STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant, vs. SCHOOL DISTRICT OF LADYSMITH-HAWKINS, Respondent.	Case 18 No. 41582 MP-2183 Decision No. 25934-A

Appearances:
Mulcahy & Wherry, S.C., Attorneys at Law, 715 S. Barstow, Eau Claire, Wisconsin 54702-1030, by Mr. Stevens L. Riley, appearing on behalf of Respondent.
Mr. Alan D. Manson, Executive Director, Northwest United Educators, 16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of Complainant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators, hereinafter Complainant, filed a complaint on January 17, 1989, wherein it alleged that the Ladysmith-Hawkins School District, hereinafter Respondent, had violated Secs. 111.70(3)(a)1, 4, and 5, Wisconsin Statutes, by illegally interfering with the protected rights of municipal employes. The Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(05), Wisconsin Statutes. A hearing was held in Ladysmith, Wisconsin on March 30, 1989, at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed post-hearing briefs. The last brief was filed on June 6, 1989, at which time the record was closed. The Examiner having considered the evidence and arguments of Counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Northwest United Educators, hereinafter Complainant, is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., and has its principal offices at 16 West John Street, Rice Lake, Wisconsin 54868.

2. That the Ladysmith-Hawkins School District, hereinafter Respondent, is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., and has its principal offices at 1700 Edgewood Avenue East, Ladysmith, Wisconsin 54848.

3. That at all times material hereto, Respondent has been the exclusive collective bargaining representative for all certified teaching personnel and librarians employed by the Ladysmith-Hawkins School District, excluding the Administrator, Principals, Director of Students Services, and Assistant Principals; the Complainant and Respondent were parties to a collective bargaining agreement which, by its terms, commenced on July 1, 1986 and continued in full force and effect until June 30, 1988; the Complainant and Respondent are parties to a collective bargaining agreement, which, by its terms, commenced on July 1, 1988 and continues in full force and effect through June 30, 1990; the two collective bargaining agreements have contained the following language:

ARTICLE III, MANAGEMENT RIGHTS CLAUSE

Section B

> This written agreement between NUE and the School Board constitutes the entire agreement between said parties on all matters pertaining to wages, hours, and working conditions. All matters not specifically covered in this written agreement are and shall remain exclusively the prerogative of the School Board for the term of the agreement and NUE waives and gives up any right to negotiate further on wages, hours and working conditions for the period covered by this agreement.

ARTICLE XIV, CALENDAR

. . .

The number of days on the individual teacher's contract will be equal to the number of days on the calendar found in Appendix E.

ARTICLE XVI, SUMMER EMPLOYMENT

Section A

The Board will endeavor to allow for the development of curriculum for continued quality education within the Ladysmith-Hawkins School District by hiring teachers to write or rewrite curriculum during the summer at $90 per day. The teacher must indicate to the Superintendent by May 1 that he will work and will at this time state the length of time that he will work. The time not to exceed three weeks. The time need not run consecutively.

Payment may be pro-rated throughout the ensuing school year's checks or received as one sum within 30 days after completion of summer employment--the choice to be made by the teacher. Payment is to be made after certification of work completion by the principal.

APPENDIX A, SALARY SCHEDULE

. . .

B.All salaries on this schedule will be prorated according to the ratio appearing on the teacher's personal contract.

. . .

D.All overtime pay will be itemized on the check stubs.

. . .

Appendix E of each bargaining agreement has contained the calendar for a 186 day school year; each collective bargaining agreement has also contained a grievance procedure which provides for the final and binding arbitration of grievances; Complainant Representative Marinucci and Respondent Representative Bobbe agree that Appendix A, Paragraph B, governs the payment of the District's part-time teachers who teach during the regular school year and permits Respondent to "dock" teachers who have taken unpaid time-off during the school year; the language of Paragraph's B and D of Appendix A do not require Respondent to pay bargaining unit employes who teach summer school at their individual daily rate; the 1986-88 and 1988-90 collective bargaining agreements are silent on the issue of summer school pay; prior to 1988, Respondent did not offer a summer school program; bargaining unit members, however, had performed work during the summer; guidance counselors had performed scheduling work during the summer and the band instructor had provided individual instruction; drivers' education instructors, whose exact duties were not revealed at hearing, also performed summer work; some of these teachers, such as the drivers' education instructor, were paid a flat rate, others were paid 80 per cent of their daily rate; the band instructor has been paid 100% of his daily rate to provide individual lessons during the summer; individual lessons are also a part of the band instructor's normal teaching duties during the school year; it is not evident that the summer work performed by other bargaining unit employes differs in any material respect from their regular school year duties; and that bargaining unit members who have performed summer curriculum work have been paid at the contractually provided rate of $90/day;

4. That prior to February 18, 1988, Erland S. Lindelof, Respondent's Summer School Director, distributed the following memo to members of Complainant's bargaining unit:

SUMMER SCHOOL 1988

TO: Prospective Summer School Teacher's

FROM: Erland S. Lindelof, Summer School Director

If you are interested in teaching Summer School please complete and return to me by February 18, 1988.

Thank you.

(Summer School is tentatively scheduled for 1/2 day Monday, Tuesday, Wednesday, and Thursday for six weeks beginning June 13, 1988.)

Circle One: Remedial (Language Arts Reading Math) Enrichment

Course Title: _____ Grade Levels: _____

Course Description: _____
_____
_____

Name: _____

at the time that this memo was distributed to bargaining unit members, the Complainant and Respondent were in the process of negotiating their 1988-90 collective bargaining agreement; bargaining unit members who expressed an interest in teaching summer school received the following memo:

TO: SUMMER SCHOOL STAFF

FROM: ERLAND LINDELOF

DATE: APRIL 11, 1988

CONCERNING: INFO ON SUMMER SCHOOL

> There will be an organizational meeting on Wednesday, April 13 at 4:00 P.M. in Bonnie Titera's room at Ladysmith High School to discuss summer school. You have received this notice because you expressed an interest in working this summer.

AGENDA

Time Line for Summer School

Course Descriptions

Money news --- amount of pay, number of checks, contract

Tentative teaching assignments

Lindelof met with bargaining unit members on April 13, 1988 to discuss the summer school program; Lindelof informed the bargaining unit members, including Joe Baye, that each would be paid $90/day for teaching summer school; Respondent's decision to pay $90/day was determined without consultation with Complainant's Representatives; at that time, Joe Baye, Complainant's Grievance Chairman, advised Lindelof that it was a violation of the parties' collective bargaining agreement to pay summer school teachers less than their daily rate; while Baye was discussing the summer program with Lindelof, District Administrator Bobbe joined the discussion; Baye informed Bobbe that Complainant wanted teachers to be paid their daily rate for summer school; contrary to the recollection of Bobbe, Rod Marinucci, Complainant's Chief Negotiator, did not attend the April 13, 1988 meeting and did not participate in any of the April 13, 1988 discussions between Baye, Bobbe and Lindelof; on the evening of April 13, 1988, Complainant's bargaining unit members met to ratify the parties' 1988-90 collective bargaining agreement; at that time, Baye informed the attendant bargaining unit members that he had been advised that Respondent intended to pay bargaining unit members $90/day to teach summer school; Baye further informed the attendant bargaining unit members that the $90/day payment was in violation of the parties' labor contract because the contract required that the bargaining unit members be paid at their daily rate; during the meeting, Marinucci advised bargaining unit members not to volunteer for summer school unless they received their daily rate; Complainant's membership ratified the 1988-90 contract at the April 13, 1988 ratification meeting; the agreement was executed on April 14, 1988; Baye and Lindelof agreed to meet to discuss the summer school program; when Marinucci learned of the meeting, he decided to attend the meeting; when Bobbe learned of Marinucci's involvement, he decided to attend the meeting; Marinucci and Baye recall that the meeting occurred on April 14, 1988; Bobbe recalls that the meeting occurred approximately one week later; at the meeting, Baye and Marinucci advised Lindelof and Bobbe that it was improper to pay the summer school teachers at less than their daily rate and that it was improper to present individual contracts to teachers which had not been negotiated with Complainant; at some point in time between April 13, 1988 and the latter part of May, 1988, Bobbe, in consultation with Respondent's Board of Education, decided to increase summer school pay to $13.33/hour, which is equivalent to a daily rate of $100; according to Bobbe, the increase in the daily rate was an attempt to reconcile the differences between Complainant's and Respondent's position on the summer school wage rate; Bobbe did not consult with Complainant's representatives on the $100/day rate before the Board of Education decided to increase the summer pay from $90/day to $100/day; following this decision of Respondent, Bobbe met with Marinucci to advise Marinucci of the decision to pay $100/day; in response, Marinucci indicated that the increase would not be sufficient to persuade bargaining unit members to teach in the summer school program; Bobbe modified the District's regular individual employe contract to produce the following document:

SUMMER 1988

PROFESSIONAL EMPLOYEE CONTRACT

IT IS HEREBY AGREED, between the Board of Education of Ladysmith-Hawkins Systems, Joint District Number One, et al, and a qualified teacher pursuant to the Statutes of the State of Wisconsin, that said teacher is to teach:

_____ _____

_____ _____

_____ _____

TOTAL _____

and perform such other duties as are mutually agreed upon by the teacher and the Board of Education for ____ Hours commencing on ____

JUNE 9, 1988

Payment will be two equal installments on July 5 and July 20.

This contract is subject to all provisions of any Master Contract and/or Salary Document agreed upon by the Board of Education and the Ladysmith-Hawkins Education Associ-ation. Termination of this contract may be affected by either party upon 30 days written notice. This contract is not valid unless signed and returned by said teacher as per section 118.22 of the Wisconsin State Statutes. The Sick Leave Provision does not apply.

_____

_____ _____

Teacher's Signature Social Security Number

_____ _____

Date of Birth

_____ _____

Summer Address Teaching Address

This contract is executed in duplicate. The original is intended for the Board of Education and the carbon copy for the teacher.

this document differs from the regular individual teaching contract in that the sentence "The Sick Leave Provision does not apply" has been added; the rate of $13.33/hour was entered on the individual contracts of the seven bargaining unit members who volunteered to teach 1988 summer school; the remaining vacancies, i.e., six, were filled by non-bargaining unit members; 1988 summer school began on June 9, 1988 and extended into July, 1988; and that for some of the bargaining unit members, the $13.33/hour wage rate provided the bargaining unit member with a greater wage than would have been provided by the payment of their daily rate.

5. On June 28, 1988, NUE Representative Alan Manson sent a letter to the superintendent of Ladysmith-Hawkins School District, William Bobbe, which stated as follows:

> It has come to the attention of NUE that the District is conducting a summer school during which professional employes are under contract to the District. In connection with this activity of the District, NUE has several important questions. These questions are to determine whether or not the District's actions in setting up the summer school and in hiring the employes and in paying them are consistent with the NUE contract and the obligation under Wisconsin law to honor the terms of that contract and Wisconsin Statute 111.70.
>
> NUE has obtained a copy of the Summer School-88 pamphlet which was issued by the District. Included in that pamphlet is Appendix C "Summer 1988 Professional Employee Contract".

In connection with that professional employee contract, NUE has the following questions:

> What procedure was used by the employer in contacting existing bargaining unit members for potential summer school employment? During contact with potential

summer school employes did the District indicate what the salary would be for the summer school work? How did the District determine what the salary would be for the summer school work? Did any of the bargaining unit employes, who were asked by the District if they were interested in working in the summer school, indicate that they would not work in the summer school because of the District proposed wages for the summer school? What wages are being paid to those bargaining unit employes who have been working for the District in the summer school program? Are there professional employes working in the summer school program who are not members of the regular teaching staff (members of the NUE bargaining unit)?

It appears to NUE that the possibility exists that the District has been illegally bargaining with individuals relative to their summer school employment and wages. Depending upon the response to this letter which is provided to NUE (please send your response to me at the NUE office), NUE reserves the right to file a complaint of prohibited practices should NUE determine that the actions of the District in this matter have been violative of Wisconsin Statute 111.70.

shortly after receiving this letter, Bobbe prepared a response which he forwarded to Respondent's attorney for review; several times between June, 1988 and November, 1988, Manson telephoned Bobbe to ask when Manson would receive a response to his June 28, 1988 letter; Manson and Bobbe agree that Manson was advised that the matter had been referred to Respondent's attorney and that a reply would be forthcoming; Bobbe, unlike Manson, recalls that during these telephone conversations, Manson asked questions relating to the summer school program; Bobbe recalls that he answered all of the questions asked by Manson; according to Bobbe, the information sought by Manson was a matter of public record, had been made available to teachers, and, thus, the information sought by Manson could have been provided by his own bargaining unit representatives; as Manson recalls the telephone conversations, there were no questions on the details of the summer school 1988 pay rates or other discussions between the parties; on November 28, 1988, Bobbe sent the following letter to Manson:

Dear Mr. Manson:

In response to your letter of November 19, 1988 inquiring about the ECIA I program at the Middle School, Hawkins and High School, I will submit to you the following information:

- The program is computerized and provides individualiz-ed direct instruction to all students.

- The maximum number of students is small: middle school 8 and high school 6.

- A full time instructional aide is provided at each site - middle school, high school and Hawkins.

- The distribution of teacher time is as follows: High school 9-12 hours weekly, Middle school 19-21 hours weekly and Hawkins 5 hours weekly.
- Federal audits in similar programs support the student teacher ratio and schedule.
- The number of children served is as follows: Hawkins 17, Middle 45 and High school 62.

Some of these are duplicates. Eligibility is basically scoring below the 40th percentile on National Achievement testing.

- The key factor is that the certified teacher must meet with each student weekly to review their progress and to chart future work assignments.
- Ladysmith is one of the two high school ECIA I programs in CESA's 10, 11 and 12.

It is our conclusion that we meet federal guidelines and minimum requirements for professional staffing. If there was a problem, our solution would be the lay off of an aide and program reduction. So in the interest of keeping the present staff, I hope you will continue to support us in our educational efforts. Sixty-two students would lose the specialized help they are presently receiving.

In regard to your letter of November 28, 1988, I am sending a copy of the final budget information. If you would like additional information, please call

> Mr. Erland Lindelof, Director of Pupil Services. Mr. Lindelof was the Director of the Summer School. If my memory serve (sic) me, the teachers made more money at the $13.33 per hour than they would have on a per diem salary schedule basis.

until the date of hearing, Bobbe was under the impression that Respondent's attorney had provided Complainant with a response to Complainant's letter June 28, 1988; the focus of the 1988 summer school program was two-fold, i.e., a remedial program and an enrichment program; the remedial program primarily involved teaching students what they had failed to learn during the previous school year; the enrichment program primarily involved exposing students to new programs such as computer science; and that, in the summer school program, unlike the school year program, each class had a student volunteer and a parent volunteer, as well as a teacher.

6. Complainant did not make any demand to bargain the issue of summer school pay during the 1988-90 contract negotiations and that the issue of summer school pay was not addressed by either party at any 1988-90 contract negotiation session; nor did either party propose any modification to the language of Article XVI or to the language of Paragraphs A-D of Appendix A of the labor contract; prior to April 13, 1988, Complainant representatives and Respondent representatives did not have any discussions concerning the 1988 summer school pay rate; the terms pro-rated salary, per diem, and daily rate all refer to the amount obtained by dividing the individual teacher's school year salary by 1/86; at the time of the April 13, 1988 meeting, Bobbe had been advised by Respondent's legal counsel that Respondent did not have an obligation to bargain with Complainant on the issue of summer school pay; during discussions concerning summer school pay, Bobbe informed Complainant's representatives that Respondent did not have an obligation to bargain the 1988 summer school pay; neither Bobbe, nor any other Respondent representative, refused to bargain the issue of summer pay within the context of negotiations on the 1988-90 contract; according to Bobbe, one of Complainant's spokespersons admitted that he did not believe that Respondent had an obligation to bargain the summer school rate; Bobbe did not identify this spokesperson by name; Bobbe considers the discussions with Complainant's representatives Baye and Marinucci to be a form of negotiations in that the discussions were not unlike those which resulted in the settlement of the parties' labor contract; Marinucci considers the meeting involving Marinucci, Bobbe, Baye and Lindelof to have been an impromptu bargaining session in that the parties "ended up bargaining"; while Marinucci may have said that the parties should get together again, Marinucci understood that the positions of the parties were "set in stone"; Marinucci acknowledges that the parties occasionally engage in "door knob" discussions in which they negotiate informally and on an impromptu basis; Marinucci and Bobbe agree that, during all discussions on the issue of summer school pay, Complainant's representatives consistently maintained that bargaining unit members should be paid their daily rate, while Respondent's representatives consistently maintained the position that they should be paid a flat rate; during the course of the summer pay discussions, Bobbe advised Complainant's representatives that the major point of contention was Complainant's insistence on the daily rate concept, rather than the specific amount of money generated by the Complainant's position; according to Bobbe, all of the summer school teachers performed the same function and, therefore, there was no justification to vary wages on the basis of the individual teacher's years of experience; it is Bobbe's opinion that Respondent's Board of Education would not have agreed to pay summer school teachers at their daily rate and, thus, payment of such a rate would have jeopardized the summer school program; Bobbe was approached by individuals who taught in the 1988 summer school program to discuss the program; the main item of discussion was wages; and that the record fails to establish the specific nature of Bobbe's remarks to these individuals.

Upon the basis of the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The provisions of the parties' 1986-88 and 1988-90 collective bargaining agreement do not require Respondent to pay bargaining unit employes who teach summer school at their individual daily rate and, thus, Respondent did

not violate Sec. 111.70(3)(a)5, Stats., when it did not pay bargaining unit members who taught 1988 summer school at their daily rate.

2. Respondent did not violate the provisions of either the 1986-88 collective bargaining agreement or the 1988-90 collective bargaining agreement when the Respondent paid bargaining unit employes who taught 1988 summer school at the rate of $13.33/hour and, thus, the payment of such a rate is not violative of Sec. 111.70(3)(a)5, Stats.

3. The wage rate to be paid bargaining unit members who teach summer school is a mandatory subject of bargaining and that, during the term of the parties' 1986-88 agreement, the parties bargained to impasse on the issue of 1988 summer school wages.

4. The language of Article III, Section B, contained in both the 1986-88 and the 1988-90 collective bargaining agreements, is a clear and unmistakable waiver of Complainant's statutory right to bargain the issue of summer school pay during the term of either contract.

5. Respondent's establishment of the 1988 summer school wage rate of $13.33/hour does not violate either Sec. 111.70(3)(a)1 or Sec. 111.70(3)(a)4, Stats.

6. Respondent did not violate either Sec. 111.70(3)(a)1 or Sec. 111.70(3)(a)4, Stats., when Respondent's representatives, Bobbe and Lindelof, informed individual bargaining unit members of the 1988 summer school wage rate which had been established by Respondent.

7. Respondent did not violate Sec. 111.70(3)(a)1 or Sec. 111.70(3)(a)4, Stats., when its representative, Bobbe, informed Complainant's representatives that Respondent did not have to bargain with Complainant on the issue of the 1988 summer school pay.

8. Respondent did not violate Sec. 111.70(3)(a)1, 4, or 5, Stats., when its representative, Bobbe, issued individual 1988 summer school contracts to bargaining unit employes which indicated that the bargaining unit employes would be paid at the rate of $13.33/hour.

9. Respondent has not been shown to have violated any provision of the Municipal Employment Relations Act.

Upon the basis of the above Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER 1/

IT IS ORDERED that the Complainant in the instant matter be, and the same hereby is, dismissed in its entirety.

1/ 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

Dated at Madison, Wisconsin this 4th day of October, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Coleen A. Burns, Examiner

(Footnote 1/ continued on page 9)

1/ continued

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

Complainant argues that Respondent has illegally interfered with the protected rights of municipal employes in violation of Wisconsin Statutes 111.70(3)(a)1, 4, and 5. Respondent denies that it has violated these statutes, or any other provision of the Municipal Employment Relations Act.

POSITIONS OF THE PARTIES

Complainant

There are two primary issues in this case. The first is whether or not Respondent has violated the terms of its collective bargaining agreement with NUE by paying certain bargaining unit employes wages for summer school teaching in 1988 which were not consistent with the Appendix A Salary Schedule in the negotiated agreement. An integral part of Appendix A is the provision that the salaries from the schedule would be prorated according to the ratio appearing on a teacher's personal contract. As Respondent acknowledges, it established a daily and hourly rate for most, but not all, summer school teachers in 1988, and that it applied this Respondent generated wage rate (which was not based on the salary schedule) to the individual teachers recruited for the new summer school program. The personal contracts of the teachers who worked in the 1988 summer school program contained the statement that the contract was subject to all provisions of "any Master Contract and/or Salary Document agreed upon between the Board of Education" and the teacher Association. By ignoring the provisions of Appendix A of the parties' collective bargaining agreement, Respondent has violated Wisconsin Statute Sec. 111.70(3)(a)5.

The second issue is whether or not, by its various actions surrounding the establishment and implementation of a unilaterally generated wage rate for teaching in the 1988 summer school, Respondent has interfered with the rights of represented employes guaranteed by the Municipal Employment Relations Act. Also in question, is whether Respondent has, by dealing with individuals directly on summer school wage matters, refused to bargain collectively with NUE, which has been recognized by the Board as the exclusive bargaining representative for the certified teaching personnel.

If the Examiner finds that Respondent's actions constitute a violation of the provisions of the collective bargaining agreement, then this case is significantly simplified with the resolution being that the Respondent should be ordered to stop violating the contract. Disputes regarding refusal to bargain are secondary since the establishment of a violation of the terms of the collective bargaining agreement requires Respondent to recognize those terms.

If the Examiner concludes that there has not been a violation of the collective bargaining agreement, then the Respondent's refusal to bargain, as characterized by its direct approach to individuals, its direct statement to NUE representatives that the District does not have to bargain summer school wage rates, and its use of the individual professional employe personnel contracts, must be found to be in violation of Sec. 111.70(3)(a)1 and 4, Wis. Stats.

Contrary to the argument of Respondent, the collective bargaining agreement does contain language specifically covering wage rates for summer school programs. The specific language is found in Appendix A, Parts B and D. The Appendix covers teaching above and below the standard school day and school year. This includes evenings, weekends, holidays and summer days. The salary schedule is specifically negotiated for all certified teachers in the bargaining unit as they perform their professional instruction in work with students, including instruction of students beyond the regular workday in the regular school year. This provision applies to all certified teachers, including the band instructor.

As the Respondent argues, witness Marinucci did testify that Appendix A, Paragraph B, referred to part-time teachers. Witness Marinucci, however, immediately followed this testimony with a statement that a teacher who works 187 days in a school year with 186 regular days will be paid 187/186 of the wage on a salary schedule. NUE agrees that Appendix A, Paragraph B, refers to part-time teachers. This language, however, does not apply only to part-time teachers. The record is devoid of sufficient information on the other "various" teachers referred to by Superintendent Bobbe in his testimony concerning the "flat daily rate" to show whether or not these teachers were paid in accordance with Appendix A, Part B.

The language and schedule in Appendix A, as well as the practices of paying professional employes pro-rated salary schedule wages for summer teaching, and since 1986, the $90 per day for summer curriculum writing (without any responsibility for supervising students), are absolutely clear and apply to the teaching wages of bargaining unit members for the 1988 summer school program. For the District to succeed in arguing that it has the

authority to set the summer school wages without negotiations with NUE because NUE has waived it right to negotiate these wages, the District must show that there is a specific, clear, and unambiguous written waiver by NUE of its statutory right to bargain the teaching wages of the represented employes. Since there is no such clear waiver, and, further, the professional employes salaries for teaching are negotiated and set forth in Appendix A, and have been applied on a pro-rated basis for employes who work both less and more than a standard school year, the Respondent's case must fail.

To argue that the "zipper clause" relieves the District of the obligation to bargain the wages of all teaching not specifically addressed in the agreement, including any new courses created by Respondent, is ridiculous.

At all times material hereto, NUE's official and clear reaction to Respondent's announcement that it intended to pay summer school wages based on a flat daily rate was that to do so would be to violate Appendix A, including Part B, of the collective bargaining agreement, which provides for the proration of the salary schedule wages to match the ratio of the teacher's employment. When the NUE ratification meeting took place, NUE leaders told NUE members that the $90 per day wage, while appropriate for curriculum writing summer work, would be improper for summer school teaching. NUE members were further advised that it would be improper for the District to negotiate with individuals, since the Respondent was required to pay the salary schedule wages. At that time, NUE members were advised not to bargain individually with the Respondent and to refrain from volunteering for summer school teaching work in an effort to cause the Respondent to accept NUE's position that the regular salary schedule wages were required.

The following day, NUE Grievance Representative Baye and NUE Negotiator Marinucci met with Respondent Representatives, Lindelof and Bobbe. At that meeting, the District claimed that it did not have to negotiate the summer school wages with NUE. NUE responded that it would be improper to pay anything but pro-rated regular salary rates to bargaining unit employes for summer teaching, and that it would be improper to bargain with individuals over any other wage. Thereafter, Superintendent Bobbe, decided, with School Board approval, and without discussions or bargaining with NUE, to pay wages for the 1988 summer school program based on $100 per day ($13.33 per hour). This rate was in fact paid to bargaining unit employes who did work in the 1988 summer school program. However, at least one other bargaining unit employe, the Band Instructor, was receiving regular pro-rated salary schedule wages for teaching students that summer.

Contrary to the contention of Respondent that they "proposed" a pay rate of $90 per day at the meeting on April 13, 1988, the record demonstrates that Respondent announced the pay rate, and did not make a bargaining proposal. Superintendent Bobbe's testimony clearly demonstrates that Respondent had no intention of bargaining that rate, believed that it had no legal obligation to bargain that rate, and in fact did not bargain that rate. Respondent's attempt to characterize these meetings as significant bargaining sessions is a flimsy attempt to justify its substantial and admitted multiple conversations with individuals of the bargaining units on summer school teaching wages with no parallel or simultaneous contact with NUE negotiating representatives.

It is noteworthy that, during the negotiation of the 1988-90 contract, which took place during a time in which Respondent was in the process of examining the potential for a summer school program, neither the District nor NUE brought summer school wages to the bargaining table. It is understandable why NUE did not do so, given its position that both the language of Appendix A and District practices apply to teaching by bargaining unit members during the summer. The fact that the Respondent waited until only hours before the contract ratification vote to announce its intention to pay a summer school rate other than required by the contract, provides an additional explanation as to why NUE had no reason to believe that summer school wages should have been a subject of negotiations prior to April 13, 1988.

Upon examination, the enrichment or remedial conditions cited by the Superintendent as a justification for distinguishing the summer school wages from the regular school day wages is without merit. During the regular school day, teachers in Title programs and other special education programs are involved in remedial learning, have low teacher/pupil ratios, and have a teaching aide present. The Band teacher, who taught individual students in the summer, is very likely engaged in either enrichment or remedial work and certainly is teaching with a low teacher/student ratio. Likewise, the Superintendent's reliance on paying what he characterized as "equal pay", i.e. a flat rate which, unlike the negotiated salary schedule, does not take into account professional training or experience, is without merit. If all that is required to unilaterally change the negotiated wage structure is to allege change in teaching conditions, then Respondent, if successful, would be encouraged to try to pay special education teachers different than "regular" classroom teachers during a school year.

A potentially confusing aspect of this case is that Respondent's violation of Wisconsin Statute 111.70(3)(a)1 and 4 does not take the form of refusing to formally negotiate with NUE on summer school wages. This is

because NUE did not ask to negotiate on that topic, maintaining the position that any action by the Respondent which resulted in summer school wages not being paid by the pro-rated formula in Appendix A constituted a violation of the collective bargaining agreement. Nonetheless, when NUE negotiators and grievance representatives heard of Respondent's intention to pay wages other than that required by the collective bargaining agreement, NUE representatives informed Respondents representatives that it would be improper for the Respondent to bargain with individuals over this matter.

NUE is interested in having the District realize that it cannot ignore its obligations under the terms of the collective bargaining agreement and Wisconsin Statute 111.70 as they apply to the primary issue of wages. Accordingly, NUE asks for a cease and desist order, with appropriate compliance notices being required, which force the District to stop ignoring Appendix A, and in particular, Part B thereof, of the collective bargaining agreement, and to apply that pay procedure to all teaching wages (except where specifically provided otherwise such as summer curriculum writing or specific extra-curricular activities). Such an order would require the Respondent to make whole any 1988 summer school teachers whose wages at $13.33 per hour were below what they would have been under the application of Appendix A of the contract. Similarly, the Respondent should be directed to make whole any teachers who have received less than the contractual wage rate for the 1989 summer school program. NUE, hereby, drops its claim for the remedy to make whole those employes who were not selected or who did not volunteer for the 1988 summer school as a result of their refusal to accept the unilateral wage established by Respondent. This claim is dropped in order to simplify potentially complex calculations and to avoid perhaps even further litigation over who is entitled to what for the summer of 1988. In view of the blatant manner in which the Respondent's representatives have disregarded the terms of the agreement and interfered with the protected rights of the represented employes, in particular the right of employes to have exclusive representation by NUE on matters of wages, NUE is hereby requesting that the District be required to pay the NUE's cost of litigating this matter.

RESPONDENT

Complainant has waived its right to bargain over the terms and conditions of the 1988 summer school employment. Both the 1986/88 and the 1988/90 collective bargaining agreements contain a zipper clause, which constitutes an express waiver by Complainant of the right to bargain over any matter not contained in the contract. The 1986-88 collective bargaining agreement contains no specific language covering summer school teaching nor is there any indirect or general reference to this subject. A review of the contract reveals that it contains no provisions relative to (1) any summer school conducted or to be conducted by the Respondent (2) the selection process to be followed in providing teachers for the same (3) the nature of the contract, if any, to be provided teachers selected for the program or (4) the salary to be paid for the program. The only remotely related provision is Article XVI, which obviously refers solely to summer work involving curriculum development.

If Complainant is to avoid the waiver contained in Section B of Article III of the parties' collective bargaining agreement and establish a basis for a finding that Respondent violated Sec. 111.70(3)(a)5, Wis. Stats., it must first establish that wages for teachers in the newly created summer program were "specifically covered" in said agreement. It attempts to do so by its claim that Paragraph B, following the Salary Schedule appended to the contract, constitutes specific reference to summer school wages. This argument is not only unsupported by any bargaining history, but it is discredited by Complainant's own witness, Marinucci, who admitted that the language in question was intended to refer to part-time teachers. Marinucci's testimony was corroborated by the testimony of Superintendent Bobbe. Part D refers to overtime, which has no relevance to the matter at hand. The ratio of employment appearing on the teachers' personnel contract refers to part-time school year teachers, not the summer school program. Complainant's allegation that the language in Sec. B of Article III is not sufficiently specific or explicit to constitute a waiver is without merit.

It is conceded by Respondent that summer pay for the band teacher was based upon the teacher's annual salary. This admission, however, has no bearing upon the instant case. As Superintendent Bobbe testified, there are other teachers, (drivers education for example) whose services continue beyond the end of the normal school year and who are paid on a flat daily rate, as were the 1988 summer school teachers. There is obviously no hard and fast rule with respect to the payment of summer school wages. Further, the summer school program is totally new and has no past practice connected with it.

Negotiations on the master contract were taking place throughout the entire period that the summer school program was being developed. Complainant had every opportunity to take this summer school matter to the bargaining table, but failed to do so. Under long established common law doctrines of waiver and estoppel, either may be established by action or inaction. In this case we have both. Complainant actively waived any right it had to bargain over summer school issues when it executed the 1986-88 and 1988-90 collective

bargaining agreements. Further, by failing to put the issue on the bargaining table when it had every opportunity to do so, it firmly nailed shut the door which now it feebly attempts to pry open with these charges.

While Respondent maintains that it had no duty to bargain with Complainant over the pay for summer school teachers, the record clearly establishes that such bargaining did, in fact, take place. The initial bargaining session occurred in connection with the organizational meeting called by Lindelhof on April 13, 1988. High School teachers who are local union leaders and not personally involved in the summer school program, attended the meeting and promptly and aggressively questioned the rate of pay proposed by Respondent. The NUE leaders very purpose in attending the meeting was to raise this issue. In the course of this initial discussion, each party presented to the other its rationale for its position. Immediately following this meeting, and prior to the Union's ratification meeting scheduled for that evening, the bargaining moved to another room and continued. As Complainant's witness Marinucci succinctly phrased it, we ended up bargaining.

Following the second meeting, for reasons unknown to anyone but its leadership and not explained at hearing, the bargaining unit ratified the 1988-89 bargaining agreement, even though it contained no reference to the summer school program. Apparently, rather than delay ratification and bargain over the issue, Complainant's leadership opted to instruct the bargaining unit to boycott the program. The next day, April 14th, a third meeting was held on the subject attended by Superintendent Bobbe and the same union representatives. Neither party was able to prevail upon the other to change his position at any of the meetings. A final meeting, between Superintendent Bobbe and Complainant's Representative Marinucci occurred in late May. At that time Dr. Bobbe offered to increase the daily rate by slightly more than ten percent, i.e., from $90 to $100 per day, in the hope that the Complainant could be persuaded to lift its boycott of the program. Marinucci, on behalf of the Complainant, rejected this offer out of hand, clearly indicating that the Complainant would settle for nothing less than its original demand for prorata pay based on annual salaries. Respondent respectfully submits that at this point, the parties had not only bargained over the issue of pay for teaching summer school, but that they had bargained to impasse.

Even if there were no impasse, Respondent's implementation of its final offer and its offer of employment to summer school teachers did not constitute a violation of any subsection of Wisconsin Statute 111.70(3)(a). Necessity required that the Respondent proceed with the summer school program after its final offer made to Complainant through Marinucci was rejected. Complainant's boycott had been a limited success. At the last minute, the program was still short of teachers. In order to preserve the program, Respondent sought and obtained nonbargaining unit teachers to fill these positions. This action was necessary if the program were to be held. Had the program not been implemented, about 130 children would not have had the remedial instruction that they badly needed.

While Complainant has made much of the fact that individual contracts were issued for the summer school program, the issuance of such contracts does not constitute a prohibited practice. These contracts contained express language providing that the contract is subject to amendment by a subsequent collective bargaining agreement. Complainants intransigence on the pay issue and its call for a boycott of the summer school program necessitated Respondent seeking instructors from outside the bargaining unit. Respondent was fully justified in doing so and did not commit a prohibited practice in connection therewith.

Complainant has the burden to prove that Respondent violated Secs. 111.70(3)(a)1 and 4, Wis. Stats., by negotiating directly with individual bargaining unit members. The exchange between Mr. Manson and Superintendent Bobbe quoted in the Respondent's brief, is totally inadequate to support the conclusion that the referenced discussions constituted "bargaining." In the first place, in uncontroverted testimony, Superintendent Bobbe stated that it was the individual teachers who initiated discussions and who brought up the subject of the summer school programs. Secondly, the fact that wages were mentioned in discussions, or even that they were the main item of discussions, falls far short of establishing that such discussions constituted "bargaining" with any individual teachers.

Complainant has admitted over and over again that it unequivocally rejected the method of pay proposed by Respondent and that its agents urged bargaining unit members to boycott the program. There can be no doubt that teachers were fully aware that there was a controversy between Complainant and Respondent concerning the summer school wages. Little wonder, then, that they approached the Superintendent for information regarding the program or that they, "God forbid," inquired as to how they would be paid. To inform them of Respondent's position on the issue was in no sense illegal. Given the fact that the individual bargaining unit members with whom the Respondent is alleged to have unlawfully bargained were not called by the Complainant to testify with respect to such conversations, it is respectfully submitted that the Examiner may reasonably infer that their testimony regarding their conversations with the Superintendent would have been unfavorable to the Complainant (Wisconsin Jury Instructions - Civil, No. 410).

In conclusion, Respondent has not interfered with, restrained or coerced its employes in the exercise of their right to bargain collectively through Complainant over the terms and conditions of summer school employment. Respondent has not refused to bargain collectively with the Complainant over the terms and conditions of summer school employment. The manner in which Respondent paid teachers for services performed during the 1988 summer session is not violative of any of the parties' collective bargaining agreements. Binding the collective bargaining unit employes to the terms and conditions of the 1986-88 and 1988-90 collective bargaining agreements, Complainant has effectively waived the right to bargain collectively over pay for teaching summer school in 1988 on behalf of such employes. Even though not obligated to do so, Respondent has bargained to impasse over these matters, at which time it was free to unilaterally implement the same. Even if the matters had not been bargained to impasse, necessity required the Respondent to proceed in the manner in which it did.

DISCUSSION

Section 111.70(3)(a)5

Under the provisions of Sec. 111.70(3)(a)5, Stats., it is a prohibited practice for a municipal employer, individually or in concert with others, to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes. Where, as here, the parties' collective bargaining agreement contains a grievance procedure which provides for the final and binding arbitration of grievances, the Commission does not automatically assert jurisdiction to hear a Sec. 111.70(3)(a)5 claim, but rather, exercises discretion to determine whether the claim should be deferred to the contractual grievance arbitration procedure.

In the present case, Respondent has not objected to the Commission asserting jurisdiction to determine the breach of contract claim, and the issue has been fully litigated at hearing. Under such circumstances, the Commission will assert jurisdiction to resolve the breach of contract claim. 2/

At issue is whether the provisions of Paragraph B and D of Appendix A require Respondent to pay bargaining unit members who teach summer school at their daily rate, i.e., 1/86 of their salary schedule pay. Paragraph D of Appendix A provides that "All overtime pay will be itemized on the check stubs." One may conclude from this provision that the parties recognize that overtime may be earned and paid. The provision, however, is silent as to the manner in which this overtime is to be earned and paid. The language of Paragraph D neither expresses, nor implies, a requirement that the summer school work in dispute be compensated as overtime. Nor does this provision otherwise require Respondent to compensate bargaining unit employes who perform such work at the employe's daily rate.

Paragraph B of Appendix A states that "All salaries on this schedule will be pro-rated according to the ratio appearing on the teacher's personal contract." Teacher salary schedules, such as the one contained on Appendix A of the parties' collective bargaining agreement, normally reflect salaries to be paid to full-time teachers for performing their normal teaching duties during the regular school year. Accordingly, the most reasonable construction of Appendix A, Paragraph B, is that the salaries subject to proration are regular school year salaries. Such a construction is also consistent with the language of Article XIV and Appendix E.

Article XIV provides that "The number of days on the individual teachers contract will be equal to the number of days on the calendar found in Appendix E." Appendix E contains the regular school year calendar of 186 days. Given these provisions, it is reasonable to conclude that the "teacher's personal contract," as that term is used in Appendix A, Paragraph B, refers to the contract which is issued for work performed during the regular school year. Thus, to the extent that a "ratio" would appear on such a contract, it would involve work performed during the regular school year. In summary, construing the language of the contract as a whole, the most reasonable interpretation of Appendix A, Paragraph B, is that the parties intended to provide a mechanism for pro-rating the pay of employes on the basis of time worked during the regular school year. Normally, such provisions are intended to provide a mechanism for paying part-time employes.

At hearing, Complainant Witness Marinucci and Respondent Witness Bobbe were in agreement that Appendix A, Paragraph B, governs the payment of part-time teachers and permits the Respondent to "dock" teachers for unpaid time off. Thus, the parties' mutual understanding of the implementation of the language of Appendix A, Paragraph B, supports the conclusion that the provision was intended to provide a mechanism for pro-rating salary on the basis of time worked during the regular school year.

2/ Jt. School District No. 1, Dec. No. 16753-A (Yaeger, 12/79).

While Complainant argues that there is a past practice of paying bargaining unit members who "teach" during the summer a daily rate equivalent to 1/86 of the employes' school year salary, this argument is not supported by the record. Prior to the instant dispute, the District did not have a summer school program. Accordingly, there is no practice with respect to payment for teaching in a summer school program. As the testimony of Bobbe reveals, there have been times when bargaining unit employes have performed work during the summer. Specifically, the band instructor has provided individual instruction and guidance counselors have performed scheduling work. Drivers' Education instructors have also performed summer work, although the record fails to reveal the precise nature of this work. Additionally, employes have been paid to write or rewrite curriculum.

Summer curriculum work, which is expressly addressed in Article XVI, is paid at the contractually provided rate of $90/day. Of the other employes who performed summer work, only the band instructor was paid at his daily rate. The other employes were paid at 80% of their daily rate or were paid at a flat rate. There is, therefore, no consistent practice of paying teachers who perform summer work at their daily rate.

Despite the Complainant's argument to the contrary, the evidence that the band instructor has been paid his daily rate for providing individual instruction during the summer is not sufficient to demonstrate that the parties have a binding past practice of paying the daily rate to bargaining unit employes who "teach" during the summer. While the record does demonstrate that the band instructor gives individual instruction during the regular school year, the record is silent as to whether the summer work performed by the Drivers' Education instructor and the guidance counselors differs in any material respect from the work that each performs during the regular school year. Therefore, there is no reasonable basis to conclude that only the band instructor has performed "teaching" duties during the summer.

In conclusion, neither the express language of Appendix A, Paragraph B, nor the express language of Appendix A, Paragraph D, requires Respondent to pay bargaining unit members who teach summer school at the daily rate. Nor does the evidence of past practice demonstrate that such a requirement should be implied. Nor does this language mandate any other payment for teaching summer school. Rather, the language is silent on the issue of summer school pay. Despite Complainant's assertion to the contrary, the record does not warrant a finding that Respondent violated any provision of the collective bargaining agreement when it paid a flat rate of $13.33/hour to bargaining unit employes who taught in the 1988 summer school program.

Section 111.70(3)(a)4

Section 111.70(3)(a)4, Stats., states, in part, that it is a prohibited practice for a municipal employer:

> To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit.

A violation of Sec. 111.70(3)(a)4, Stats., constitutes a derivative violation of Sec. 111.70(3)(a)1, Stats., which, provides that it is a prohibited practice for a municipal employer "to interfere with, restrain or coerce municipal employes in the exercise of their rights" guaranteed in Sec. 111.70(2), Stats. The rights guaranteed in Sec. 111.70(2), Stats., include:

> ...the right of self organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purposes of collective bargaining or other mutual aid or protection, . . .

Complainant maintains that the Respondent violated Sec. 111.70(3)(a)4, Stats., by unilaterally determining the wage to be paid bargaining unit employes for teaching summer school.

Generally speaking, a municipal employer has a Sec. 111.70(3)(a)4 duty to bargain with the representative of its employes with respect to mandatory subjects of bargaining. Mandatory subjects of bargaining are those which "primarily relate" to wages, hours and conditions of employment, as opposed to those subjects which "primarily relate" to the formulation or implementation of management policy. 3/ The amount of money to be paid to bargaining unit employes for teaching summer school primarily relates to the "wages" of such employes and, thus, is a mandatory subject of bargaining.

By its terms, the parties' 1986-88 collective bargaining agreement was effective from July 1, 1988 through June 30, 1988. Since summer school began on June 9, 1988, the wage rate in dispute became effective during the term of the parties' 1986-88 labor contract. 4/ The duty to bargain collectively during the term of an agreement does not extend to matters covered by the agreement or to matters on which the Complainant has clearly and unmistakably waived its right to bargain. 5/ For the reasons discussed supra, the matter in dispute is not a matter which is covered by the provisions of the parties' agreement. Thus, the question becomes whether bargaining on said matters has been clearly and unmistakably waived.

Respondent maintains that the Complainant waived its right to bargain the matters in dispute when it agreed to include the language of Article III, Section B, in the parties' 1986-88 collective bargaining agreement. Article III, Section B, provides as follows:

> This written agreement between NUE and the School Board constitutes the entire agreement between said parties on all matters pertaining to wages, hours and working conditions. All matters not specifically covered in this written agreement are and shall remain exclusively the prerogative of the School Board for the term of the agreement and NUE waives and gives up any right to negotiate further on wages, hours and working conditions for the period covered by this agreement.

Under the clear and unambiguous language of Article III, Section B, Complainant has waived the right to bargain during the term of the contract on wages, hours and working conditions "not specifically covered" in the agreement. For the reasons discussed supra, the issue of summer school pay is not a matter which is "specifically covered" in the agreement. Giving effect to the plain language of Article III, Section B, Complainant has waived its right to bargain on the issue of summer school pay during the term of the parties' 1986-88 collective bargaining agreement.

In reaching this conclusion, the Examiner is aware that the Commission does not favor contract provisions which purport to waive bargaining on all matters not covered by the agreement 6/ and has stated that such "blanket waivers" are to be construed restrictively, rather than expansively. 7/ The Commission has further held that the "waiver of the duty to bargain can be found only on evidence which is clear and unmistakable." 8/ The Commission will give

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3/ Beloit Education Association v WERC, 73 Wis.2d. 43 (1976) and City of Brookfield v WERC, 87 Wis.2d 819 (1979).

4/ The 1988 summer school, however, did extend into the term of the parties' 1988-90 agreement.

5/ Waupaca County (Highway Dept.), Dec. No. 24764-A (McLaughlin, 7/88); City of Richland Center, Dec. No. 22912-B (WERC, 8/86).

6/ Deerfield Community School District, Dec. No. 17503 (WERC, 12/79).

7/ State of Wisconsin, Dec. No. 13017-D (WERC, 5/77).

8/ State of Wisconsin, at p. 4.

such effect to a "blanket waiver" as the negotiating history and other surrounding circumstances seem to make appropriate. 9/

In the present case, the language of Article III, Paragraph B, presents an express waiver and the undersigned is not required to find waiver by implication or inference from broad contract language. There is no bargaining history or other surrounding circumstances which make it inappropriate to give effect to the plain language of Article III, Section B. Under the circumstances presented herein, the language of Article III, Section B, constitutes a clear and unmistakable waiver of Complainant's right to bargain the issue of summer school wages during the term of the parties' 1986-88 agreement.

Notwithstanding the fact that Respondent did not have a Sec. 111.70(3)(a)4, duty to bargain the issue of the 1988 summer school wage during the term of the 1986-88 contract, it is evident that representatives of Complainant and Respondent did bargain the issue of the 1988 summer school pay. Specifically, on April 13, 1988, Complainant's grievance representative, Baye, was advised that Respondent intended to pay a summer school wage of $90/day. On that date, Complainant's grievance representative, Baye, advised Respondent's representative Lindelof, that it was a violation of the parties' collective bargaining agreement to pay less than the daily rate. Subsequently, Complainant's bargaining representative, Marinucci, and grievance representative, Baye, met with Respondent's representatives, Lindelof and Bobbe. Marinucci's testimony at hearing demonstrates that he considered this meeting to have been an impromptu bargaining session, upon the conclusion of which each party understood that their respective positions were "set in stone." 10/ The record does not demonstrate otherwise. It is not evident that, thereafter, Marinucci, Baye or any other Complainant representative made a further request to discuss or bargain the issue of the 1988 summer school wage rate. The Examiner is persuaded, therefore, that the parties did, during the term of the 1986-88 agreement, bargain to impasse on the issue of the 1988 summer school pay. 11/

Since the language of Article III, Section B, of the 1988-90 collective bargaining agreement did not differ in any material respect from the language of the 1986-88 collective bargaining agreement, the language of Article III, Section B, also served to waive Complainant's right to bargain the 1988 summer pay issue during the term of the 1988-90 agreement. With respect to the 1988-90 agreement, the finding of waiver is also supported by the evidence of the parties' bargaining history.

Prior to February 18, 1988, during the period of time in which the parties were negotiating their 1988-90 collective bargaining agreement, Respondent distributed a memo to members of Complainant's bargaining unit which notified bargaining unit members that Respondent was contemplating a six week summer school session, commencing on June 13, 1988. 12/ While it is not evident that Complainant received such a notice, it is not reasonable to conclude that Complainant could have remained unaware of the proposed summer school program. Neither Marinucci, nor any other representative of Complainant, made any request to bargain the issue of summer school pay during the negotiation of the parties' 1988-90 agreement. Nor were there any discussions concerning summer school pay during the 1988-90 contract negotiations.

9/ Ibid. at p. 5.

10/ Complainant's position being that bargaining unit members should be paid at their individual daily rate and Respondent's position being that bargaining unit members would be paid at a flat rate.

11/ During the parties' discussions on the 1988 summer school pay, Bobbe advised Complainant's representatives that Respondent did not have a duty to bargain the issue of summer school. The undersigned does not consider Bobbe's and Lindelof's participation in those discussions to constitute a waiver of Respondent's right to rely upon the provisions of Article III.

12/ The summer school, however, actually started on June 9, 1988.

Prior to Complainant's ratification of the 1988-90 agreement, Complainant representatives Marinucci and Baye both knew that Respondent had decided to pay summer school at a flat rate, rather than at the individual teacher's daily rate. Respondent's position on the issue of summer school pay was discussed at the April 13, 1988 ratification meeting and the 1988-90 contract was ratified with the knowledge that Respondent and Complainant did not agree on the issue of summer school pay. Respondent's failure to demand to bargain the issue of summer school pay during the negotiation of the 1988-90 agreement, is a "surrounding circumstance" which supports the conclusion that, by agreeing to the language of Article III, Section B, Complainant knowingly and willingly waived its statutory right to bargain the issue of summer school pay during the term of the parties' 1988-90 agreement.

In summary, the record, as a whole, clearly and unmistakably establishes that Complainant has waived its statutory right to bargain the issue of summer school pay during the term of the parties' 1986-88 and 1988-90 agreements. Since the summer school wage rate in dispute was implemented during the term of the parties' 1986-88 contract, Respondent did not have a statutory duty to bargain with Complainant on the issue of the 1988 summer school wage. Contrary to the argument of Complainant, Respondent did not violate Sec. 111.70(3)(a)4, Stats., when it established a summer school pay rate of $13.33/hour.

Section 111.70(3)(a)1 Allegation

Under the provisions of Sec. 111.70(3)(a)1, Stats., it is a prohibited practice for a municipal employer to interfere with, restrain or coerce municipal employes in the exercise of their Sec. 111.70(2) rights. Complainant's Sec. 111.70(3)(a)1 allegation rests upon several claims.

As Complainant argues, Superintendent Bobbe did advise Complainant Representatives that Respondent did not have to bargain the issue of the 1988 summer school wage. These remarks were made during the term of the parties 1986-88 agreement and not within the context of discussions on the parties' 1988-90 agreement. 13/ For the reasons discussed supra, at the time this remark was made, Respondent did not have a duty to bargain the issue of the 1988 summer school wages. It is not a violation of Sec. 111.70(3)(a)1 for a representative of a municipal employer to advise a representative of municipal employes of the municipal employer's legal rights.

In arguing that Bobbe bargained individually with Complainant's bargaining unit members, Complainant relies upon Bobbe's testimony that he had discussions with individual bargaining unit members who taught in the 1988 summer school program. Bobbe's testimony reveals that these discussions were initiated by the bargaining unit members and that the main item of discussion was summer school wages. However, the specific nature of Bobbe's remarks to these bargaining unit employes is not revealed in the record.Neither Bobbe's testimony, nor any other record evidence demonstrates that Bobbe "bargained" wages with these individual employes. 14/ Contrary to the assertion of Complainant, it is not evident that Bobbe made any remarks to any bargaining unit employe which is violative of Sec. 111.70(3)(a)1, Stats.

To the extent that Complainant's Sec. 111.70(3)(a)1 claim is based upon the fact that Respondent's representatives informed bargaining unit employes of the 1988 summer wage prior to negotiating the wage rate with Complainant, such a claim is without merit. Given Complainant's waiver of its right to bargain the 1988 summer school wage, Respondent was entitled to unilaterally establish the 1988 summer school wage rate. Neither Respondent's unilateral determination of the 1988 summer school wage, nor its announcement of the same to individual bargaining unit members, constitutes a violation of Sec. 111.70(3)(a)1, Stats. For the same reasons, Respondent did not violate Sec. 111.70(3)(a)1, Stats., when it issued individual teaching contracts which reflected that bargaining unit employes would be paid at the rate of $13.33/hour, the rate established by the Respondent.

Conclusion

13/ As the Complainant acknowledges, and the record establishes, Complainant did not request to bargain the issue of 1988 summer school pay during negotiation on the 1988-90 agreement. Nor is it evident that Respondent refused to negotiate this issue during the negotiation of the 1988-90 agreement.

14/ As Respondent argues, not one of these individual employes testified at hearing.

Contrary to the argument of Complainant, the record does not demonstrate that Respondent has violated Sec. 111.70(3)(a)1, 4, or 5 of the Municipal Employment Relations Act. 15/ Accordingly, the Examiner has dismissed the complaint in its entirety.

Dated at Madison, Wisconsin this 4th day of October, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Coleen A. Burns, Examiner

15/ Complainant has not argued that Respondent has violated the Municipal Employment Relations Act by failing to provide information requested by the Complainant.