STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHLAND PINES EDUCATION ASSOCIATION and JOHN TILLEY, Complainants, vs. NORTHLAND PINES SCHOOL DISTRICT, BOARD OF EDUCATION, Respondent.	Case XXVI No. 31751 MP-1486 Decision No. 20855-A

Appearances:

Mr. Gene Degner, Executive Director, WEAC UniServ Council #18, 25 East Rives Street, Rhinelander, Wisconsin 54501, appearing on behalf of the Northland Pines Education Association and John Tilley.

Mr. John L. O'Brien, Drager, O'Brien, Anderson, Burgy and Garbowicz, Attorneys at Law, Arbutus Court, P.O. Box 639, Eagle River, Wisconsin 54521, appearing on behalf of the Northland Pines School District, Board of Education.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northland Pines Education Association and John Tilley, having, on June 17, 1983, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Northland Pines School District, Board of Education, had committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission, on July 20, 1983, having appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a) and Sec. 111.07 of the Wisconsin Statutes; and a hearing having been conducted on the complaint in Eagle River, Wisconsin on August 18, 1983; and a transcript of that hearing having been provided to the Examiner on September 9, 1983; and the parties having filed briefs and reply briefs by November 14, 1983; and the Examiner having considered the evidence and the arguments of the parties, 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 the Northland Pines Education Association, hereinafter referred to as the Association, is a labor organization which has its offices located in care of 25 East Rives Street, Rhinelander, Wisconsin 54501.

2. That John Tilley is an individual who lives at Route 2, P.O. Box 1317, Rhinelander, Wisconsin 54501.

3. That the Northland Pines School District, Board of Education, hereinafter referred to as the District, is a municipal employer which has its offices located at 501 West Pine Street, Eagle River, Wisconsin 54521, and which operates a public school district organized under the laws of the State of Wisconsin.

4. That the District and the Association are parties to a collective bargaining agreement which, by its terms, was in effect from July 1, 1981 until June 30, 1983; that this agreement, among its provisions, contains the following:

> SECTION I - BOARD RESPONSIBILITIES
>
> The Board of the Northland Pines School District, on its own behalf and on behalf of the electors of the district, hereby retains and reserves unto itself, except as herein otherwise specifically provided and agreed to, all powers, rights, authority, duties and responsibilities.

. . .

SECTION II - RECOGNITION OF THE BARGAINING UNIT

The Board recognizes the Northland Pines Education Association as the legally constituted bargaining agent under the provisions of Section 111.70 of the Wisconsin Statutes for all regularly employed classroom teachers, librarians, and guidance counselors, which shall include teachers hired to replace teachers leaving the Northland Pines system permanently, but which shall not include substitute teachers and shall exclude all managerial and supervisory employees.

. . .

SECTION VI - DISCIPLINE, DISCHARGE AND SUSPENSION

. . .

B) No teacher shall be dismissed, suspended, reduced in rank or compensation or otherwise disciplined without cause.

C) All rules and regulations governing employee activities and conduct shall be interpreted and applied uniformly throughout the district.

SECTION VII - NON-RENEWAL AND LAY-OFF

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B. (Lay-Off) In the event the Board determines to reduce the number of employee positions (full lay-off) or the number of hours in any position for the forthcoming school year, the provisions set forth in this article shall apply:

Selection - Selection of employees to be laid off shall be made according to the following guidelines:

1. Normal attrition

2. Volunteers

3. Least senior person in the certification category affected, within the following categories:

   a. K-5

   b. 6-8

   c. 9-12

Seniority - For the purpose of this article, the commencement of an employee's service in the district shall be the first day of employment under his/her initial contract and, when two or more employees begin employment on the same day, the respective dates upon which the Board offered such employees employment shall be used to establish the length of service; provided that these (sic) still remain a tie the district administration shall determine which employee is laid off on basis of performance.

. . . Notwithstanding the above, the Board shall have the right to deviate from the above criteria once each year for good and sufficient cause if adherence would jeopardize the continuation of a program involving students which the Board wishes to retain, or its having a qualified employee for such a program; and

the right once each year, regardless of cause, provided this deviation shall not be arbitrary or capricious.

. . .

The district shall provide the Union president a seniority list annually on or about October 1.

Recall - When a teaching position becomes available, the Board shall recall laid off teachers in the reverse order of layoff to any position for which they are certified.

Any teacher who is recalled under this article shall retain all recall rights, benefits and seniority that may have occured prior to the time of layoff.

Any teacher who is reduced to or recalled to, a part-time status shall accrue seniority at the normal full-time rate for the period worked on part-time status.

A teacher shall not lose his/her recall rights if they secure other employment during the recall period.

Recall rights will terminate two years following the effective date of lay-off.

. . .

SECTION IX - TRANSFERS AND REASSIGNMENTS

A) (1) Notices of vacancies will be sent to the Association president as the administration is aware of the existence of such vacancies.

(2) Such notices shall contain the date, a description of the position, name and location of the school, name of person to whom the application is to be made, and the date by which application is to be made.

. . .

B) (1) All vacant positions shall be filled by teachers from within the school district provided: (a) they make application within ten school days of the notice date of the vacancy, and (b) they are qualified for said position.

. . .

SECTION XV - GRIEVANCE PROCEDURE

. . .

C) Steps of Grievance Procedure:

Step 1: The grievant shall make a sincere effort to resolve the matter informally by oral discussion between himself/herself or his/her immediate supervisor.

Step 2: If the matter is not resolved through means of informal discussion, it shall be presented by the grievant to a committee established by the Association for this purpose. The committee shall determine the merit of the alleged grievance. If no merit is found, the committee shall instruct the grievant to cease pursuit of the matter. If merit is found, the grievance shall advance to the next step.

Step 3: The grievant shall present the grievance, in writing, to his/her principal within fifteen (15) days after the facts upon which the grievance is based first occur (sic) or first became known. The principal shall advise the grievant, in writing, of the disposition of the grievance within ten (10) days of the time the grievance was presented to him.

Step 4: If the grievance is not adjusted in a satisfactory manner within ten (10) days as per Step 3, the grievant has five (5) days time in which he/she may present the written grievance to the Administrator for discussion. Such discussion shall be held within ten (10) days at a mutually convenient time. The Administrator shall advise the grievant, in writing, of the disposition of the grievance within ten (10) days of the time of such discussion.

Step 5: If the grievance is not adjusted in a satisfactory manner in Step 4, the grievant may present his/her written grievance to the School Board. Such presentation must be made within five (5) days after the time limitations specified in Step 4. The School Board shall act upon the grievance either at the next regular, scheduled meeting, or at a special meeting held for that purpose, whichever is earlier. The School Board shall issue a written answer to the grievance within fifteen (15) days after the meeting with the grievant.

. . .

F) The parties agree to follow each of the foregoing steps in the processing of grievances. . . . Grievances not proceessed to the next step within the presribed time limits shall be considered dropped.

. . .

that the Association is also the exclusive bargaining representative of a separate collective bargaining unit composed of certain District employes, including teacher aides, who are excluded from the scope of the bargaining unit described in Section II above; and that the grievance procedure set forth as Section XV above does not contain any provision for the final and binding arbitration of disputes not resolved by the processing of a grievance through the enumerated five steps.

5. That John Tilley has been certified by the Department of Public Instruction of the State of Wisconsin as a high school Art teacher, and has been employed by the District as a high school Art teacher since August 27, 1973; that high school Art is Tilley's sole area of State certification; that Tilley's individual teaching contract for the 1981-1982 school year identifies his position as "ART-High School"; that during the first semester of the 1981-1982 school year, Tilley's normal daily schedule consisted of four periods of Art instruction, one period of preparation time, and two periods of study hall supervision; that in the second semester of that school year, Tilley's normal daily schedule consisted of five periods of Art instruction, one period of preparation, and one period of study hall supervision; that Tilley's individual teaching contract for the 1982-1983 school year identifies his position as "2/3 TIME ART-High School"; that in the 1982-1983 school year, Tilley's normal daily schedule consisted of four periods of Art instruction, and one period of preparation; that Tilley's individual teaching contract for the 1983-1984 school year identifies his position as "1/2 TIME ART-High School"; that in the 1983-1984 school year Tilley's normal daily schedule consisted of three periods of Art instruction and one-half period of preparation; that Kevin Tonkovich has been employed as a teacher by the District since August 10, 1980; that Tonkovich has been certified by the State of Wisconsin as a high school German teacher; that in the 1981-1982 school year, Tonkovich's normal daily schedule consisted of six periods of German instruction and one period of preparation; that in the 1982-1983 school year, Tonkovich's

normal daily schedule consisted of six periods of German instruction and one period of preparation; that Tonkovich's individual teaching contract for the 1983-1984 school year identifies his position as "GERMAN-High School"; that in the 1983-1984 school year Tonkovich's normal daily schedule consisted of four periods of German instruction, one period of preparation and two periods of study hall supervision; that John Wainwright has been certified by the State of Wisconsin as a high school Industrial Arts teacher, and has been employed by the District as a teacher since August 25, 1976; that in the 1981-1982 school year, Wainwright's normal daily schedule consisted of six periods of Industrial Arts instruction and one period of preparation; that Wainwright's individual teaching contract for the 1982-1983 school year identifies his position as "INDUSTRIAL ARTS-High School"; that in the 1982-1983 school year, Wainwright's normal daily schedule consisted of six periods of Industrial Arts instruction and one period of preparation; that Wainwright's individual teaching contract for the 1983-1984 school year identifies his position as "INDUSTRIAL ARTS/ATTENDANCE-High School"; that in the 1983-1984 school year, Wainwright's normal daily schedule consisted of four periods of Industrial Arts instruction and two periods devoted to "Attendance"; that "Attendance" denotes a work function which requires Wainwright to obtain attendance records from the high school principal, to record student absences during particular periods, and to make phone calls to the parents of any students identified as absent during a period to inform the parents that their child is not in the school building; that this Attendance work function was first put into effect by the District in the 1983-1984 school year; that Donald Conachen has been employed by the District as a teacher since August 20, 1980; that Conachen's normal daily schedule for the 1982-1983 school year included six periods of instruction 1/ and one period of preparation, while his normal daily schedule for the 1983-1984 school year consisted of five periods of instructional work, one period of preparation, and one period of study hall supervision; that James Tiplady has been employed by the District as a teacher since August 4, 1980; that Tiplady's normal daily schedule for the 1982-1983 school year consisted of six periods of instruction and one period of preparation, while his normal daily schedule in the 1983-1984 school year consisted of five periods of instruction, one period of preparation, and one period of study hall supervision; that Judith Wainwright 2/ has been employed by the District as a teacher since August 22, 1979; that her normal daily schedule for the 1982-1983 school year consisted of six periods of instruction and one period of preparation, while her normal daily schedule for the 1983-1984 school year consisted of five periods of instruction, one period of preparation, and one period of study hall supervision; that Roland Christensen has been employed by the District as a teacher since August 25, 1976; that Christensen's normal daily schedule in the 1982-1983 school year consisted of six periods of instruction and one period of preparation while his normal daily schedule for the 1983-1984 school year consists of five periods of instruction, one period of preparation, and one period of study hall supervision; that Michael Reimer has been employed by the District as a teacher since August 11, 1975; that Reimer's normal daily schedule for the first semester of the 1982-1983 school year consisted of six periods of instruction and one period of preparation, and his normal daily schedule for the second semester consisted of five periods of instruction, one period of preparation, and one period of study hall supervision; that Reimer's normal daily schedule for the first semester of the 1983-1984 school year consisted of six periods of instruction and one period of preparation, while his normal daily schedule for the second semester of that year consists of four periods of instruction, one period of preparation and two periods of study hall supervision; that Dale Bruss has been employed as a teacher by the District since August 28, 1984; and that Bruss's normal daily schedule for the 1982-1983 school year consisted of six periods of instruction and one period of preparation, while his normal daily schedule for the 1983-1984 school year consisted of five periods of instruction, one period of preparation and one period of study hall supervision.

6. That student enrollment in the District has been declining approximately 20-30 students per year for the last three years; that student enrollment in high school Art classes has also declined over this period; that student enrollment in high school German and high school Industrial Arts classes has declined from the

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1/ "Instruction" for the purposes of this decision means work for which a State certification is required.

2/ All references to Judith Wainwright hereinafter will be to Ms. Wainwright and references to John Wainwright will be to Wainwright.

1982-1983 school year to the 1983-1984 school year; that the District has reduced the number of periods of instruction assigned to Tilley, Tonkovich, and Wainwright due to this declining enrollment; that Tonkovich and Wainwright, unlike Tilley, received full-time teaching contracts for the 1982-1983 and 1983-1984 school years; that the District anticipates that student enrollment in high school Industrial Arts and German classes will rise in the 1984-1985 school year, while high school enrollment in art classes will not; that if enrollment in these Industrial Arts and German classes does not rise, the District anticipates that full-time teaching contracts will not be issued to the teachers of those classes; that no State certification is required as a condition of assuming the duties of study hall supervision or of the attendance work function presently being performed by Wainwright; that the District has, in the past, assigned study hall supervision to teacher aides who are not required by the District to have a teaching degree, or to have any certification from the State Department of Public Instruction; that the assignment of study hall supervision to a teacher or teacher aide has been based on the recommendation of the high school principal, subject to the ultimate approval of the District's School Board; that in the 1982-1983 school year, one teacher (Reimer) who was assigned study hall supervision had been hired after Tilley, while others assigned such supervision were hired by the District before Tilley; and that the District has, in isolated instances, offered two study hall supervisions during a school year to an individual teacher.

7. That a grievance filed regarding Tilley's reduction from full-time to a two-thirds teaching contract for the 1982-1983 school year was dropped, and did not result in the filing of a complaint of prohibited practice with the Wisconsin Employment Relations Commission; that the District did not violate the parties' collective bargaining agreement by offering teachers Tonkovich and Wainwright full-time teaching contracts, and teacher Tilley a half-time teaching contract for the 1983-1984 school year; and that, on the facts of this case, the District did not violate the parties' collective bargaining agreement by not offering Tilley the attendance work function presently being performed by Wainwright, or sufficient study hall supervisions to grant Tilley a two-thirds or a full-time teaching contract.

CONCLUSIONS OF LAW

1. That the Northland Pines School District, Board of Education, is a "Municipal employer" within the meaning of Sec. 111.70(1)(a) of the MERA.

2. That John Tilley is a "Municipal employe" within the meaning of Sec. 111.70(1)(b) of the MERA.

3. That since the collective bargaining agreement mentioned in Finding of Fact 4 above does not contain any provision for final and binding arbitration, the issue of whether or not the District violated Sec. 111.70(3)(a)1 or 5 of the MERA by offering Tilley a half-time teaching contract, while offering Tonkovich and Wainwright full-time teaching contracts for the 1983-1984 school year is within the Commission's jurisdiction under Secs. 111.70(3) and (4) of the MERA, and is properly before the Examiner.

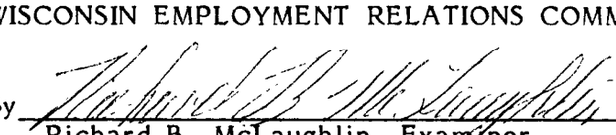
4. That the District did not violate the collective bargaining agreement mentioned in Finding of Fact 4 by offering Tilley a half-time teaching contract, while offering Tonkovich and Wainwright a full-time teaching contract for the 1983-1984 school year, and, therefore, did not commit any violation within Sec. 111.70(3)(a)1 and 5 of the MERA on the facts of this case.

ORDER 3/

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

Dated at Madison, Wisconsin this 12th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

Footnote 3 appears on Page 7

3/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PARTIES' POSITIONS

According to the Association, "Wisconsin arbitration law is in need of a good working definition and analysis of the relatively new phenomenon of reduction hours (sic)." This case, according to the Association, represents an appropriate case to supply such a definition since the reduction of Tilley from two-thirds to one-half time was a layoff which must be effected in accordance with Section VII (B). The significance of the seniority rights at issue in the present case is demonstrated, according to the Association, by the possibility that the District could, if its interpretation was accepted, manipulate schedules to force any teacher to take a part-time position. The Association contends that Section VII mandates that "less senior employes bear the burden of layoffs if employes with more seniority are qualified to take the work of the less senior teacher," and that the District's application of that section does not effect this purpose. The Association also asserts that the attendance work function is an assigned duty, not a position, and that the District gave this function and two study hall supervisions to Wainwright and Tonkovich to maintain their full-time teaching contracts in spite of the fact that they have less seniority than Tilley and in spite of the fact that neither teacher had such non-instructional duties in the prior school year. Finally, the Association asserts that Tilley's reduction from two-thirds to one-half time violated the practice followed by the District regarding Tonkovich and Wainwright. The Association concludes its arguments by asking for "reinstatement with full back pay and fringe benefits for Tilley to a full-time and/or 2/3 time teaching contract."

According to the District, it is undisputed that Tilley has seniority and that the reduction in hours is a layoff under Section VII. Thus, according to the District, the only issue presented in the present case is "whether the District had an obligation to assign study halls and/or "attendance" to Tilley because of his seniority, rather than to teachers with less seniority." The District concludes that it had no such obligation. According to the District, the provisions of Section VII have been fully complied with regarding Tilley since the necessity for the layoff is undisputed, since there was no normal attrition or volunteers for the reduction in hours in Tilley's department and since Tilley is the only teacher in the "certification category affected." According to the District the collective bargaining agreement does not restrict the District's right to assign study halls or the attendance function to whomever it wishes, teacher or non-teacher. To accept the Association's argument would, in the District's estimation, demand that the District guarantee Tilley a full-time position without regard to his instructional load. The District asserts that neither study hall supervision nor "attendance" can be considered an assigned duty, and concludes that the District "has the right, by the management rights paragraph of the contract, to assign study hall supervision and clerical positions as it wishes."

DISCUSSION

The complaint alleges District violations of Sec. 111.70(3)(a)1 and 5 of the MERA, but the alleged violation of Sec. 111.70(3)(a)1 is a derivative violation of Sec. 111.70(3)(a)5. Thus the core of the alleged prohibited practices centers on an alleged violation of the parties' collective bargaining agreement regarding the reduction of Tilley from two-thirds to one-half time. The parties' collective bargaining agreement contains a grievance procedure which does not provide for final and binding arbitration, there is no dispute that Tilley's March 14, 1983 grievance has been timely filed and processed, and neither party disputes the Commission's authority to apply the parties' collective bargaining agreement to that grievance. Thus, the issues of contract interpretation posed by this case are properly before the Examiner.

The parties' conflicting arguments demand a determination of whether or not the District violated the collective bargaining agreement by not offering Tilley sufficient study hall supervision or attendance duties to restore him to a two-thirds or to a full-time teaching contract for the 1983-1984 school year. The

March 14, 1983 grievance focuses on the application of Sections VI, VII and IX to Tilley's teaching contract for the 1983-1984 school year. Section VI governs "Discipline, Discharge and Suspension" and since there is no contention that the reduction in Tilley's 1983-1984 teaching contract was for disciplinary reasons, that section is not relevant to this case. Section IX governs "Transfers and Reassignments" and has not been argued by the parties beyond the initial grievance. That section is, in any event, silent regarding the seniority rights the Association has asserted Tilley posseses in this matter, and thus is not relevant to the issues presented in this matter.

Thus, the layoff provisions contained in Section VII of the collective bargaining agreement are the provisions governing this dispute. Section VII B) is divided into separate headings labeled (Lay-Off), Selection, Seniority, and Recall. The (Lay-Off) section defines the scope of the provision and assumes that the District has determined to reduce the number of employe positions or the number of hours in any position for the forthcoming school year. The Selection provisions specify the procedures to be applied in such an event, and lists seniority as a relevant consideration. The Seniority section defines the meaning of seniority, and provides for the creation of a seniority list. The Recall section adds certain detail to the seniority provisions and specifies the scope of laid off employes' rights to claim available work within the District following a layoff.

The issue for decision in the present matter fundamentally involves the Recall provisions of Section VII B) since Tilley is attempting to be recalled either to a two-thirds teaching contract such as that he held in the 1982-1983 school year, or to a full-time teaching contract such as he held for the 1981-1982 school year. The Recall provisions of Section VII B) mandate that the District "recall laid off teachers" to "any position for which they are certified . . ." when a "teaching position becomes available." It is undisputed that Tilley is a laid off teacher with recall rights, and thus the issue in this case is whether or not the District should have recalled Tilley to the study hall supervisions or attendance work function presently performed by teachers Tonkovich and Wainwright. The Association urges that these functions constitute teaching positions because they are performed by teachers and that anyone is certified for such duties because they require no certification.

The Association's interpretation of the recall rights of Section VII B) are not persuasive for three reasons. First, this interpretation is without support in the Recall provisions of Section VII B. That section specifically refers to "teaching positions," and mandates that the District recall teachers to "any position" for which they were certified. Although the reference to "any position" would appear broad enough, standing alone, to encompass both instructional and non-instructional duties, that reference does not stand alone but is followed by the qualification that the position be one a teacher is certified for. This qualification is positively stated and encompasses an obligation that the teacher have certification in the position to be recalled to. This obligation is reinforced by the initial reference that recall will be to a teaching (emphasis added) position. Read as a whole, the Recall provisions create a right in teachers to return to instructional positions when such positions become available. The Association's assertion that the reference to positions "for which they are certified" be read to mean "for which they are certified or for which no certification is required" is without support in the language of the Recall provisions of Section VII B).

Second, if the Recall provisions of Section VII B) are interpreted as the Association asserts, then the application of that section would produce results which would not appear to have been contemplated by the parties. The Association's interpretation of the Recall provisions would create two separate pools of work subject to recall--a pool of instructional duties for which certification is required and a pool of non-instructional duties for which no certification is required. Under this interpretation the absence of a need for more Art classes would not affect Tilley's right to claim a full-time position, since Tilley could claim the non-instructional duties held by any employe with a later date of hire than Tilley. In effect, then, the Association urges that Tilley enjoys a vested right to a full-time position without regard to the number of instructional classes he is responsible for. Such a result is without limitation, and could result in a teacher holding a full-time teaching position with few, if any, instructional duties. It is impossible to believe that a

guarantee of employment without regard to instructional load would rest on a series of inferences rooted in the Recall provisions of Section VII B), and not on unambiguous language. 4/

Finally, significant questions exist regarding the application of the Association's interpretation of the Recall provisions of Section VII B) to the present matter. The Association accurately points out that both Tonkovich and Wainwright, in the 1983-1984 school year, are responsible for four periods of instruction, similar to Tilley's situation in the 1982-1983 school year. However, if Tilley can claim recall rights to non-instructional duties as the Association asserts, it is unclear why such rights can be asserted only against Wainwright and Tonkovich. Six other high school teachers (Conachen, Tiplady, Ms. Wainwright, Christensen, Reimer and Bruss) have more recent dates of hire than Tilley and have study hall duties which compose a part of their teaching schedule in the 1983-1984 school year. Significantly, each of these teachers has fewer instructional duties in the 1983-1984 school year than in the 1982-1983 school year. One of those teachers, Conachen, was hired more recently than both Tonkovich and Wainwright, while four teachers (Conachen, Tiplady, Ms. Wainwright, and Christensen 5/) were hired more recently than Wainwright. Why Tilley should assert recall rights only against Tonkovich is unclear, and interjects an additional reason to question the persuasive force of the Association's interpretation of the Recall provisions of Section VII B). In sum, the Recall provision of Section VII B) does not grant Tilley the right to force the District to assign him sufficient study hall supervisions or the attendance work function to restore him to either a two-thirds or to a full-time teaching contract.

The Association has also argued that Tilley's rights can be located elsewhere in Section VII B). Specifically, the Association has urged that Tilley has received disparate treatment from the District since he was reduced from full-time to two-thirds time when his schedule consisted of four instructional periods in the 1982-1983 school year, while teachers Tonkovich and Wainwright were not so reduced for the 1983-1984 school year when their schedules also consisted of four instructional periods. The Association's argument centers on the (Lay-Off) and Selection provisions of Section VII B) since they assert either that Tilley was improperly selected for a layoff in 1982-1983, or that teachers Tonkovich and Wainwright were improperly not selected for layoff in the 1983-1984 school year. 6/

The (Lay-Off) section sets forth the scope of Section VII B), and establishes that the section applies to full layoff and to a reduction in the number of hours and "an imposition for the forthcoming school year . . ." The Association forcefully argues that a study hall must be considered part of a teaching position since the District compensates full-time teachers whose schedules include a study hall at the same rate as full-time teachers whose schedules who do not include study halls. 7/ Under this line of argument the loss of a study hall would

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4/ Arguably, the Association's request that Tilley be recalled to a full-time position raises issues of timeliness since Tilley lost such a full-time position in the 1982-1983 school year, and a grievance regarding this reduction was dropped. Discussion on this point appears below in footnote 6.

5/ Christensen and Wainwright have the same date of hire. The seniority list received into evidence as Joint Exhibit 7, however, shows Wainwright to have greater seniority than Christensen.

6/ These arguments are closely intertwined. A claim by Tilley that he was improperly selected for layoff in the 1982-1983 school year would, standing alone, be untimely since a grievance regarding that layoff was dropped. See Section XV F). However, the question regarding the propriety of the District's treatment of Tilley compared to teachers Tonkovich and Wainwright in the 1983-1984 school year is timely. An attempt to separate these closely intertwined arguments would be difficult, if not impossible, and the discussion above will ignore the timeliness issue since that issue does not play a dispositive role in the question of whether or not the District disparately treated teachers Tonkovich, Wainwright and Tilley in violation of the parties' collective bargaining agreement.

7/ See School District of Rib Lake, (Shaw, 1983).

constitute a reduction in the number of hours in a position. This argument has significant persuasive force, but even assuming the accuracy of the argument for the purposes of this case does not change the focus of the analysis of Section VII B) or the application of that Section to this case. The (Lay-Off) provisions cannot be read to create an unqualified right in an individual teacher to a study hall. Rather, the assumption that the loss of a previously held study hall for a forthcoming school year can constitute a reduction in hours within the (Lay-Off) provisions of Section VII B) underscores the need to look to the Selection provisions of that section to determine whether the appropriate teacher was selected for the reduction.

An examination of the Selection provisions of Section VII B) will not support the Association's contention that those provisions were improperly applied to Tilley. The Association's interpretation of the Selection provisions, like its interpretation of the Recall provisions creates and separately treats instructional and non-instructional duties. The Association grounds this assertion on item 3 of the Selection provisions and urges that study hall requires no certification and therefore any teacher falls within the "certification category affected." This interpretation would grant Tilley seniority rights against teachers in certification areas other than art regarding the loss of non-instructional duties but not with regard to the loss of instructional duties. This interpretation is not, however, persuasive. The interpretation would render a, b, and c of item 3 difficult, if not impossible, to understand since categories of certification would be irrelevant to the non-certified duties the Association asserts item 3 applies to. Even if the specified grade levels contained in 3a, b and c are taken to denote the location of an assignment, it is difficult to understand why the parties would speak of a K-5 category regarding the assignment of a study hall. If, as the Association asserts, instructional and non-instructional duties are to be separately treated it is impossible to understand why the parties chose not to expressly state the distinction, but chose instead to place the distinction within provision 3 which includes language (a, b and c) which is meaningful to certain circumstances and meaningless to others. In addition, the Association's interpretation does not clarify why Tilley's rights to non-instructional duties should be asserted against Tonkovich and Wainwright, when there are teachers having study hall duties for the 1983-1984 school year, who have more recent dates of hire than Tilley.

In sum, item 3 of the Selection provisions of Section VII B) does not create separate classes of instructional and non-instructional duties which must be separately treated for the purposes of selecting the employe to be laid off. At best, non-instructional duties, if subject to the (Lay-Off) provisions of Section VII B), are a part of the teacher's position for the forthcoming school year, and cannot be treated separately from that teacher's position. Thus, Tilley's reduction from full-time to two-thirds time and from two-thirds time to one-half time are similar on the facts of this case since he was the sole employe within the high school Art department available for selection for a reduction in hours due to the declining enrollment in Art classes in both years. Because instructional and non-instructional duties cannot be separately treated under the Selection provisions of Section VII B), and because there are not any less senior employes within Tilley's certification category available for selection for reduction in hours, Tilley's reduction in hours from full-time to one-half time was not improper under Section VII B).

Nor can the Association's argument that Tilley has been disparately treated in comparison to teachers Tonkovich and Wainwright because those teachers should have been reduced in hours for the 1983-1984 school year be accepted. The issue posed by this argument is not whether the District has treated teachers Tonkovich, Wainwright and Tilley with strict consistency, but whether any inconsistency involved affords a basis to conclude that the District has violated Section VII B) by not selecting teachers Tonkovich and Wainwright for a reduction in hours for the 1983-1984 school year. Examination of this issue is difficult given the nature of the background to the issue. Tonkovich and Wainwright were responsible for only four instructional periods in the 1983-1984 school year as was Tilley in the 1982-1983 school year, but neither Tonkovich nor Wainwright were reduced in hours. Although this fact is clear, the situation in the two school years is not identical. The District did use more teacher aides to supervise study halls in the 1982-1983 school year than in the 1983-1984 school year, and it appears that the District has not, in the past, used study halls to make part-time employes full-time although the District has, on occasion, assigned two study halls to an

individual teacher. In addition, the District urges that it anticipates enrollment in Tonkovich's and Wainwright's classes to rebound in the 1984-1985 school year, while it does not anticipate an enrollment in Tilley's classes to similarly rebound. Whatever the differences between the two school years, it does remain apparent that the District has made teachers Tonkovich and Wainwright full-time through the use of non-instructional duties while it did not do so for Tilley. While this inconsistency may present a situation the parties wish to address in collective bargaining, it does not present a situation presently governed and proscribed by Section VII B). That Section deals with the selection of employes to be laid off and limits such selection to certain categories within three specified grade levels. The Association's dispute with the District regarding the alleged disparate treatment of these teachers is less involved with these Selection or Recall provisions than with the Association's desire to impose a duty on the District to fill out Tilley's schedule. No such duty, applicable to the facts of this case, exists in Section VII B). In addition, the Association's attempt to impose such a duty on the District does not appear to be entirely consistent in itself. The Association urges that the District's obligation to assign non-certified duties to Tilley would not include "bumping rights" or a need "that the District reassign classes" but would apply only to Tonkovich and Wainwright who presently are responsible for four periods of instruction. The language the Association seeks to interpret, however, speaks only of "the certification category affected, within the following categories . . ." and is silent regarding the number of instructional or non-instructional duties assigned to a teacher. If, as the Association asserts, the assignment of duties for which no certification is requried may not be limited to a teacher certification category under Section VII B), it is impossible to understand why Tilley would have rights against only teachers Tonkovich and Wainwright. Rather, the Association's interpretation would grant Tilley rights to non-instructional duties held by any less senior teacher without regard to certification and this would create the very bumping and class reassignment problems the Association asserts it does not seek. In sum, whatever differences exist between the District's treatment of Tilley in the 1982-1983 school year and teachers Tonkovich and Wainwright in the 1983-1984 school year do not present a basis on which to conclude that the District violated the parties' collective bargaining agreement regarding its treatment of Tilley for the 1983-1984 school year.

The parties have extensively argued the issues presented in the present matter and it is necessary to comment further on the Association's remaining arguments. The Association has cited a considerable body of authority to establish that Tilley's reduction to half time status was a layoff under Section VII B), and that "Wisconsin arbitration law is in need of a good working definition and analysis of the relatively new phenomenon of reduction hours (sic)." The role of an Examiner in this case is not dissimilar to that of an arbitrator. In either context, the parties must be given no more and no less than the benefit of their agreement. Section VII B) of the parties' collective bargaining agreement expressly applies to a reduction in hours. Thus, whether Wisconsin arbitration law is or is not in need of definition of reduction in hours, the issue in this case is not to supply a new definition in this area, but to apply a definition contained in the (Lay-Off) provisions of Section VII B). 8/

The Association has also argued that Section VII B) provides "that less senior employes bear the burden of layoffs if employes with more seniority are qualified to take the work of the less senior teacher." Within the limits discussed above, the Association's argument on this point can be accepted since less senior employes within the certification category affected and within certain specific categories do bear this burden. However, the Association's argument attempts to impose an obligation on the District to assign non-instructional work

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8/ Closely related to this point is the treatment of the considerable body of authority cited to the Examiner. Some of that authority need not be discussed since it deals primarily with whether a reduction in hours can be considered a layoff under contract language which does not specifically mention reduction in hours. Because the balance of the authority cited to the Examiner does not involve the same parties to this case, the same contract language presented in this case, or precisely the same issue presented for decision in this case, that authority is, at best, persuasive authority in the present matter. Rather than extensively discuss the points of distinction between that authority and the present case, I have chosen to directly address the major contentions of the parties.

to senior teachers without regard to the certification category of the teacher. Such an obligation does not appear in the language of Section VII B) and cannot be implied.

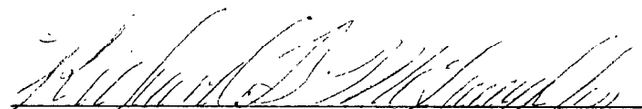
The Association also asserts that the decision in favor of the District could lead to "harsh, unjust and unbargained for results," by undermining the significance of the principle of seniority. This assertion cannot be accepted on the facts of the present case. This case does not involve an attempt by the District to reduce a teacher's contract without regard to student enrollment and to a teacher's seniority. The Association's statements regarding the significance of the principle of seniority have been forcefully argued, but seniority rights are granted by contract and can be enforced only to the degree contracted for. It is unclear how a decision adverse to the Association on the facts of this case would undermine the seniority system contained in Section VII B) which is limited to the certification category affected within certain specified grade levels.

The Association has also argued that the "attendance office is an assigned duty and not a position." While the parties' dispute as to whether study hall supervision and the duties incident to the attendance work function should be considered a position or an assigned duty may be significant on another set of facts, this dispute is not dispositive of the present matter. Thus, whether duties incident to the supervision of a study hall or to the attendance work function are properly considered assigned duties or positions, must be left to the parties to either bargain or to litigate on an appropriate factual situation.

Thus, the District did not violate the parties' collective bargaining agreement by not offering Tilley the attendance work function offered Wainwright or by not offering Tilley sufficient periods of study hall supervision to restore him to a two-thirds or to a full-time teaching contract for the 1983-1984 school year. It follows that the District did not commit any prohibited practice within the meaning of Sec. 111.70(3)(a)5 of the MERA or, derivatively, of Sec. 111.70 (3)(a)1 of the MERA. Accordingly, the complaint has been dismissed.

Dated at Madison, Wisconsin this 12th day of June, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner