

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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NORTHWEST UNITED EDUCATORS,	:	
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Complainant,	:	
	:	Case 21
vs.	:	No. 28975 MP-1991
	:	Decision No. 25976-A
SHELL LAKE SCHOOL DISTRICT,	:	
	:	
Respondent.	:	
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Appearances:

Mr. Kenneth J. Berg, Executive Director, Northwest United Educators, 16 W. John Street, Rice Lake, Wisconsin 54868, appearing on behalf of Complainant Northwest United Educators.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Richard J. Ricci, 715 S. Barstow, Suite 111, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Respondent Shell Lake School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators (hereinafter Complainant or Union), having filed a complaint of prohibited practices on June 24, 1987, with the Wisconsin Employment Relations Commission (hereinafter Commission), alleging that the Shell Lake School District (hereinafter Respondent or District) had committed prohibited practices within the meaning of Sec. 111.70(3)(a)5, Stats., by violating the terms of the collective bargaining agreement between the Complainant and Respondent in these instances; and scheduling of the hearing concerning said complaint of prohibited practices having been held in abeyance pending an informal attempt to resolve this matter; and on April 17, 1989, the Commission having appointed James W. Engmann, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Order in this matter as provided in Secs. 111.70(4)(a) and 111.07, Stats.; and on May 11, 1989, the Respondent having filed an answer to said complaint in which it denied that it had violated the collective bargaining agreement and Sec. 111.70(3)(a)5, Stats.; and hearing on said complaint having been scheduled for and held on May 25, 1989, at which time the parties were afforded the opportunity to enter evidence and make arguments as they wished; and said hearing having been transcribed; and a transcription of the hearing having been received on June 9, 1989; and the parties having filed briefs, the last of which was received June 26, 1989; and the parties having declined to file reply briefs on July 14, 1989; and the Examiner having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

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

2. That Shell Lake School District, hereinafter Respondent or District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and maintains its offices at 201 West Eighth Avenue, Shell Lake, Wisconsin 54871.

3. That the Complainant and Respondent were parties to a collective bargaining agreement commencing on July 1, 1985 and extending to June 30, 1987; that in said agreement the District recognized the Union as the exclusive bargaining representative for all regular full-time and regular part-time noncertified employes of the District, including teacher aides and the head cook, but excluding the bookkeeper and the superintendent's secretary and all supervisory, managerial, confidential and casual employes, and all other employes of the District; that said agreement provided a grievance procedure for employe complaints concerning the interpretation, meaning or application of the specific provisions of the agreement as it related to wages, hours and conditions of employment; that said grievance procedure did not provide for final and binding arbitration of employe complaints; and that said agreement contained the following language:

ARTICLE II - MANAGEMENT RIGHTS

Except as expressly modified by other provisions of the

contract, the School Board possesses the sole right to operate the school district and all management rights repose in it. These rights include, but are not limited to, the following:

- A.To direct all operations of the School District;
- B.To hire, promote, transfer, schedule and assign employees in positions within the school district;
- . . . .
- E.To maintain efficiency of School District operations;
- . . . .
- J.To determine the methods, means and personnel by which School District operations are to be conducted;
- K.To take whatever action is necessary to carry out the functions of the School District in situations of emergency.
- L.To determine the services, supplies and equipment necessary to continue its operation and to determine all methods and means of distributing the above in establishing standards of operations, the means, methods, and processes for carrying on the work, including automation or subcontracting thereof or changes therein.

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ARTICLE IX - PROBATION/JUST CAUSE

All employees shall serve a probationary period of 6 months from the date of hire in the bargaining unit during which employees are paid 85% of base rate. It is understood that summer break periods shall be excluded from the computation of the probationary period for school year employees. During the probationary period, the employee shall be subject to dismissal for any reason without recourse. Upon completion of the probationary period, the employee shall be granted seniority rights from the employee's date of hire, and no employee shall be disciplined, discharged or reduced in rank or compensation without just cause.

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ARTICLE XXI - WAGES

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Effective 7/1/86 the wage rates shall be:

Cooks - \$5.62 per hour  
Head Cook - \$7.28 per hour  
Custodians - \$6.83 per hour  
Aides - \$5.62 per hour  
Playground Supervisor - \$6.30 per hour  
Bus Drivers - \$601.69 per month  
Elementary Secretary - \$6.06 per hour  
High School Secretary - \$6.85 per hour

New employees shall receive 85 percent of the above rate during their 6 month probationary period; thereafter they shall receive the above rates. Custodians shall receive an additional 10 cents per hour night differential for all hours worked after 6 p.m.

4. That in its complaint the Complainant alleged that the Respondent violated the agreement and, thereby, Sec. 111.70(3)(a)5, Stats., by not paying bus drivers the appropriate wage rate for certain extra trips; that in its answer the Respondent stated as an affirmative defence that this allegation had been resolved by a side letter agreement to the successor collective bargaining agreement; and that at hearing the Complainant agreed that this allegation had been resolved and should be dismissed.

5. That Ann Ruhl is a teacher aide; that as a teacher aide, her duties include typing and filing, correcting papers and tests, answering telephones and taking messages, and filling in for the secretary; that Polly Penning is a secretary in the same office in which Ruhl works; that as a secretary, Penning's duties include daily accounting of student attendance, selling lunch tickets, answering telephones and taking messages, and typing all correspondence, reports and memos; that when Penning is absent, Ruhl fills in for her; that in those instances, Ruhl's start time changes from 9:00 a.m. to 7:45 a.m.; that when Penning is absent on Mondays, Ruhl sells lunch tickets for about 30 minutes; that when Penning is absent on other days, Ruhl sells lunch tickets for five minutes; that when Penning is absent, Ruhl records student absences which takes five to ten minutes; that when both employes are present, it is Penning's job to answer the telephone, though Ruhl answers it when Penning is busy or on break; that when Penning is absent, it is Ruhl's job to answer the telephone; that when both employes are present, Ruhl does very little typing; that when Penning is absent, Ruhl will type something if it is urgent; that these are the only duties of Penning that Ruhl does during Penning's absence; that the qualifications for secretary include training in the use of office equipment and computer software and knowledge of basic accounting, filing systems, money handling systems and general office procedures; that Ruhl does not meet these qualifications; that Ruhl is responsible for her own duties when she is covering for the secretary; that the position of secretary receives 44 cents per hour more than the position of teacher aide; that on those days that the secretary is absent, and Ruhl fills in for her and does some of her duties, the District pays Ruhl at the lesser teacher aide rate; that a grievance was filed seeking the higher secretary rate of pay for Ruhl on those occasions; that said grievance was processed through the grievance procedure on a timely basis; that as the grievance procedure does not end in final and binding arbitration, this matter is properly before this Examiner as an alleged violation of the collective bargaining agreement and, thereby, Sec. 111.70(3)(a)5, Stats.; and that the collective bargaining agreement contains no provision for paying a person a higher rate of pay when the person works at another person's job.

6. That on and before January 1, 1986, Alfred Petz was a full-time regular bus driver for the District; that in December, 1985, the State of Wisconsin wrote to Petz, requesting him to return his license because of a problem with his physical examination; that following January 1, 1986, there was a question as to whether Petz could maintain his license to drive a school bus; that there was a question as to which of two medical opinions the state would use in determining if Petz could maintain his license; that Petz did not get his license back; that Petz was on a leave of absence from January 1 to March 17, 1986; that on March 18, 1986, Petz submitted his resignation as a bus driver to the District; that during the 1985-86 school year, Lou Minton was on the

District's list of substitute drivers; that between January 1 and March 18, 1986, Minton and substitute driver Elaine Atkinson drove Petz's route in his absence; that after March 18, 1986, Minton drove the route through the end of the school year; that the District did not fill the vacancy caused by Petz's resignation during the 1985-86 school year; that part of the reason the District did not fill the vacancy was because it was considering subcontracting the bus operation; that following the school year, the District decided to fill

the vacancy; that the District advertised the vacancy during the summer of 1986; that at the meeting of the Board of Education on August 18, 1986, the Board met in executive session to interview and discuss the five candidates for the bus driver position; that the Board moved to hire Minton as a regular full-time bus driver effective with the beginning of the 1986-87 school year; that the Union filed a grievance, alleging that as Minton had worked regularly for the District since at least March 18, 1986, his initial hiring date for purposes of calculating benefits under the collective bargaining agreement should be March 18, 1986; that in regard to salary the contract specified that new employes receive 85% of the contractual rate during the first six-months probationary period; that the Union alleged that for salary purposes, Minton's starting date should be considered March 18, 1986; that said grievance was processed through the grievance procedure in a timely manner; and that as the grievance procedure does not end in final and binding arbitration, this matter is properly before the Examiner as an alleged violation of the collective bargaining agreement and, thereby, Sec. 111.70(3)(a)5, Stats.

7. That the District did not violate the collective bargaining agreement when it paid Ann Ruhl her regular rate of pay when she filled in when the secretary was absent.

8. That the District did not violate the collective bargaining agreement when it calculated Lou Minton's wage and fringe benefits based on a hiring date of August 18, 1986.

#### CONCLUSIONS OF LAW

1. That the Complainant's allegation that the Respondent has committed a prohibited practice by not paying bus drivers the appropriate wage rates for certain extra trips is withdrawn by the Complainant without objection by the Respondent.

2. That the District did not violate the collective bargaining agreement in regard to Ann Ruhl's rate of pay, and, therefore, did not violate Sec. 111.70(3)(a)5, Stats.

3. That the District did not violate the collective bargaining agreement in regard to Lou Minton's date of hire and, therefore, did not violate Sec. 111.70(3)(a)5, Stats.

Based upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issue the following

ORDER 1/

IT IS ORDERED that the complaint be and the same hereby is dismissed in its entirety.

Dated at Madison, Wisconsin this 15th day of August, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
James W. Engmann, Examiner

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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 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.

SHELL LAKE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant

In regard to the grievance involving Ann Ruhl, the Union asserts that the facts in the case are quite clear; that Ruhl works as a teacher aide; that she shares an office with school secretary Polly Penning; that on those days when Penning is absent, Ruhl is called in 1 1/4 hours earlier than her normal starting time; that she sells lunch tickets, takes attendance and answers the telephone; and that when she covers both positions, she spends most of her time handling the secretary's duties, including typing some letters that need to go out that day. Although the contract is silent on the issue of pay when an employe covers for someone in another classification, the Union argues that the contract does state specific wages in each classification; that when the District calls Ruhl in early because Penning is absent, the District is by that action assigning her to that classification; that the wage that goes along with that classification should apply; and that, therefore, the Union requests that Ruhl be paid the difference between the two classifications for each day she covered both positions from the time she filed the grievance.

As to the grievance involving Lou Minton, the Union asserts that the issue is quite simple: when Albert Petz resigned from his position on March 18, 1986, and the District continued to assign Minton to that position, did Minton become a regular employe on that date? The Union contends that the District by its actions made Minton a regular employe on March 18, 1986; that Article IX which provides for 85% of regular pay should have begun on that date; and that Minton should receive the difference between substitute pay and the 85% provision for that period of time he was treated in this manner. In support the Union argues that after March 18, 1986, Minton drove the route on a regular basis; that at that time the District had not yet decided to fill the vacancy or to reduce staff; that whether the District considered subcontracting at this time is irrelevant; that the District used Minton in a full-time capacity; and that when Petz retired, Minton could no longer be viewed as a substitute because he was not substituting for anyone.

Respondent

In regard to the grievance of Ann Ruhl, the District asserts that some areas overlap between the job descriptions of the teacher aide and secretary, such as an typing, filing and answering telephones; that the qualifications necessary for the secretarial position are greater and more specific and, hence, require higher pay; that because the office is small, the teacher aide will often do some of the secretary's work, such as when the secretary is on break; and that when the secretary is absent, the teacher aide does some of the duties of the secretary, but the time necessary to accomplish these duties is small compared with the time used to perform her teacher aide duties. The District argues that Ruhl's performance of her teacher aide duties and a limited number of tasks of the secretary on a specific day does not entitle the employe to be paid at the secretary's rate; that this is especially true where the tasks do not require the higher qualifications of the secretarial position commensurate with the higher rates of pay, such as use of office machines, computer software and basic accounting; and that the contract provides the District with this authority.

As to the grievance involving Lou Minton, the District argues that Minton was not a regular bus driver nor was he covered by the collective bargaining agreement until he was in fact hired on August 18, 1986, from a group of five applicants pursuant to the District's usual hiring procedures; that as the regular bus driver did not resign until March 18, 1986, and as only slightly over two months were left of the 1985-86 school year, and as the District was considering subcontracting the transportation services for 1986-87, the District did not decide to fill the position until the end of the 1985-86 school year; that the District had commonly utilized substitute drivers from a substitute list for extended periods of time and Minton was one driver on the substitute list; that this practice and the contract provides this amount of flexibility to the District; and that the evidence does not support an allegation that Minton was a regular full-time bus driver prior to August 18, 1986.

As to both grievances, the District requests that the complaint be dismissed and that it be reimbursed for its attorney fees and costs.

DISCUSSION

1. Ann Ruhl Grievance

The Union concedes that the contract is silent on the issue of pay when an employe covers for a second employe in another classification. Instead, the Union relies on the contract clause stating specific wages for each classification, arguing that by assigning her secretarial duties, the District is assigning her to that classification of the wage rate that it pays. The Union argument must fail for several reasons.

First, duties of the secretary and teacher aide overlap. This is common, especially in a small workplace. Here both answer the telephone and both type. While each of these duties is primarily the secretary's, the teacher aide assumes them when the secretary is present but unable to fulfill the duty, such as when the secretary is on break. While the teacher aide may answer the telephone all day when the secretary is absent, this is not a new duty but a day in which she does this duty more than she normally does. As for typing, even when the secretary is absent for the day, the teacher aide does very little typing, only typing those things that urgently need to be done. In any case, answering the telephone and typing are part of the teacher aide's stated duties, so the change is not one of kind when the secretary is absent but one of degree; that is, these are not new duties but more of her regularly assigned duties.

Second, when the secretary is absent, the teacher aide will sell lunch tickets and record student absences. On Mondays this takes 35-40 minutes; on all other days, it takes 10-15 minutes. These duties are not listed in the teacher aide job description so she is definitely doing the secretary's job. But she is doing a small part of the secretary's job, at most 40 minutes a day and 15 minutes most days. Nor is this the part of the secretary's job for which the secretary is paid 44 cents an hour more than the teacher aide. These two tasks do not involve the use of office equipment or computer software or accounting principles. These tasks could just as easily be assigned to the teacher aide.

Third, the Union asks that the teacher aide be paid the secretary's rate of pay for each day the secretary is absent, even though the teacher aide only spends, at most, 40 minutes a day doing the secretary's work. But on those days when the secretary is absent, the teacher aide does not become the secretary; she remains the teacher aide who is covering in a couple of areas for the secretary, none of which are those more complex duties for which the secretary is more highly paid.

Fourth, if the Union had wanted the teacher aide to receive the secretary's rate of pay on those days when the secretary is absent, it could have negotiated such a clause. The only language which the Union can point to as being violated in this situation is the wage scale. About specific language requiring the District to pay the teacher aide the secretary wage rate in this situation, this Examiner will not infer such a requirement from the wage scale above.

For these reasons I do not find a violation of the collective bargaining agreement by the District and, therefore, I dismiss the allegations of prohibited practices in violation of Sec. 111.70(3)(a)5, Stats., regarding this grievance.

## 2. Lou Minton grievance

The Union is quite correct when it frames the issue of this grievance as follows: when Albert Petz resigned from his position on March 18, 1986, and the District continued to assign Lou Minton to that position, did Minton become a regular employe on that date? The Union answers the issue in the affirmative, and in support thereof cites Article IX. This article states in part as follows: "All employes shall serve a probationary period of 6 months from the date of hire in the bargaining unit during which employes are paid 85% of base rate."

Prior to March 18, 1986, Minton was on the substitute driver list. Following the beginning of Petz's leave of absence on January 1, 1986, Minton and another substitute driver shared in covering Petz's route until Petz quit on March 18, 1986. After that time and until the end of the school year, Minton covered the route. The Union argues that when Petz resigned, Minton could no longer be viewed as a substitute because he was not substituting for anyone. The Union defines the word "substitute" too narrowly. The batter substituting or pinch hitting for the pitcher does not necessarily have to pitch the next inning; instead, the pinch hitter fills in or stands in for the pitcher until the next pitcher takes over.

So it is here. March 18, 1986, is not Minton's "date of hire in the bargaining unit." Minton continued to be a substitute driver after March 18, 1986. The District could have divided the route between Minton and the substitute driver who shared the route with him prior to March 18, 1986. Instead, for whatever reasons, the District assigned Minton to finish out the school year on this route. By this action the District was assigning a substitute

driver, not hiring a replacement full-time regular driver. The District did not hire a replacement full-time regular driver until August 18, 1986, after following its normal hiring procedure. It hired Lou Minton; thus, August 18, 1986, is the "date of hire in the bargaining unit," the date that Article IX commences.

For these reasons I do not find a violation of the collective bargaining agreement by the District and, therefore, I dismiss the allegation of prohibited practice in violation of Sec. 111.70(3)(a)5, Stats., regarding this grievance.

### 3. Summary

The complaint in this matter alleged three contract violations by the District. The collective bargaining agreement does not provide for final and binding arbitration so these matters are properly before this Examiner as allegations of prohibited practices in violation of Sec. 111.70(3)(a)5, Stats.

The allegation regarding pay for certain extra but trips was resolved prior to hearing and withdrawn by the Union. No violations of the collective bargaining agreement were found in regard to the Ann Ruhl or the Lou Minton grievances. Therefore the complaint of prohibited practices is dismissed in its entirety.

Dated at Madison, Wisconsin this 15th day of August, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By \_\_\_\_\_  
James W. Engmann, Examiner