STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MORAINE PARK VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, Complainant, SANDRA ANDERSON and MORAINE PARK FEDERATION OF TEACHERS LOCAL 3338, Respondents.	Case 21 No. 33324 MP-1599 Decision No. 22009-B
SANDRA ANDERSON and MORAINE PARK FEDERATION OF TEACHERS LOCAL 3338, Counter-Complainants, MORAINE PARK VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, Counter-Respondent.	

Appearances:

St. Peter Law Offices, S.C., Attorneys at Law, Fond du Lac Plaza, 131 South Main Street, Fond du Lac, Wisconsin 54935, by Mr. John A. St. Peter, appearing on behalf of the Counter-Respondent, Moraine Park Vocational, Technical and Adult Education District.

Shneidman, Myers, Dowling, Blumenfield, & Albert, Attorneys at Law, P.O. Box 442, Milwaukee, WI 53201-0442, by Mr. Timothy E. Hawks, appearing on behalf of the Counter-Complainants, Sandra Anderson and the Moraine Park Federation of Teachers Local 3338.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Mary Jo Schiavoni having on March 29, 1985, issued her Findings of Fact, Conclusions of Law and Order in the above-entitled matter, wherein she concluded that none of the parties had committed the prohibited practices alleged in the complaint and counter-complaint filed in the above-captioned matter; and said Examiner having therefore dismissed both the complaint and counter-complaint in their entirety; and Sandra Anderson and Moraine Park Federation of Teachers Local 3338 having, on April 18, 1985, timely filed with the Commission a Petition for Review of the Examiner's dismissal of their counter-complaint; and the parties having, by June 13, 1985, submitted briefs on the Petition; and the Commission having reviewed the record, and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be modified;

NOW, THEREFORE, it is

ORDERED 1/

A. That the Examiner's Findings of Fact 1-11, shall be and hereby are affirmed and adopted as the Commission's.

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by

(Footnote 1 continued on Page 2)

(Footnote 1 continued from Page 1)

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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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.

B. That the Examiner's Finding of Fact 12 is modified to read as follows and adopted as the Commission's:

> 12. That there is no material difference in facts or issues between the Petrie award and the Anderson grievance with respect to the issue of whether the District has any right to require employes to accept extended teaching contracts; but that said award and grievance materially differ as regards the facts and issues regarding whether the District acted within its rights (as recognized in the Petrie award) by making the assignment to Anderson referred to in her grievance.

C. That the Examiner's Conclusion of Law 1 and the Examiner's related Order paragraph dismissing the District complaint against Anderson and Local 3338 Respondents were not the subject of a timely petition for Commission review or of a timely Commission order setting them aside for review; and that, therefore, by operation of Sec. 111.07(5), Stats., Examiner Schiavoni's Conclusion of Law 1 and her Order dismissing the District's complaint became the Commission's Conclusion and Order on April 18, 1985, and are not a subject of the instant review decision.

D. That the Examiner's Conclusion of Law 2 is hereby set aside and the following substituted and adopted as the Commission's:

> 2. That the arbitration award issued by Arbitrator William Petrie on January 5, 1983, is res judicata as to the issue of whether the District is prohibited from requiring employes to accept extended teaching contracts, such that the District did not violate Sec. 111.70(3)(a)5, Stats., by refusing to submit that aspect of the Sandra Anderson grievance to arbitration.
>
> 3. That the arbitration award issued by Arbitrator William Petrie on January 5, 1983, is not res judicata as to the issue of whether the District exceeded its contractual authority to require extended contracts (as recognized in the Petrie award) by making the particular assignment referred to in the Anderson grievance, such that the District did commit a prohibited practice within the meaning of Sec. 111.70(3)(a)5, Stats., by refusing to submit that aspect of that grievance to arbitration.

E. That the Examiner's Order is hereby modified to read as follows and adopted as the Commission's:

ORDER

IT IS ORDERED that the Moraine Park Vocational, Technical and Adult Education District, its officers and agents shall immediately:

1. Take the following affirmative action which the Commission finds appropriate under the Municipal Employment Relations Act:

   (a) Proceed to arbitration on the Anderson grievance as regards the limited issue of whether the District exceeded it contractual authority to require extended contracts (as recognized in the Petrie award) by making the particular assignment referred to in that grievance; and notify Moraine Park Federation of Teachers Local 3338, in writing, of its willingness to proceed to arbitration on said issue and any issues such as remedy directly related to that issue.

(b) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date hereof, as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 26th day of November, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

MORAINE PARK VOCATIONAL, TECHNICAL, AND ADULT EDUCATION DISTRICT

MEMORANDUM ACCOMPANYING
ORDER MODIFYING EXAMINER'S
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

BACKGROUND

The District's complaint alleged that the Union refused to comply with an arbitration award in violation of Sec. 111.70(3)(b)4 of MERA by filing and processing the Anderson grievance. The Union counter-complained that the District refused to proceed to arbitration on the Anderson grievance in violation of Sec. 111.70(3)(a)5.

THE EXAMINER'S DECISION

The Examiner found that on January 5, 1983, Arbitrator William Petrie issued an arbitration award involving the instant parties regarding whether the District could require teachers to perform duties in excess of the normal 190 day school year. The issues submitted to the Arbitrator were:

> (1) Does the requirement of extended contracts by the District violate the collective bargaining agreement?
>
> (2) Does variation from the teaching calendar (with attachments D, E, and F) by the District violate the collective bargaining agreement?
>
> (3) If the answer to either of the above is yes, what is the appropriate remedy?

Most of the evidence adduced at the arbitration hearing involved the practical nursing program because the District argued a past practice existed with regard to the LPN program. Petrie found the matter was a straight contract interpretation dispute but that the intent of the parties was not completely clear. He therefore considered the past practice of the parties, the internal standards of contract interpretation, the reasonableness of the disputed assignments and the appropriate compensation for employes working under extended contracts before reaching the following preliminary conclusions:

> (1) The disputed language of Article VIII, Section 6(c) and 6(d) is ambiguous in certain respects, and is subject to interpretation by the Impartial Arbitrator.
>
> (2) Primarily on the basis of the parties' past practice and to a lesser extent on the basis of the overall context in which the provisions appear, the appropriate interpretation of the disputed contract provisions, is that the District has the right to require teachers to work in excess of the normal 190 day contract.
>
> (3) There is nothing in the record to suggest that the Employer has acted unreasonably, in requiring extended teaching contracts within the Practical Nursing faculty.
>
> (4) Although it is impossible to make individual determinations at this time, on the contractual propriety of any scheduled time-off during February and March of 1983, affected teachers working under extended contracts should not be detailed-off for the purpose of avoiding the payment of additional compensation required by Article VIII, Section 6(c).

His final award was as follows:

> (1) The requirement of extended contracts by the District does not violate the collective bargaining agreement.

(2) It is impossible at this time to determine the contractual propriety of changes in the teaching schedule for affected teachers, in February or March of 1983. Variations from the teaching calendar in connection with extended contracts, would not violate the collective bargaining agreement if undertaken for the purpose of reasonably meeting bona fide educational needs; variations unilaterally undertaken by the District for the purpose of avoiding the payment of the additional compensation requirements of extended contracts, would violate the collective bargaining agreement.

(3) Subject to the above, the grievance is denied.

The Examiner found that on February 3, 1984, Sandra Anderson filed an individual grievance which alleged that the District had violated the labor agreement when it required her to work 236 days rather than 190 days. This grievance further alleged that the District acted in an arbitrary and capricious manner by not having a uniform policy dealing with extended contracts. This grievance also alleged that instructors in the Cosmetology Department had filed and settled a grievance similar to this matter in November, 1981, which established the meaning of the work year as it affects the Cosmetology Department. The Union processed Anderson's grievance through the grievance procedure and attempted to submit the matter to arbitration, but the District refused to submit the grievance to arbitration on the grounds that the Petrie award governed the Anderson grievance. In response, the Union claimed that res judicata should not apply because there were significant differences of fact between the Petrie award and the Anderson grievance including differences in instructional areas, length of extended contracts and a difference in the past practice of the department involved. The Union also asserted that the Anderson grievance contained an issue as to the reasonableness of the District's action which allegedly did not exist in the Petrie award.

The Examiner found that the parties' contract language and issue in the two cases were identical. She also found that no material difference of facts existed between the Petrie award and the Anderson grievance. This was because she concluded Petrie considered evidence of the District's practice of extended contracts in instructional areas other than practical nursing in his award. The Examiner also considered the length of the extended individual contract in the two cases to be an insignificant fact. She also decided that nothing in the settlement of the 1981 cosmetology instructor's grievance revealed any type of waiver or deviation by the District from its position that it had the right to require extended contracts of the cosmetology instructors. Thus, she found no material difference of fact with respect to past practice in the two cases. Finally, the Examiner decided that the issue of the "reasonableness" of the District's action in requiring an extended contract of an instructor was addressed by Petrie in his award. She therefore concluded that the Petrie award was res judicata of the interpretation of Article III, Sec. 1(a) and (c)1-5 and Article VIII, Sec. 6 of the parties' contract as to the District's authority to require extended individual teaching contracts. The Examiner concluded that the District did not violate Sec. 111.70(3)(a)5, Stats., by refusing to submit the Anderson grievance involving an extended individual teaching contract to arbitration. She also concluded that Anderson and the Union did not violate Sec. 111.70(3)(b)4, Stats., by failing to comply with the Petrie award and filing the Anderson grievance inasmuch as they had a good faith basis for believing the Anderson grievance differed from the facts in the Petrie award.

The Examiner then dismissed both the complaint and the counter-complaint and denied their requests for costs and any additional monetary remedies.

PETITION FOR REVIEW

The Union timely filed a petition for Commission review challenging the Examiner's dismissal of the Union's counter-complaint, and it is to the issues raised in that petition alone that we are addressing ourselves on this review, as noted in Paragraph C of our Order, above.

The Union argues that Finding of Fact No. 12 should be revised to reflect that material differences of fact and issue exist between those before Arbitrator Petrie and those stated in the Anderson grievance. In support thereof, the Union notes the following variation of facts between the 2 cases:

(1) The Petrie award involved an involuntary assignment of work for 8 days while it is 46 days in the Anderson grievance.

(2) In the Anderson grievance, unlike the Petrie award, there was a prior grievance settlement the implication of which was to allow teachers to establish their summer vacation schedules at their option.

(3) In the Anderson grievance, unlike the Petrie award, there was a specific allegation of arbitrary and capricious conduct by the employer in the exercise of its discretion.

(4) There is nothing in the record of the Anderson grievance, unlike that before Arbitrator Petrie, to demonstrate that the District's conduct toward Anderson followed sound educational policies and practices.

(5) Unlike the Petrie award, the District here admitted the existence of the following practice in the Cosmetology Department prior to the summer of 1983: "The teachers have been able to set their own time off over the summer . . ."

(6) The District admitted that in the event Ms. Anderson believed that the assignment to her of work beyond the 190 days was not done in a reasonable manner or was instead done in an arbitrary or capricious fashion then the means of resolution of the problem would be through the grievance procedure.

It is argued these differences in fact are material. The Union focuses primarily upon Anderson's allegation that the District acted in an arbitrary and capricious manner because this allegation was not contained in the Petrie award in the stipulated 3-part statement of the issue nor is there an "award" applicable to such an issue. It is submitted that Arbitrator Petrie's discussion on this point is dicta. Therefore, the Union contends any evidence in the Anderson grievance which bears upon the issue of the District's arbitrary conduct is materially different from any "material" evidence in the Petrie matter. The Union emphasizes that in the Anderson grievance, unlike the Petrie award, the question of the District's arbitrary and capricious conduct in requiring a 236-day contract necessarily takes into consideration the consequence of its conduct such that an employe is effectively precluded from a vacation during the summer months.

The Union also contends that the Examiner erred in her second conclusion of law that the Union was barred as a matter of res judicata from pursuing the Anderson grievance to arbitration. According to the Union, the issue in the Anderson grievance is not whether the District has a right to schedule cosmetology instructors in excess of 190 days, since that issue was clearly decided in the District's favor in the Petrie award. Instead, the issue in the Anderson grievance is framed by the Union as follows:

> Did the District violate its contractual agreement to exercise its management rights in a manner which is not arbitrary or capricious when it required the grievant to execute an individual teaching contract of 236 days despite a longstanding past practice and grievance settlement allowing her to establish her vacation schedule while accomodating the District's need for an extended teaching year? .

Consequently, the Union submits that the refusal by the District to proceed to arbitration in this case constitutes a violation of Sec. 111.70(3)(a)5. Alternatively, the Union requests that under the principles established by Wisconsin Public Service Corp., 2/ rigid scrutiny requires that the arbitrator and not the Commission or its duly appointed examiners determine whether the Petrie award is to given res judicata effect.

2/ Dec. No. 11954-D (WERC, 5/74).

The District opposes the Petition for Review on the grounds that the Examiner correctly applied res judicata to the Anderson grievance since this case was previously tried before Arbitrator Petrie. It argues the Union should not be allowed to relitigate the matter because there is an identity of parties and no material difference of fact or issue exist between the Petrie award and the present Anderson grievance. The District maintains that the Petrie award addressed the points now being raised by the Union in this grievance (i.e., he found an unbroken past practice whereby the District required extended teaching contracts in departments such as cosmetology where there were bona fide educational reasons to justify the additional teaching and he also addressed the issue of the reasonableness of the District's action in requiring extended contracts). Thus, the District argues, it did not commit a prohibited practice by refusing to proceed to arbitration on the Anderson grievance.

DISCUSSION

Established Commission caselaw principles exist concerning the circumstances in which a prior grievance arbitration award relieves a party from an otherwise-existing obligation to submit a current grievance to contractually mandated grievance arbitration. Res judicata effect will be given the prior award (relieving the obligation to arbitrate the grievance) where the subsequent grievance is shown to share an identity of parties, issues and material facts. 3/ However, even where the parties and the issues are the same, a prior award will not be a defense to an obligation to arbitrate as regards a grievance that involves materially different facts than that leading to the prior award. 4/

Since the same employer and union were involved in both, the instant case turns on whether there are differences in the issues and material facts between the Petrie award and the Anderson grievance sufficient to warrant requiring the District to arbitrate some or all aspects of the Anderson grievance.

It is clear that the Petrie award establishes that the District has the contractual right to require employes to work in excess of 190 days subject to limits of reasonableness of exercise not fully delineated in that award. The Union acknowledges as much in its brief, though the grievance on its face and as initially processed by the Union could fairly have been understood by the District to be, in part, an attempt at relitigation of that general question. In this review, the Union argues that the Anderson grievance raises the following issues not dealt with in the prior award because it asserts that the particular exercise of that previously recognized right was arbitrary and capricious in that it: failed to take into consideration Anderson's vacation plans for the following summer; it failed to accommodate any such plans; it foreclosed any possibility that it could consider or accommodate such plans by giving Anderson a choice of either accepting a 236-day contract or termination; and it failed to consider or to conform its conduct to a prior grievance settlement in the Cosmetology Department which specifically allowed for such consideration and accomodation.

In our view the Anderson grievance presents two general issues: first, whether the District has any right to require an extended contract of an employe in the Cosmetology Department; and second whether the District exceeded its contractual rights in making the instant assignment to Grievant Anderson.

In our opinion, the conclusions reached in the Petrie award concerning the

On the other hand, the second general issue area noted above was not conclusively addressed by the Petrie award. Although Petrie decided in his award that the District had not been shown to have acted unreasonably in that case in its scheduling of certain members of the practical nursing faculty, he did not thereby make that determination as regards a fact situation that is materially the same as that in the Anderson grievance. As noted by the Union, the issue of whether the District exceeded its contractual rights (as previously recognized in the Petrie award) with regard to Anderson could turn on her employment circumstances, the information communicated to her at the time she was required to work 236 days, and the nature of past accomodations of employe vacation preferences, especially in the Cosmetology Department. Since most of these facts were not involved in the Petrie award, we conclude that material differences of fact exist between the Petrie award and the Anderson grievance as regards this latter issue area.

Accordingly, we have concluded that the Petrie award is not res judicata as regards whether the District exceeded its contractual rights previously recognized in the Petrie award by making the particular assignment to Anderson at issue in her grievance. Of course, the arbitrator who is ultimately selected to hear and decide that issue will be free to look to the Petrie award for guidance.

Given under our hands and seal at the City of Madison, Wisconsin this 26th day of November, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner