

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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NORTHWEST UNITED EDUCATORS, :  
: :  
Complainant, :  
: :  
vs. : Case 28  
: No. 42370 MP-2239  
: Decision No. 26138-A  
AMERY SCHOOL DISTRICT, :  
Respondent. :  
: :  
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Appearances:

Mr. Alan D. Manson, Executive Director, Northwest United Educators,  
16 West John Street, Rice Lake, Wisconsin 54868, appearing on behalf of  
Northwest United Educators.  
Ms. Kathryn J. Prenn, Mulcahy & Wherry, S.C., Attorneys at Law, 21 South  
Barstow, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on  
behalf of Amery School District.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Northwest United Educators filed a complaint with the Wisconsin Employment Relations Commission on June 19, 1989, alleging that Amery School District had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 4 and 5, Stats. On August 31, 1989, the Commission appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(4)(a), and Sec. 111.07, Stats. Hearing on the matter was conducted in Amery, Wisconsin, on October 5, 1989. A transcript of that hearing was provided to the Commission on November 6, 1989. The parties filed briefs and reply briefs by January 9, 1990.

FINDINGS OF FACT

1. Northwest United Educators, referred to below as the NUE, is a labor organization which maintains its offices at 16 West John Street, Rice Lake, Wisconsin 54868.

2. Amery School District, referred to below as the District, is a municipal employer which maintains its offices at 115 North Dickey Avenue, Amery, Wisconsin 54001.

3. The District and NUE were parties to a collective bargaining agreement in effect, by its terms, from "July 1, 1987 . . . through June 30, 1989." That agreement contains, among its provisions, the following:

ARTICLE I

RECOGNITION

A.The Board recognizes the NUE as the exclusive bargaining representative on wages, hours, and conditions of employment for all teachers . . . in the employ of the School District of Amery, but excluding managerial and supervisory employees.

. . .

ARTICLE V

PLACEMENT

A.The Board retains the right to determine grade, subject, and activity assignments and to make transfers between schools as necessary in the best interests of the district.

. . .

ARTICLE IX

WORK CONDITIONS

. . .

E.Contracts

- 1.The Board will give written notice of renewal of teacher contracts for the ensuing year on or before March 15. The teacher must accept or reject the contract in writing no later than April 15.
- 2.Teachers who are not to be renewed will be notified in writing on or before February 28.
- 3.Contracts cannot be terminated without mutual consent during the period for which they are written.
- 4.Teacher contracts will list grade or subjects and/or extra-curricular activities assigned with the agreement that the administration may, if necessary, change these assignments during the term of the contract. The teacher shall be notified at the earliest time possible of any change.
- 5.No teacher shall be discharged, non-renewed, suspended, or reduced in compensation without cause.
- 6.Elementary teachers shall not be required to perform playground duty or cafeteria duty commencing with the 1974-75 contract year provided state requirements do not require teachers to perform such duties.

. . .

ARTICLE XII

MANAGEMENT RIGHTS

- A.The Board hereby retains and reserves unto itself all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of Wisconsin, and the United States.
- B.These rights include, but are not limited by enumeration to, the following rights:
- 1.To direct all operations of the school system.
  - 2.To establish and require observance of reasonable work rules and schedules of work.
  - 3.To hire, promote, transfer, schedule, and assign employees in positions with the school system.
  - 4.To suspend, discharge, and take other disciplinary action against employees.
  - 5.To maintain efficiency of school system operations.
  - 6.To introduce new and improved methods or facilities.
  - 7.To select employees, establish quality standards, and evaluate employee performance.
  - 8.To determine the educational policies of the school district.
- C.The exercise of the powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in

furtherance thereof and the use of judgment and discretion in connection therewith shall be limited only by the terms of this agreement and then only to the extent such terms hereof are in conformance with the Constitution and the laws of the State of Wisconsin and the Constitution and the laws of the United States.

The 1987-89 agreement does not contain a grievance procedure, but does contain separate appendices headed "EXTRA-CURRICULAR SCHEDULE" and "EXTRA-CURRICULAR LONGEVITY SCHEDULE" for the 1987-88 and 1988-89 school years. Those appendices establish a rate of pay for each extra-curricular activity and a system of longevity payments for certain teachers who perform those duties.

4. Henry Yetter has been employed by the District as a teacher for twenty-nine years, and has served as the Head Wrestling Coach for the District for twenty-nine years. Prior to 1978, Yetter served as a teacher on a full-time basis for the District. Since 1978, Yetter has been employed on a part-time basis as a chemist for a private corporation. From 1978 through the present, Yetter has worked for that corporation in the morning and has taught chemistry and physics for the District in the afternoon. Prior to the 1989-90 school year, Yetter served as Head Wrestling Coach after the completion of his afternoon classes. On April 13, 1988, Yetter signed an individual teaching contract for the 1988-89 school year. That contract included the following provision:

SALARY CALCULATION

<u>MA + 30</u>	<u>10</u>	
Salary Lane	Step	
\$ 21,153.86 *		Base Salary * \$32,906 x 4.5/7 = \$21,153.86
	\$	Longevity
	<u>2,660.00</u>	1. <u>Head Wrestling Coach - HS</u>
		2. _____
		3. _____
		4. _____
		5. _____
<u>2,660.00</u>		Total Longevity and Extra-Curricular
Salary		GRAND TOTAL SALARY
<u>23,813.86</u>		

On August 24, 1988, Yetter signed a document headed "REVISED TEACHER'S CONTRACT" which reads thus:

SCHOOL DISTRICT OF AMERY

Amery, Wisconsin 54001

<u>HENRY YETTER</u>	1988-89	<u>MA + 30</u>	<u>11</u>	
Employee	School Year	Salary Lane	Step	

SALARY CALCULATION

\$ <u>23,573.57</u> *		Base Salary * (\$36,670 x 4.5/7 =
\$23,573.57)		
	\$ <u>2,830.00</u>	1. <u>Head Wrestling Coach - HS</u>
		2. _____
		3. _____
		4. _____
		5. _____
		6. _____
<u>2,830.00</u>		Total Extra-Curricular Salary
\$ <u>26,403.57</u>		GRAND TOTAL REVISED SALARY

The Base Salary and Extra-Curricular Salary figures were taken from the Salary and Extra Curricular Schedules of the collective bargaining agreement noted in Finding of Fact 3 above. On April 14, 1989, Yetter signed an individual teaching contract for the 1989-90 school year. That contract included the following provision:

SALARY CALCULATION

<u>MA + 30</u>	<u>11</u>	
Salary Lane	Step	
\$ 23,573.57 *		Base Salary
		* \$36,670 x 4.5/7 = \$23,573.57
	\$ _____	Longevity
	_____	1. _____
	_____	2. _____
	_____	3. _____
	_____	4. _____
	_____	5. _____
_____		Total Longevity and Extra-Curricular
Salary		
\$ 23,573.57		GRAND TOTAL SALARY

5. John Wyatt is the District's High School Principal, and is responsible for overseeing the operation of the High School's athletic programs. During the three school years preceding the 1989-90 school year, Wyatt had discussed with Yetter the declining number of participants on the High School's wrestling team and how that decline could be addressed. From November of 1988 through at least March of 1989, Wyatt or other District administrators, including Raymond Norsted, the District's Superintendent, met with Yetter to discuss District concerns with the High School wrestling program. Sometime in January or February of 1989, Donovan Parnell, a member and past President of the Wrestling Club, phoned Norsted to determine what the status was of the District's assignment of a Head Wrestling Coach, and whether the District was contemplating action to place someone other than Yetter in that position. Norsted informed Parnell that the Board had not addressed the point, and that nothing was then happening regarding the assignment of a Head Wrestling Coach. On or about March 16, 1989, a meeting which included Yetter, Wyatt and Norsted was conducted concerning the status of the District's Wrestling Program. The discussion at that meeting covered, among other points, Yetter's past achievements with the program, the declining numbers of students participating in wrestling and whether Yetter was relating to the current participants as effectively as he had with past participants. Norsted indicated to Yetter, at this meeting, that he would get back to Yetter with specific recommendations for the wrestling program. Approximately one week after this meeting, Norsted, Wyatt and Yetter met again. No NUE representative was present at this meeting. During the course of this meeting, Norsted and Wyatt proposed to Yetter that he accept a one-year contract as Head Wrestling Coach for the 1989-90 school year in exchange for a letter of resignation from the position of Head Wrestling Coach from Yetter to be effective at the end of the 1989-90 school year. Yetter received no written statement of the District's concerns about the wrestling program, except for the absence of the assignment in his individual teaching contract for the 1989-90 school year.

6. Yetter responded to the District's dropping the assignment of Head Wrestling Coach from his 1989-90 individual teaching contract in a letter to Norsted dated April 3, 1989, which reads thus:

Enclosed with this letter please find my 1989-90 individual teaching contract. I have signed it. However, I am sending this letter of transmittal in order to inform the District that my signature on the individual contract does not mean that I agree with all of its terms.

In particular, I contest the failure of the District to list the extra-curricular assignment of Head Wrestling Coach. I intend to coach in 1989-90 and reserve the right to pursue this matter under the terms of the NUE contract if that assignment is not restored or made available to me.

The Board addressed Yetter's letter at a meeting conducted on May 16, 1989, by stating that it regarded the position of Head Wrestling Coach as open for 1989-90. Alan Manson, the Executive Director of NUE, responded on Yetter's behalf in a letter to Norsted dated May 18, 1989, which reads thus:

It has come to the attention of NUE that the Amery District has apparently determined to remove the 1989-90 head wrestling coach position from Mr. Henry Yetter. Furthermore, it appears that the removal of this assignment, and the reduction in compensation that results, is done

involuntarily, that is without the agreement of Mr. Yetter.

NUE believes that such an involuntary extra-curricular activity assignment change, accompanied as it appears to be by a reduction in compensation, requires that the employer have cause to make such a change. Specifically, the NUE negotiated agreement requires, in Article IX, part E-5, that any reduction in compensation be for cause.

To date there is no evidence available to NUE that the District has cause for this action involving the reduction of compensation for Mr. Yetter. This letter is to indicate that NUE will file a complaint with the WERC alleging a violation of the terms of the agreement cited above should the District fail to rehire Mr. Yetter as the wrestling coach for 1989-90.

It has been reported that you said, at the latest Amery School Board meeting, that Mr. Yetter could apply for the position of wrestling coach for 1989-90 when it is posted soon by the District. I am serving as the representative of NUE and Mr. Yetter in this case. Please be advised that Mr. Yetter believes that he is entitled to continue as the wrestling coach in Amery, that he is willing and prepared to serve in that assignment in 1989-90, and therefore he will not be applying for any posted vacancy since it should be abundantly clear to the District that he is available and willing to work that assignment.

If you have any questions regarding this matter, please direct them to me at the NUE office. I would particularly appreciate being informed of any decision by the Amery District to hire any other individual beside Mr. Yetter for the coaching position in 1989-90, or of a decision by the District to offer Mr. Yetter that position.

Norsted responded to Manson in a letter dated May 31, 1989, which reads thus:

I am writing this letter in response to your correspondence in regard to Mr. Henry Yetter. The Administrative Team and I have reviewed the Master Contract and do not find any violation. Therefore, we are denying your request to reinstate the wrestling position.

If you have any further questions, feel free to contact me.

7. The District opened the position of Head Wrestling Coach for the 1989-90 school year for applications, and ultimately awarded the position to a full-time teacher who had previously served as Assistant Wrestling Coach.

8. Judy Collier has served the District as a Physical Education instructor. In May of 1979, Collier signed an individual teaching contract for the 1979-80 school year which designated her as the Head Girls' Volleyball Coach. On April 15, 1980, Collier signed an individual teaching contract for the 1980-81 school year which did not designate her Head Girls' Volleyball Coach. She explained her position on this contract in a letter to Norsted dated April 15, 1980, which read thus:

I have signed and returned my contract for the 1980-81 school year. However, at this time, I wish to ask for a maternity leave for the 1st semester of that school year. I mentioned earlier that I would be willing to coach Volleyball during that season and in following years. Upon receiving my contract I found that Volleyball had been eliminated without my knowledge or consent. If it is the wish of the Amery School Board for me not to coach Volleyball in the fall of 1980 I will comply. However, under these circumstances, I would then like to apply for a resignation from all Volleyball duties in subsequent years.

The District removed Collier from the position of Head Girls' Volleyball Coach based on the District's determination of the best interests of the program.

9. The District and the NUE have not directly addressed, in the process of collective bargaining, whether the collective bargaining agreement noted in Finding of Fact 3 above requires that the District have cause to remove an extra-curricular assignment from a teacher.

10. The District has not demonstrated cause to deny Yetter the assignment of Head Wrestling Coach for the 1989-90 school year.

#### CONCLUSIONS OF LAW

1. Yetter is a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

2. The District is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

3. The NUE is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

4. The meeting between Norsted, Wyatt and Yetter in late March of 1989, during which Yetter was offered a one-year assignment as Head Wrestling Coach for the 1989-90 school year in exchange for a letter of resignation as Head Wrestling Coach at the close of that year constitutes individual bargaining by the District in violation of Sec. 111.70(3)(a)4, and, derivatively, Sec. 111.70(3)(a)1, Stats.

5. The District has not demonstrated cause for reducing Yetter's compensation by denying him the assignment of Head Wrestling Coach for the 1989-90 school year, in violation of Article IX, Section E, 5, of the collective bargaining agreement noted in Finding of Fact 3 above. The District's violation of the collective bargaining agreement constitutes a violation of Sec. 111.70(3)(a)5, and, derivatively, Sec. 111.70(3)(a)1, Stats.

ORDER 1/

1. To remedy its violation of Secs. 111.70(3)(a)1, 4 and 5, Stats., the District shall immediately:

a. Cease and desist from:

(1). Bargaining individually with Yetter regarding matters of contract administration.

(2). Reducing Yetter's compensation as a teacher by refusing to assign him the position of Head Wrestling Coach for the 1989-90 school year.

b. Take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

(1). Notify teachers represented by the NUE by conspicuously posting the attached APPENDIX "A" in places where notices to such employes are customarily posted, and take reasonable steps to assure that the notice remains posted and unobstructed for a period of thirty days.

(2). Reinstate Yetter in the position of Head Wrestling Coach for the 1989-90 school year.

(3) Pay Yetter the difference between the amount he is being paid for the 1989-90 school year and the amount he would have been paid but for the District's refusal to assign him to the position of Head Wrestling Coach for the 1989-90 school year, together with interest on that amount at the rate of 12% per

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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.

year. 2/

(4) Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the District has taken to comply with this Order.

Dated at Madison, Wisconsin this 19th day of February, 1990.

By \_\_\_\_\_  
Richard B. McLaughlin

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2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the Commission. The complaint was filed on June 19, 1989, when the Sec. 814.04(4), Stats., rate in effect was 12% per year. See Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83).

APPENDIX "A"

NOTICE TO EMPLOYEES OF THE AMERY SCHOOL DISTRICT REPRESENTED BY  
NORTHWEST UNITED EDUCATORS

As ordered by the Wisconsin Employment Relations Commission, the Amery School District notifies you as follows:

1. The Amery School District will not seek to collectively bargain with an individual teacher represented by the Northwest United Educators in the absence of a representative of the Northwest United Educators.

AMERY SCHOOL DISTRICT

By \_\_\_\_\_  
Name Title  
\_\_\_\_\_  
Date

THIS NOTICE IS TO REMAIN POSTED FOR 30 DAYS AND IS NOT TO BE COVERED OR OTHERWISE OBSTRUCTED OR DEFACED.



MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint alleges District violations of Sec. 111.70(3)(a)1, 4 and 5, Stats. The NUE amended certain factual allegations of the complaint at the October 5, 1989, hearing.

THE PARTIES' POSITIONS

In its initial brief, after an extensive review of the pleadings, the NUE asserts that "all the relevant facts in this case are undisputed", and establish that the District's removal of Yetter as Head Wrestling Coach reduced him in compensation. Since the language of Article IX, Section E, 5, is "absolutely clear" in requiring cause for such a reduction in compensation, it follows, according to the NUE, that the District has violated Sec. 111.70(3)(a)5, Stats. The management rights asserted by the District are not relevant here, according to the NUE, because "the general management rights article is specifically limited by the terms of the agreement itself, which include the right of a teacher to make the District show cause before the District can legally impose a reduction in compensation." District claims that past practice is an appropriate guide in the present matter must be rejected, the NUE argues, since the language of Article IX, Section E, 5, is clear and since "there is no evidence of knowledge or approval by NUE of such a practice." Beyond this, the NUE contends that the District has violated Secs. 111.70(3)(a)1 and 4, Stats., "when the administrators made proposals to Mr. Yetter regarding his coaching contract." The NUE states the remedy appropriate to the District's violation of Secs. 111.70(3)(a)1, 4 and 5, Stats., thus:

NUE requests that the District be ordered to reinstate Mr. Henry Yetter to the position of head wrestling coach for 1989-90, that the District be ordered to make whole Henry Yetter for any losses suffered as a result of the District refusing to allow him to work in his assignment and the assignment of head wrestling coach for 1989-90, including interest thereon, that the District be ordered to cease and desist from bargaining with individual employees regarding matters of wages, hours, and working conditions, and that the District be ordered to post appropriate compliance notices regarding the above.

The District contends the complaint poses the following issues:

- A. Did the District violate the collective bargaining agreement when it did not assign Mr. Yetter as the Head Wrestling Coach for the 1989-90 school year?
- B. If so, what is the appropriate remedy?

The District's first major line of argument is that the cause provision does not apply to its decision not to assign Yetter to the position of Head Wrestling Coach. Asserting that case law distinguishes between extra-curricular and teaching contracts and that the law imposes the burden of proof on the NUE, the District concludes that "the record will clearly indicate that the Union has failed to meet its burden." 3/ More specifically, the District contends that Article V, Section A; Article XII, Section B, 3; and Article IX, Section E, 4, grant the District the authority to assign or not to assign a particular extra-curricular position. These provisions establish, according to the District, that "the teacher had no contractual right to be assigned as Head Wrestling Coach." This conclusion, the District contends, is further buttressed by relevant arbitral precedent. 4/ Beyond this, the District counters the NUE's contention that it was obligated to show cause before denying Yetter the position of Head Wrestling Coach by contending that Article IX, Section E, read as a whole, "is intended to relate to the renewal of teacher contracts and teacher discipline." More specifically, the District contends that Article IX, Section E, 5, is silent regarding extra-curricular assignments, and must be read to require cause for suspensions without pay. Because the collective bargaining agreement expressly addresses the District's

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3/ Citing Richards v. Board of Education, 58 Wis.2d 444, 206 N.W.2d 597 (1973); and Bloomer Joint School District No. 1 et. al., Dec. No. 16228-A (Rothstein, 8/80), aff'd by operation of law, (WERC, 8/80).

4/ Citing Abbotsford School District, WERC A/P M-87-287, (Mueller, 11/87); and Little Chute Area School District, Case 9, No. 35333, MA-3795 (Crowley, 2/86).

authority to assign extra-curricular positions, and because the District has in the past removed coaches without being required to show cause, it follows, according to the District, that Article IX can not persuasively be read as the NUE asserts. Acknowledging that "although it has retained the right to not assign extra-curricular assignments, that right must be exercised in a manner which is not arbitrary or capricious", the District argues that the record establishes objective reasons for its refusal to reassign Yetter as Head Wrestling Coach. Viewing the record as a whole, the District concludes that the complaint should be dismissed in its entirety.

In reply to the District's brief, the NUE argues initially that:

The employer is clearly without adequate argument or logic to overcome the existence, in the collective bargaining agreement, of the words: "No teacher (such as Mr. Yetter) shall be . . . reduced in compensation (such as having his \$2,830 per year wages as head wrestling coach removed from his employment contract) without cause" (such as providing Mr. Yetter with advanced warning, in writing, of alleged deficiencies in the performance of his wrestling coach duties, and the opportunity to improve, particularly considering his 29 years of experience as a wrestling coach in Amery).

Beyond this, the NUE contends that the authority cited by the District is irrelevant in this matter, since those cases did not address the phrase "reduced in compensation". Citing Commission cases it believes are relevant to this point, the NUE concludes that a demonstration of cause must precede the denial of the extra-curricular position at issue here. 5/ Article IX, Section E, 4, can not, in the NUE's view, be read as the District contends without violating the limiting language stated on the face of that provision. The "main issue in this case", according to the NUE, is the language of Article IX, Section E, 5. This "simple, declarative sentence" turns on the term "compensation", and that term, according to the NUE, "is not qualified or limited" and must be accorded its intended breadth.

In reply to the NUE's brief, the District contends that "the Union must demonstrate that the parties have bargained language which expressly affords the same contractual protections for a teacher's extra curricular assignments as for the teacher's regular teaching position." The NUE has not done so in this case, according to the District, because Article IX, Section E, 5, is silent on this point, while Article V, Section A, and Article IX, Section E, 4, "expressly reserve to the Board the authority to make (extra-curricular) assignments, and, in fact, to change such assignments mid-term." Responding to the NUE's assertion that it bargained individually with Yetter, the District contends that it has bargained the right to assign extra-curricular activities as it deems appropriate, and the wage rates for those activities. The "counseling" the District attempted with Yetter "hardly rises to the level of bargaining", according to the District. Beyond this, the District asserts that if a violation is found in the present matter, "the Union has requested a remedy which is beyond the Examiner's scope of authority in that the Union is requesting back pay and reinstatement". The District states its position on this point thus:

Inherent in the Union's position is an acknowledgement that the only contractual remedy would be back pay. If the Examiner were to conclude that the just cause standard applies to the reduction of a teacher's extra curricular compensation resulting from the Board's exercising its right to determine extra curricular assignments, then it is the District's position that the District could assign the teacher new extra curricular duties so long as it did not reduce the teacher's extra curricular compensation.

The District concludes its reply brief by reasserting its request that the complaint be dismissed in its entirety.

#### DISCUSSION

The complaint poses alleged violations of Secs. 111.70(3)(a)1, 4 and 5, Stats. The violation of Sec. 111.70(3)(a)1, Stats., asserted by the NUE is derivative in nature. Thus, examination of the NUE's contentions focuses on Secs. 111.70(3)(a)4, and 5, Stats.

#### The Alleged Violation Of Sec. 111.70(3)(a)4, Stats.

Section 111.70(1)(a), Stats., defines "Collective bargaining" as the "mutual obligation of a municipal employer . . . and the representatives of its

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5/ Citing Lancaster Joint School District No. 3 et. al., Dec. No. 13016-A (Fleischli, 6/75), aff'd Dec. No. 13016-B (WERC, 6/76); Weyauwega Joint School District No. 2 et. al., Dec. No. 14373-B (Henningsen, 6/77), aff'd, Dec. No. 14373-D (WERC, 7/78).

employees . . . to resolve questions arising under . . . an agreement, with respect to wages, hours and conditions of employment". Section 111.70(3)(a)4, Stats., enforces the duty defined in Sec. 111.70(1)(a), Stats., by making a refusal of a municipal employer to "bargain collectively with a representative of a majority of its employees" a prohibited practice. The duty defined and enforced by the Municipal Employment Relations Act thus extends to the District as a municipal employer and to the NUE as the majority representative of the bargaining unit composed of the District's teachers. In the absence of a valid defense, collective bargaining by a municipal employer with individual members of a bargaining unit is proscribed by Sec. 111.70(3)(a)4, Stats. 6/

The District contends that it was under no duty to bargain with the NUE regarding Yetter's assignment as Head Wrestling Coach either because it had bargained the unfettered right to make or not to make such assignments or because its offer to Yetter in late March of a one year assignment in return for his resignation at the end of the year was "counseling" which does not rise to the level of bargaining.

Neither defense asserted by the District is persuasive. The District is correct that the duty to bargain during the term of an agreement does not extend to matters covered by the agreement. 7/ It can also be noted that the statutory right to compel bargaining can be waived by inaction on a labor organization's part. 8/ Neither principle of waiver is, however, implicated by the facts of this case. The 1987-89 agreement does state the District's rights to assign extra-curricular positions and the pay for those positions. The waiver by contract principle noted above is not applicable here since the NUE seeks not to compel bargaining on extra-curricular assignments or on how those assignments should be paid, but on how the previously negotiated provisions on those points are to be applied to Yetter's situation. The issue posed, then, is one of contract administration, not contract negotiation. Because the contract contains no grievance procedure, there is no language authorizing Yetter to bargain as an individual with the District on how the contract negotiated by the NUE and the District is to be applied to him. There is, then, no basis for a finding that the NUE has waived, by contract, its role as the majority representative for Yetter on the issue of how the contract is to be applied to his non-assignment as Head Wrestling Coach. Nor is there persuasive evidence of waiver by inaction on the NUE's part. There is no basis for a finding that the NUE was afforded the opportunity to represent Yetter at the meeting when Norsted and Wyatt offered Yetter a one year assignment as Head Wrestling Coach in return for his resignation at the end of that year. Manson's letter of May 18, 1989, establishes that the NUE has actively sought to serve as Yetter's spokesman.

Nor can the District's offer to Yetter of a one year assignment as Head Wrestling Coach in return for Yetter's resignation at the end of that year be considered "counseling" as opposed to "bargaining". As noted above, the 1987-89 contract governs the District's rights to assign such positions, as well as the compensation for those positions. The base pay for the Head Wrestling Coach position as well as a longevity payment for Yetter's service in that position had previously been negotiated by the NUE and the District. These points can not persuasively be characterized as anything other than "wages" within the meaning of Sec. 111.70(1)(a), Stats. Similarly, the issues on the District's right to deny Yetter the assignment of Head Wrestling Coach can not persuasively be characterized as anything other than "questions arising under . . . an agreement, with respect to wages, hours and conditions of employment . . ." within the meaning of Sec. 111.70(1)(a), Stats. These matters are, then, subjects falling within the statutory definition of collective bargaining and must be characterized as such. Thus, the meeting of late March between Yetter, Norsted and Wyatt, with no NUE representative present, involved individual bargaining proscribed by Sec. 111.70(3)(a)4, Stats.

The Alleged Violation of Sec. 111.70(3)(a)5, Stats.

The parties' labor agreement does not contain a grievance procedure, thus there is no claim that the NUE has failed to exhaust the procedural requirements of the contractual grievance procedure. It is, then, appropriate to exercise the Commission's jurisdiction under Sec. 111.70(3)(a)5, Stats., to determine if the District has violated the parties' 1987-89 collective bargaining agreement. 9/

The parties have cited a number of contractual provisions as those governing this dispute, but the parties' dispute essentially questions the

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6/ See Columbia County, Dec. No. 22683-B (WERC, 1/87)

7/ See City of Richland Center, Dec. No. 22912-B (WERC, 8/86).

8/ See Racine Unified School District, Dec. No. 25283-B (WERC, 5/89).

9/ See Hayward Community School District, Dec. No. 24259-C (WERC, 5/89).

relationship of Articles IX and XII. Article XII, Section B, 3, states the District's general right to assign teachers "in positions with the school system". Section C of Article XII provides that this right to assign "shall be limited . . . by the terms of this agreement". The District's citation of Article V, Section A, and Article IX, Section E, 4, do not pose independent issues of contract interpretation here. Each section specifies the general right to assign stated in Article XII, Section B, 3, but neither is directly applicable to the denial of the extra-curricular position posed here, and neither grants the District a right to assign greater than that stated by Article XII, Section B, 3. Thus, the interpretive issue posed here is whether Article IX, Section E, 5, limits, within the meaning of Article XII, Section C, the District's general right to assign under Article XII, Section B, 3.

The determinative interpretive issue, then, is whether Article IX, Section E, 5, applies to the District's determination not to assign Yetter as Head Wrestling Coach for the 1989-90 school year. Article XII, Section B, 3, is sufficiently broad to grant the District this right, and thus the determinative issue focuses on whether Article IX, Section E, 5, limits this right by requiring the District to demonstrate cause for its decision.

The resolution of this contractual issue is determinative here because the present record can not support a conclusion that the District has demonstrated cause to deny Yetter the position of Head Wrestling Coach. The Commission has noted that "notice and opportunity to remediate" are "implicit" in a just cause provision. 10/ In this case, Wyatt and Norsted noted that they had expressed concerns over the wrestling program to Yetter over a considerable period of time. These discussions, however, were not directed to Yetter to put him on notice of deficiencies in his performance and to thus afford him the opportunity to address those deficiencies. The discussions were those one would expect concerned administrators to have with the head of a significant extra-curricular program as a matter of course. Discussions sufficient to put Yetter on notice of deficiencies in his performance did not occur until March of 1989. Those discussions did not, however, culminate in an opportunity for Yetter to address the deficiencies addressed by Norsted and Wyatt, but in the late March meeting during which Yetter was afforded the opportunity to serve as Head Wrestling Coach for one more year in return for the submission of a letter of resignation at the end of that year. This afforded Yetter no opportunity to "remediate" his performance. Thus, the applicability of Article IX, Section E, 5, to Yetter is the determinative issue here. Since the District lacked cause to deny Yetter the assignment, the essential issue must be whether the contract imposes that requirement on the District.

This can not be resolved simply by labeling the language of Article IX, Section E, 5, clear and unambiguous. The difficulty with the language of that section is traceable to the fact that the relationship of the section to an extra-curricular assignment is unclear. This lack of clarity flows from the fact that Article IX, Section E, 5, does not specifically mention extra-curricular assignments and the fact that extra-curricular assignments have been afforded a unique and problematic legal status. In Richards, the Wisconsin Supreme Court stated that a Board's denial of a co-curricular coaching assignment to a teacher did not constitute a "dismissal" within the meaning of the governing collective bargaining agreement. Arbitrators, and Commission examiners have followed this distinction by determining the cause provision of a contract does not necessarily extend to the denial of an extra-curricular assignment. 11/

The most reliable guides for resolving ambiguous contract language are past practice and bargaining history, since each focuses on the conduct of the contracting parties. Neither guide is available in this case, however. The parties have not addressed, during collective bargaining, whether Article IX, Section E, 5, extends to the denial of an extra-curricular position. Beyond this, the record affords no persuasive basis to conclude the parties have, by practice, acknowledged that the District need not demonstrate cause to deny a teacher an extra-curricular assignment. The essence of a past practice is the agreement manifested by the parties' conduct. 12/ The evidence of past practice adduced in this case is insufficient to infer mutual understanding between the District and the NUE. Wyatt testified that the District has, on numerous occasions, denied an extra-curricular position to a teacher without demonstrating, or being asked to demonstrate, cause for the denial. His general testimony does not, however, establish the specific circumstances of these denials or any basis on which to infer the NUE was aware of the denials.

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10/ Unified Joint School District No. 1, City of Tomahawk et. al., Dec. No. 18670-D (WERC, 8/86) at 36.

11/ See authority cited at footnotes 3/ and 4/ above, and see The School Board of Joint School District #1, Town and Village of Pewaukee, Dec. No. 12737-A (Greco, 10/75), aff'd by operation of law, Dec. No. 12737-B (WERC, 10/75).

12/ For a general discussion of this point, see How Arbitration Works, Elkouri and Elkouri, (BNA, 1985) at Chapter 12.

Yetter was denied the position of Head Boys' Track Coach for the 1979-80 school year, but it appears Yetter either sought or willingly accepted this denial. The record does establish that the NUE was aware of the District's denial of the position of Head Girls' Volleyball Coach to Judy Collier for the 1980-81 school year. Her letter of April 15, 1980, establishes, however, that she accepted the District's decision. In sum, the record will not support a conclusion that the District and the NUE had, by practice, acknowledged the inapplicability of Article IX, Section E, 5, to the denial of an extra-curricular position.

Resolution of the interpretive issue posed here turns ultimately on the language of Article IX, Section E, 5, viewed in light of other provisions of the agreement and relevant precedent. Although the relationship of Article IX, Section E, 5, to other agreement provisions can be characterized as ambiguous, any view of its mandate that "No teacher shall be . . . reduced in compensation without cause" covers the \$2,830 difference between Yetter's revised 1988-89 contract and his 1989-90 contract. This \$2,830 difference is solely attributable to the District's decision to deny him the assignment of Head Wrestling Coach. The commonly understood meaning of these terms firmly supports the NUE's interpretation of the provision.

Beyond this, the balance of Article IX indicates that Yetter must be considered a "teacher" within the meaning of Subsection 5 of Article IX, Section E, and that the coverage of that section can not be narrowly limited to the classroom teaching assignment made on his individual teaching contract. Article IX, Section E, is entitled "Contracts". Subsection 4 of that section refers to "Teacher contracts" and specifies that such contracts "will list . . . extra-curricular activities assigned". The subsection also notes that "(t)he teacher shall be notified . . . of any change". This indicates that the word "teacher" is not intended to signal only an individual who performs as a classroom instructor, but can signal extra-curricular work performed by a contracted teacher. That Subsection 4 requires the inclusion of extra-curricular assignments on a "Teacher contract" also indicates that such contracts are not to be narrowly restricted to teaching duties.

Beyond this, it must be noted that the 1987-89 agreement comprehensively covers the wages, hours and conditions of employment for District teachers. Article I subsumes this point by recognizing the NUE as the majority representative "on wages, hours, and conditions of employment" for teachers. The word "teacher" thus connotes more than "an individual performing classroom instruction". In fact, the agreement contains two extra-curricular wage schedules which provide a base rate and a longevity bonus for teachers who perform such duties. Against this background, it is unpersuasive to give the word "teacher" in Article IX, Section E, 5, a less than comprehensive meaning.

In Lancaster the Commission expressly approved an Examiner's determination that the sentence "No teacher shall be discharged, non-renewed, reduced in rank or compensation without just cause" required a school district to demonstrate just cause for denying extra-curricular coaching positions to two teachers. 13/ Of the cases cited by the parties, this is the most relevant here. It must be noted that the language at issue in Lancaster is not identical to that at issue here, which makes no reference to a reduction "in rank". However, the reasoning of the Examiner in Lancaster, which was approved by the Commission, is applicable, and persuasive, here.

That the NUE's interpretation of Article IX, Section E, 5, is persuasive on the facts posed here is not to say the District has offered an implausible interpretation of that provision. The District's interpretation is forceful, but ultimately unpersuasive. The force of the District's arguments centers on the precedent it argues more than on the language of the parties' agreement.

Most significantly here, the District's interpretation reads the terms "reduced in compensation" out of existence. According to the District, Article IX, Section E, 5, read in light of Section E as a whole, relates solely to "the renewal of teacher contracts and teacher discipline." The terms "reduced in compensation", according to the District, apply only to the classroom teaching salary and require that there be no suspensions without pay unless cause can be demonstrated. This interpretation, at a minimum, makes the "reduced in compensation" reference superfluous, since Subsection 5 expressly mentions the suspension of a teacher, and it is unpersuasive to interpret that reference to mean the District has contracted for the right to discipline a teacher by a suspension with pay. Beyond this, restricting Section E solely to discipline is not without difficulty. The Section is entitled "Contracts" not "Discipline"; Subsection 4 expressly requires extra-curricular assignments to be included on contracts; and, even excluding Subsection 5, two of the remaining five subsections deal with matters which can not involve discipline.

Even assuming Subsection 5 of Article IX, Section E, can be applied only to disciplinary actions, the subsection still applies to the facts posed here. The District's assertion that its denial of the Head Wrestling Coach position to Yetter was non-disciplinary is unpersuasive. Wyatt's and Norsted's testimony reveal that they respect Yetter's past service as a coach, and continue to appreciate his ability as a teacher, but felt that the Wrestling Program would be better served by a change in the Head Coach position. Thus, they viewed the change as a matter of policy, which was not intended to personally slight Yetter. To characterize the denial of the position on the present facts as non-disciplinary is, however, to make a distinction without a difference. Wyatt testified that he felt the number of wrestlers was dropping and that Yetter did not enjoy the rapport with student athletes he once had. The sole "policy" change effected by the District for the program was to deny Yetter the position of Head Coach. This "policy" choice is meaningless unless it is assumed Yetter's performance caused the reduction in numbers and the loss of rapport. The record establishes, then, no broader policy issue than the District's concern with Yetter's performance.

Beyond this, neither the language of Article IX, Section E, 5, nor the District's conduct supports the assertion that the assignment of Yetter as Head Wrestling Coach was solely an annual assignment. Article IX, Section E, 5, addresses non-renewal, which is a process which is implemented in one school year to take effect in the next. In addition, although the District informed Yetter the Head Wrestling Coach position for 1989-90 was open for bids, there is no evidence that in any of Yetter's prior twenty-nine years of experience

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13/ Cited at footnote 5/ above.

the position had been so opened.

The major persuasive force of the District's arguments flows from its citation of precedent. The reasoning of those decisions can not be rejected as flawed, but on review, those decisions are distinguishable from the situation posed here. The District is correct that Richards shows the distinct legal status of an extra-curricular assignment. The Richards court noted, however, that the decision did not "render an opinion as to whether the failure to renew a co-curricular assignment could also be made subject to a grievance procedure under the terms of a collective bargaining agreement." 14/ This issue must turn on the facts of each case. Thus, Richards only prefaces the issue posed here.

Most significantly here, none of the arbitral or examiner cases cited by the District involves the interpretation of the terms "reduced in compensation". Abbotsford is the most relevant of the decisions cited by the District, for the contract interpreted by the Arbitrator contained the following sentence: "No teacher will be disciplined or deprived of professional advantage without just cause . . . "

While the dissimilarity of the language construed in Abbotsford to that at issue here, coupled with the Commission's approval, in Lancaster, of language substantially the same as that posed here, undercuts the precedential value of Abbotsford, certain other factors must also be noted. First, the terms "deprived of any professional advantage without just cause" have been interpreted to apply to a school district's denial of a co-curricular position. 15/ Beyond this, the situation in Abbotsford was factually distinguishable from that at issue here, and the distinction is significant. As Arbitrator Mueller noted:

In this case, the co-curricular assignments were specifically divorced from the individual teacher contracts during the 1984-85 contract negotiations between the parties. 16/

Mueller detailed the factual background to this point thus:

. . . (P)rior to 1984-85, the co-curricular assignment to which a teacher was assigned was included in and made a part of the individual teacher contract. The evidence reveals that pursuant to the Union's request and suggestion, reference to such co-curricular assignments was removed from inclusion in the individual teaching contract and was set forth in a

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14/ 58 Wis.2d at 460b.

15/ See Joint School District No. 1, City of Rice Lake et. al., Dec. No. 18651 (Malamud, 4/81), aff'd by operation of law, Dec. No. 18561-A (WERC, 5/81).

16/ Dec. No. WERC A/P M-87-287 at 19.

separate document entitled "Extra-curricular Assignments," which documents were issued annually. 17/

Thus, Arbitrator Mueller did not address what the terms "deprived of professional advantage" mean, but focused on whether the terms, in light of the facts noted above, applied to extra-curricular assignments at all. In this case, Article IX, Section E, 4, requires that extra-curricular assignments be listed on the teacher's individual teaching contract. This fact puts the cause provisions of Article IX, Section E, 5, directly in issue, for the teaching and extra-curricular contracts can not be separated as they were in Abbotsford. Thus, while the Arbitrator's decision in Abbotsford poses considerable points, that decision is not applicable to the facts posed here.

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17/ Ibid., at 16.



Before closing, it should be noted that the parties have disputed the allocation of the burden of proof. This point is problematic in the present matter since the Commission allocates the Sec. 111.07(3) Stats., burden of proof differently in cases of discipline under a just cause provision than in cases of contract interpretation. 18/ Given the parties' dispute on whether the denial of the position at issue here was disciplinary or not, this point is potentially troublesome. Burden of proof becomes significant, however, only in cases in which both parties have sustained their burdens to come forward with evidence, all the evidence has been introduced, and doubt remains on the issue to be resolved. 19/ In this case, placing the burden of proof on the NUE would not change the conclusions stated above.

In sum, Section E, 5, of Article IX limits, within the meaning of Article XII, Section C, the District's right, under Article XII, Section B, 3, to deny Yetter the assignment of Head Wrestling Coach for the 1989-90 school year. Because the District has not demonstrated cause for that denial, the denial violates Article IX, Section E, 3, and thus Sec. 111.70(3)(a)5, Stats.

#### The Issue of Remedy

The bulk of the remedy entered above does not require extensive discussion. The posting of a notice has been included to highlight the District's duty to bargain with the NUE as the majority representative of teachers on issues of contract administration, and to remedy any chilling effect the District's individual bargaining with Yetter may have had on other unit members. The general make-whole remedy entered above does not pose disputed points, with two exceptions.

The first area of dispute posed in the make-whole award is the order of reinstatement. The District, with considerable persuasive force, urges that Yetter's reinstatement to the position of Head Wrestling Coach can not be made without violating the District's contractual rights of assignment. Article IX, Section E, 5, does refer to a reduction in compensation, which signals a monetary remedy. It does not, however, follow from this that the only means to remedy the District's violation of the agreement is monetary in nature. The District reduced Yetter's compensation by denying him the position of Head Wrestling Coach, not by reassigning him. The District may well have rights of assignment it has not exercised regarding Yetter. Such rights, if any, are not posed here. The District did not choose to take any assignment action toward Yetter other than to deny him the position of Head Wrestling Coach for the 1989-90 school year. The remedy ordered here addresses the action the District actually took, and can not address actions the District might have taken, but chose not to take. To award Yetter a monetary payment without reinstatement would be to condone the District's violation of Article IX, Section E, 5.

Beyond this, it can be noted that the Commission, in Lancaster, modified the Examiner's Order by not ordering the Board to reinstate one of the affected teachers to the coaching position at issue, but by ordering the Board to grant the teacher, upon request, a hearing "(t)o determine whether the collective bargaining agreement has been violated." 20/ The Board, in that case, chose to argue "the unfettered right with respect to the selection of coaches". 21/ This is not the case here, since the District declined a proposed stipulation by the NUE to limit the evidentiary record to that point. 22/ Thus, a hearing on cause for the denial is inappropriate here, since that point was litigated at the October 5, 1989, hearing.

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18/ See Tomahawk cited at footnote 10/.

19/ For a general discussion of this point, see McCormick On Evidence (1972) at Chapter 36.

20/ Dec. No. 13016-B at 6.

21/ Ibid., at 5.

22/ See transcript at 46-47.

The second area of dispute concerns the NUE's request for its litigation costs. Whatever basis for an award of litigation costs exists in Commission case law is traceable to a concurring opinion in Madison Schools. 23/ That concurrence refers to "exceptional cases where an extraordinary remedy is justified." 24/ The present matter poses two plausible, good faith views of ambiguous contract language. Thus, the Order entered above includes no award of the NUE's litigation costs.

Dated at Madison, Wisconsin this 19th day of February, 1990.

By \_\_\_\_\_  
Richard B. McLaughlin, Examiner

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23/ Dec. No. 16471-D (WERC, 5/81), cited with approval in Rock County, Dec. No. 23656 (WERC, 5/86).

24/ Cited in footnote 3/ at 9 of Rock County, Dec. No. 23656 (WERC, 5/86).