

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS,	:	
	:	
Complainant,	:	
	:	Case 25
vs.	:	No. 45338 MP-2451
	:	Decision No. 26832-B
CAMERON SCHOOL DISTRICT,	:	
	:	
Respondent.	:	
	:	

Appearances:

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

Mr. Richard J. Ricci, Weld, Riley, Prens & Ricci, S.C., Attorneys at Law,
715 South Barstow, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030,
on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

Northwest United Educators (hereafter the Union), filed a complaint herein on February 15, 1991 before the Wisconsin Employment Relations Commission wherein it alleged that Cameron School District (hereafter the District) had unilaterally changed terms and conditions of employment for support staff bargaining unit employes by discontinuing an alleged practice of giving such employes parent/teacher conference days off with pay, in violation of MERA. On March 20, 1991, the Commission appointed Sharon Gallagher Dobish, a member of its staff to act as Examiner in the matter and at that time the Examiner made full written disclosures to the parties. On April 15, 1991 the District filed a Motion to Dismiss the Complaint and a supporting brief. The Union chose not to file a responsive brief but opposed the Motion orally. Oral argument on the Motion occurred on April 15, 1991 by telephone with all parties present. After having considered the parties' written and oral arguments on April 26, 1991, the Examiner issued a written decision denying the District's Motion to Dismiss the complaint (Dec. No. 26832-A). Hearing in the case was then held on May 1, 1991 at Cameron, Wisconsin and a stenographic transcript of the proceedings was made. The transcript was received by May 17, 1991, and all briefs were received and thereafter exchanged by the Examiner by July 18, 1991. The parties chose not to file reply briefs. Having considered the evidence and arguments and being fully advised in the premises the Examiner makes the following

FINDINGS OF FACT

1. Complainant, Northwest United Educators (hereafter the Union) is a labor organization with its offices located at 16 W. John Street, Rice Lake, Wisconsin 54868. Since 1986, the Union has had a collective bargaining relationship with Respondent, Cameron School District in a unit consisting of:

all regular full-time and regular part-time non-professional employees of the Cameron School District, excluding confidential, seasonal, temporary, casual, professional, supervisory, and managerial employees.

The first contract between the parties covered the 1986-87 school year.

2. Respondent, Cameron School District (hereafter the District) is a municipal employer within the meaning of the Municipal Employment Relations Act with its offices located at 1825-12th Avenue, Cameron, Wisconsin 54822.

3. The 1986-88 collective bargaining agreement between the parties contained the following language relating to employe work schedules:

ARTICLE XII - HOURS OF WORK

. . .

C. Hours by employee designations:

1. Custodians

a. School days or when school activities scheduled:

Day Shift (both schools)	7:00 a.m. to 3:00 p.m.
Night Shift (high school)	3:00 p.m. to 11:00 p.m.
(grade school)	2:30 p.m. to 10:30 p.m.
Saturday (both schools)	7:00 a.m. to 10:00 a.m.

b. Non-school, non-activity, non-summertime days:

All custodians will work 7:00 a.m. to 3:00 p.m.

c. Summer vacation schedule:

All custodians will work 7:00 a.m. to 2:00 p.m.
No Saturdays

2. Cleaning person:

185 days per year	3:00 p.m. to 6:00 p.m.
or other hours	as directed by the Superintendent

3. Cooks:

All cooks shall work 183 days per year.

Grade school		
Tuesday, Thursday	6:30 a.m. to	1:30 p.m.
Monday, Wednesday, Friday	7:30 a.m. to	1:30 p.m.
High School		
Monday through Friday	9:30 a.m. to	1:30 p.m.

4. Dishwashers:

Two hours per day or such additional hours as specified by the District Administrator.

5. Aides:

180 days per year coinciding with the school year, with hours per day to be determined by the Superintendent.

6. Secretaries:

High school secretary
Grade school secretary

School year	8:00 a.m. to	4:00 p.m.
except Fridays and days		
preceding holidays when it		
shall be	8:00 a.m. to	3:30 p.m.

Summer vacation		
Monday through Friday	8:00 a.m. to	1:00 p.m.

7. Bus drivers:

School year hours as determined by the Superintendent.

8. All work schedules above set forth are changeable by the Superintendent according to the needs of the District.

The above-quoted language was deleted from the agreement in the 1990-92 contract and the following language was inserted into Article XII C, as follows:

- c. Employees shall receive an employment contract and a schedule of days/hours to be worked.

The 1986-88 agreement contained the following language regarding employe entitlement and holidays:

ARTICLE XIV - HOLIDAYS

The following holidays will be fully-paid holidays (pay that is normally paid for employee's normal workday) with the employee not working during such days:

- A. For calendar-year full-time employees, the holidays are Memorial Day, Thanksgiving Day, Christmas, New Year's Day, Good Friday, 4th of July, and Labor Day.
- B. If the holidays, as listed, fall on a Saturday or Sunday, the day to be observed will be either the previous or the next workday as determined by the Superintendent.
- C. If it is necessary for an employee to work on a paid holiday, the employee shall be given time and one-half for compensatory time or paid double-time for working at the District's discretion.

This language was changed in the 1988-90 agreement when a paragraph was added, as follows:

- D. For school-year full-time employees, the holiday is Labor Day.

This paragraph D was changed again in the 1990-92 agreement to read as follows:

- D. For school-year full-time employees, the holidays are Labor Day and Memorial Day. For the school-year part-time employees, the holiday is Labor Day.

Appearing in each contract between the parties since the first one was reached for 1986-88 are the following Articles:

ARTICLE XVII - GENERAL PROVISIONS

. . .

- C. This Agreement shall supersede any rules, regulations, or practices of the District which are contrary to or inconsistent with its terms.

. . .

ARTICLE XX - ENTIRE MEMORANDUM OF AGREEMENT

This Agreement has been reached as a result of collective bargaining, represents the full and complete agreement between the parties, and supersedes all previous agreements between the parties. Any supplemental amendments to this Agreement or past practices shall not be binding on either party unless executed in writing by the parties hereto. Waiver or any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement.

4. The first collective bargaining agreement covering unit employes became effective in 1986. The Unit Director (the equivalent of Union President) at that time and until May 14, 1990 was Ms. JoAnn Trowbridge, a calendar year secretary at the District's Elementary School. On May 14, 1990 at the meeting at which unit employes voted to ratify the 1990-92 agreement, Ms. Caroline Crotteau was elected Unit Director and Ms. Trowbridge was from that point on, no longer a Union officer. The District Administrator at the time the first contract was entered into by the parties was Mr. McDougall who left that post prior to the current District Administrator, Howard Hanson's hire in July, 1989. For many years prior to the advent of the Union, Cooks and aides had received parent-teacher conference days off with pay. During negotiations for the 1986-88 agreement, no proposals were made and no discussion was had regarding the paid or non-paid status of parent-teacher conference days for cooks and aides, although paid holidays for all unit employes were a substantial issue in those negotiations. In the years covered by the 1986-88 agreement, cooks and aides received parent-teacher conference days off with pay, despite the fact that the contract did not address this day in any way and despite the inclusion in the 1986-88 agreement of Articles XVII and XX. No proposals were made by either party and no discussions were had during the negotiations which led up to the 1988-89 agreement regarding the pay status of parent-teacher conference days. After Mr. Hanson's hire in July 1989, some calendar year employes came to him with questions regarding their wages, hours and/or benefits. The Union was unaware of these contacts. Hanson attempted to investigate the source and history of similar problems in the District and found that similar questions had arisen in 1987 under Mr. McDougall. Specifically, in an October 20, 1987 memo from Unit Director Trowbridge to Mr. McDougall, Ms. Trowbridge indicated concerns about and/or requested verification of unit employes' vacation and sick leave balances. This memo did not mention parent-teacher conference days. It did indicate that Ms. Trowbridge and another employe had submitted to District Administrator McDougall the actual hours worked by employes for the year 1986-87 along with a projection of what hours would be worked in 1987-88. Mr. Hanson continued to investigate the number of hours employes were to receive pay pursuant to the then-effective 1988-90 agreement and the number of hours the District was actually paying employes for. Between July, 1989 and January, 1990, Mr. Hanson engaged Unit Director Trowbridge in informal discussions which occurred entirely outside of contract negotiations regarding Hanson's concerns about

clarifying employe hours of work and Hanson's request to create and establish time sheets for all unit employes. These informal discussions resulted in the Union's agreement, mid-term of the 1989-90 agreement, to allow the Employer to create and implement the use of time sheets by all unit employes. The time sheet system went into effect some time during the Summer of 1989. Sometime during November, 1989, cook and/or aide employes asked Mr. Hanson how they should record the hours for the November, 1989 parent-teacher conference day. Hanson told employes to record no hours for the day since it was a non-paid "holiday" per the 1988-90 agreement. The Union objected to this approach, indicated that the District had always paid cooks and aides for the day off in question both before and after the advent of the Union and it argued that therefore, the day should remain a paid day off for cooks and aides. Hanson, on behalf of the District, thereafter agreed to pay cook and aide employes for the 1989 parent-teacher conference day but he told Unit Director Trowbridge that the District did not intend to pay for days not defined in the contract in subsequent years. The District paid cook and aide employes for the November, 1989 parent-teacher day at the end of the 1989 school year.

5. Collective bargaining concerning the 1990-92 agreement began on January 23, 1990 when NUE Executive Director, Attorney Michael J. Burke met with local Union officers and all 10 unit employes to determine what proposals they wished to discuss at bargaining. At this meeting, Burke took notes indicating employes had concerns about or an interest in negotiating regarding the following items: longevity, sick leave accumulation and payout additional vacation and holidays, a one year agreement, snow days, shift differential, job posting, insurance, LTD, questions regarding custodians' Saturday work hours and equalizing High School and Elementary cooks and aides' hours. Regarding the question of holidays, the employes wanted to add three new holidays for school year employes and three new holidays for calendar year employes. In bargaining the Union later proposed to significantly increase paid holidays for both categories of employes. On February 8, 1990, Burke met with Unit Director Trowbridge and District Administrator Hanson. Hanson had requested that the parties meet on a smaller scale for negotiations, without the whole Board of Education and the 10 member bargaining unit being present (which had apparently been the custom in the past). The Union had agreed to this approach. At this February 8th meeting, the parties discussed the Union's Holiday proposal and Mr. Hanson indicated he wanted employes to have individual employment contracts.

At some point during February, 1990, Mr. Hanson wrote an internal memo in which he listed the issues he believed should be discussed in bargaining. This memo was not distributed to the Union negotiating team. The relevant issues Hanson listed in his memo are as follows:

- 1) Wages paid; vacations . . .
Establish time sheets in July, 89 Map of hours
in the future. Individual contracts would help
Some hours are not in contract (aides/cooks)
not worked.

. . .
- 4) Negotiation Goals:
 - Map of Hours: Individual contracts
 - Clear up discrepancies
 - Agree on reconciling at the start
 - Respond to unit proposals
 - Make considerations based on _____

Hanson, Burke and Trowbridge met again on February 28, 1990, at which time Hanson apparently made a counter-proposal to increase holidays for employes by one-half day. Also at this meeting, Hanson stated that the District wanted to delete the list of employe work hours contained in Article XII (C) and to have these hours "contained in the individual contract". Hanson also stated that he wished to have a system whereby new employes would receive less vacation and fewer holidays than current employes, the latter to be grandfathered regarding these benefits. The next meeting occurred on March 14, 1990 and all unit employes were present along with Burke and Hanson. This meeting was designed to bring unit employes up-to-date regarding negotiations. Both the Union and the District created written agendas of what occurred at this meeting. The District's agenda read as follows:

- 1) Verification of support staff wage/benefits:
The administration has worked on the following items:
 - Clarify definition of hours: also summer schedules
 - Reconciliation of contracts
 - Use of time sheets
 - Mapping of hours
 - Issuance of contracts
 - Benefits that are due
 - Issuance of job descriptions

- 2) Goals in negotiations offered by the administration:
 - Approach negotiations in a non-adversary manner
 - Raise the level of understanding fiscal operations

- 3) Items brought to the table by the Support Staff:]
 - a) Seniority - Job promotions: (Article X)
Proposed to delete "relative ability"
 - b) Sick leave: (Article XIII)
Proposed to increase accumulated sick leave to 120 days. Also to cash in accumulated sick leave at regular hourly rate to go toward payment of insurance upon retirement.
 - c) Holidays: (Article XIV)
Proposed to add 2 holidays to 12 month people and 3 holidays to 9 month people. Administration suggested consideration be given to having holiday benefit accrue to employees over time rather than full scale on date of hire.
 - d) Vacation: (Article XV)
Proposed to get three weeks after two years. Proposed to get additional day per year after 15 years of service to a maximum of five weeks vacation after 25 years of service.

- e) Long term disability: (Article XVIII)
Proposed to go to all employees.
- f) Structure of salary schedule: (Article XXI)
Propose to combine various job classifications to equate wages of aides and cooks, elementary secretary to high school secretary etc. NUE is to provide written proposal.
- g) Insurance: (Article XIII)
Propose to maintain insurance at level provided to the certified staff.
- h) Longevity: (New - Nue is to provide wording of proposal)
Propose to have additional 3% wage increment after 5 years of service: 6% after 10 years: 9% after 15 years.
- i) Wages: (Article XXI)
Propose to have 5% rate adjustment for all personnel. Propose additional 5% for custodial personnel only.
Propose to have Saturday custodial work at over-time rate.

In addition, at this meeting the definition of the number of inclement weather days was discussed (Article XVI).

Mr. Hanson expressed concern over the cost of the requests. He also observed that many members present did not know about the proposal presented on their behalf.

NUE stated that no cost-out had been done and they had no idea how much the proposal would cost the district.

No proposals were presented by the administration at this meeting.

The next meeting is tentatively scheduled at 4:00 on Monday, April 2, 1990.

The Union's agenda for the March 14th meeting left space for note-taking regarding each topic listed. The printed portion thereof was as follows:

1. Verification of support staff wage/benefits _____
2. Goals in negotiations _____
3. Seniority - Job promotions _____
4. Sick Leave _____
5. Holidays _____
6. Vacations _____

7. Long term disability _____
8. Snow day definition _____
9. Structure of salary schedule _____
10. Insurance _____
11. Longevity _____
12. Wages _____
13. Other _____

Attorney Burke took notes on his copy of the March 14, 1990 Union Agenda (submitted here) which read in relevant part, as follows: Burke had no notes on #1 above. Next to #2, Burke listed "individual contracts" and "job descriptions". Next to #5, Burke listed "9" and "4" and the words, "Howard wants to slowly implement - grandfather." Next to #9, Burke wrote the word "equalize." Next to #13, Burke wrote, "1 year contract" and "1 1/2 pay for Saturday custodians."

The next bargaining session was held on March 22, 1990. At this meeting, nothing of any moment occurred. Burke has no notes thereon. The next meeting was held on April 18th with Burke, Hanson and Trowbridge present. At this meeting, Hanson made an extensive counterproposal which, according to Burke's bargaining notes, included deletion of Article XII (C). Burke noted that Hanson proposed that "employees will receive a calendar of work days at start of year," and that Hanson proposed individual employment contracts for employees. In his notes, Burke also wrote "correction in benefits - District will take care of that - most has been already taken care of." Hanson's counterproposal also included the addition of "1 holiday to all staff" and a slower rate for new employees entitlement to holidays. Thereafter, on April 23, the Union prepared a counterproposal for Hanson's consideration.

6. On May 14, Burke's notes indicate that he explained the parties' tentative agreement to unit employees in relevant part as follows:

That Article XII(C) would be deleted and that individual employment contracts would be issued. Burke noted that "verification of info is the key and auditors want this also."

On May 14th, Burke also explained that all employees would receive one additional holiday. On or about May 18, 1990 the District held its ratification vote. Mr. Hanson issued the Board the following memo describing the terms of the tentative agreement:

- 1) Change wording relating to the custodian/snow day - evenings (ARTICLE XVI)
- 2) Change language relating to snow-days to be defined same as instructional staff (ARTICLE XVI)
- 3) Delete the detail of hourly breakout in the Master Agreement (ARTICLE XII)
- 4) Supply people with individual contracts

- 5) Supply people with schedule of hours
- 6) Take care of the corrections in benefits
- 7) Add LTD to all remaining staff - if allowable by insurance company [Page 13 (G)]
- 8) Change the probationary period from 6 months to 12 months (ARTICLE VI)
- 9) Freeze the base salary on all employment categories at pre-1990 level (ARTICLE XXI)
- 10) Add one paid holiday to all staff (ARTICLE XIV)
- 11) Wage increase to be 4.25% in the first year and 4% the second year. Bus drivers may have 4% in first year and license renewal paid following completion of probation period or 4.25% on wages. (ARTICLE XXI)
- 12) District to pay same % on insurance in 1990-91 as prior year. Insurance not settled in second year (Page 12)
- 13) Reword Section E regarding summer hours/breaks (Page 9)
- 14) Vacation to two weeks after two years

7. After both the Union and the District had ratified the tentative agreement on or before May 22, 1991, the District issued individual contracts to all unit employees. These contracts consisted of a calendar with the work days and non-work days shown thereon as well as a written contract indicating each employe's hours of work per day and per year, the number of work days per year and the number of contract days per year, the number of holidays, the employe's hourly wage rate and annual contract rate. At least two employes objected to the omission of the November 9, 1990 parent-teacher conference day as a paid day off but employes nonetheless signed and returned their contracts by May 30th in order to avoid losing their positions with the District. The Union filed the instant complaint herein on February 15, 1991, after having sent the District a letter dated November 20, 1990 offering to discuss the case prior to a complaint being filed.

8. Neither at the March 14th meeting nor at any other bargaining session did Hanson directly describe or mention his concerns (listed in Hanson's February, 1990 internal memo) that cooks and aides were being paid for hours not worked and not listed in the contract. Hanson never mentioned that the District intended to eliminate one paid non-work day from cooks and aides' schedules. Hanson never mentioned parent-teacher conference days or the date of November 9, 1990. During bargaining at the March 14th session - and at other sessions, Hanson did address the deletion of Article XII (C) and the reasons therefor, but Hanson never stated that the deletion of this Section would result in some employes being paid one day less per year or that employes would have their work days or work year changed thereby. Mr. Hanson did not state during bargaining that he wanted to live up to the exact provisions of the contract with respect to wages and benefits or any words to that effect. Hanson was aware, through his study of the time sheets implemented in the Summer of 1989, that the parent-teacher conference day might be the extra-contractual, non-work day for which aides and cooks were being paid. However,

Hanson never conveyed his suspicions about the parent-teacher conference day to the Union. At no time during bargaining did Hanson state or explain his apparent intention to add one holiday to the agreement for cooks and aides so that all paid days off would be listed in the agreement from that point forward. During bargaining, Hanson stated several times that he did not intend to take anything away from employes by proposing individual contracts with a map of hours attached thereto, that the District only wished to verify what wages/benefits were in existence.

9. A valid past practice existed over a long period of time, both prior to and after the parties entered into their first collective bargaining agreement in 1986 whereby cooks and aides were allowed the day off with pay for parent-teacher conference days. District Administrator Hanson was made aware of this practice shortly after his hire in 1989. The District ultimately paid cooks and aides for the day off on the 1989 parent-teacher conference day. Mr. Hanson's statement in 1989 to Unit Director Trowbridge that the District would no longer pay for work not done constituted a statement of future intent which the District did not follow-up on specifically in bargaining. Thus, Hanson's statement in 1989 was insufficient to clearly notify the Union that the District was then repudiating the past practice. The District also failed to clearly notify the Union that it wished to eliminate the long-established past practice of paying cooks and aides for their day off on parent-teacher conference day during negotiations for the 1990-92 agreement, either by statements made during bargaining, by the parties' agreement to District-proposed changes in Article XII (C) or by the parties' agreement to establish a map of hours for each employe and to issue each employe an individual employment contract.

10. The Union did not waive its right to bargain regarding the elimination of the past practice of paying cooks and aides on the day in question by its agreement to Articles XVII and XX in the initial contract (1986-88), or by allowing their continued inclusion in successor agreements thereafter. Nor did the Union waive its right to bargain regarding the pay status of the day in question by its acts or conduct during negotiations for the 1990-92 agreement. As stated in Finding No. 9, Hanson's 1989 statement to Trowbridge was not sufficient to establish repudiation and therefore the burden never shifted to the Union to codify the practice.

CONCLUSIONS OF LAW

1. The District had a duty to bargain with the Union regarding its decision to cease paying cooks and aides for the day off they received on parent-teacher conference days and therefore the District committed a prohibited practice in violation of Section 111.70(3)(a)1, 2 and 4 by ceasing to pay for the day in question mid-term of the 1990-92 agreement.

2. The District unilaterally ceased paying for the parent-teacher conference day without first properly notifying the Union and offering to bargain thereon in violation of Sec. 111.70(3)(a)1, 2 and 4.

3. The Union did not waive its rights to bargain regarding the District's decision to cease paying cooks and aides for the day off on parent-teacher conference days falling during the 1990-92 agreement. Nor did the Union waive its right to bargain regarding the effects of the District's

decision.

1. To remedy its violations of Secs. 111.703(a)1, 2 and 4, Stats., the District shall immediately:

- a. Cease and desist from:
 - (1) Making unilateral changes without proper notice and bargaining with the Union regarding pay for cooks and aides on parent-teacher conference days which these employes shall have off.
 - (2) In any other or related manner interfering with the rights of support staff employes pursuant to the provisions of the Municipal Employment Relations Act.

- b. Take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act.
 - (1) Notify support staff represented by 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) Make all cook and aide employes whole for any pay not received for November 9, 1990, due to the District's refusal to pay them for the day off on November 9, 1990, together with any interest on that amount at the rate of 12% per year, 2/ from the pay period following November 9, 1990 to the date the amount is paid to cook and aide employes.

(See Footnotes 1/ and 2/ on Page 14)

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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.

- 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 February 15, 1991, when the proper rate was 12% per year. See, Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83).

- (3) Continue to pay cooks and aides for the day off on parent-teacher conference days during the term of the 1990-92 agreement in accordance with the effective past practice thereon, and after the expiration of the 1990-92 agreement, continue to pay these employes for the day in question until the District properly notifies the Union upon expiration of an agreement that it intends to repudiate the past practice and eliminate the pay for the day in question.
- (4) Notify the Wisconsin Employment Relations Commission within twenty days of this Order as to what steps the District has taken to comply with this Order.

Dated at Madison, Wisconsin this 18th day of September, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Sharon Gallagher Dobish, Examiner

APPENDIX "A"

Notice to Employees of the Cameron School District
Represented by Northeast United Educators

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

1. WE WILL NOT unilaterally cease paying cooks and aides for parent-teacher conference days occurring during the 1990-92 agreement between it and NUE.
2. WE WILL abide by the effective past practice regarding pay for cooks and aides during the term of the 1990-92 agreement.
3. WE WILL make all cooks and aides whole for any loss they suffered due to our failure and refusal to pay them for the November 9, 1990 parent-teacher conference day.
4. WE WILL NOT in any other or related manner interfere with the rights of our employes pursuant to the provisions of the Municipal Employment Relations Act.

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACTED OR COVERED BY ANY OTHER MATERIAL.
CAMERON SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

POSITIONS OF THE PARTIES:

Union:

The Union filed its brief on July 18, 1991. The Union urged that the District's failure and refusal to pay regular wages to aides and cooks for the November 9, 1990 parent-teacher conference day, a day on which these employes had traditionally received a day off with pay, clearly violated the Act. In this regard, the Union pointed out that any change in the school calendar is a mandatory subject of bargaining. Thus, the District was obliged to negotiate and reach mutual agreement with the Union prior to making any change in its long-established practice of paying cooks and aides for the non-work day in question. Such a mutual agreement was never reached. In addition, the practice, the Union pointed out, had not only existed for some time prior to the establishment of the parties' collective bargaining relationship but it also existed and was followed after 1986 and until 1990. The Union asserted that the subject of eliminating pay for the day in question was never raised by the District (or the Union) during the negotiations which resulted in the 1990-92 agreement. Indeed, the date of November 9, 1990 or the parent-teacher conference day were never mentioned in so many words.

The Union contended that the fact that the parties agreed to change some of the language contained in Article XIII (C) is wholly unrelated to the District's later actions in reducing the number of paid leave days for aides and cooks. Also, the Union urged that the District failed to prove that the Union it had waived its right to bargain on the issues here by its response to the issuance of the individual employment contracts to employes in May, 1990.

By May 22, 1990, the parties had ratified the 1990-92 agreement which became effective on that date. Thereafter, the District issued unit employes' individual employment contracts. The Union pointed out that this was the first point at which it became clear that employes would not be receiving pay for the day off in question, as they had consistently for many years. Thus, the Union argued, the District's actions amounted to a unilateral change, mid-term of the 1990-92 agreement which was accomplished without proper notice to or any bargaining with the Union. The Union asserted, therefore, that even if the District had properly notified the Union and offered to bargain regarding the subject, absent the Union's agreement thereon, the District could not eliminate pay for the 1990 parent-teacher conference day until after the expiration of the 1990-92 agreement. In addition, the Union noted that District Administrator Hanson became fully aware of and had agreed to pay cooks and aides for the day off for the 1989 parent-teacher conference day. This, the Union asserted, made it incumbent upon the District to clearly state in negotiations that it wished to eliminate pay for future parent-teacher conference day for cooks and aides. The District did not do this. Rather, it chose to make (at best) only general statements during bargaining regarding paying according to the contract. These statements were insufficient, in the Union's view, to put the Union on notice that the District intended to repudiate the practice.

The Union therefore sought a finding that the District violated Sec. 111.70(3)(a)4, 1 and 2, Stats., an order making employes whole and requiring the District to return to the status quo ante of granting a paid day off to aides and cooks for parent-teacher conference days that fall during the term of the 1990-92 agreement.

District

The District asserted that it did not commit a prohibited practice when it failed to pay aides and cooks for the day off, November 9, 1990. The District pointed out that in 1989, District Administrator Hanson made it clear

that the District needed to know when employes were working and what days/times they were being paid for. As a result, the Union and the District agreed to institute time-sheets for all employes where no such records had existed previously. In November, 1989 when employes questioned how to record hours for the parent-teacher conference day that month, Mr. Hanson told them not to record any hours on their time sheets. When employes complained that they had always been paid for that day, Hanson agreed to pay for the day but told local Union representatives that the District did not wish to pay for work not done in the future. Thus, the District argued that even assuming a true past practice of paying for the day in question existed, it properly notified the Union that it no longer wished to pay for items not listed in the agreement.

The District also contended that since the contract language is clear and unambiguous, the Union's evidence of practice should not be allowed to vary that language. In this regard, the District pointed out that it based each employe's 1990 map of hours on the language of the 1988-90 agreement which was deleted from the 1990-92 contract by mutual agreement of the parties. The District also noted that Article XIV(D) - Holidays does not list the parent-teacher conference day as a holiday. It was therefore incumbent upon the Union, when Article XII (C) was changed during the negotiations for the 1990-92 agreement to see to it that the parent-teacher conference day was listed therein as a holiday. In addition, the District asserted that Articles XVII and XX also support its arguments that past practice may not be considered here. Finally, the District noted that the alleged practice here does not fit the general definition of past practice: That is, this "practice" is neither unequivocal, nor clearly enunciated and acted upon, nor readily ascertainable or accepted by both parties.

The District argued that District Administrator Hanson did not specifically mention November 9th or parent-teacher conference day because no one knew the exact date that employes had been paid for not working. The District complained that despite its requests, the Union never notified the District what non-work day employes had been paid for in the past. Also, Hanson had made it clear to Union president Joann Trowbridge between July and December, 1989 that the District did not intend to pay for days not worked unless they were listed in the contract. The District asserted that Hanson reiterated these sentiments at bargaining as well. In all the circumstances, the District sought dismissal of the complaint in its entirety.

DISCUSSION

Section 111.70(1)(A), Stats., defines "collective bargaining" as the "mutual obligation of a municipal employer . . . and the representatives of its 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 an employer to "bargain collectively with a representative of a majority of its employees" a prohibited practice. Thus, the statutory duty described above extends to the Cameron School District as a municipal employer and to NUE as the majority representative of the support staff bargaining unit.

Clearly, the duty to bargain during the term of the agreement does not extend to matters that are covered by the agreement and/or any effective past practices thereunder. In addition, the statutory right to compel bargaining can be waived by inaction on a labor organization's part where it has knowledge of the significance of its inaction. See, e.g., City of Richland Center, Dec. No. 22912-B (WERC, 8/86) and cases cited therein.

This case is specifically driven by its facts. The central issue here is whether a valid past practice existed, to provide pay for parent-teacher conference days, upon which cooks and aides could rely. The facts of record indicate without contradiction that before the advent of the Union, the day in

question was a paid day off. In addition, after the Union became the exclusive representative of the support staff employees here, the District continued to pay cooks and aides for the day off on parent-teacher conference days. This was done despite the fact that the 1986-88 and the 1988-90 collective bargaining agreements were silent regarding the subject of parent-teacher conference days. This was also done despite the fact that each of those contracts contained the identical "zipper" clause language (Articles XVII and XX) which essentially stated that all past practices would be extinguished with those agreements. Thus, a past practice existed until 1989.

I note that in 1989, Mr. Hanson was hired to replace former District Administrator McDougall. Clearly, Mr. McDougall had known of the practice and had paid cooks and aides for parent-teacher conference days prior to Mr. Hanson's hire. The subject of pay for the 1989 parent-teacher conference day was thereafter raised by employees to Mr. Hanson. Mr. Hanson disputed it but the District ultimately agreed to pay employees for the day. In these circumstances, it is clear that through 1989, the past practice not only existed but it was, in fact, continued by the District's paying for the 1989 parent-teacher conference day.

The question arises, however, regarding the value and significance of Mr. Hanson's statement to then-Unit Director Trowbridge in 1989 at the time pay for the 1989 parent-teacher conference day arose. At that time, Mr. Hanson stated that he told Trowbridge 3/ that the District would no longer pay for days not defined in the contract in future years. This statement (which I accept as true and correct) might have been effective to extinguish the practice of paying for the day in question had it been made in a negotiations for the 1990-92 contract. However, it is significant that Hanson made this statement outside of negotiations. In the context it was made, Hanson's 1989 statement to Trowbridge amounted to merely a statement of future intent.

Hanson's assertions at trial that he made it clear at negotiations that he wished to verify wages and benefits because the District wished only to pay for hours worked is simply not supported by his own testimony or by that of any Union witness. Indeed, none of the Union witnesses corroborated Hanson on this point. In fact, Hanson testified that he did not tell the Union at negotiations that the reason he wanted to delete Article XII (C) and get the Union to agree to individual contracts with a map of hours and days worked was because he wanted to make the contract language match what was being done by the District regarding wages. Hanson also admitted that he did not tell the Union that the affect of their agreement to these changes would be that cooks and aides would not receive an "additional" holiday (like all other unit employees under the 1990-92 agreement); but that they would receive the same number of holidays under the 1990-92 agreement as they had under the 1988-90 agreement. Hanson also admitted that he never raised the subject of the parent-teacher conference day or the date of November 9, 1990 at negotiations. Notably, both Mr. Burke and Ms. Trowbridge corroborated Hanson's omissions at

3/ Trowbridge was not asked specifically about Hanson's statement at the instant hearing. She did state that Hanson spoke to her informally in 1989 over a period of months regarding Hanson's concerns that hours worked by employees needed clarification. But Trowbridge stated that Hanson never raised these concerns with her regarding nine month employees.

bargaining, as stated above. Thus, the evidence demonstrates that Hanson never acted upon his 1989 statement of future intent.

Hanson asserted at the instant hearing that he felt that the affect and impact of the map of hours was "implied" at negotiations and that everyone knew that it meant that cooks and aides would have their "additional" holiday (a holiday which had previously been outside the contract) put into the contract. 4/ However, this "trade-off" was never specifically discussed by the parties. The amendment of Article XII(C) does not itself demonstrate that the parties clearly intended to eliminate the practice on the facts of this case. In this regard, I note that Hanson admitted at trial that during negotiations he had repeatedly stated that he did not intend to take anything away from employes by his proposals/discussions regarding Article XII(C), the map of hours, etc., but rather that his intent was merely to verify what was then in existence. In all of the circumstances here, it is clear that Mr. Hanson did not clearly and properly notify the Union that the District no longer intended to continue the practice of paying cooks and aides for days not worked and not otherwise listed in the agreement as paid days.

Other record evidence supports this conclusion. First, I note that Mr. Hanson admitted that his investigation of employe time sheets in 1989 had indicated that the parent-teacher conference day might be the day for which employes were being paid while not working. Yet, Mr. Hanson said nothing to the Union about this. In his February, 1990, internal memo Hanson also identified as a problem the fact that cooks and aides were receiving pay for hours not worked, but Hanson never shared this memo or its contents with the Union. Furthermore, it is significant that in his summary to the Board of the tentative agreement he had reached on the Board's behalf with the Union, Hanson described the agreed-upon change in Article XIV - Holidays as "add one paid holiday to all staff." It would have been reasonable and logical for Hanson to make some distinction between cooks and aides' holidays and other employes' holidays at this juncture in presenting the tentative package to his superiors, yet Hanson did not do this. Finally, I note that there was apparently no draft documents of either the individual contracts or the map of hours agreed upon by the parties prior to their ratification meetings. Only after ratification did the District issue the actual contracts and maps of hours directly to employes. Thus, the Union had no opportunity to raise any objections to these items before ratifying the tentative contract agreement.

Given the fact that the District's agent, Hanson did not clearly notify the Union that it wished to repudiate the practice at the end of the 1988-90 agreement, the Union had no duty to attempt to codify the practice in the 1990-92 agreement. Furthermore, the Union in this case cannot be said to have waived its rights to bargain regarding the District's decision/actions in 1990. Here, the District announced for the first time in clear terms that it would no longer pay cooks and aides for the day in question, but it did so after ratification of the 1990-92 agreement. Because the District failed to properly repudiate and extinguish the practice after the expiration of the 1988-90 agreement but before agreeing to the 1990-92 contract, it must live by the practice until the expiration of the 1990-92 agreement. The order attached hereto reflects what the District must do through 1992. However, at that time,

4/ Hanson's avowed method of recapturing the extra-contractual holiday enjoyed by cooks and aides prior to 1990 and placing it in the agreement was unconventional.

if it chooses, the District is free to notify the Union that it no longer intends to live by the practice. At this point, it is up to the Union to have the practice described and placed in the agreement. If the Union fails to gain codification of the practice in a successor agreement, the practice will then be eliminated.

Dated at Madison, Wisconsin this 18th day of September, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Sharon Gallagher Dobish, Examiner