1963 to 1965 taught vocal music at the elementary level on a four-fifth time basis; that from 1968 to 1979, she was employed by the District as a full-time vocal music teacher teaching grades K or 1, through 12, depending on whether vocal music was offered in kindergarten at various times; that in February of 1979, at Schaller's request, the Respondent reduced her employment from full-time to a sixty percent time position teaching vocal music to grades K through 6; that Schaller continued to be employed by Respondent under a sixty percent individual teaching contract for the school years 1979-80, 1980-81, 198182, and 1982-83; and that Schaller, for the entire duration of her employment until the 1983-84 school year, received full health, life, disability and dental insurance fringe benefits.

6. That in addition to her teaching contract, for at least 1982-83, Schaller received additional compensation in the amount of $1,800 per year for supervising a lunch room from 11:15 a.m. until approximately 12:15 p.m.

7. That in February of 1983, Schaller was notified that the District had decided to reduce her elementary music position from sixty percent of a full contract to fifty percent of a full contract; that the District also notified Schaller that her benefits were being reduced from full payment to fifty percent payment; that Schaller received this information by letter from Winchell on February 28, 1983; that Schaller met with Winchell on March 10, 1983 to discuss the potential grievance; and that Schaller filed a grievance on March 14, 1983 which was timely processed.

8. That in response to the grievance filed by Schaller, Winchell sent her the following letter on March 21, 1983:

> In response to your grievance concerning the Board of Education's offer of a continuing contract for 1983-84, reduced to a 50% contract with 50% benefits, I believe your grievance to be inappropriate and without merit.
>
> The reasons for my response are:
>
> 1. Unless specifically restricted by the collective bargaining agreement, the Board, under Article I. - G, Management Rights 2. has the right to "hire all teachers, and subject to the provisions of law and of this contract, (underlines mine for emphasis), to determine

their qualifications and conditions for their continued employment or dismissal or demotion, and to promote and transfer all such teachers.

I am stating the Board is excerising(sic) its right "to determine the conditions for your continued employment", and you have been timely notified as to under what conditions you are being offered a contract.

The collective bargaining agreement is silent as to reference to part-time teachers, and that added to the fact that the statutes (provisions of law referred to above) 118.22(1) specifically excludes part-time teachers from protection under dismissal or lay-off situations. Therefore, I am contending the Board is properly within the scope of its authority in offering you a 50% contract next year, regardless of what percentage of time you were employed this year.

2. Secondly, when you speak of "violation of the provisions of this practice", I am not sure what you are referring to. If you are implying that the Board is locked into not making adjustments as necessary in the interest of fiscally responsible management, you are mistaken. We do not have a "maintenance of standards clause" in our present agreement.

3. You list several potenial(sic) violations of the agreement and I will respond to them individually here.

   Article V. D. concerns Dismissal - First of all, I do not believe you, as a part-time teacher, are covered under this article, but supposing it is determined you are, there could be no violation of the agreement as you are not being dismissed, the Board is simply offering you employment at a percentage of time which more closely corresponds to the actual time you spend teaching.

   Article V, Section F, refers to Layoff Procedures. Again, I do not believe you, as a part-time teacher, are covered under this article, but supposing it is determined you are, there would not be a violation as you are not being laid-off. The language of the agreement addresses itself to "when it becomes necessary to reduce the number of staff members". We are not reducing the number of staff members. We are offering you a contract that will allow you plenty of time to teach the same classes you are teaching this year. We are saying you are overemployed (actually employed for more time than is necessary to effectively discharge your teaching duties). This will correct that overemployment. Finally, if you are considering this a lay-off, Article V., Section F, subsection 5 of our agreement states: "Layoffs are not subject to the grievance procedure".

   Article VI - Section C - refers to the Salary Schedule. I fail to see the relevance of how reducing your employment from 60% to 50% is precluded by this section. The salary schedule is based on full-time teachers, and part-time employees are paid the correct and corresponding percentage of wherever they fit on the negotiated schedule.

   Article VI - E.F.G. and H. - refer to Health Insurance, Dental Insurance, Disability Insurance, and Term Life Insurance. I fail to see the potential violation of these articles. You will be eligible for all of these fringe benefits at 50% should you choose to participate, the Board will pay 50% of the cost for each of these benefits. You will be responsible for the other 50% of each premium.

> In summary, it is a well-established principle that School Boards each year determine staffing needs, and then contract to fill such needs. In relation to part-time employees, depending upon that need, one year it may be 40%, the next year 80% and again go back to 40%. The taxpayers would never approve of us paying someone 60% of a full-time contract when only 50% is needed to do the job.
>
> As for fringe benefits, it again is not fair to the taxpayers to pay for benefits in greater proportion than the employee is employed. I also would suspect present full-time employees would resent the fact they have to work full-time for the same level of benefits someone also received for part-time work.
>
> I cannot be responsible for the judgement (or lack of) of past administrators. The Board of Education was not aware you were receiving 100% benefits for part-time employment. As I find situations that need correcting, I will attempt to do so in an orderly and timely fashion. If there are other part-time people receiving too great a percentage of benefits, they also will be corrected for 1983-84.
>
> In summary, I deny your grievance. Please feel free to proceed to Level Two of the Grievance Procedure.

9. That on April 6, 1983, Schaller and Complainant's President David Lund met with Winchell to discuss Schaller's grievance; that, in response to Schaller's contention that she did not believe she could teach everything within the time that the District was allotting, Winchell sent Schaller a proposed schedule on April 12, 1983 along with the following letter:

> Plesse(sic) find enclosed a probable schedule for next year. As you will note, Monday, Tuesday, Thursday, and Friday, you will be face to face with students for 150 minutes each day with 75 minutes preparation time each day. On Wednesday you will be face to face with students for 120 minutes with 105 minutes preparation time. Therefore, with this schedule you will be face to face with students for 720 minutes each week and have 405 minutes preparation time, or 56% preparation time. I submit this is <u>extremely</u> generous.

10. That the total work week for a 100% full-time teacher consists of 37.08 hours including 2.5 hours of duty-free lunch, or 34.58 hours exclusive of the duty-free lunch.

11. That, pursuant to Schaller's schedule for 1982-83 and presumably for 1981-82, Schaller's work week consisted of 12.5 hours of classroom time, four hours of preparatory time, and 2.5 hours of duty-free lunch; and that Schaller's work week was 19 hours or 51% that of a full-time teacher, if duty-free lunch is included.

12. That for 1983-84, Schaller's proposed work schedule consists of 12 hours of classroom time, 4.25 hours of preparatory time and that, while the schedule does not expressly reflect 2.5 hours of duty-free lunch, duty-free lunch is calculated into her contract so that her work week will consist of 18.75 hours or 50% that of a full-time teacher.

13. That, in addition to her teaching contract for the upcoming 1983-84 school year, Schaller has also accepted an oral contract to supervise the lunchroom for eighteen hundred dollars per year from 11:15 a.m. to 12:15 or 12:30 p.m., whenever the lunch hour concludes; and that said compensation is in addition to compensation paid to Schaller pursuant to her teaching contract.

14. That the District had a past practice of unilaterally determining which fringe benefits it would offer to individual part-time teachers; that on at least five occasions it offered no fringes to certain part-time teachers; that with regard to Schaller herself, on occasions it offered her longevity benefits,

and on other occasions she received no longevity; that the Complainant knew or should have known about the District's unilateral practice of determining what fringe benefits and what amounts it would offer to part-time employes; that one example involved James Weiland, a thirty percent (30%) health teacher who was offered pro-rated health insurance in 1980-81 and 1981-82, but may have mistakenly received full benefits for 1981-82; and that another example involved Patrick Redmond who was offered a thirty percent (30%) individual teaching contract for the 1982-83 school year with sixty percent (60%) pro-rated health insurance benefits, but was also mistakenly paid full benefits for 1982-83; and that the District intends to pro-rate benefits for all part-time employes including Redmond, Schaller, and Liska for the 1983-84 school year; and that the Complainant objects to said pro-ration.

CONCLUSIONS OF LAW

1. That Complainant and Schaller exhausted the grievance procedure set forth in the parties' collective bargaining agreement, and therefore, the jurisdiction of the Wisconsin Employment Relations Commission may be invoked to determine the merits of the grievance.

2. That the School District of Bangor did not violate the parties' collective bargaining agreement by reducing the individual teaching contract of Jeanette Schaller from sixty percent to fifty percent for the 1983-84 school year, and therefore did not violate Section 111.70(3)(a)5 and 1 of MERA by its action.

3. That the School District of Bangor did not violate the parties' collective bargaining agreement by pro-rating fringe benefits for Jeanette Schaller, a part-time teacher, for the 1983-84 school year, and therefore did not violate Section 111.70(3)(a)5 and 1 of MERA by its action.

4. That the School District of Bangor did not interfere with, restrain or coerce Grievant Jeanette Schaller for her filing of a grievance, and therefore did not independently commit a violation of Section 111.70(3)(a)1 of MERA; nor did it commit a violation of Sections 111.70(3)(a)3 and 1 of MERA by the timing of its actions.

ORDER 1/

It is hereby ordered

That the complaint be, and hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 9th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner

1/ Pursuant to Sec. 227.11(2), Stats., the Examiner hereby notifies the parties that a petition for rehearing may be filed with the Examiner by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may

order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PARTIES' POSITIONS:

Complainant

Complainant argues that Respondent has violated Sections 111.70(3)(a)1, 3, and 5 of MERA.

With regard to the Section 111.70(3)(a)1 and 3 allegations, Complainant asserts that the timing and content of various communications between Respondent and Schaller regarding its decision to reduce her in salary and fringe benefits, especially its March 21 and April 12 letters, were aimed at discouraging her from pursuing her grievance and smacked of retribution for initially filing a grievance. As an auxiliary argument, Complainant further alleges that since salary and fringe benefits are mandatory subjects, Respondent has interferred with part-time employes in the exercise of their rights by bargaining individually with them. The actual reduction in salary and in fringe benefits, it asserts, resulted in separate violations of Section 111.70(3)(a)5 because both actions by Respondent violated the parties' collective bargaining agreement.

With regard to Respondent's reduction of Schaller's salary, Complainant argues that if a comparison of other teachers' teaching time to Schaller's provides for a percent of salary, then that percent must be paid to Schaller. It compares Schaller's teaching time with that of other elementary specialists and argues that Schaller's teaching time as a percent of the other specialists for 1982-83 is 60%, 70% and 81%, respectively. For 1983-84, Schaller's time has been reduced by thirty minutes per week and, as compared to the other specialists, would be 60%, 72%, and 83%, respectively, according to Complainant. In relying upon teaching time, rather than building time, the Complainant points to the case of West Bend Joint School District No. 1 (Arb. Stuart Mukamal, 11/4/80). Even considering additional supervisional duties of the other teachers, Complainant maintains that Schaller's teaching time, as compared to that of the other specialists, was 60%, 62%, and 71%, respectively. The Complainant also argues that if a salary determination is established over time and administratively approved, then it cannot be unilaterally changed as it constitutes a binding past practice.

Arguing in the alternative, Complainant maintains the reduction in Schaller's hours is a partial layoff which must conform with the lay-off provisions of the parties' collective bargaining agreement. Citing arbitral precedent, it claims that the reduction of 30 minutes must be viewed as a layoff because failure to do so would undermine bargained-for and agreed-upon seniority rights. Under any application of the layoff clause, it submits, Schaller would not have been the vocal music teacher to be reduced. Thus, according to Complainant, Respondent's decisions were made in "bad faith".

With regard to Respondent's reduction of Schaller's fringe benefits, Complainant argues that Article VI, Sections E, F, G, and H, along with Respondent's past practice, have established that part-time teachers are entitled to fully paid fringe benefits. It points out that in the past, part-time teachers received either full or no benefits. After the decision to participate in a District-sponsored fringe benefit was made, that benefit was always fully funded by the Respondent. In any event, even if the Weiland exception is deemed persuasive, Complainant submits that past practice to be given significant weight by arbitrators need not be absolutely uniform.

Accordingly, Complainant requests a make-whole remedy with respect to both salary and fringe benefits.

Respondent

Respondent argues that there is no evidence to support Complainant's Section 111.70(3)(a)1 and 3 allegations. It stresses that the Board notified Schaller of its decision to reduce her prior to the filing of her grievance. It claims that no evidence exists to support Complainant's claim of retaliation by the Respondent.

With regard to the Section 111.70(3)(a)5 breach of contract allegation involving the reduction of Schaller's individual teaching contract, Respondent premises its argument upon the number of hours which the grievant spends in the building at the disposal of the District. It maintains that the fifty percent compensation which Schaller will be receiving in 1983-84 is for time spent between 8:00 a.m. and 11:15 a.m. It stresses that the comparison which Complainant attempts to make between Schaller and other teachers does not reveal that the Respondent improperly reduced Schaller's individual teaching contract. It claims that Complainant's reliance upon West Bend is misplaced. While Respondent readily acknowledges that West Bend stands for the proposition that a district cannot base its decision on what percentage teaching contract should be given to an individual instructor solely upon the basis of the number of "building hours" the instructor might have, it argues West Bend holds that one must look at the entire "workload" of the teacher in comparison with that of other similarly-situated teachers.

According to Respondent, "teaching time" is not synonymous with "workload"; and the comparisons presented by Complainant do not include many variables to be considered as part of a "workload". Moreover, Respondent argues that the Complainant is comparing "apples to oranges" in that two of the teachers with whom it compares Schaller teach in both the elementary and high schools. The other is a librarian. The Complainant has not presented any evidence that the nature of the responsibilities and the total workload of the four teachers are, in fact, comparable. Respondent also argues the West Bend does not eliminate "building hours" as a factor to be considered.

The Respondent asserts that there is no past practice requiring it to continue Schaller's contract at the sixty percent level. It argues that, given the express language of Article V, F and the powers reserved to the Board under Article I, G, the Respondent's action does not constitute a layoff. Assuming, arguendo, that this action does constitute a layoff, Respondent alleges that its decision to reduce Schaller's contract must nevertheless be upheld. It argues that there is no proof that any different result would have been reached had the District Administrator applied the layoff procedure. Further, Respondent stresses that misapplication of the layoff procedures is not grievable, unless there is evidence of bad faith which does not exist in the instant case.

With respect to the payment of fringe benefits to part-time teachers, Respondent argues that the collective bargaining agreement is silent and that past practice reveals varying treatment for part-time employes. It claims that its decision to pro-rate fringe benefits is reasonable and not prohibited by either the agreement or past practice.

It asks the Examiner to dismiss the complaint in its entirety.

DISCUSSION:

Restraint and Coercion

The record reflects that Respondent communicated its intent to reduce Schaller's individual teaching contract and fringe benefits prior to Schaller's filing of the grievance in the instant dispute. Clearly, the Respondent's actions in reducing her salary or pro-rating her fringe benefits were not taken in retaliation for her activity in filing the instant grievance.

Complainant, however, argues that Respondent's March 21, 1983 letter was threatening and inherently coercive in that its intent was to induce Schaller to abandon her grievance. While it is true that Schaller in reading the March 21, 1983 letter may have become alarmed to discover that Respondent was taking the position that she had no protection from dismissal under the statutes (Sec. 118.22) or the just cause and layoff provisions of the collective bargaining agreement; the mere statement by Respondent of its interpretation of the agreement

or a statement of its position regarding the merits of the grievance does not constitute interference within the meaning of Section 111.70(3)(a)1 of MERA. 2/ To hold that a municipal employer may not inform a grievant as to its position regarding his/her coverage under a collective bargaining agreement or statute, especially during the grievance procedure, would run contrary to MERA. It would hamper the employer's ability to meaningfully communicate its position on grievances to the union and have a chilling effect on full discussion and disclosure by both parties during the early stages of the grievance procedure.

It should be noted that the March 21, 1983 letter contains no express or inherent threat to Schaller should she continue to process her grievance. To the contrary, the letter concludes by informing Schaller as follows: "Please feel free to proceed to Level Two of the Grievance Procedure."

The Complainant makes much of the Respondent's representation in paragraph 2 on page 2 of the March 21, 1983 letter, which states as follows: "We are offering you a contract that will allow you plenty of time to teach the same classes you are teaching this year." It claims that this promise was dashed by Respondent's thirty-minute reduction of Schaller's teaching time which resulted from not splitting a combination second and third-grade class for vocal music instruction. It also maintains that the timing of the proposed schedule is evidence of retribution by Respondent.

The Examiner finds these arguments to be unpersuasive. "Plenty of time to teach" is a characterization over which reasonable minds might differ. Although there is a credibility conflict over whether Schaller requested Winchell to prepare a proposed schedule, the record clearly demonstrates that the proposed schedule was prepared and given to Schaller in response to Schaller's assertions at an April 6, 1983 meeting with Winchell and Lund that she did not believe she could teach everything within the time allotted by Respondent. Furthermore, there is nothing suspicious regarding the timing of the preparation of this schedule in view of the fact that the grievance was being considered at the Board level two days later. Rather, the schedule could be properly viewed as a Board attempt to demonstrate to Schaller that she did, in fact, have adequate time to teach within the time allotted by Respondent. For these reasons, it is concluded that the Respondent did not independently violate Section 111.70(3)(a)1 by its actions. Nor is there any basis upon which to premise a finding that Respondent violated Section 111.70(3)(a)3 and 1 by reducing Schaller's teaching time by thirty minutes. Complainant has not presented any evidence to suggest that the reduction in Schaller's teaching time was discriminatorily motivated. Rather, it appears that the reduction resulted from a contemplated split grade combination class. Furthermore, Schaller admitted having taught combination vocal music classes in previous years.

Complainant also argues that Respondent violated Section 111.70(3)(a)1 by individually bargaining with Schaller and other part-time teachers regarding salary and fringe benefit payments. The record reflects that, with regard to salary, the Respondent simply informed Schaller and other employes as to the percentage of an individual contract which it was willing to award. It did not negotiate salary with them. With regard to fringe benefit payments, the evidence adduced at hearing does reflect what benefits the Respondent offered to part-time employes. However, it also reflects that the Respondent engaged in a long-standing practice to this effect of which Complainant must have been aware or should have been aware. Furthermore, there is no evidence that the Complainant ever objected to this type of individual bargaining with the part-time employes in the past, and there is no evidence that this activity has occurred within the statutory time period.

With respect to Schaller's fringe benefits, the Respondent did not individually bargain with Schaller, but rather presented its pro-rated reduction as a fait accompli. Similarly, it appears that for 1983-84 the Respondent has informed the other part-time teachers of its intent to pro-rate their fringe benefits rather than having engaged in actual bargaining with these teachers. The evidence, therefore, fails to support an independent violation of Section 111.70(3)(a)1 with respect to the individual bargaining allegation.

2/ Unified School District No. 1 of Racine County, (15915-B) 12/77.

Breach of Contract - Reduction in Salary

The Respondent, in the instant dispute, reduced the percentage of Schaller's individual teaching contract from sixty percent to fifty percent. After determining to reduce Schaller's individual teaching contract, Respondent has informed Schaller that it tentatively intends to reduce her actual classroom-time by one half hour or thirty minutes per week, while increasing her preparatory time by one quarter of an hour, or 15 minutes, per week.

The threshhold question is whether Schaller's reduction in hours and in pay is prohibited by the agreement. An auxiliary issue to be addressed is whether Schaller as a part-time employe is covered by various provisions of the parties' collective bargaining agreement. Article I, Section A 2 and 3 clearly establishes that the bargaining unit covered by the agreement includes part-time teachers. With respect to non-economic provisions, in the absence of any language specifically excluding them, it is clear that they are covered by the layoff and disciplinary provisions of the agreement. With respect to Article V, Section D 1, use of the term "all" teachers includes part-time employes. Furthermore, language in Article V, Section F 4, which states "No member of the bargaining unit may be prevented from securing other employment during this period of layoff. . .", indicates that part-time employes as members of the bargaining unit are covered by Article V, F.

While at hearing Complainant argued that the reduction in both pay and hours violated Article V, Section D, of the agreement, it makes no such arguments in its brief. Article V, Section D, applies to all teachers, including part-time employes. It does not, however, on its face, cover either a reduction in hours or a reduction in salary. The "just cause" limitation of Article V, Section D on the Respondent's ability to "reduce pay" relates only to the instances where there is a disciplinary action, such as a suspension without pay. Accordingly, Article V, Section D does not apply to the instant situation.

Complainant argues that the reduction in Schaller's hours is a partial layoff which is covered by Article V, Section F of the collective bargaining agreement. Respondent, on the other hand, maintains that a partial reduction is not a layoff within the meaning of Article V, Section F; and, assuming, for argument's sake, that it is, it is not arbitrable because the language of Article V, Section F permits arbitral review of layoff decisions only where bad faith is alleged.

While the Examiner is mindful of the definite difference of opinion of various Wisconsin arbitrators as to whether a reduction in hours constitutes a partial layoff within the meaning of any given contractual layoff clause, Black Hawk School District (Arb. Marshall, 1975); Waupun No. 1 & No. 2 (Arb. Kerkman, 1978 and 1979); Kettle Moraine School District No. 12 (Arb. Yaeger, 1976); as compared to Oak Creek Franklin Joint School District No. 1 (Arb. Rothstein, 1981); Menasha Board of Education (Arb. Mueller, 1981); and Evansville Community School District (Arb. Hutchinson, 1982); nevertheless, such a determination must rise and fall on the express language of the particular agreement.

In this case, the layoff provision states "When it becomes necessary to reduce the number of staff members, the Board shall determine. . ." Article V, Section F 1 provides that "a point system for determining order of layoff shall be established. The teacher(s) with the lowest points shall be laid off. . ." Article V, Section F 3 speaks about the "position to be eliminated". Article V, Section F 4 provides that "No member of the bargaining unit may be prevented from securing other employment during this period of layoff . . .Eligibility for reinstatement shall be for up to two (2) school years following such layoff. . .No appointment of new or substitute employes shall be made in those positions where teachers certified or possessing qualifications for certification are on layoff. Failure of a teacher on layoff to accept reinstatement within fifteen (15) days of their receipt of notification of reemployment shall constitute a waiver of further employment rights under this provision." Article V, Section F 5 also states: "Any layoff, recall, or failure to recall pursuant to this article. . ." (emphasis added).

Based upon the above language, particularly Article V, Sections F 4 and 5, it is apparent that the parties considered the term "layoff" to constitute a total severance of active employment of the employe. The terms "position to be eliminated," "waiver of notification of re-employment," and "during this period of

layoff" all indicate contemplation by the parties that layoff be viewed in the context of fully eliminating an employe from active status. The continual pairing of "recall" and "recall rights" with the term "layoff" throughout the provision buttresses this conclusion. Moreover, the Complainant can point to no language in this provision which either specifically or impliedly supports an interpretation that a reduction of hours is to be viewed as a partial layoff. While it is true that there are good policy considerations to find that such is the case, see Evansville Community School District, supra.; the language here is simply not broad enough to warrant such a conclusion. Thus, Schaller's reduction of thirty minutes teaching time cannot be viewed as a partial layoff subject to the provisions of Article V, Section F. 3/

Complainant, arguing in the alternative, contends that a binding past practice exists which warrants the maintenance of Schaller's contract at a sixty percent level. This argument must be rejected because it is clear that both Schaller's schedule and classroom teaching time have been changed. Even assuming that there were no changes, the Respondent in Article I, Section G 1 and 3 has reserved to itself pursuant to the management rights clause the power to rectify errors which it may have made in the past regarding assigning Schaller a sixty percent contract or paying her twice for time spent under both the sixty percent (60%) teaching contract and the separate lunchroom supervision contract. Where the District has contractually retained its prerogatives through its management rights clause, the Examiner, in the absence of strong evidence of a contrary past practice, will not find such a practice to be controlling. The changes in Schaller's actual teaching time, as well as her schedule, are sufficient to establish that Respondent is not bound to maintain Schaller's individual contract at the sixty percent level.

Complainant also urges the Examiner to view the Respondent's reduction of Schaller's salary in terms of comparing her actual teaching time to that of other full-time specialty teachers in Respondent's district. The Complainant, however, fails to cite any contractual provision which would enable the undersigned to review Respondent's reduction of Schaller's salary in terms of a comparison with other teachers. Unlike the situation in West Bend School District No.1 (Arb. Mukamal, 1980), where the Association argued that the fractional teacher was actually "teaching" full-time and should receive "full compensation" as provided by the agreement, the issue here is what percent of a full-time individual teaching contract is appropriate. The Examiner finds that, in the absence of any language in the agreement which implies a manner or method of determining the percentage, nothing in the agreement prohibits the Respondent from making its own determination as to the appropriate percentage to be paid, given Schaller's proposed 1983-84 schedule.

In summary, the Examiner does not find the Respondent to have breached the collective bargaining agreement by reducing Schaller's compensation from sixty percent to fifty percent of a full-time teaching contract. It must therefore be concluded that Respondent did not violate Section 111.70(3)(a)5 and 1 of MERA by this action.

Breach of Contract-Reduction in Fringe Benefits

At first blush, it is tempting to accept Complainant's arguments that Articles I and VI when read together establish that part-time teachers are entitled to receive full contributions for fringe benefits. However, closer examination of the specific language provisions leads the Examiner to conclude that the agreement is silent with respect to payment of fringe benefits to part-time teachers. 4/ The parties, even where they utilized the word "all" in Article VI, were speaking of full-time teachers exclusively. For example, Article VI, Section C, provides that the basic salary for "all persons" covered by

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3/ In view of this finding, it is unnecessary to determine whether the Respondent's actions were made in "bad faith".

4/ This is not to say that Complainant is not entitled to bargain over the economic benefits to be granted part-time as such employes are clearly covered by the recognition clause in the agreement.

the agreement is set forth in Appendix B. Clearly, the parties did not intend for part-time teachers to receive the same designated amounts as full-time teachers. Similarly, assuming Complainant's interpretation that "all" teachers are entitled to full fringes, the Respondent would be obligated to pay substitute teachers full fringe benefits from their first day of employment under Article VI, Section J.

Where the agreement is silent on the subject of economic benefits to be awarded to part-time teachers, it is necessary to look at the Respondent's past practice. Contrary to the assertions of the Complainant, it is clear that the Respondent unilaterally, and in an inconsistent manner, determined what it would offer to individual part-time employes in the way of fringe benefits. The Weiland and Redmond individual teaching benefits contracts aside, Schaller's own individual teaching contracts support this conclusion. In 1980-81, she did not receive longevity although she was at the top of her lane. In 1981-82, however, she did receive longevity. With regard to longevity and at least the term life insurance, a benefit for which Respondent completely assumes payment, it is clear that Respondent made the determination as to whether or not to offer the benefit to individual part-time employes. Such employes, on their own accord, would not opt against receipt of these benefits because there is no economic disincentive, such as co-payment by the individual employe for either longevity or term life insurance. The Examiner, therefore, cannot and does not conclude that Respondent had a past practice of offering to pay full fringe benefits to part-time employes and that the part-time employes opted to decline various benefits.

Moreover, Article XI, Section D, expressly states that "all terms and conditions of employment not covered by this Agreement shall continue to be subject to the Board's direction and control. In view of Article XI, Section D, the silence on the subject of fringe benefits for part-time employes in the agreement itself, and the lack of a demonstrable past practice, the Examiner finds that Respondent did not breach the collective bargaining agreement by reducing Schaller's fringe benefits, and has not violated Section 111.70(3)(a)5 and 1 of MERA by its acts in this matter.

Dated at Madison, Wisconsin this 9th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner